Supreme Court of Ohio Clerk of Court - Filed December 15, 2015 - Case No. 2015-1288

IN THE SUPREME COURT OF OHIO
Case No. 2015-1288

STATE OF OHIO	:
Appellant	:
-vs-	:
JOSEPH HEINZ	:
Appellee	:

APPELLEE'S MERIT BRIEF

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INTRODUCTION

On October 14, 2014, Joseph Heinz appeared for a routine Community Control Violation ("CCV") hearing based on a report from his probation officer that he submitted a diluted urine sample for a drug test. He readily admitted the violation and received a 14-day jail sanction and additional community work service from the trial court. At the violation hearing, the trial court enforced its standing order that: 1) the probation officer presents the alleged violation; and, 2) the prosecutor may participate with leave of court. Although an assistant county prosecutor categorically objected to the standing order, he did not seek leave. Moreover, he did not identify anything that he would have added to the routine proceeding—he never made any proffer as to what he would have said or done, much less any proffer of information that would have had any impact on its outcome.

The case pending before this Court has little to do with Joseph Heinz. He is simply one of approximately one quarter of a million Ohioans on probation or community control supervision to a court in Ohio.[1] Rather, it involves a dispute between a common pleas judge and a county prosecutor and their fundamentally different views of the role of the prosecutor at CCV hearings. Regardless of how this Court answers that legal question, it should affirm the trial court. If this Court agrees with the trial court, then no error occurred. If, on the other hand, this Court agrees with the County Prosecutor, then any error was either inadequately preserved or harmless. The record is devoid of any evidence that the outcome of the routine CCV hearing would have been different with the involvement of the prosecutor. If this Court accepts the State's argument and reverses the trial court, this Court will have to ignore well-established principles of error preservation and harmless error.

With respect to the merits of the legal issue, this Court must decide whether the General Assembly intended Community Control Violation ("CCV") hearings to be handled in the same manner as the underlying prosecution and sentencing. Historically, probation or CCV hearings have been viewed as civil in nature and handled informally. While the defendant enjoys the protections of the Due Process Clause, the process due is far less than in a criminal prosecution. Indeed, a comparison of the two proceedings illustrate how fundamentally different they truly are:

	Criminal Prosecution	**CCV hearing**
Nature of Proceeding	Criminal; formal	Not criminal; informal[2]
Finder of Fact	Right to a Jury Trial	No Right to a Jury[3]
Burden of Proof	Beyond a reasonable doubt	"Substantial evidence" or "preponderance of evidence"[4]
Rules of Evidence	Apply	Do not apply[5]
Right to Discovery	Yes; Crim. R. 16	No[6]
Illegally seized evidence	Generally inadmissible due to the exclusionary rule	Admissible—exclusionary rule does not apply[7]
Defendant's testimonial	Right to remain silent;	No right to remain silent;[8]

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[1] This number is based on numbers reported to the Department of Justice as of December 31, 2013. http://www.bjs.gov/content/pub/pdf/ppus13.pdf.
[2] *Gagnon v. Scarpelli*, 411 U.S. 778, 782, 93 S.Ct. 1756 (1973)
[3] *Id.*
[4] *State v. Thomas*, 10th Dist. No. 13AP-985, 2014-Ohio-2912, ¶ 10; *State v. Hayes*, 6th Dist. No. WD-00-075, 2001 Ohio App. LEXIS 3519, *4; *State v. Griffeth*, 5th Dist. No. 10-CA-115, 2011 Ohio 4426, ¶ 29 ("Substantial evidence is considered to consist of more than a mere scintilla of evidence, but somewhat less than a preponderance.")
[5] Evid. R. 101(C)(3).
[6] *State v. Griffeth*, 5th Dist. No. 10-CA-115, 2011 Ohio 4426, ¶ 37.
[7] *State ex rel. Wright v. APA*, 75 Ohio St. 3d 82, 91-92, 661 N.E.2d 728 (1996).

rights	No negative inference from silence	May draw negative inference from silence
Confrontation Rights	Right to in-person confrontation of testimonial statements	No right to in-person confrontation; hearsay permissible.[9]
Allocution Rights	Right to allocute	No right to allocute[10]

Because of the fundamental differences between criminal prosecutions and informal violation hearings, the State, at a violation hearing has traditionally been "represented, *not by a prosecutor*, but by a parole [or probation] officer." *Gagnon*, 411 U.S. at 789 (emphasis added). A probation officer is more than capable of representing the interests of the State at a violation hearing that is not concerned with "amassing technically correct admissible evidence," *Wright*, 75 Ohio St. 3d at 91 and that is focused on the probationer's "progress of rehabilitation" and threat, if any, to public safety, *Gagnon*, 411 U.S. at 783-84.

The County Prosecutor's appeal in this case presents the question of whether the General Assembly intended to depart from the traditional practice of having a probation officer represent the interests of the State at a violation hearing. A probation or CCS violation has "two analytically distinct components:"

- Step 1: Did the probationer violate one or more conditions of probation; ("violation component")

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[8] *Minnesota v. Murphy*, 465 U.S. 420, 435-36 n.7; 104 S.Ct. 1136 (1984), *State v. Simpkins*, 8th Dist. No. 87131, 2006-Ohio-3496

[9] *State ex rel. Coulverson v. APA*, 62 Ohio St. 3d 12, 16, 577 N.E.2d 352 (1991).

[10] *State v. Boykins*, 3rd Dist. No. 9-14-28, 2015-Ohio-1341.

- Step 2: If there is a violation, should the probationer "be recommitted to prison or should other steps be taken to protect society and improve chances of rehabilitation." ("sanction component").

Gagnon, 411 U.S. at 784 (internal citations omitted). Thus, the question presented by this case is whether the General Assembly has afforded the County Prosecutor an absolute right to be heard at the violation component *and/or* the sanction component of the CCS hearing.

