STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC. **SUPERIOR COURT**

(Filed: AUGUST 20, 2012)

STATE OF RHODE ISLAND	**:**	
	:	
v.	**:**	**C.A. No. P2-03-2726A**
	:	
JOEL T. REIS	**:**	

DECISION

CARNES, J. Before this Court is Joel T. Reis' (hereafter the "Defendant") Motion for Conditional Release and his Motion to Terminate Imprisonment. After a hearing, the Defendant was adjudged by a justice of this Court to be a violator of his probationary sentence in P2-03-2726A. The conduct that warranted his being a violator of his probation was also the same conduct that resulted in a criminal charge being filed against him by the Cranston Police Department. Following the hearing declaring him a violator, the Attorney General did not file an information regarding the new charge. As a result, the Defendant was not prosecuted for the new charge. Jurisdiction is pursuant to G.L. 1956 § 8-2-36 and G.L. 1956 § 12-19-18(b).

I

Facts and Travel

The Defendant was on probation for several charges of breaking and entering. He had previously pled guilty to all of those charges. The Defendant's criminal history dates back to 2003 when he first pled guilty to breaking and entering. Since then, the Defendant has pled guilty to breaking and entering on three occasions. On June 13, 2011, the Cranston Police Department charged the Defendant with one felony count of breaking and entering. At the time of his arrest by the Cranston Police, the Defendant was on probation for the aforementioned

charges. As a result, the Attorney General's Office filed a report with this Court pursuant to Rule 32 of the Superior Court Rules of Criminal Procedure moving to revoke the Defendant's probation. See Super. R. Crim. P. 32(f) ("the State shall furnish the defendant and the court with a written statement specifying the grounds upon which action is sought under this subdivision"). The report filed by the Attorney General states that the "Defendant did fail to comply with a specific condition of probation in that he/she failed to keep the peace and be of good behavior."

The Defendant requested a hearing, which was held over the course of three days in the summer of 2011.[1] At the hearing, the Attorney General alleged that the Defendant had failed to keep the peace and be of good behavior because he unlawfully entered the home of Carla Pacheco at 9 Marsden Street in Cranston. The Defendant claimed that this was a case of mistaken identity. After hearing all of the evidence, the hearing justice was reasonably satisfied that the Defendant had failed to keep the peace and be of good behavior.[2] The hearing justice removed nine years from one of his previously imposed sentence and ordered the Defendant to serve those nine years at the Adult Correctional Institute ("ACI").[3]

On October 7, 2011, a member from the Attorney General's Office dismissed the underlying breaking and entering charge that resulted in the Defendant's probation being revoked. In a document with the subject line "No Information," the Attorney General concluded "that there [was] insufficient evidence to warrant felony prosecution." This action by the Attorney General dismissed the new breaking and entering charge levied against the Defendant by the Cranston Police.

---

[1] The hearing was heard over three days: July 25, 2011; August 11, 2011; and August 26, 2011.

[2] Specifically, the hearing justice determined that she was "reasonably satisfied that it is not a case of misidentification, that [Defendant] was the individual who entered into the home of Ms. Pacheco, and this Court finds that [Defendant], by doing so failed to keep the peace and be of good behavior, in violation of the terms of his . . . previously-imposed sentences." (Def.'s Ex. 3, 119:15-20).

[3] The hearing justice did not sentence the Defendant on his other convictions for which the Defendant was on probation. Instead, the hearing justice continued the Defendant on the same sentence that was previously imposed.

Shortly after the charges were dismissed, the Defendant filed the instant motions with the Court. First, the Defendant asks this Court to release him on bail pending this Court's decision on his Motion to Terminate his sentence. Next, the Defendant asks this Court to terminate the nine year term of imprisonment that he was given by the hearing justice.

II

Analysis

A

Defendant's Motion for Conditional Release[4]

The Defendant came before this Court arguing that he should be conditionally released pending this Court's determination of the Defendant's Motion to Terminate Imprisonment pursuant to § 12-19-18(b). In his motion to be released, the Defendant argued that this Court has the authority to release pending the determination of his other motion. The State argues that the Defendant should not be conditionally released because § 12-19-18 does not articulate any provision granting this Court the authority to conditionally release the Defendant. The Defendant concedes that there is statutory basis for this Court to conditionally release in § 12-19-18(b). Instead, the Defendant argues that it is within this Court's inherent authority to grant bail and conditionally release him pending the outcome of his motion.

In State v. Feng, 421 A.2d 1258 (R.I. 1980), our Supreme Court was faced with the issue of whether to grant bail to a defendant while that defendant's post-conviction relief petition was

[4] This Court had previously granted Defendant's Motion for Conditional Release. This analysis simply recounts the Court's findings and decision at the hearing. Subsequent to this Court's decision granting Defendant Conditional Release, the Attorney General filed another violation report pursuant to Rule 32 of the Superior Court Rules of Criminal Procedure for another breaking and entering charge that was brought against the Defendant by the Smithfield Police Department. This violation was filed on March 19, 2011 and the new case number is P2-2012-0801A. At the Defendant's initial appearance, this Court ordered the Defendant held without bail on this new violation. The Court's decision regarding bail on the new violation moots its previous decision granting bail to the Defendant. However, given the objections of the Attorney General, placing this portion of the analysis in the Court's Decision will serve to consolidate all the issues to allow for meaningful review in the Supreme Court.

pending in our Supreme Court. The Feng Court determined that the Supreme Court had the authority to grant bail to a defendant; however, the Feng Court cautioned that bail should only be granted in exceptional cases. Id. at 1266. In reaching its decision, the Court looked to the inherent powers of the judiciary to determine that the Court had the authority to grant bail to a defendant while appellate review of a post-conviction relief application was pending. The Court in Feng looked at several other jurisdictions and also the history of bail in reaching its decision. The Court determined that because it had the inherent authority to grant bail then that inherent authority was incorporated into a post-conviction relief application. Id. at 1265.

The procedural posture in Feng is undoubtedly different than that of the case at bar. Nonetheless, this Court finds its holding instructive. The defendant in Feng, like the Defendant in the case at bar, was attacking a final adjudication for which he was sentenced to a term of imprisonment. The defendant in Feng was seeking conditional release pending appellate review of his post-conviction application. Importantly, the defendant in Feng was seeking release even though the post-conviction relief statute did not contain a release provision. Similarly, here, § 12-19-18 does not provide for a bail provision. Notwithstanding the fact that § 12-19-18 does not provide a bail provision, this Court held at the hearing that it had the inherent authority to grant bail to the Defendant. Bail is typically governed by statute; however, as noted in Feng, it also can be found in the inherent judicial authority.

This Court has always treated bail under the principles of equity. Thus, when circumstances change, it becomes necessary to reevaluate whether bail is warranted in a particular situation. Here, the Defendant was imprisoned for being a violator of a previously imposed sentence. However, after being sentenced, the State did not file an information relating to the breaking charge in Cranston, thus triggering Defendant's right to file the instant motion

with the Court pursuant to § 12-19-18(b). Consequently, the circumstances surrounding Defendant's incarceration had changed. The Court determined at the hearing that it would be equitable to, at the very least, consider whether the Defendant should be released pending the outcome of his Motion to Terminate Imprisonment pursuant to § 12-19-18(b). Notably, the Court made this finding despite the fact that § 12-19-18(b) does not provide for a bail provision. The basis for the Court's decision was founded in the Court's inherent authority to grant bail.

