

Freeing the Exonerated: Back-End Sentencing and Probation Reform

Only two states have probation systems as broken as that of Rhode Island. Although the US justice system emphasizes the importance of a fair trial and the presumption of innocence, current Rhode Island law does not provide these basic rights to people on probation. As a result, innocent people are imprisoned. **When a person on probation is charged with a new crime, they can be sent to prison for violating probation. Even if they are not found guilty of the new charge, they remain in prison for long periods of time for the violation.**

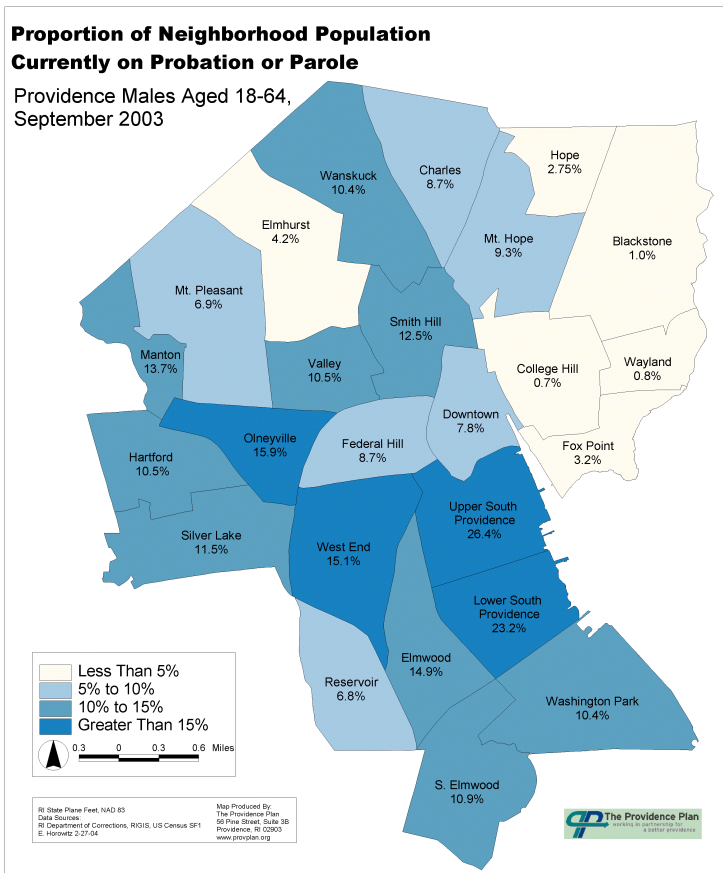
The primary source of this unjust process is the probation violation hearing. When someone on probation is accused of a new crime, the allegations are often addressed in a violation hearing, where the burden of proof is significantly lower than in a standard criminal trial. With 1 in 30 adults on probation in the state, a large portion of the allegations of new criminal conduct in Rhode Island are disposed of through these proceedings. As a result, this back-end sentencing takes on a central role in the quality of Rhode Island justice. In fact, 1 in 15 sentences to prison in Rhode Island rely on back-end sentencing, and these sentences have especially great impact on the due process provided to people of color in Rhode Island. However, only two other states (Alabama and South Dakota) provide so few rights to probationers charged with new crimes. All other states use higher standards of proof at violation hearings, making it far less likely innocent people will be sent to prison.

House Bill 5404/ Senate Bill 86, sponsored by Senator Perry and Representative Segal, almost unanimously passed the General Assembly in 2008, but were vetoed. The bill would end the prison sentence of an individual incarcerated for a probation violation if the new charge is later dismissed or the individual is found not guilty. This is already law for certain types of probation in RI, but the bill would extend the right to all types of probation.

What is Probation?

Probation is a form of community supervision that is part of a sentence in addition to or instead of prison time. The intent of probation is rehabilitation and supervision.

There are 28,000 people in Rhode Island on probation, which means that 1 in 30 adults is on probation.¹ This is the fifth highest rate in the nation, and 40% higher than the national average.² In many neighborhoods in the state, more than one in



¹ 2008 Population Report, RI Department of Corrections. US Census 2007 Data.

² Sentencing and Corrections Profile: Rhode Island, 2007. Pew Charitable Trust.

1 in 4 adult men is on probation.

In part, this large proportion is due to Rhode Island's very long probation sentences. Sentences are an average of 5 years, about double the national average. Probation violations result in 41% of all sentences to prison in the state.³ This means that since 2004 approximately 10,000 prison sentences have resulted from the probation violation process.

Due Process

Violation Proceedings and Back-End Sentencing

In the vast majority of cases in which people on probation are accused of new crimes, the charge is disposed of through a plea agreement. Otherwise, the defendant will receive a violation hearing. At the hearing, the state must prove that the defendant failed to keep the peace and be of good behavior through the alleged criminal or non-criminal conduct. The allegations must be proven to the reasonable satisfaction of the hearing justice. Often in these cases, if a defendant's probation is revoked at hearing, the criminal charges are dismissed. In other cases, defendants experience substantial pressure to plea because they are told that even an acquittal at trial will likely not result in their release.