In its argument below, the County Prosecutor did not distinguish between these two components of a CCS hearing and simply asserted that the Prosecutor handles the entire CCS proceeding by virtue of a generic grant of authority in R.C. 309.08. With its merit brief to this Court, the County Prosecutor, for the first time, identifies two different statutory provisions that require its participation during both components of the CCS hearing. Despite no mention of the County Prosecutor in the community control sanctions statute (R.C. 2929.15), the County Prosecutor maintains that he has *a statutory obligation*, pursuant to R.C. 309.08, to handle the violation component of the hearing *and* a statutory right, pursuant to R.C. 2929.19, to be heard with respect to the sanction disposition or penalty imposed for a violation.[11]

The trial court judge, in this case, has continued to preside over CCS violations in the same manner that he and his colleagues have done for decades—a probation officer presents evidence of the violation and the judge decides the violation and imposes the disposition with the input of the probation officer. While the County Prosecutor now asserts that such a process is a "clear violation of the separation of powers" and "ignores Ohio law,"

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[11] While the County Prosecutor maintains that he has always had these statutory obligations and rights, he did not "assert" this role until a 2014 violation hearing in *State*

(State's Br. at 1 and 2), the trial court's approach is consistent with the traditional manner in which probation violation hearings have been handled. *Cf. Gagnon v. Scarpelli*, 411 U.S. 778, 789, 93 S.Ct. 1756 (1973) (emphasis added).

Because the County Prosecutor is now seeking to be directly involved in some, though certainly not all, CCS violation hearings, the trial court issued a standing order to govern the County Prosecutor's participation at such hearings. The trial court's standing order acknowledges that the County Prosecutor is entitled to attend every CCS violation hearing and has a right to "bring to the attention of this Court or the Probation Department acts that may be a probation violation." And, despite the fact that the County Prosecutor has no explicit right to be heard at a CCS violation hearing, the trial court's standing order indulges his participation so long as the County Prosecutor follows some basic steps to ensure that the defendant has proper notice:

> In the event that the Prosecutor's Office desires to speak at a hearing, it may only do so with leave of Court. A Request for Leave to be Heard shall be filed no later than 2 days before the scheduled probation revocation hearing and shall include any evidence and witnesses supporting the claimed violation. Case specific statements as to the violation shall be set forth in detail in a brief attached to the request. The Request for Leave to be Heard shall be served on the Probation Department, Counsel for the Defendant, and the Defendant, should the Defendant wish to proceed pro se, at least 2 days prior to the hearing.

The County Prosecutor, and his assistants, made no attempt to comply with Judge Sutula's standing order in this case. Instead, the County Prosecutor chose to ignore Judge Sutula's order and challenge it on direct appeal.[12] The County Prosecutor's position is that

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v. Washington, CR-10-542057, where the victim of the CCS violation was one of the County Prosecutor's own family members.

[12] The County Prosecutor took these steps after filing an affidavit of prejudice in the Ohio Supreme Court in the *Washington* case (which became moot after Judge Sutula voluntarily recused himself) and after filing a writ of mandamus in the Ohio Supreme

he should not have to comply with Judge Sutula's order. He maintains that he has a right to be heard by virtue of his general powers under R.C. 309.08 to "prosecute, on behalf of the state, all complaints, suits, and controversies in which the state is a party."

The County Prosecutor is wrong. His flawed argument reflects, among other things: 1) A fundamental misunderstanding of the nature of CCS violation hearings; and 2) His failure to consider the General Assembly's decision to explicitly afford the County Prosecutor the right to be heard at initial sentencing hearings, see R.C. 2929.19 and Crim. R. 32.2, and then not mention any such right of participation with respect to CCS violation hearings, see R.C. 2929.15 and Crim. R. 32.3.[13] A criminal defendant placed on CCS is under the exclusive authority of the trial court judge. And it is the trial court judge's responsibility, along with the probation department or the Adult Parole Authority,[14] to supervise those defendants and decide whether there have been any violations of the CCS conditions. Of course, if any of the defendant's violations constitute new criminal offenses, the County Prosecutor may, and generally does, separately prosecute them.

The General Assembly's decision to assign responsibility for CCS violation hearings to county probation departments and/or the Adult Parole Authority, rather than the county

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Court, *State ex rel. McGinty v. Sutula*, Ohio Sup. Ct. Case No. 2014-993 (which was dismissed by the Court on November 5, 2014).

[13] Mr. Heinz recognizes that Crim. R. 32.2 and 32.3 were promulgated pursuant to this Court's rulemaking authority. Nonetheless the General Assembly did not exercise its right to veto these rules. OHIO CONST. ART. IV, SEC. 5.

[14] Although Cuyahoga County has a County Probation Department that supervises individuals on CCS, more than half of Ohio's counties rely on the Adult Parole Authority (APA) to supervise individuals on community control. The APA "provides probation and community control services in part or in full to 52 of Ohio's 88 counties." http://www.drc.ohio.gov/web/parsup.htm (last visited 11/8/15).

prosecutor, is perfectly consistent with historical practice and does not violate the separation of powers doctrine. Indeed, this legislative decision is no different than legislatively assigning responsibility for conducting parole or PRC violation hearings to the Adult Parole Authority without the involvement of the county prosecutor.[15]

Because the County Prosecutor does not have an absolute right to be heard at CCS violation hearings, this Court should affirm the trial court's decision. Judge Sutula's standing order is reasonable, protects criminal defendants' due process rights, affords the County Prosecutor an opportunity to be heard, and is entirely consistent with the statutory framework established by the General Assembly for CCS violation hearings. Even if this Court concludes that the County Prosecutor has a statutory right to be heard at CCS violation hearings, it should nonetheless affirm because the assistant prosecutor failed to proffer for the record anything that he wished to present at the hearing and, thus, there is no basis upon which this Court can find any harm. Indeed, the defendant was found to have violated the conditions of his supervision and received additional sanctions even without the County Prosecutor's involvement.