Having determined that this Court has the authority to conditionally release the Defendant and grant bail, the Court then determined whether release was appropriate under these circumstances. At argument, both parties agreed that Abbott v. Freeman, 322 A.2d 33 (R.I. 1974) and Feng were controlling regarding the factors to be considered in granting release to the Defendant. In Abbott, our Supreme Court delineated four factors that the trial court should consider in releasing a defendant pending an appeal. They are:

> "(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."[5] Abbott, 322 A.2d at 35 (citations omitted).

The Abbott Court went on to state that "[i]n cases where a short sentence has been imposed, consideration must be given to the question of whether or not a denial of bail will nullify the right of appeal."

Here, the Court never granted bail to the Defendant because he was presented as a violator of his previously imposed probationary sentences after being charged in P2-12-0801A.

[5] The parties argued that likelihood of success on the merits of Defendant's Motion to Terminate Imprisonment was also a factor to be considered. However, the Court specifically did not address this factor because it chose to reserve decision regarding the Motion to Terminate Imprisonment pending this written decision.

B

Plain Meaning of the Amendment to § 12-19-18

Our General Assembly amended § 12-19-18 in 2010. See P.L. 2010, ch. 311, § 1. The amendment added a new subsection and became law on June 25, 2010. The new subsection states:

> "(b) Whenever any person, after an evidentiary hearing, has been sentenced to imprisonment for violation of a suspended sentence or probationary period by reason of the alleged commission of a felony or misdemeanor said sentence of imprisonment shall, on a motion made to the court on behalf of the person so sentenced, be quashed, and imprisonment shall be terminated when any of the following occur on the charge which was specifically alleged to have constituted the violation:
>
> (1) After trial person is found "not guilty" or a motion for judgment of acquittal or to dismiss is made and granted pursuant to Superior or District Court Rule of Criminal Procedure 29;
>
> (2) After hearing evidence, a "no true bill" is returned by the grand jury;
>
> (3) After consideration by an assistant or special assistant designated by the attorney general, a "no information" based upon a lack of probable cause is returned;
>
> (4) A motion to dismiss is made and granted pursuant to the Rhode Island general laws § 12-12-1.7 and/or Superior Court Rule of Criminal Procedure 9.1; or
>
> (5) The charge fails to proceed in District or Superior Court under circumstances where the state is indicating a lack of probable cause, or circumstances where the state or its agents believe there is doubt about the culpability of the accused." Sec. 12-19-18(b).

Here, the statute's plain meaning guides this Court's analysis. Section 12-19-18(b) makes clear that it only applies to particular defendants, and there are several prerequisites that a defendant must satisfy before invoking the benefits of § 12-19-18(b). First, the defendant must have an evidentiary hearing—a probation violation hearing. Second, after such a hearing, the defendant must be adjudged a violator of his previously imposed sentence. Next, the defendant

must be sentenced to a term of imprisonment. Finally, and most importantly, the underlying charge that triggered the violation must be disposed of in a manner provided in the statute. See § 12-19-18(b)(1)-(5). After these elements are satisfied, the defendant may file a motion with this Court pursuant to § 12-19-18(b) to quash and terminate his or her imprisonment.

The General Assembly used the word "quash" within § 12-19-18(b), and the Court finds it significant that this word was included. See State v. Santos, 870 A.2d 1029, 1032 (R.I. 2005) (the Court must interpret the statute literally and must give the words of the statute their plain and ordinary meanings). While the word "quash" has never been defined by our Courts, it is not difficult to obtain the meaning of the word and also the intent of our General Assembly. Black's Law Dictionary defines quash as "[t]o annul or make void; to terminate." Black's Law Dictionary (9th ed. 2009). Likewise, several other jurisdictions have used similar definitions. See State v. Almori, 222 A.2d 820, 822 (1966) ("To quash means to abate, annul, overthrow or make void.) (citations omitted); Hood v. French, 19 So. 165, 167 (1896) (quash means to annul, overthrow, or vacate by judicial action).

Based upon the plain meaning of the statute, this Court can glean the General Assembly's intent when it amended § 12-19-18 to include the new subsection. The Assembly even stated—in legislative materials—that:

> "[t]his Act would require the termination of imprisonment relative to a probationary period or suspended sentence in situations where information has not been filed or the defendant has been found not guilty on the charge which was specifically alleged to have constituted the violation of the probationary period or suspended sentence." See Def.'s Supp. App. Ex. A "Explanation by the Legislative Council."

The General Assembly was undoubtedly concerned that a defendant would be serving a prison term based on the more lenient probation revocation standard, specifically, that a hearing justice

was reasonably satisfied that the defendant failed to keep the peace and be of good behavior—when the more critical standards of criminal prosecution were not met—probable cause and proof of guilt beyond a reasonable doubt. The legislature's intent was that so long as a defendant met the four procedural requirements articulated above, then that defendant had the opportunity to have his sentence quashed—terminated or voided. It is with this framework in mind that the Court can now turn the issue of whether § 12-19-18(b) applies to the Defendant.

C

Application of Amendment to Facts of This Case

It is a well-established principle of statutory interpretation that when the language of a statute is clear and unambiguous, the Court must enforce the statute as written by giving the words of the statute their plain and ordinary meaning. State v. Graff, 17 A.3d 1005 (R.I. 2011); see also Drs. Pass and Bertherman, Inc. v. Neighborhood Health Plan of Rhode Island, 31 A.3d 1263, 1269 (R.I. 2011); DeMarco v. Travelers Insurance Co., 26 A.3d 585, 616 (R.I. 2011); Sidell v. Sidell, 18 A.3d 499, 504 (R.I. 2011). The task in construing any statute is to effectuate and establish the intent of legislature. In re Advisory Opinion to the Governor, 504 A.2d 456 (R.I. 1986). When charged with the duty of statutory construction, one must read language so as to effectuate legislative intent behind its enactment; if language is clear on its face, then the plain meaning of statute must be given effect. Gilbane Co. v. Poulas, 576 A.2d 1195 (R.I. 1990); see also Mullowney v. Masopust, 943 A.2d 1029, 1034 (R.I. 2008); Martone v. Johnston School Committee, 824 A.2d 426, 431 (R.I. 2003) ("The best evidence of [legislative] intent can be found in the plain language used in the statute."). Therefore, if a statutory provision is unambiguous, there is no room for statutory construction and the court must apply the statute as written. International Broth. of Police Officers v. City of East Providence, 989 A.2d 106 (R.I.

2010). It is only when confronted with an unclear or ambiguous statutory provision that this Court will examine the statute in its entirety to discern the legislative intent and purpose behind the provision. In re Harrison, 992 A.2d 990 (R.I. 2010). However, a statute that is clear and unambiguous cannot stand if it is clearly unconstitutional. Downer v. Liquor Control Comm'n, 59 A.2d 290, 292 (Conn. 1948).

Our Supreme Court—while never analyzing the amendment embodied in § 12-19-18(b)—has analyzed § 12-19-18 on several previous occasions. Instructive to this analysis is State v. Garnetto, 75 R.I. 86, 63 A.2d 777 (1949), wherein our Supreme Court was faced with a similar issue before this Court. However, the Garnetto Court was faced with § 12-19-18(a), which dealt with deferred sentences.

In Garnetto, a defendant received a deferred sentence in 1942 after pleading nolo contendere to a charge of assault with a dangerous weapon. Four years later in 1946, Garnetto was arrested and charged with rape. The State presented the defendant as a violator, and he was sentenced to a six-year term of imprisonment for violating the previously imposed deferred sentence. Id. at 87, 63 A.2d at 778. Later, however, a grand jury did not return an indictment on the rape charge. Id. at 88, 63 A.2d at 778.