Back-end sentencing relies on the revocation procedure instead of trial to prove probation violations. The Family Life Center has identified 1,436 cases since 2004 which used back-end sentencing and resulted in prison sentences (out of 21,227 total sentences to prison—approximately 1 in 15). In all these cases, probation was revoked for a new criminal charge and the new criminal charge was dismissed or in a small number the defendant was acquitted. This does not count the larger number of cases in which the defendant pleads to the new criminal charge.

“68% of the back-end sentences were the result of nonviolent or property crime accusations. In addition, most of the individuals sentenced did not have criminal histories for the more serious crimes—76% had no history of felony convictions for crimes of violence and 85% had no history of drug dealing convictions.”

The vast majority of these cases involved people charged with crimes that were not crimes of violence. 68% of the back-end sentences were the result of nonviolent or property crime accusations. In addition, most of the individuals sentenced did not have criminal histories for the more serious crimes—76% had no history of felony convictions for crimes of violence and 85% had no history of drug dealing convictions. Only .2% (33 cases out of 1,436) of the back-end sentences involved people with any history of sex-related convictions.

Due Process at Violation Hearings

The US Supreme Court has set minimal due process requirements for these violation hearings, however it has been up to each state to interpret and implement these standards. The US Supreme Court established that while a probation violation hearing need not fulfill all the due process standards applied to a criminal trial, a probationer's conditional liberty “includes many of the core values of unqualified liberty,” and its termination inflicts a ‘grievous loss’ on the probationer.⁴ In addition, a probationer can no longer be denied due process on the grounds that probation is “an act of grace.”⁵

State-by-State Comparison

Each state deals with probation and parole violations differently as a result of differences in case precedent, state statute, judicial discretion, and prosecutorial protocol. The clearest difference is in the standards of proof used at violation hearings. Only Rhode Island, Alabama, and South Dakota used the

³ Ibid.

⁴ US Supreme Court, *Gagnon v Scarpelli* 411 U.S. 778 (1973)

⁵ US Supreme Court, *Morrissey v Brewer* 408 U.S. 471, 92 S.Ct. 2593 (1972)

standard “reasonably satisfied,” the lowest standard possible. In Rhode Island, this standard is similar to probable cause, which is the amount of evidence needed to search a vehicle or make an arrest.⁶

In addition, there are many other important differences in how states conduct probation violations. The most important difference is how often the violation is prosecuted before the trial. In Rhode Island, the violation hearing almost always occurs first. In most other states this is not the case. For example, in Massachusetts, the order is determined on a case-by-case basis. A chart for 13 states is included at the end of the report.

Colorado stands out as state with a very equitable probation revocation process. According to state statute, at a violation hearing the state must prove that the defendant committed any criminal conduct beyond a reasonable doubt, though only a preponderance of evidence is required for non-criminal allegations. In practice, in almost all probation and parole cases the trial occurs before the violation hearing. Defense attorneys and prosecutors both describe this system as fair, stating that public safety is best served when the facts of the criminal allegation are first determined at trial.⁷

State	Standard of Proof	Violation first
Rhode Island	Reasonably Satisfied	Always
Massachusetts	Preponderance	Sometimes, often dismiss violation if acquitted
Colorado	Beyond a reasonable doubt for criminal charges	Rarely

Comparison of the violation revocation process in 3 states

Back-end Sentencing is Racially Biased

Back-end sentencing has a particularly large impact on the due process provided to people of color in Rhode Island. Of the 1,436 back-end sentences to prison since 2004, one half involved defendants of color. In general, people of color are disproportionately charged with crimes and sent to prison, meaning that any erosion of due process protection will affect them more significantly. The use of back-end sentencing mirrors this trend. African-American defendants sentenced using back-end sentences are 8 times more common than similar white defendants.⁸ However, this is exacerbated by the fact that back-end sentencing was more likely to be chosen as the method of disposing of charges for defendants of color than white defendants. African-American defendants were 18% more likely to be convicted using back-end sentencing than regular sentencing in relation to white defendants.

Sentencing

Probation is not necessarily an alternative to incarceration. In many cases it is an additional sentence. In almost all cases in Rhode Island, when an individual is sentenced to prison they also receive a lengthy suspended sentence with probation. While Rhode Island does have a relatively low incarceration rate nationally in relation to its high probation rate, these two are not mutually exclusive. Rhode Island’s probation rate is the second highest in New England, after Massachusetts, but it also has the second highest rate of incarceration, after Connecticut.⁹ This is despite having a lower rate of violent crime than both Connecticut and Massachusetts.¹⁰ In addition, Rhode Island’s incarceration rate has increased faster in the last seven years than any state in New England aside from Maine.

⁶ RI Supreme Court, *Broccoli v Kindelan* 9S A.2d 67, one of the earliest cases in which the RI standard is cited, uses the phrase “that the facts before gave reasonable and probable cause” to describe the RI standard.