STATEMENT OF THE CASE AND FACTS

A. Prior Proceedings

On December 1, 2011, Joseph Heinz pled guilty to attempted abduction, a felony of the fourth degree. The trial court sentenced Mr. Heinz to 24 months of CCS with the following conditions: 1) perform 80 hours of community work service; 2) submit to

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[15] The County Prosecutor appears to have abandoned the due process argument he had raised below. The State and Federal Due Process Clauses provide protections to *citizens* from actions taken by the Government and has no role in disputes between governmental entities. The State has "no right of due process from itself." *State v. Mayo*, 8th Dist. No. 80216, 2002 WL 853547, ¶ 12, n.1.

random drug testing; 3) complete out-patient substance abuse treatment and anger management; 4) obtain/maintain verifiable employment; and 5) have no contact with the victim. *There is no indication in the record that the County Prosecutor, or one of his assistants, chose to exercise his right to be present or be heard at the initial sentencing hearing.*

On April 6, 2012, the trial court found Mr. Heinz to be in violation of the conditions of CCS due to a positive drug test for marijuana. (Tr. at 3). The trial court continued Mr. Heinz on CCS with the following additional conditions: 1) A negative drug test on or after 5-16-12; 2) 50 additional hours of community work service. *There is no indication in the record that the County Prosecutor, or one of his assistants, appeared at this first CCS violation hearing.*

On November 22, 2013, the trial court again found Mr. Heinz to be in violation of the conditions of CCS due to a positive drug test for marijuana. (Tr. at 3). The trial court continued Mr. Heinz on CCS but extended his supervision for another 18 months (until 12-28-15) and added the following additional conditions: 1) A negative drug test on or after 12-11-13; 2) 100 additional hours of community work service. *There is no indication in the record that the County Prosecutor, or one of his assistants, appeared at this second CCS violation hearing.*

B. Trial Court's standing order

In January 2014, the Cuyahoga County Prosecutor (a former judge familiar with the customary practices of Cuyahoga County Common Pleas Court) decided, for the first time, that he had a statutory right to be heard at every CCS violating hearing. He made this realization in an unrelated case, *State v. Washington*, CR-10-542057, where the

victim of the CCS violation was one of the Cuyahoga County Prosecutor's own family members and where the Cuyahoga County Prosecutor personally signed a 122-page motion to reopen the probation violation hearing.

Because the Cuyahoga County Prosecutor was now seeking to be directly involved in some CCS violation hearings, the trial court issued a standing order in *Washington* on February 14, 2014 to govern the County Prosecutor's participation at such hearings. In his merit brief, the County Prosecutor suggests, without any evidence in the record, that the trial court "abandoned" his standing order when the prosecutor appealed in *Washington* and then "reversed course and reinstated" the standing order after the State voluntarily dismissed its *Washington* appeal. (County Prosecutor Br. at 7-8). There is nothing to suggest that the trial court ever changed his policy or, as insinuated by the County Prosecutor in its brief, that he feigned a change in policy to induce the dismissal of an appeal. The trial court has consistently applied his February 14, 2014 since it was issued.

C. The violation hearing that is the subject of the County Prosecutor's appeal.

On October 8, 2014, the trial court issued a journal entry scheduling a probation violation hearing for the following week: "Probation violation hearing set for 10/14/2014 at 10 a.m." The Probation Department requested this hearing because Heinz had submitted a diluted urine sample for his September 17, 2014 drug test. (Tr. at 3-4). Despite the County Prosecutor Office's historical practice of not appearing at CCS violation hearings, an assistant county prosecutor appeared at the October 14, 2014 hearing and asserted a purported "right of the prosecutor's office to be present and heard

at all probation violation hearings."[16] (Tr. at 3). Prior to appearing, the assistant prosecutor made no attempt to comply with Judge Sutula's standing order. He did not provide defense counsel with notice of his intent to appear or be heard at the violation hearing. He did not provide defense counsel with a "list of charges or arguments" that the prosecutor intended to make at the violation hearing. (Tr. at 5). And defense counsel had no opportunity to prepare for any of the prosecutor's potential, yet unspecified, arguments. (Tr. at 5). The prosecutor did not offer a reason for failing to comply with the standing order and did not proffer for the record anything that he wished to say at the violation hearing.

In any event, Mr. Heinz admitted the violation. (Tr. at 5). The probation officer recommended a 14-day jail sanction as "sufficient for a dilute drug test." (Tr. at 4). The trial court found Mr. Heinz to have violated the conditions of his CCS. (Tr. at 6). The trial court continued Mr. Heinz on CCS with the following additional conditions: 1) 14 days in jail; and 2) 24 hours of additional community work service. (Tr. at 6).

The County Prosecutor filed a notice of appeal on November 7, 2014, along with a motion for leave to appeal. Mr. Heinz was not initially represented by counsel on appeal and no response to the County Prosecutor's motion requesting leave to appeal was filed. On November 21, 2014, the Court of Appeals granted the County Prosecutor's request for leave to appeal and appointed the Cuyahoga County Public Defender's Office. After briefing and oral argument, the Court of Appeals issued a 2-1 decision affirming the trial court. *State v. Heinz*, 8th Dist. No. 102178, 2015-Ohio-2763.

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[16] The trial court did not say anything in response to the assistant prosecutor's statement and simply proceeded with the hearing. The assistant prosecutor did not say anything else at the hearing.

LAW AND ARGUMENT

With this appeal, the Cuyahoga County Prosecutor is asking this Court to create a mandatory role for the prosecutor at community control sanctions violation hearings that was neither established nor envisioned by the General Assembly when it enacted R.C. 2929.15. The State argues that the Court of Appeals has "now replaced prosecutors with these non-attorney employees to represent the State's interests in a court proceeding" and complains that its decision "ignores the basic principles of reason and law." (County Prosecutor's Br. at 10). The County Prosecutor, however, has ignored the reality, expressed by the United States Supreme Court in *Gagnon*, that prosecutors do *not* handle probation violation hearings and the reality that *this* County Prosecutor only came up with his current interpretation of the law in 2014. Prosecutors were not "replaced" by probation officers; they were never there.

Ultimately, historical practice does not dictate this Court's interpretation of the statutes enacted by the General Assembly regarding CCV hearings. However, it does counter the County Prosecutor's hyperbole about a "takeover" of its (previously non-existent) role at CCS violation hearings and does lend support to the plain meaning of the applicable statutes. For reasons set forth in detail below, Mr. Heinz asks this Court to adopt the following proposition of law:

> The probation department or the adult parole authority is the entity charged with presenting evidence of an individual's non-compliance with court community sanctions and the trial court can establish reasonable procedures to manage its docket of CCS violation hearings. The reasonable procedures may include requiring the prosecutor to seek leave to participate at the hearing.