In 1948, while Garnetto was imprisoned for the violation, our General Assembly enacted § 12-19-18(a). Section 12-19-18 (a) stated that:

> "Whenever any person shall have been sentenced to imprisonment for violation of a deferred sentence by reason of the alleged commission of a felony, and the grand jury shall have failed to return any indictment on the charge which was specifically alleged to have constituted the violation of said deferred sentence, the sentence to imprisonment for the alleged violation of the deferred sentence shall, on motion made to the court on behalf of the person so sentenced, be quashed and imprisonment thereunder shall be terminated forthwith and the deferred sentence shall have same

> force and effect as if no sentence to imprisonment had been imposed thereunder." Sec. 12-19-18.

Relying on this statute, Garnetto filed a motion to quash the sentence he received for violating the deferred sentence agreement. Id. The Garnetto Court declared the statute unconstitutional because it "makes it mandatory that the court grant a motion to quash the sentence of a person duly imprisoned and terminate his imprisonment." Id. at 93, 63 A.2d at 780. In so holding, the Court reviewed precedent dating back to 1854[6] and noted:

> "[The General Assembly had] no power merely by the provisions of an act to reverse the judgment of a court or to require any court to quash or annul its judgment or in any way to alter its records ... [because] the passage of a mandatory act directing and compelling a court to quash a sentence previously imposed would amount in effect to a reversal of the court's pronounced judgment [and that] [s]uch an act would be an indirect exercise of judicial power by the general assembly over the judgment and records of the court." Id. at 92-93, 63 A.2d at 780.

Importantly, Garnetto's sentences—the deferred sentence and the violation sentence—predated the statute. The Garnetto decision left uncertain whether the statute was constitutional as applied to sentences that were executed after the statute was passed. Years later, our Supreme Court was faced with another challenge to § 12-19-18(a) in Hazard v. Howard, 110 R.I. 107, 290 A.2d 603 (1972). Hazard's two sentences, unlike the sentence in Garnetto, were imposed after the statute was enacted. In Hazard, the defendant pled nolo contendere to entering a dwelling with intent to commit larceny in 1969 and was then placed on a deferred sentence. Id. at 108, 290 A.2d at 604. One year after receiving the deferred sentence, the defendant was charged with burglary, and the State presented him as a violator of his previously imposed deferred sentence. A violation hearing was held, and this Court found the defendant to be a violator based "entirely on the alleged attempted burglary and nothing else." Id. at 109, 290 A.2d at 604. Similar to the

[6] Opinion of the Supreme Court upon the Act to Reverse the Judgment Against Dorr, 3 R.I. 299 (R.I. 1854). The Rhode Island Supreme Court simply refers to the case as "Opinion of the Justices" in the Garnetto case.

case in Garnetto, the grand jury failed to indict Hazard on the new burglary charge in 1971. Id. at 109, 290 A.2d at 605. Pursuant to § 12-19-18(a), the defendant filed a motion to vacate the sentence he received for the violation. This Court denied the motion, and Hazard appealed to the Supreme Court.

Our Supreme Court, however, did not find the statute to be unconstitutional as it did in Garnetto. Instead, the Supreme Court distinguished the Garnetto case, stating that Garnetto was decided on its own facts and it "stands for the proposition that [§] 12-19-18 is unconstitutional insofar as deferred sentence agreements executed prior to its enactment are concerned." Id. at 110, 290 A.2d at 605. The Hazard Court determined that Garnetto did not apply to cases when the original deferred sentence was imposed after the enactment of the statute. Id., 290 A.2d at 605 (emphasis added). The Court then went on to hold that the statute was constitutional and did not present a separation of powers or retroactivity issue. In so holding, the Court determined that "§ 12-19-18, as far as it affects deferred sentence agreements entered into subsequent to the enactment of that statute, is valid." Id. at 111, 290 A.2d at 606. The Hazard Court further ruled that three conditions precedent to the application of § 12-19-18 [(a)][7] must be satisfied before the statute has application. See Hazard, 290 A.2d at 606 (The three conditions are "(1) that the accused was charged with a specific felony, which charge was referred to the grand jury; (2) that the grand jury failed to indict; and, (3) that the presenting of the accused as being in violation of his deferred sentence agreement was predicated exclusively on the ground that he had committed the specific offense for which the grand jury failed to indict.") (citing State v. Plante, 109 R.I. 371, 376, 285 A.2d 395, 398 (1972)).

The Hazard Court indicated that it had reviewed the transcripts of three hearings in the Superior Court and was satisfied that the three Plante conditions had been met. It noted that the

[7] The statute did not have subparts at the time. Currently § 12-19-18 (a) embodies the original enactment.

defendant was charged with the specific felony of attempted burglary and the grand jury failed to indict. The Court further noted that after reviewing the statements of the trial justice, it was satisfied that the third condition was satisfied. The Hazard Court quoted a portion of the hearing transcript from the Superior Court hearing on October 6, 1970, recounting that the hearing justice spoke in part, as follows:

> "In the Court's judgment, the evidence proved this Defendant was upon the property of Mr. Masterandrea and attempted to burglarize a house . . . . The evidence is overwhelming. In my judgment there was an attempted burglary and he is the man. I find as a matter of fact that Steven Hazard violated the terms of his deferred sentence set by the Attorney General in that he attempted to commit burglary. On this the Court finds that he is a violator." Id. at 112, 290 A.2d at 606-07.

The Hazard Court quoted more of the trial justice's ruling:

> "There's no doubt in my mind that this man is guilty of the crime of attempted breaking and entering and there was nothing in the case to indicate that he was so drunk that he didn't know what he was doing." Id.

The above findings of the trial justice in Hazard are markedly different than that of the hearing justice in the instant case, who simply found that she was "reasonably satisfied that it is not a case of misidentification, that [Defendant] was the individual who entered into the home of Ms. Pacheco, and this Court funds that [Defendant], by doing so failed to keep the peace and be of good behavior, in violation of the terms of his . . . previously-imposed sentences."[8] (Def.'s Ex. 3, 119:15-20). In performing the analysis required by Hazard, this Court notes the following chronology. Defendant entered a nolo contendere plea on August 8, 2003, in case number P2-03-2726A, to a charge of breaking and entering. The Defendant was sentenced to a ten year sentence with one year to serve at the ACI. The remaining time was suspended along with probation. Thereafter, Defendant was arrested on a new charge of breaking and entering on June

[8] See Footnote 2, supra.

13, 2011. As a result, he was presented as a violator of his sentence in case number P2-03-2726A and thereafter found to be a violator as described above after a violation hearing in the summer of 2011. After the hearing justice found Defendant to be a violator of his sentence in case number P2-03-2726A, the hearing justice removed the remaining nine years of Defendant's suspended sentence in that case and ordered Defendant to serve those nine years at the ACI.

The effective date of § 12-19-18 (b), the amendment to the statute that Defendant seeks to invoke, is June 25, 2010. It is readily apparent that the date of Defendant's new charge of breaking and entering—June 13, 2011—and the date of the violation hearing and finding of violation—summer 2011—both are subsequent to the enactment date of the amendment. However, the original sentence imposed in case number P2-03-2726A was August 8, 2003. This conviction clearly predates the effective date of the amendment that Defendant seeks to invoke.

It is axiomatic that a "probation revocation hearing is not part of a criminal prosecution and therefore does not give rise to the full panoply of rights that are due a defendant at trial." State v. Gautier, 871 A.2d 347, 358-59 (R.I. 2005) (citations omitted). Importantly, a probation-revocation hearing is not a prosecution that seeks to convict the defendant for the alleged violation, but, rather, a "continuation of the original prosecution for which probation was imposed." Id. Here, Defendant was sentenced on his original charge in 2003. Section 12-19-18(b) did not take effect until June 25, 2010. Consequently, the statute is inapplicable to the Defendant because his original prosecution predated the statute. See Garnetto, 75 R.I. at 86, 63 A.2d at 777 (quashing statute was determined inapplicable because original prosecution predated the effective date of the statute). This conclusion does not end the Court's analysis however.