⁷ Personal correspondence, Ryan Esplin, Grand Junction Public Defender; Jeremy Savage, Grand Junction Deputy District Attorney; Todd Hildebrandt, Grand Junction District Attorney.

⁸ This is in relation to the percentage of the Rhode Island population that is African-American (6.9%) versus Caucasian (79%).

⁹ Bureau of Justice Statistics, *Prison Inmates at Mid-year 2008*, March 2009.

¹⁰ FBI Uniform Crime Report, 2007

Wrongful Imprisonment Cases

The 1,436 back-end sentencing cases mentioned include many cases in which the defendant was guilty and the evidence existed to obtain a conviction. However, the process vastly increases the chances of convicting innocent people. Some of these individuals are actually acquitted of the charges for which their probation is revoked. Others never receive trials but have been exonerated in other ways. These are three examples in which innocent people were sent to prison as a result of back-end sentencing.

Jodi Johnson Found Not Guilty- 9 year sentence

After two years on probation without any violations, in 2001 Mr. Johnson was arrested for alleged robbery. As a result of this arrest, he was sentenced to nine years in the ACI for violation of probation. Almost two years later, a jury found him not guilty and concluded he was not the man at the scene of the crime. Despite being found innocent, he remained incarcerated for the probation violation.

Phillip Jackson Charge Dismissed- 7 year sentence

On August 21, 2006, Phillip Jackson was charged with hitting a neighbor during an argument. Jackson was on probation for a possession of a firearms charge that carried a 10 year suspended sentence. He was found to be a violator and given 7 years in prison, even though there were three witnesses who stated that he was innocent. The simple assault charge was dismissed two months later. Despite the fact that the charges were dismissed, he remained incarcerated for the probation violation.

John Prince Lost Violation Hearing, Maintains Innocence- 4 year sentence

John Prince was on probation when he was accused of breaking and entering and engaging in a high-speed chase. He was sentenced to four years in prison after losing his violation hearing. The only problem is, John was in class at the time. His students and teachers all sent letters saying that John was with them, and that the wrong man was accused. However, John never received a trial and was sentenced to four years in prison after a hearing in which a judge was *reasonably satisfied* John had committed the crime. After being sentenced to prison as a probation violator, John ending up pleading no contest to the charge itself. Years later, the guilty man identified himself to John.

Probation Revocation Procedures in 13 States			
Jurisdiction	Standard of Proof	Violation before Trial	Sources
Alabama	Reasonably Satisfied	Often, but if acquitted at trial generally released	Criminal Defense Lawyer's Association; Gibson v. State, 616 A.2d 877 (1992)
Arizona	Preponderance	Rarely	Mike Kimerer, attorney at law. State v Gerlaugh, 134 Ariz. 164
California	Preponderance	Sometimes, often held at same time	San Francisco and Los Angeles Public Defenders Offices; People v Rogriguez, supr, 51 Cal.3d att 447
Colorado	Reasonable doubt if a new criminal charge is involved	Rarely	Colo. Rev. Stat. Annot. S 16-11-206(3); Grand Junction Office of the Public Defender
Connecticut	Preponderance	Often, sometimes at same time	Office of the Public Defender; State v Davis 229 Conn. 285, 641 A.2d 370
Illinois	Preponderance	Often, but if acquitted at trial generally released	People v Grayson 58 Ill 2d570
Maine	Preponderance	Often	Maine Assoc. of Criminal Defense Lawyers; State v LaCasce
Maryland	Preponderance	Rarely, though often still violated on lower standard even after acquittal	Office of the Public Defender
New Hampshire	Preponderance	Depends	Public Defender; Stapleford v Perrin, 122 N.H. 1083, 1089, 453 A.2d 1304
New York	Preponderance	Depends	Alan Rosenthal, Center for Community Alternatives; People v Hemphill, 120 App. Div 2d 767
Vermont	Preponderance	Depends	State v Begins, 147 Vt. 295, 297, 514 A.2d 719
Massachusetts	Preponderance	Sometimes, often dismiss violation if acquitted	Office of Framingham Public Defender; Connollet v Holmgren 421 Mass 224
Rhode Island	Reasonably Satisfied	Always	Office of the Public Defender; State v. Znosko 755 A.2d 832, 834 (R.I. 2000)

This chart describes state-by-state law and protocol in regard to violation proceedings. The second column refers to the standard of proof used at violation hearings. The third column describes how the state deals with new criminal charges in regard to violation hearings—is the violation disposed of first or is the new criminal charge heard first. While many states may dispose of the violation first before dealing with the criminal charge, the decision is often made on a case-by-case basis and in certain cases the violation is held until after the trial or the same time as the trial. “Rarely” mean that the trial comes first; “Always” means the violation comes first, and “Often” means that in most cases the violation comes first but there are significant exceptions. This information is based on state statute, case law, and conversations with attorneys in each state.