A. Probation officers, not prosecutors, traditionally handle violation hearings.

Historically, probation or CCV hearings have been viewed as civil in nature and handled informally. While the defendant enjoys the protections of the Due Process Clause, the process due is far less than in a criminal prosecution. A criminal defendant does not have a right to in-person confrontation (hearsay permissible and no Confrontation Clause violation), does not have a right to suppress illegally obtained evidence, does not have a right to discovery, does not have a right to a jury, and has only a limited right against self-incrimination. *Gagnon v. Scarpelli*, 411 U.S. 778, 782, 93 S.Ct. 1756 (1973); *Murphy*, 465 U.S. at 435-36 n.7; *State ex rel. Stamper*, 62 Ohio St. 3d 85, 87-88, 578 N.E.2d 461 (1991); *State ex rel. Wright*, 75 Ohio St. 3d at 91-92; *State ex rel. Coulverson*, 62 Ohio St. 3d at 16; *Griffeth*, 2011 Ohio 4426, at ¶ 37; *Simpkins*, 2006-Ohio-3496. Moreover, the Rules of Evidence do not apply to these informal proceedings, Evid. R. 101(C)(3), and the amount of proof required is simply "substantial evidence," *Griffeth*, 2011 Ohio 4426 at ¶ 29 ("Substantial evidence is considered to consist of more than a mere scintilla of evidence, but somewhat less than a preponderance.")

Given the informality of probation violation hearings, the State, at a violation hearing has traditionally been "represented, *not by a prosecutor*, but by a parole [or probation] officer." *Gagnon*, 411 U.S. at 789 (emphasis added). A probation officer is more than capable of representing the interests of the State at a violation hearing that is not concerned with "amassing technically correct admissible evidence," *Wright*, 75 Ohio St. 3d at 91 and that is focused on the probationer's "progress of rehabilitation" and threat, if any, to public safety, *Gagnon*, 411 U.S. at 783-84.

B. CCS violation hearings are akin to parole violation and PRC violation hearings, neither of which involve the County Prosecutor.

Throughout the Cuyahoga County Prosecutor's brief, he decries the use of "non-attorney" probation officers at violation hearings. Ignoring historical practice, the County Prosecutor expresses the belief that non-attorneys are simply incapable of handling violation hearings and that the use of such employees would constitute a violation of the separation of powers doctrine. The County Prosecutor is wrong.

As an initial matter, it is not at all unusual for non-attorneys to handle violation hearings with respect to post-conviction supervision. With R.C. 2967.15, the General Assembly afforded exclusive authority to the Adult Parole Authority to determine whether a parolee violated the conditions of his or her parole and what sanction, if any, should be imposed. At parole violation hearings, non-lawyers are both presenting the evidence of the violation and deciding whether or not a violation occurred. Non-lawyers from the Adult Parole Authority also primarily handle any alleged violations of post-release control pursuant to R.C. 2967.28. Supervision under community control sanctions, like parole and PRC, is a form of post-conviction supervision. Indeed, in over one-half of Ohio's counties, the Adult Parole Authority handles supervision of individuals released on community control sanctions *as well as* parole and PRC. http://www.drc.ohio.gov/web/parsup.htm (last visited 11/8/15). If prosecutors are not indispensable to parole or PRC violation hearings, they are no more necessary for CCS violation hearings.

The County Prosecutor's separation-of-powers' argument simply has no merit. In order for the Prosecutor to prevail on a separation-of-powers' claim, he would have to demonstrate that one of his fundamental constitutional duties is to handle violations

hearings and that the General Assembly is powerless to assign those duties to the probation department or the APA (and not the County Prosecutor). Outside of bare assertions, the County Prosecutor offers nothing to meet his burden of establishing a constitutional violation created by a statutory framework which does not provide prosecutors an absolute right to participate at violation hearings. [17]

The separation of powers doctrine is "implicitly embedded in the framework of those sections of the Ohio Constitution that define the substance and scope of powers granted to the three branches of government." *State v. Bodyke*, 126 Ohio St. 3d 266, 275, 933 N.E.2d 753, 2010-Ohio-2424. This Court has emphasized that the judiciary has the "power and solemn duty" to "ensure that the boundaries between branches remain intact." *Id.* at 276. Although "the authority to legislate is for the General Assembly alone," the courts have, on rare occasions, struck down legislation that that improperly "encroach[es] on the province of the judiciary." *Id.* at 277-78 (finding the Adam Walsh Act's reclassification provinces improperly intruded on the judiciary's authority by, among other things, delegating authority to the executive branch to review past decisions of the judicial branch); *See also State ex rel. Bray v. Russell*, 89 Ohio St. 3d 132, 134-35 (finding the General Assembly's enactment of a "bad time" statute unconstitutional because it conferred judicial power upon the executive branch.").

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[17] It is somewhat unclear whether the County Prosecutor is actually asserting a freestanding separation of powers claim. Because this Court only decides constitutional questions when it must, it would only reach a putative separation of powers claim *if* it concurs with Mr. Heinz that the General Assembly chose not to place responsibility for CCS violations with the prosecutor. If this Court agrees with the County Prosecutor's suggested interpretation of R.C. 309.08, then it would never even have to address a separation of powers claim.

Here the General Assembly's exercise of legislative power is entirely appropriate as it merely conferred authority upon the judicial branch that has historically been within its province. It is well-established that a probation or CCS revocation proceeding "is *not* a stage of a criminal prosecution." *Gagnon v. Scarpelli*, 411 U.S. 778, 781, 93 S.Ct. 1756 (1973). Traditionally, the probation officer has been entrusted with "broad discretion to judge the progress of rehabilitation in individual cases, and has been armed with the power to recommend or even to declare revocation." *Id.* at 784. And, at probation or CCS revocation proceedings, "the State is represented, *not by a prosecutor*, but by a parole [or probation] officer." *Id.* at 789. The General Assembly's decision to follow the historical practice of assigning responsibility for probation revocation hearings to a probation officer or the APA, and not to a prosecutor, is well within its legislative authority and does not intrude upon the powers of the executive branch.