D

Dynamics of a Violation Hearing

Further clouding the analysis in the instant case is the change in the dynamics of a violation hearing. Our Supreme Court has consistently held that the purpose of a violation hearing is not to determine a defendant's guilt or innocence on the new charge; instead, the hearing justice's job is to simply determine whether the defendant's "conduct on the day in question had been lacking in the required good behavior expected and required by his probationary status." State v. Znosko, 755 A.2d 832, 834-35 (R.I. 2000) (citations omitted). Nowhere is this principle more evident than in State v. Gautier, 774 A.2d 882 (R.I. 2001), also commonly known as Gautier I.

In Gautier I, the defendant was on probation after pleading nolo contendere to a drug charge. Months after the plea, the defendant was arrested again, this time for the murder of his wife's boyfriend. Id. at 883-84. The State presented the defendant as a violator of his previously imposed sentence pursuant to Rule 32(f). As the basis for the violation, the State alleged that the defendant had committed the crime of murder. Id. at 885.

One month after the murder, a hearing was held to determine if the defendant had violated the terms of his probation. The State presented three witnesses: the defendant's wife; a patrolman from the Providence Police Department; and a doctor from the Medical Examiner's Office. The defendant's wife testified that defendant came to her apartment where she was staying with her boyfriend. Id. at 884. After a short conversation with the defendant, the wife testified that the defendant attacked her boyfriend with a knife, stabbing him several times. Id. After the stabbing, the wife stated that she and the defendant went to his sister's house.

Next, Officer Anthony Teixeira, Jr. ("Officer Teixeira"), a patrol officer with the Providence Police Department, testified. Id. Officer Teixeira testified that on the morning of the arrest—also the morning of the murder—he traveled to the defendant's apartment, based on information he was provided at role call, regarding the murder. The officer encountered the defendant and after a short chase arrested him. Officer Teixeira testified that defendant had blood on his person and in the car he was driving. Id. at 885.

At the conclusion of the hearing, the trial justice determined that based on the Super. R. Crim. P. 32(f) notice that the state had presented alleging only the offense of murder, defendant was not a violator of his previously imposed sentence. The trial justice stated:

> "I made a factual finding [that] I did not believe the State's witness that [defendant] in fact caused the death or that he murdered-and that was the notice that was given to the defendant-that he murdered [the boyfriend]. I'm called upon to make certain findings. The evidence presented to me, as I indicated to you in chambers, I think the 32(f) notice was deficient. Had the 32(f), for example, alerted the defendant to the fact that he was being accused of violating the nine-and-a-half years I believe it was, nine years, ten months of a previously suspended sentence because he beat up his wife or violated a restraining order, that would have been simple. But the 32(f) notice presented to me said that he's a violator because he murdered [the boyfriend]. From the evidence presented to me, I was not satisfied the State met its burden [in proving] that he did murder [the boyfriend]." Id. at 885-86.

The State appealed the hearing justice's finding of no violation. The Supreme Court reversed holding that the hearing justice erred in determining that the issue before him was whether defendant had murdered the boyfriend. The Court stated that a hearing justice's determination at a probation violation hearing is not to determine guilt or innocence, but to determine "only whether in the [hearing justice's] discretion that the [defendant's] conduct on the day in question had been lacking in the required good behavior expected and required by his probationary status." Id. at 886-887 (emphasis added) (citations omitted). The Court held that

the fact that defendant was present during such a brutal slaying and that he had failed to notify the police after he fled the scene was enough to establish that he had violated the terms of his probation. Id. The Court even went so far as to say that the hearing justice could have based a finding of violation on the fact that the defendant fled from Officer Teixeira.

Following Gautier I, the defendant's case was remanded so that the hearing justice could enter a finding of violation. The hearing justice did find defendant to be a violator, and the defendant was continued on the same sentence. Thereafter, a grand jury returned an indictment against the defendant, charging him with the murder of his wife's boyfriend and various other charges. The defendant then moved to dismiss the murder charge, arguing that the State was collaterally estopped from prosecuting him for the murder pursuant to our Supreme Court's holding in State v. Chase, 588 A.2d 120 (R.I. 1991). A justice of the Superior Court denied the defendant's motion. This time the defendant appealed the adverse decision to our Supreme Court in State v. Gautier, 871 A.2d 347 (R.I. 2005), also known as Gautier II.

Our Supreme Court in Gautier II determined that the State was not estopped from pursuing a criminal conviction after the defendant had won the probation violation hearing. In its decision, the Court discussed the history of probation violation hearings and criminal prosecutions. Moreover, in overruling its earlier precedent in Chase—that a finding of non-violation at a probation violation hearing collaterally estopped the state from relitigating the issue of a defendant's guilt—the Supreme Court discussed at length the proper role of a hearing justice at probation violation hearings. The Supreme Court specifically noted, "we have adhered to and reaffirmed the principle that [t]he court's role [in a probation-revocation proceeding] is not to determine the defendant's criminal guilt or innocence with respect to the underlying conduct that triggered the violation hearing [,] but rather, to determine whether a defendant has

breached a condition of his probation by failing to keep the peace or remain on good behavior." Id. at 357-58 (citations omitted). The Court further went on to state:

> "[i]n light of these decisions, we are of the opinion that further adherence to our decision in Chase no longer is warranted. Because it is not appropriate for a hearing justice in probation-revocation proceedings to make factual determinations of guilt or innocence on the charges which form the basis of the alleged violation, we believe that our holding in Chase governing the preclusive effect of such findings and conclusions is inconsistent and confusing to both practitioners and criminal defendants alike." Id. (emphasis added).

The Court concluded by saying that they were

> "[m]indful of the critical differences in both the purposes of and procedures employed during probation-revocation hearings and criminal trials, we are of the opinion that further application of the Chase doctrine would strongly counteract the significant public interest in the preservation of the criminal trial process as the intended forum for ultimate determinations as to guilt or innocence of newly alleged crimes." Id. at 359 (citation omitted).

The holdings of Gautier I and Gautier II have been reaffirmed by our Supreme Court on several occasions. See State v. Washington, 42 A.3d 1265 (R.I. 2012); State v. Gromkiewicz, 43 A.3d 45 (R.I. 2012); State v. Pona, 13 A.3d 642 (R.I. 2011); State v. Pitts, 960 A.2d 241 (R.I. 2008); State v. Bouffard, 945 A.2d 305, 310 (R.I. 2008); State v. Forbes, 925 A.2d 929, 934 (R.I. 2007); State v. Santiago, 799 A.2d 285 (R.I. 2002); Znosko, 755 A.2d 832 (R.I. 2000); State v. Godette, 751 A.2d 742 (R.I. 2000) (all consistently holding that the only determination before the hearing justice is whether the defendant failed to be of good behavior as required by probation and not whether defendant had committed the new criminal charge).

Similar reasoning regarding the differences between violation hearings and criminal proceedings was further amplified in State v. Smith, 721 A.2d 847 (R.I. 1998). In Smith, the defendant was on probation for a previous conviction when she was charged with assault with a

dangerous weapon and assault resulting in serious bodily injury. Id. The State presented her as a violator pursuant to Rule 32(f) of the Superior Court Rules of Criminal Procedure. The parties agreed to hold the trial first, and then conduct the violation hearing. After the defendant was found not guilty, the violation hearing was held. The State relied on the evidence adduced at the criminal trial, and defendant did not present any testimony. The hearing justice then determined that he was reasonably satisfied that defendant had violated her probation because the defendant failed to keep the peace and be of good behavior. Id. at 847-848. On appeal, the defendant argued that the hearing justice committed error when he found her in violation because the defendant was acquitted of the underlying charges. Id. at 848. Our Supreme Court disagreed and held that the defendant could be found a violator despite being acquitted of the charges. In so holding, the Smith Court again highlighted the differences between a violation hearing and a criminal prosecution.