Finally, the County Prosecutor's concern about "a system of justice which allows, 'the trial court [to] act as both judge and prosecutor'" is particularly misplaced. It is hardly unusual for revocation hearings in post-conviction supervision to be handled entirely by a single branch of government and, indeed, a single office. Placing exclusive responsibility for CCS violations within the judicial branch is certainly no more constitutionally problematic than placing exclusive responsibility for parole violations within the executive branch.[18] *Cf. Woods v. Telb*, 89 Ohio St. 3d 504, 511-12, 733 N.E.2d 1103, 2000-Ohio-171 (explaining that "for as long as parole has existed in Ohio,

[18] As discussed above, while Cuyahoga County has a probation department, probationers in many other counties are actually supervised by the APA.

the executive branch (the [Adult Parole Authority] and its predecessors) has had absolute discretion over that portion of an offender's sentence.")

C. CCS violation hearings do not require the presence or participation of the county prosecutor.

Given the informal nature of CCS of probation violation hearings and its historical context, the General Assembly clearly has the constitutional authority to decide whether or not the county prosecutor has a mandatory role in CCS violation hearings. The question presented by this case is whether the General Assembly intended to depart from the traditional practice of having a probation officer represent the interests of the State at a violation hearing and instead delegate that role to the county prosecutor. Specifically, this Court must decide whether the county prosecutor has a role at either of the "two analytically distinct components" of the violation hearing—the violation component or the sanction component. *Gagnon*, 411 U.S. at 784 (internal citations omitted). Mr. Heinz maintains that there is no statutory role for the County Prosecutor during either component of the violation hearing.

1. Violation Component: R.C. 309.08 does not impose a mandatory obligation upon the County Prosecutor to "prosecute" CCS violations.

With respect to the "violation" component of the CCS hearing, the County Prosecutor exclusively relies on his generic grant of authority, pursuant to R.C. 309.08, to "prosecute, on behalf of the state, all complaints, suits, and controversies in which the state is a party." The County Prosecutor maintains that R.C. 309.08 necessarily means that the County Prosecutor has a statutory obligation to present evidence at CCS violation hearings. The County Prosecutor's argument fails to recognize, however, that CCS violation hearings are fundamentally different from the prosecution of the original case

and are governed by an entirely separate statutory provision, R.C. 2929.15; and by Criminal Rule 32.3, neither of which contemplates the County Prosecutor's involvement. Ohio's statutory framework is consistent with historical practice, which treats probation violation hearings very differently from formal criminal trials:

> In a [probation] revocation hearing, on the other hand, the State is represented, not by a prosecutor, but by a parole officer with the orientation described above; formal procedures and rules of evidence are not employed; and the members of the hearing body are familiar with the problems and practice of probation or parole.

Gagnon v. Scarpelli, 411 U.S. at 789.

a. The General Assembly did not fashion a mandatory role for county prosecutors in its community control sanctions statute, R.C. 2929.15.

When a trial court imposes a sentence of CCS under R.C. 2929.15, it establishes the conditions of the community control sanctions and the parameters of the defendant's supervision. R.C. 2929.15(A)(1). The trial court then places the defendant "under the general control and supervision of the department of probation in the county." R.C. 2929.15(A)(2)(a). The department of probation "*serves the court* for purposes of reporting to the court a violation of any condition of the sanctions, any condition of release under a community control sanction imposed by the court, a violation of law, or the departure of the offender from this state without the permission of the court or the offender's probation officer."[19] *Id.* (emphasis added). If a criminal defendant is required to serve a residential, non-residential, or financial sanction as a part of CCS, and violates that sanction, the "public or private person or entity that operates or administers the sanction or the program shall report [any] violation directly to the sentencing court" or

[19] For counties without probation departments, the adult parole authority fills the role of the probation department. R.C. 2929.15(A)(2)(a).

the probation department. R.C. 2929.15(A)(2)(b). A criminal defendant's supervision on CCS is entirely within the province of the trial court. The county prosecutor has no role in that supervision and the statute provides for no notice to the prosecutor of any alleged violations. R.C. 2929.15 likewise does not contemplate any involvement by the prosecutor at the violation hearing. Indeed, the statute does not mention the county prosecutor at all.

This Court need not go beyond the plain language of R.C. 2929.15 to determine that the prosecutor has no statutory right to be heard at CCS violation hearings. However, if it finds some ambiguity in the statute, several rules of statutory construction lead to the same conclusion. As an initial matter, it is "the duty of the court to give effect to words used, not to delete words used or insert words not used." *Cline v. Ohio Bur. Motor Vehicles*, 61 Ohio St. 3d 93, 97, 573 N.E.2d 77 (1991). To find that the State had a right to be heard at a CCS violation hearing, this Court would need to insert words not used by the General Assembly and fashion a role for the County Prosecutor that was never envisioned by the General Assembly.

Moreover, the General Assembly clearly understands how to enact a statute to afford the County Prosecutor the right to be heard, respectively. Indeed, it has done so in R.C. 2929.19 and in R.C. 2929.20, where it gave the County Prosecutor the right to be heard at the initial sentencing hearing and at a judicial release hearing, respectively. The General Assembly did not elect to afford the County Prosecutor a statutory right to be heard at a CCS violation hearing. This Court should not view the General Assembly's lack of reference to a County Prosecutor as a mere oversight. *See State v. Droste*, 83 Ohio St. 3d 36, 39, 697 N.E.2d 620 (1998) ("Under the general rule of statutory

construction *expressio unius est exclusion alterius*, the expression of one or more items of a class implies that those not identified are to be excluded.")

Contrary to the State's argument, statutory language:

> [M]ust be construed as a whole and given such interpretation as will give effect to every word and clause in it. No part should be treated as superfluous unless that is manifestly required, and the court should avoid that construction which renders a provision meaningless or inoperative.