Gautier I, makes clear that the mere presence of a defendant at a crime can trigger a violation, and Smith makes clear that a defendant may be acquitted of a criminal charge and subsequently adjudged a violator of his or her probationary sentence. To determine whether the defendant has committed a violation, the hearing justice "weighs the evidence and assesses the credibility of the witnesses." State v. Pena, 791 A.2d 484, 485 (R.I. 2002). The Supreme Court gives the trial justice's assessment of the credibility of witnesses "great deference." State v. Christodal, 946 A.2d 811, 816 (R.I. 2008) (quoting Bajakian v. Erinakes, 880 A.2d 843, 852 (R.I. 2005)). It is well-established that "[t]his Court's 'review of a hearing justice's decision in a probation-violation proceeding is limited to considering whether the hearing justice acted arbitrarily or capriciously in finding a violation.'" State v. Sylvia, 871 A.2d 954, 957 (R.I. 2005)

(quoting State v. Rioux, 708 A.2d 895, 897 (R.I. 1998)); see also State v. English, 21 A.3d 403, 407 (R.I. 2011).

In the case at bar, the hearing justice determined that she was reasonably satisfied that the Defendant did violate the terms of his previously imposed sentence. Importantly, here, the hearing justice did not pass judgment as to whether the Defendant was guilty of the underlying criminal charges.

E

Separation of Powers Considerations

It is well-established that it is the role of the hearing justice—at a probation revocation hearing—to assess witness credibility and weigh the evidence as the trier of fact. See Pena, 791 A.2d at 484; Gromkiewicz, 43 A.3d at 45. Furthermore, the hearing justice is also required to make evidentiary rulings and rule on motions. A probation violation hearing is somewhat akin to a criminal trial in many respects because witnesses are sworn in, testimony is presented, objections are made, and summation arguments are heard. But see Gautier II, 871 A.2d at 358-59 (court discusses the differences between criminal trial and violation hearing). Probation violation hearings are informal proceedings that are loosely based upon the procedure used for a criminal trial. See id. At the conclusion of a hearing, a hearing justice is required to determine whether the defendant has violated the terms of their probation, and if the person is deemed a violator, the hearing justice is required to impose a sentence.

In sentencing a defendant for a violation of his or her probation, our Supreme Court at one time instructed that the hearing justice, while having the authority to proceed with the probation revocation hearing prior to the disposition of the offense which precipitated such hearing, should not consider the new offense in determining the extent of the penalty to be

imposed on the charge on which sentence had formerly been deferred. See State v. Fortes, 114 R.I. 161, 174, 330 A.2d 404, 411-412 (1975). This principle was revised somewhat several years later in State v. Pires, 525 A.2d 1313 (R.I. 1987), when the Supreme Court indicated that although trial justice need not completely ignore the nature of a second offense when imposing sentence for probation violation, the trial justice should be guided principally by consideration of the nature of the first offense in sentencing for probation violation. Id. at 1313-1314. This principle has been reaffirmed on several occasions. See, e.g., State v. Christodal, 946 A.2d 811, 817 (R.I. 2008) (hearing justice is afforded wide latitude regarding the sentence to be imposed on the defendant if the hearing justice determines him or her to be a violator); State v. Vieira, 883 A.2d 1146 (R.I. 2005) (The hearing justice, when determining the proper sentence to impose upon a probation violator, has wide discretion to "remove the suspension and order the defendant committed on the sentence previously imposed, or on a lesser sentence, or may continue the suspension of a sentence previously imposed . . . .") (quoting G.L.1956 § 12-19-9). In arriving at an appropriate sanction for the defendant in Christodal, the hearing justice noted:

> "(1) that defendant had thirty previous contacts with law enforcement; (2) that his record reflected thirteen convictions for a variety of offenses; and (3) that this was not the first time defendant had appeared before the Superior Court as an alleged violator. The hearing justice pointed to a number of specific criminal incidents involving defendant, including destruction of a fence, fighting with a police officer and threatening to kill a person, and maliciously destroying the front door of a commercial establishment. The hearing justice emphasized the serious nature of what defendant had done during the incident that was described by the witnesses at the violation hearing; the hearing justice noted that defendant had thrown stones at a person only five feet away, and the hearing justice further observed that Ms. LaBonte could have been scarred for life . . . [and that] [t]he potential for great harm was present." Id. at 815 (quotation marks omitted).

The hearing justice went on to state that:

> "in view of the evidence presented at the probation violation hearing and the instances of past wrongdoing by defendant, he had been inclined to sentence defendant to serve the entire nine years remaining on his suspended sentence. However, he went on to say that, taking into account both the state's recommendation of three years to serve and defendant's mental health issues, he had instead decided to sentence defendant to serve five years of his suspended sentence rather than the substantially longer term that he had initially considered imposing. A judgment of conviction was entered on September 8, 2006, and defendant filed his notice of appeal on September 15, 2006." Id. at 815 (footnote omitted).

On appeal, Christodal took issue with the term of the sentence imposed by the hearing justice after the finding of violation. The Rhode Island Supreme Court reviewed the following comments of the hearing justice in fashioning the sentence:

> "'I would indicate that my initial impression after hearing the evidence and a review of the defendant's record was that a nine year sentence to serve would have been appropriate, but I considered the Attorney General's recommendation of three years, and I also consider the fact that this defendant has a great burden. He has some serious mental health issues and thus, although no one argued this, I took that into account for purposes of this violation hearing and only for that purpose, I considered that the defendant might be entitled to something akin to a diminished capacity argument.'
>
> 'So, I factored that in and took four years off the sentence I would have otherwise imposed.'" Id. at 818 (emphasis in original).

After reviewing the above comments, the Rhode Island Supreme Court held that it was "utterly clear" that after he found the defendant to be a violator, the hearing justice did not act arbitrarily or capriciously in fashioning the defendant's sentence.[9] Id. at 818.

The Rhode Island Supreme Court, on appeal, affords substantial deference to a hearing justice's decision to revoke a defendant's probation. Gromkiewicz, 43 A.3d at 48 ("This Court's

[9] The Supreme Court went on to say "[i]ndeed, it is our view that his thoughtful analysis of the various relevant factors and the resultant sentence struck an appropriate balance between both the defendant's mental health problems and his destructive and criminal behavior." Christodal, 946 A.2d at 818.

review of a trial justice's decision in a probation violation proceeding is restricted to considering 'whether the hearing justice acted arbitrarily or capriciously in finding a violation.'") (quoting State v. Seamans, 935 A.2d 618, 621 (R.I. 2007)). It is clear to this Court, based upon all of this precedent, that a hearing justice plays a pivotal role in any probation violation hearing. The hearing justice acts as the trier of fact, which entails assessing witness credibility and weighing the evidence. The hearing justice also rules on matters of law, such as motions and evidentiary objections. He or she is also the final arbiter as to whether a defendant has violated the terms of his or her probation. Finally, the hearing justice is required to impose a sentence.