D.A.B.E., Inc. v. Toledo-Lucas Cty. Bd. of Health (2002), 96 Ohio St. 3d 250, 257 (quoting *State ex rel. Myers v. Spencer Twp. Rural School Dist. Bd. of Educ.* (1917), 95 Ohio St. 367, 372-73); *see also East Ohio Gas Co. v. Public Utilities Comm'n* (1988), 39 Ohio St. 3d. 295, 299. In order to accept the County Prosecutor's contention that it has a right to be heard at CCS violation hearings despite the General Assembly's choice not to explicitly afford it such a right, this Court would render meaningless statutory language which gives the prosecutor the right to be heard in some proceedings but not others. Under the Cuyahoga County Prosecutor's logic, he has an automatic right to be heard at any proceeding captioned "State versus" by virtue of its general powers under R.C. 309.08. Such an interpretation would render meaningless any further attempt by the General Assembly to carve out specific roles for different government agencies depending on the nature of the proceeding.

In short, the General Assembly has established a clear process for CCS violations that involve the probation department or the APA and the trial court—not the county prosecutor. According to the process, the probation department or the APA presents evidence to the trial court of any violation and the trial court makes a determination whether a violation occurred. There is nothing in the statute that affords the County Prosecutor any particular right to be heard or otherwise involved in the violation

component of the CCS hearing. And, given that R.C. 2929.15 does not provide an automatic role for the county prosecutor at CCS violation hearings, it is certainly within the trial court's authority to require the county prosecutor to notify the Court if he would like to be heard at the CCS violation hearing.

b. The General Assembly's generic grant of authority to the prosecuting attorney in R.C. 309.08 does not require the County Prosecutor to handle the violation component of a CCS violation hearing.

Eschewing the more specific statutory provision dealing with CCS violation hearings, the County Prosecutor relies exclusively on R.C. 309.08, the general legislative grant of his authority, as a basis for a statutory right to participate in CCS violation hearings. The County Prosecutor's reliance on R.C. 309.08 is misplaced.

Despite the fact the Cuyahoga County Prosecutor and/or his assistants are infrequently present for CCS violation hearings, the County Prosecutor's brief in this case claims that the county prosecutor has the statutory obligation to handle these hearings based on its generic statutory mandate to "prosecute, on behalf of the state, all complaints, suits, and controversies in which the state is a party." In making such an argument the County Prosecutor fails to appreciate that CCS violation hearings, much like parole or PRC violation hearings, do not fall within the ambit of R.C. 309.08. With R.C. 2967.15, the General Assembly afforded exclusive authority to the Adult Parole Authority to determine whether a parolee violated the conditions of his or her parole and what sanction, if any, should be imposed. Similarly, in R.C. 2967.28, the General Assembly has provided the Adult Parole Authority with the exclusive authority to

adjudicate PRC violations and determine appropriate sanctions.[20] And finally, with R.C. 2929.15, the General Assembly has afforded authority to the trial courts to adjudicate CCS violations, with the assistance of the probation department or the APA, and determine appropriate sanctions. The common thread in all three types of post-conviction supervision is that the General Assembly has selected the appropriate State entity to handle the supervision and any violation hearings and that entity is *not* the county prosecutor.

The Cuyahoga County Prosecutor concedes that he has no role at PRC violation hearings pursuant to R.C. 2967.28. (Appellant's Br. at 4 and 16). He maintains that the General Assembly "granted exclusive authority to the department of rehabilitation and corrections to determine whether a parolee had violation his conditions of post-release control." *Id.* He then argues, that, if the General Assembly wanted to grant exclusive authority to someone other than the prosecutor for community control sanctions violations, it would have enacted a statute similar to R.C. 2967.28. The County Prosecutor is correct that PRC statute provides an apt comparison for the community control sanctions statute. The County Prosecutor is wrong, however, about the implications that should be drawn from such a comparison. While R.C. 2929.15 is a more concise statute, the pertinent language regarding the grant of authority for supervision and violation hearings is materially similar:

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[20] There is one limited exception when the Adult Parole Authority may not be involved in a PRC violation: If an individual on PRC is convicted of a new felony offense, the trial court handling that new felony offense can also terminate PRC for the prior offense and impose sanctions for the violation. See R.C. 2929.141.

	Post-Release Control (2967.28(F))	Community Control Sanctions (2929.15 and Crim. R. 32.3)
Supervision	The offender "shall be under the general jurisdiction of the adult parole authority and generally shall be supervised by the field services section" of the APA.	The offender is placed "under the general control and supervision of a department of probation . . . [or] the adult parole authority . . . ."
Violation hearing	"The parole board [or in limited circumstances the court] may hold a hearing on any alleged violation. . . ."	The court must hold a hearing on CCS violation in order to impose prison.
Determination of violation	Parole Board or Court	Court
Specific mention of which entity presents evidence at violation hearing	No	No
Reference to County Prosecutor	None	None

Both the PRC and CCS statutes delegate authority to an entity *other* than the county prosecutor for handling violations. In terms of the delegation of authority to the APA/Court with respect to PRC violations and to the court with respect to CCS violations, there are no material distinctions between the two statutes. Neither statute carves out a role for the county prosecutor and, indeed, neither statute even mentions the county prosecutor.

Despite the fact that *neither* statute specifies an entity responsible for presenting evidence at the violation hearing, the Cuyahoga County Prosecutor assumes that the General Assembly intended him to have a role at CCS violation hearings but not at PRC hearings. The County Prosecutor's argument is logically flawed. Either R.C. 309.08

requires the County Prosecutor to handle *all* PRC and *all* CCS violation hearings or, as maintained by Mr. Heinz, the statute has no applicability to post-conviction violation hearings.

Ultimately, the General Assembly's *general* grant of authority to the county prosecutor to prosecute criminal cases under R.C. 309.08 must yield to the General Assembly's *specific* grant of authority to the probation department to handle probation violation hearings. *Cf.* R.C. 1.51. If this Court were to accept the Cuyahoga County Prosecutor's unduly broad interpretation of R.C. 309.08, it would render meaningless multiple statutory provisions granting authority to different State agencies to handle probation, parole, and PRC violations.

Moreover, the County Prosecutor's suggested interpretation of R.C. 309.08 would have clearly unintended and unfortunate consequences. By using the word "shall," R.C. 309.08 sets forth mandatory obligations for the County Prosecutor. If this Court were to accept the County Prosecutor's interpretation of R.C. 309.08 as encompassing CCS violation hearings (and necessarily parole and PRC violation hearings), then the county prosecutor *must* handle each and every one of those hearings. Although the Cuyahoga County Prosecutor seems to suggest that R.C. 309.08 allows him to pick and choose in which proceedings to involve himself, such an interpretation ignores the mandatory language of R.C. 309.08. While Heinz maintains that R.C. 309.08 does not require the county prosecutor's involvement in CCS violation hearings, if this Court disagrees, then it must necessarily conclude that the county prosecutor is obligated to handle every CCS, parole, and PRC violation—a result that (1) was clearly not intended or even contemplated by the General Assembly, (2) calls into question decades of hearings held

throughout the State where county prosecutors did not participate, and (3) goes beyond the Cuyahoga County Prosecutor's position in this case.

In sum, the Cuyahoga County Prosecutor's reliance on R.C. 309.08's general grant of authority is misplaced given the specific statute enacted by the General Assembly to govern CCS violation proceedings. No court has previously interpreted R.C. 309.08 as broadly as suggested by this County Prosecutor. Indeed, the sole case relied on by the County Prosecutor as support for his broad interpretation of R.C. 309.08 stands for a much more limited proposition, namely, that "nothing prevents the prosecutor" from reporting probation violations and seeking an arrest warrant based on "a subsequent felony arrest."[21] *See State v. Young*, 154 Ohio App. 3d 609, 631-32, 798 N.E.2d 629, 2003-Ohio-4501. *Young* does not hold, as maintained by the County Prosecutor, that county prosecutors have a statutory right or obligation to handle the violation component of probation violation hearings.

If the General Assembly had intended to deviate from historical practice with respect to the informal nature of probation violation hearings, it would not have simply resorted to silence. In fact, when the General Assembly wants the county prosecutor to be involved in a post-conviction hearing, it provides the county prosecutor with a specified role. *See e.g.* R.C. 2929.20(E) and (I) (requiring a court to "promptly . . . give notice of the hearing to the prosecuting attorney" and to "afford a similar opportunity to the prosecuting attorney" to "present written and, if present, oral information relevant" to the judicial release motion); R.C. 2953.21(B) and (D) (requiring that a petition for post-

[21] The trial court's standing order in this case is entirely consistent with *Young* as it specifically provides that the County Prosecutor may "bring to the attention of the Court or the Probation Department acts that may be a probation violation."

conviction relief be served by the clerk of court upon the prosecuting attorney and assigning responsibility for addressing the petition to the prosecuting attorney); R.C. 2953.23 (B) (requiring the court to notify the prosecutor of an expungement hearing and authorizing the prosecutor "to object to the granting of the application.") Here, the General Assembly did not require the involvement of the county prosecutor and therefore did not require that notice be given to the prosecutor.

2. Sanction Component: This Court's decision in *State v. Fraley* does not give the county prosecutor the right to be heard with respect to the sanction imposed by the trial court after a violation is found.

The Cuyahoga County Prosecutor also argues, in the alternative, that, even if he has no right to be heard on whether or not a violation of CCS occurred, he nonetheless has the right to be heard with respect to the sanction to be imposed if a violation is found. The County Prosecutor argues that, once a violation is found, the proceeding turns into a second sentencing hearing and he has a statutory right to be heard pursuant to R.C. 2929.19. The County Prosecutor is wrong.

The trial court's options with respect to potential sanctions are set forth in the CCS statute itself. If a violation is found, a trial court has the authority to impose a longer period of CCS, impose a more restrictive CCS sanction, or impose a prison term as long as the prison term does "not exceed the prison term specified in the notice provided to the offender at the sentencing hearing." R.C. 2929.15(B). While the County Prosecutor maintains that the disposition of CCS violation is essentially a second sentencing hearing, the CCS statute itself makes clear that it is not a new sentencing hearing. The trial court's ability to impose a prison term is specifically limited by the length of the time stated or reserved at the time of the original sentencing hearing.

Moreover, the CCS statute does not require a trial court to comply with the sentencing statute, R.C. 2929.19, before imposing a prison sentence as a sanction for a CCS violation.

The County Prosecutor attempts to incorporate the sentencing hearing statute (R.C. 2929.19) into the CCS statute (R.C. 2929.15) because the sentencing statute explicitly affords the County Prosecutor a right to be heard whereas the CCS statute does not. Because there is no statutory basis for such a strained interpretation of the two statutes, the County Prosecutor further relies on language from this Court's decision in *State v. Fraley*, 105 Ohio St.3d 13, 821 N.E.2d 995, 2004-Ohio-7110. *Fraley*, however, addresses a fair narrower issue and does not control the outcome here. "When the *Fraley* court determined, in the context of a community-control-violation hearing, that "the court sentenced the offender anew and must comply with the relevant sentencing statutes,' it was not speaking of the entirety of the statutory and procedural sentencing scheme." *State v. Jackson*, 1st Dist. No. C-140384, 2015-Ohio-2171, ¶ 21 (Mock, J. dissenting). Specifically, this Court "was speaking in the context of this R.C. 2929.19(B)(5) and 2929.15(B) interplay and the mechanics of the actual imposition of a prison term" and addressing the "untenable conclusion" that "once a trial court failed to impose a prison term at the original sentencing hearing, it could NEVER correct that defect at a subsequent community-control-violation hearing." (emphasis in original) The *Fraley* court never concluded that a trial court must comply with all statutes related to sentencing and never held that R.C. 2929.19 applies in its entirety.