Recently, our Supreme Court addressed whether the Legislature had the authority to direct the courts regarding the maintenance of court records. State v. Greenberg, 951 A.2d 481, 496 (R.I. 2008). In Greenberg, a seventeen year old defendant was charged with the murder of another teenager after a boating accident. A recent statutory amendment allowed the defendant to be charged as an adult; however, the amendment stated that after a disposition, the court must destroy most of the court records. The Court determined that the maintenance of court records was a judicial function that could not be encroached on by another branch of government, thus determining the Legislature had violated the separation of powers doctrine. See generally 16A Am. Jur. 2d Constitutional Law § 239 ("The separation of powers doctrine serves a dual function: it limits the exercise of power within each branch, yet ensures the independent exercise of that power.") (emphasis added). In so holding, the Court stated that "[t]he Legislature is not free to exercise this judicial power, nor may it enact legislation purporting to affect court judgments." Greenberg, 951 A.2d at 497.

Greenberg was not the first time our courts have considered the propriety of legislation that directs or commands the courts to do some affirmative act. In Taylor v. Place, 4 R.I. 324

(1856), a plaintiff obtained a civil judgment against a group of defendants. Id. at 330. After the verdict, the defendants lobbied with the Legislature to pass a law to set aside the judgment and order a new trial in the matter. The law was approved by a vote of the Legislature. A new trial was ultimately had, and the defendants were absolved of liability. On appeal, our Supreme Court held that the Legislature's act was a violation of the separation of powers doctrine. In reaching its decision, the Court highlighted the differences between the judicial and legislative branches of government and also the importance of keeping the branches separate. "The judicial power is exercised in the decision of cases; the legislative, in making general regulations, by the enactment of laws." Id. at 337. The Court went on to state that the legislature's attempt "[t]o affect to decide, or to control the decision, of a case or controversy which has arisen at law or in equity, or to interfere with its progress, or to alter its condition in any way, is to assume the exercise of judicial power. . . ." Id.

Our Supreme Court "frequently has held that the power of the General Assembly to make and enact laws is broad and plenary."[10] Cherenzia v. Lynch, 847 A.2d 818, 822 (R.I. 2004). Due to this broad legislative power of the General Assembly, courts are to presume the constitutional validity of legislative enactments. Id. In passing on the constitutionality of a statute, the Court exercises its power to do so "with the greatest possible caution." Gorham v. Robinson, 57 R.I. 1, 7, 186 A. 832, 837 (1936). To be deemed unconstitutional, a statute must

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

"palpably and unmistakably be characterized as an excess of legislative power." City of Pawtucket v. Sundlun, 662 A.2d 40, 44-45 (R.I. 1995).

In the instant case, the hearing justice's finding of violation and resulting imposition of sentence was based upon the Defendant's previous sentence and not solely on the new conduct giving rise to the violation. See State v. Brown, 915 A.2d 1279, 1282 (R.I. 2007) (The focus of a probation violation hearing is not on the defendant's guilt or innocence with respect to the most recent crime with which he has been charged; rather, the focus is on whether or not the defendant's "conduct on the day in question had been lacking in the . . . good behavior expected and required by his probationary status.") (internal quotation marks omitted). Taylor makes clear that the General Assembly is without authority to affect a judgment—such as a finding of violation along with the particular imposition of sentence—that was previously entered by this Court. Such action usurps the authority of this Court and its ability to determine if a defendant has failed to keep the peace of good behavior. See Taylor, 4 R.I. at 339 ("to set aside [a] verdict; to open [a] past judgment; . . . was, therefore, not only the exercise of judicial power on the part of the general assembly over this court and case, but of judicial power of the most eminent and controlling character") (emphasis added).

This Court is mindful that the General Assembly is not powerless in our form of government. Our Supreme Court has consistently stated that "it is the prerogative of the General Assembly to define criminal offenses and set forth the sentences for those crimes and that when it does so, the Legislature is not intruding upon the judicial function." State v. Monteiro, 924 A.2d 784, 793 (R.I. 2007) (citing Hazard, 110 R.I. at 111, 290 A.2d at 606)). "It is the job of the [l]egislatures, not courts, [to] prescribe the scope of punishments." Monteiro, 924 A.2d at 794 (quoting Missouri v. Hunter, 459 U.S. 359, 368, (1983)). However, the General Assembly

exceeds its power when it passes legislation that affects, or otherwise encroaches on judgments and verdicts entered by the Courts. See Taylor, 4 R.I. at 339; see also Berberian v. Lussier, 87 R.I. 226, 139 A.2d 869 (1958) (The hearing and deciding of adversary suits at law and in equity, with the power of rendering judgments and entering decrees according to the decision, is to be executed by the process and power of the tribunal deciding, or of another tribunal acting under its orders and according to its direction, is the exercise of "judicial power," within constitutional provision relating to separation of powers.). "[T]he General Assembly may [also] not overstep the bounds of its authority to 'subvert the power of the judiciary.'" Advisory Opinion to the Governor, 437 A.2d 542, 543 (R.I. 1981) (quoting Creditors' Service Corp. v. Cummings, 57 R.I. 291, 300, 190 A. 2, 8 (1937)).

As discussed supra, the role of the hearing justice in a violation hearing is pivotal. The hearing justice engages in a number of functions during a probation violation hearing, and most importantly, the hearing justice makes a finding of violation. It is this finding that is expressly in the province of a judge's authority—as it is the exclusive power of the judiciary and not the legislature to determine whether a violation has occurred. This finding is bolstered by the fact that our Supreme Court has a limited review of a hearing justice's finding of violation. See Sylvia, 871 A.2d at 957. Thereafter, a hearing justice will fashion an appropriate sentence for the violation based upon the original conduct—see Fortes, and Pires—as well as the new conduct and other factors brought before the Court at the time of the finding of violation. See Christodal, and Vieira, (as well as factors and cases cited therein). Any attempt by the Legislature to disturb a finding of a violation and the resultant imposition of a sentence by the hearing justice is an encroachment on or an attempt to subvert the power of the judiciary. Lemoine v. Martineau, 115 R.I. 233, 238, 342 A.2d 616, 620 (1975) (Our Supreme Court has expressly stated that the

General Assembly is without authority to alter a judicial decision or a court's prior judgment. Such an attempt is a violation of the separation of powers doctrine.); Garnetto, 75 R.I. at 91–92, 63 A.2d at 779–780.

In reaching this determination, the Court also finds it important that the statute provides for no discretion to the members of this Court; instead, the statute mandates that the sentence must be quashed. See State v. Almonte, 644 A.2d 295, 299 (R.I. 1994) (the Court's separation of powers analysis was bolstered because the Legislature completely divested the Court of any authority to allow a health care professional to testify); see also In re House of Representatives (Special Prosecutor), 575 A.2d 176, 179 (R.I. 1990) (court found a separation of powers issue because the statute provided for absolute control by the Chief Justice). Similar reasoning regarding the legislature's ability to command a court to alter a sentence has also been used in other jurisdictions. See Com. v. Sutley, 378 A.2d 780, 782 (Pa. 1977) (a legislative command to the courts to open a judgment previously made final, and to substitute for that judgment a disposition of the matter in accordance with the subsequently expressed legislative will is a violation of separation of powers).

1

Difference between No Probable Cause and Finding of Violation

Here, the Defendant was not prosecuted for the breaking and entering charge that triggered the violation because the State had stipulated that there was insufficient probable cause to warrant a prosecution. The Court finds it noteworthy that § 12-19-18(b) attempts to draw a correlation between a no probable cause determination and quashing a finding of violation and sentence. The Court further finds that any attempt to find such a correlation is misguided.