While *Fraley* uses some broad language, it clearly does not contemplate a sentencing *de novo*. In imposing a sanction for a CCS violation, the trial court cannot

impose a sentence longer than it advised the defendant of at sentencing and is not required to make additional findings at the CCS violation hearing to support consecutive sentences, *State v. Williams*, 12th Dist. No. CA2012-08-080, 2013-Ohio-3410, ¶¶ 40-43. Moreover, a majority of appellate districts have specifically held that a *defendant* has no right of allocution with respect to the sanction imposed for a CCS violation. *State v. Michael*, 3rd Dist. Henry No. 7-13-05, 2014-Ohio-754; *State v. Krouskoupf*, 5th Dist. Muskingum No. CT2005-0024, 2006-Ohio-783, ¶ 15; *State v. Favors*, 7th Dist. Mahoning No. 08-MA-35, 2008-Ohio-6361; *State v. Turjonis*, 7th Dist. Mahoning No. 11 MA 28, 2012-Ohio-4215, ¶ 6, 13; *State v. Gibson*, 11th Dist. Portage No. 2013-P-0047, 2014-Ohio-433, ¶ 43-44; *but see State v. Jackson*, 1st Dist. No. C-140384, 2015-Ohio-2171 (Mock, J. dissenting). If a defendant has no statutory or constitutional right to allocute with respect to the sanction imposed for a violation, then certainly neither does the county prosecutor.

In addition to the fact that the CCS statute does not require a trial court to follow the procedures set forth in the sentencing hearing statute (R.C. 2929.19) before imposing a sanction for a violation, the sentencing hearing statute on its face does not purport to apply to CCS violation sanctions. The sentencing hearing statute applies in two specific circumstances: 1) the initial sentencing; and 2) a resentencing after an appeal. R.C. 2929.19(A). There is no mention in the statute to a sentencing after a community control violation.

The juxtaposition of the two statutes—R.C. 2929.19 and 2929.15—demonstrates that the General Assembly can and will assign a role to the county prosecutor when it deems one to be necessary and appropriate. With respect to the initial sentencing

hearing, the General Assembly has provided that the county prosecutor "may present information relevant to the imposition of sentence in the case." R.C. 2929.19(A). With respect to the sanction imposed at the conclusion of the CCS violation hearing, the General Assembly did not afford the county prosecutor such a right and indeed made no mention of the prosecutor at all. This same distinction is recognized by the criminal rules. In the criminal rule applicable to the initial sentencing hearing, the court is required to "[a]fford the prosecuting attorney an opportunity to speak." Crim. R. 32(A)(2). Conversely, Criminal Rule 32.3, which applies to CCS violation hearings, does *not* afford the prosecuting attorney any right to be heard. And given the historical practice of prosecutors not being involved in probation of CCS violation hearings, there is no reason to assume that this was an oversight.

D. The County Prosecutor had notice of the CCS violation hearing in this case.

Despite the fact that the Cuyahoga County Prosecutor has no statutory role at CCS violation hearings, the trial court's standing order permits his participation so long as he requests leave and indicates what he could possibly add to these generally straightforward proceedings. The County Prosecutor argues that this opportunity is inadequate because the standing order provides that the prosecutor "will not receive notice either from the Court or the Probation Department" of the CCS violation hearings. He argues that he cannot possibly comply with the standing order that he request leave if he does not receive adequate notice of the hearing. Because he received adequate notice of the hearing in this case, this is a non-issue.

The County Prosecutor asserts that CCS violation hearings "are often not placed on the public docket" and can only be identified by "leafing through a schedule book kept

with the court's bailiff." (Appellant's Br. at 2). However, in this particular case, the trial court provided notice of the CCS violation hearing in an October 8, 2014 entry: "Probation violation hearing set for 10/14/2014 at 10 a.m." Clearly, the County Prosecutor had notice of the hearing (as also evidence by his being in court on the day of the hearing) and could have complied with the standing order if he cared to do so. He chose not to.

Ultimately, because the County Prosecutor does not have a statutory role at CCS violation hearings, there is likewise no statutory requirement that he receive notice of such hearings. However, if this Court feels that the County Prosecutor should be entitled to notice beyond an entry on the public docket, it could say so without disturbing the bulk of the trial court's standing order.

E. The County Prosecutor's policy arguments should be directed to the General Assembly or to the Rules Commission.

Throughout its brief, the County Prosecutor argues that it is bad policy to have probation officers handling the State's interest at probation violation hearings. Despite the fact that probation officers have successfully handled probation violation hearings for decades, the County Prosecutor now contends that these "non-attorney court employees" are poorly equipped to handle these hearings. (County Prosecutor's Br. at 10). Such a claim is dubious in light of a longstanding historical practice and a demonstrated track record of success. However, even if the claim had some merit, the County Prosecutor should direct his concerns to the General Assembly and/or the Rules Commission who, unlike this Court, have the power to enact legislation or rules to give the County Prosecutor the statutory right he seeks.

F. Any error in this case has not been adequately preserved and, even if preserved, is harmless.

This Court should hold that the trial court's standing order is an entirely appropriate exercise of discretion in managing its docket and is consistent with the statutory framework for CCS violation hearings. However, even if this Court identifies some infirmity in the standing order, the State failed to properly preserve that error through a proffer, *Cf.* Evid. R. 103(A)(2) and any error was harmless in this case. Even without the direct involvement of the County Prosecutor, the trial court found Heinz to be in violation of conditions of his CCS. Thus, unless the County Prosecutor is suggesting that its involvement would have resulted in no violation being found, its lack of direct involvement in the proceeding made no difference. Moreover, the sanction imposed by the trial court was entirely within its discretion and the County Prosecutor has made no attempt to suggest that its lack of participation had any impact on the information considered by the trial court or the sanction imposed. Indeed, the assistant prosecutor present at the hearing did not proffer anything that he intended to present at the hearing that the judge did not already know or did not already take into consideration.

Thus, even if this Court were to conclude that the standing order was flawed in some manner, it should nonetheless affirm the trial court's judgment from the CCS violation hearing because any error was not properly preserved and/or was harmless.

Respectfully submitted,

/s/ Cullen Sweeney
CULLEN SWEENEY
Assistant Public Defender

CERTIFICATE OF SERVICE

A copy of the foregoing Appellee's Merit Brief was served via email upon Assistant Prosecuting Attorney Frank Zeleznikar (Counsel of Record) at fzeleznikar@prosecutor.cuyahogacounty.us on this 15th day of December 2015.

/s/ Cullen Sweeney
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