"It is well settled in this state that the Attorney General is the only state official vested with prosecutorial discretion." State v. Rollins, 116 R.I. 528, 533, 359 A.2d 315, 318 (1976) (citing Rogers v. Hill, 22 R.I. 496, 48 A. 670 (1901)). The Attorney General is granted wide latitude in its ability to dismiss a charge, in that even a justice of this Court cannot dismiss an information without a defendant's motion. See State v. Young, 941 A.2d 124, 128 (R.I. 2008). A prosecutor's authority to dismiss an information or criminal charge should not have the later consequence of quashing a hearing justice's finding of violation and his or her sentence imposed. As discussed supra, the differences between a criminal prosecution and a probation violation hearing are plentiful. Furthermore, a violation hearing is not meant to determine guilt or innocence on the underlying charge. 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.

2

Rule of Decision

Due to the numerous functions performed by a hearing justice during the course of a violation hearing, the exercise of discretion involved in the finding of violation, and the imposition of an appropriate sentence, this Court finds that § 12-19-18(b) attempts to impose a rule of decision on a judgment of the Superior Court in the instant case[11] at a time subsequent to the entry of that judgment. Such an attempt encroaches on the power of the judiciary and is thus unconstitutional. For any violation proceeding that was continued until after the time of trial—see Smith, 721 A.2d 847—the amendment would impose a rule of decision upon the Superior

[11] The instant case is a part of a certain class of cases as described in the amendment. That class is made up of those defendants served with a notice of violation, who have been found to be violators of their probation after an evidentiary hearing, sentenced to imprisonment, and thereafter, one of the contingencies described in § 12-19-18(b) occurs.

Court if a jury returned a not guilty verdict. Such a result is contrary to the separation of powers guarantees of the United States and Rhode Island Constitutions. The Superior Court is vested with discretion regarding probation violation hearings pursuant to § 12-19-9 which provides in pertinent part:

> "The 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. Upon a determination that the defendant has violated the terms and conditions of his or her probation the court, in open court and in the presence of the defendant, may remove the suspension and order the defendant committed on the sentence 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." (emphasis added).

Also instructive on the rule of decision matter is United States v. Klein, 80 U.S. 128 (1871). In Klein, the Supreme Court of the United States dealt with a suit for the proceeds of property seized and sold by the army in the Civil War. The administrator of the deceased prior owner's estate sued under legislation allowing recovery by such owners under proof of loyalty, which the Supreme Court had held was satisfied by receipt of a presidential pardon. After the plaintiff recovered in the Court of Claims, Congress passed another statute, denying such pardons any effect in showing loyalty and providing that acceptance without protest of a pardon referring to the recipient's participation in the rebellion would affirmatively prove disloyalty. Congress further directed that on proof of such a pardon or its acceptance, the Court of Claims and Supreme Court should dismiss the suit for want of jurisdiction. Id. at 141-44. The Supreme Court found the purported limit on its jurisdiction invalid and ineffective.

In determining that Congress has overstepped its authority and the actions were unconstitutional, the Supreme Court of the United States specifically noted the power to pardon

was in the exclusive province of the Executive branch of government. The Court noted the role of each branch of government in our system and determined that power to grant pardons was exclusively in the Executive branch, much like passing laws was exclusively in the Legislative branch of government. The Court also found that the statute prescribed a rule of decision in a case pending before the courts without changing the substantive law underlying the litigation, and did so in a manner that required the courts to decide the case in the government's favor. Id. at 146–147.

In Klein, the court was directed to ignore the presidential pardon and make certain findings of law and fact. The legislation violated the separation of powers between Congress and the Executive by attempting to invalidate the effects of the presidential pardons. The statute also violated the separation of powers between Congress and the Judiciary by directing courts to make certain findings of law and fact. Similarly, here, the General Assembly's passing of § 12-19-18(b) is directing this Court to annul findings of fact and conclusions of law in a previous violation hearing simply because a defendant was not found guilty of the underlying criminal offense that triggered the violation. However, as discussed supra, a guilty finding and a finding of a violation have little correlation; and therefore, the General Assembly has exceeded the scope of its powers.

F

Other Considerations that Impact the Court

The Court is cognizant that it is not the role of the judiciary to make policy. See Chambers v Ormiston, 935 A2d 956, 965 (R.I. 2007) (The role of the judicial branch is not to make policy, but simply to determine the legislative intent as expressed in the statutes enacted by the General Assembly.) However the instant analysis should include observations about two

practical considerations that affect the Court's inherent power to manage its own affairs so as to achieve the orderly and expeditious disposition of cases. See Kedy v. A.W. Chesterton Co., 946 A.2d 1171, 1180 (R.I. 2008) (Court held that it was the inherent judicial power of courts to manage their own affairs so as to achieve the orderly and expeditious disposition of cases.). Such observations are centered purely on the question "of legislative power and not at all one of sound policy." Gorham v. Robinson, 57 R.I. 1, 7, 186 A. 832, 837 (1936).

1

Timing of the Violation Hearing

Each day this Court handles countless probation revocation cases. Some of these defendants have their probation revoked on the most serious charges; while some have it revoked on petty, victimless crimes. Regardless of the charge that triggers the violation, these defendants face possibly long prison terms on a much lower standard of proof than the standard employed in criminal prosecutions.

The Court is mindful of the abuses alleged to exist as they relate to probation revocation hearings. For example, a defendant with significant probation time hanging over his or her head could be violated for being arrested on a petty charge. That same defendant could be sentenced for the remainder of his probationary time, which presumably will be greater than any sentence the defendant would receive for the petty charge. In response to this long sentence, the State, on many occasions, has chosen to forego a prosecution of these matters because the State has fulfilled its responsibility by virtue of the fact that the defendant has already been sentenced. The result is a defendant serving an extended prison sentence—on a more lenient standard—for a petty offense that was never prosecuted criminally and also afforded the protections of criminal proceeding. See Gautier, 871 A.2d 347. Some would argue that this practice undercuts the

criminal justice system and strays from the original purpose of probation, which was rehabilitation. See Andrew Horowitz, The Costs of Abusing Probationary Sentences: Overincarceration and the Erosion of Due Process, 75 Brook. L. Rev. 753, 754 (2010).

Our Supreme Court has acknowledged that probation violation hearings can be held after criminal trials. Smith, 721 A.2d 847. Notably, this position has been advocated by the American Bar Association for years. See ABA Standards for Criminal Justice Sentencing, § 18-7.4(h) (1994). The Supreme Judicial Court of Massachusetts has aptly stated that:

> "The practice of postponing revocation proceedings is said to serve various purposes including: permitting the probationer to clear himself of the new criminal charges, thus, likely enabling him to avoid revocation of probation; avoiding the need to have the probationer testify at the revocation hearing as to matters that may prejudice him in the criminal case; and avoiding hampering the probationer's ability to defend himself on the criminal charges." Com. v. Odoardi, 397 Mass. 28, 36, 489 N.E.2d 674, 678-79 (1986) (citing United States v. Sackinger, 537 F. Supp. 1245, 1250 (W.D.N.Y.1982), aff'd, 704 F.2d 29 (2d Cir. 1983)).

While allowing a criminal trial to proceed first also eliminates any temptation on the part of the prosecution to prosecute a defendant on the lower standard of proof in a probation revocation hearing, and despite our Supreme Court's approval of this practice, this Court is not convinced that this procedure is advisable for every single revocation proceeding. Probation is meant to serve a rehabilitative purpose; however, "[w]here probation fails as a rehabilitative device, as evidenced by the probationer's failure to abide by his probation conditions, the State has an overwhelming interest in being able to imprison the probationer without the burden of a new adversary criminal trial." State v. Maier, 423 A.2d 235, 239 (Me. 1980) (citations omitted). Moreover, our government was "instituted for the protection, safety, and happiness of the people," R.I. CONST. art. I, § 2, and it is the responsibility of the State, through the Attorney

General,[12] to protect the general welfare of its citizens, which includes revoking the probation of a potential dangerous person because of his or her conditional liberty status. See Maier, 123 A.2d at 239.

This Court questions—were all violations continued until the time of trial—the adequacy of the Superior Court's resources and its ability to effectively manage its own affairs so as to achieve the orderly and expeditious disposition of the cases. See Kedy. Violation hearings were meant to be summary proceedings and are conducted in a more informal manner than a criminal trial in the interest of determining whether probation has proven an effective vehicle to accomplish rehabilitation. See Gautier II, 871 A.2d at 359. However, to engage in a number of violation hearings prior to the commencement of the associated trials, and thereafter have the results of the violation hearings undone based upon the occurrence of one or more of the contingencies in the amendment, would result in a churning of the cases and consequent consumption of the judicial, staff, time, and security resources of this Court.

2

Reconsideration

Reconsideration of a finding of violation, or a sentence on a violation, has been dealt with in a number of different ways by both the Supreme Court and the Superior Court. See, e.g., State v. Tetreault, 973 A.2d 489 (R.I. 2009). In that case, the defendant was found to be a violator of a previously imposed sentence in the Superior Court. The defendant was charged with breaking and entering into a business where cigarettes were stolen. The store contained a video surveillance depicting a white male falling through the ceiling and then proceeding behind the store's counter where he emptied the contents of a trash bag onto the floor and proceeded to

[12] See G.L. 1956 § 42-9-4, "Prosecution of offenses"; which states: (a) The attorney general shall draw and present all informations and indictments, or other legal or equitable process, against any offenders, as by law required, and diligently, by a due course of law or equity, prosecute them to final judgment and execution."

load it with cartons of cigarettes. The perpetrator left the store with $3000 worth of cigarettes. Id. at 490.

After police viewed the video, the defendant became the prime suspect. At a later date, when the defendant was in custody at the police station on an unrelated offense, he was questioned about the break and admitted that he was the person depicted in the photographs and stated that he "must have been stealing meat." Id.

The defendant was thereafter presented as a violator of a previously imposed sentence. At the close of the evidence, the hearing justice concluded that she was reasonably satisfied that defendant had violated the terms and conditions of his probation. She ordered defendant to serve the remaining four years of his suspended sentence at the ACI. The defendant timely appealed to the Supreme Court. Id.

Meanwhile, defendant was tried for the underlying offense of breaking and entering into the Cumberland Farms store and was acquitted after a trial. The trial testimony revealed that BCI detectives had discovered a fingerprint at the crime scene that did not match defendant's prints. Because this evidence was not disclosed to defendant at the time of his earlier probation-violation hearing, defendant filed a motion with this Court to remand the case to the Superior Court. The Supreme Court granted said motion and remanded the case to the Superior Court "in order that a motion to reopen [defendant's] violation hearing may be filed and heard." Id. at 490-91.

At the motion hearing, defendant sought a new decision based on his acquittal after his trial and, more importantly, because the police department failed to inform the Attorney General's office about the fingerprint discovered at the crime scene. Defense counsel argued that she was unaware of this evidence until trial, when she cross-examined the store's manager,

who testified that a BCI detective dusted the store for fingerprints after the break-in. The State then called the BCI detective, who testified that he examined the crime scene and that the only fingerprint of value that he found was located on top of a refrigeration unit that was situated near the point of entry. He also testified that he compared the fingerprints with those of defendant, and the prints did not match. Id.

The State argued that based on the surveillance video, there was no suggestion that when he dropped from the ceiling, the intruder touched the top of the refrigeration unit. In addition, the State noted that the detective could not date the fingerprint and because the store was open to the public, the fingerprint likely was left by a customer before the break-in. Id.

The hearing justice concluded that even taking into consideration the fingerprint evidence, she still was reasonably satisfied that defendant was a violator; she noted that defendant had admitted to Detective Fernandez that he was depicted in the photographs, and that there was no evidence that the intruder touched the refrigeration unit, nor any proof about when the fingerprint was made. The hearing justice denied relief, and the papers subsequently were returned to this Court. Id.; see also State v. Jackson, 966 A.2d 1225, 1228 (R.I. 2009) (Defendant, after being found to be a violator of a previously imposed sentence, and while defendant's appeal was pending, brought a motion to "reopen the proceedings" due to alleged failure of the hearing justice to consider mitigating information. The Supreme Court granted the motion and the hearing justice considered defendant's motion as one for reconsideration of sentence.).

In another case involving a motion to reconsider, State v. Wiggins, 919 A.2d 987, 991 (R.I. 2007), the defendant appealed from judgment of Superior Court revoking his probation. After the hearing justice denied the motion to reconsider, the defendant appealed. The Supreme

Court, in affirming the hearing justice on other grounds, noted: "It is true that Mr. Wiggins filed a motion to reconsider." The Supreme Court then added a footnote which stated: "We are hard pressed to discern on what Rule of Procedure such a motion rests." See English, 21 A.3d at 406 (court approves hearing justice's determination that a defendant cannot file a motion to reconsider the finding of violation).

Notwithstanding the divergent methods of dealing with the prospect of reconsideration, this Court feels that the better practice would be to allow a defendant to obtain a reconsideration of a judgment of the Superior Court finding a violation. While there is no court rule expressly providing for this mechanism, the practice would comport with that described in Tetreault.

Allowing a person, such as the Defendant in the case at bar, to ask the hearing justice who presided over his violation hearing to reconsider his or her earlier ruling—in light of the occurrence of one of the triggering events in the amendment—would effectively provide a remedy similar to the one § 12-19-18(b) attempts to impose upon the Court.

III

Conclusion

The Court is cognizant of the conflicting and persuasive case law regarding this issue in both Garnetto and Hazard. The Court finds that the reasoning of Hazard is inapplicable to the case at bar because the Defendant's original sentence predated the passing of the statute—Defendant was sentenced August 8, 2003, and the statute was passed on June 25, 2010. The Hazard Court made clear that the statute calling for his sentence to be quashed did apply because the defendant's original sentence was determined after the statute was passed.

Notwithstanding the timing issue, the Court further finds that the dynamics of a violation hearing have changed as reflected in a host of cases decided many years after Hazard. The Court

further finds that quashing a prison sentence after a probation violation hearing affects a judgment of this Court. The Court can easily determine that a judgment is made at a violation hearing based upon the numerous functions a hearing justice serves, and because the hearing justice makes an ultimate determination regarding whether a defendant had violated the terms of his or her probation. Cases decided by the Rhode Island Supreme Court have referred to findings of violation as "judgments of the Superior Court." See Wiggins, and English, supra. Due to these many functions, any decision rendered by this Court after a violation hearing is a judgment, and making such a judgment is a core judicial function of the judiciary. United States v. Johnson, 48 F.3d 806, 808 (4th Cir.1995) ("the imposition of a sentence, including any terms of probation or supervised release, is a core judicial function"); see also Ex parte United States, 242 U.S. 27, 41 (1916) (imposition of punishment is a judicial function); Whitehead v. United States, 155 F.2d 460, 462 (6th Cir. 1946) ("[f]ixing the terms and conditions of probation is a judicial act which may not be delegated"), cert. denied, 329 U.S. 747 (1946). Our General Assembly's objective in passing § 12-19-18(b) is well-established; however, such legislation usurps a core judicial function of this Court. Consequently, § 12-19-18(b) cannot stand as written and must be deemed unconstitutional as it encroaches on the judiciary's power. Both Counsel shall confer and prepare an appropriate Order for entry.