STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC. **SUPERIOR COURT**

[FILED: October 16, 2019]

JOSHUA DAVIS	:	
	:	
v.	:	**C.A. No. PM-2010-4824**
	:	
STATE OF RHODE ISLAND	:	

DECISION

McGUIRL, J. Before the Court is Joshua Davis's (Petitioner) application for postconviction relief (Application). Petitioner asserts two theories in support of his Application: (1) that his change of plea hearing was in violation of his constitutional rights and Rule 11 of the Superior Court Rules of Criminal Procedure (Rule 11); and (2) that his attorneys rendered constitutionally ineffective assistance of counsel by failing to raise the question of his competency or to inform the Court he was being prescribed anti-psychotic medications at the time of the change of plea hearing. Petitioner filed a second amended petition alleging that the Court violated Rule 11 when it failed to advise him that his plea would subject him to sex offender registration and community supervision. *See* G.L. 1956 §§ 11-37.1-1 *et seq.*; G.L. 1956 § 13-8-33. Therefore, the Petitioner contends that his attorneys were ineffective for not advising him of this registration requirement and ramification of the community supervision statute prior to entering his plea. Jurisdiction is pursuant to G.L. 1956 § 10-9.1-1.

I

Facts and Travel

On May 7, 2006, eight-year-old Savannah Smith disappeared from outside her home in Woonsocket, Rhode Island. Petitioner, who resided near the Smith home, was identified as an individual with whom Savannah was last seen. Subsequently, Petitioner was questioned by Woonsocket Police the night of the disappearance and would later lead detectives to Savannah's body in a wooded location in Cranston, Rhode Island. In addition, Petitioner confessed to driving Savannah from Woonsocket to Cranston, engaging in sexual intercourse with her, and strangling her with his hands. A used condom with the Petitioner's semen inside and the victim's blood on the outside was also found near Savannah's body.

Petitioner was charged with first-degree murder, first-degree child molestation, and kidnapping of a minor. The Petitioner was held without bail from the time of his arrest on May 7, 2006 until he entered guilty pleas to all three charges on April 17, 2008. On June 25, 2008, the Petitioner was sentenced to serve life without parole for the murder, and consecutive life sentences for the crimes of first-degree child molestation and kidnapping of a minor.

In August 2011, the Superior Court appointed attorney Glenn Sparr to represent Petitioner in connection with his Application. After reviewing Petitioner's claims, Attorney Sparr moved to withdraw from the case and filed a lengthy memorandum in support of said motion pursuant to *Shatney v. State*, 755 A.2d 130 (R.I. 2000). The Superior Court granted Attorney Sparr's motion to withdraw but allowed the Petitioner an opportunity to provide evidence in support of his claims. After review, the Superior Court denied Petitioner's claim. Subsequently, the Petitioner appealed and on November 12, 2015, the Rhode Island Supreme Court remanded the Petitioner's case with

instructions for the lower court to appoint new counsel and provide Petitioner with an evidentiary hearing. *Davis v. State*, 124 A.3d 428 (R.I. 2015).

Present counsel was assigned, and an evidentiary hearing was held on November 15 and 27, 2018. The Court heard testimony from Dr. Wade Myers, Director of Forensic Psychiatry at Rhode Island Hospital; Scott Tirocchi, Mental Health Clinician; the Petitioner, and defense attorney Anthony Capraro.[1] A further hearing was held July 10, 2019 in relation to the Petitioner's second amended petition with no additional testimony heard. After review of submitted evidence and testimony, a Decision is herein rendered.

II

Standard of Review

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

[1] At the time, Anthony Capraro was the Chief of the Rhode Island Public Defender's Office trial division. Anthony Capraro was elevated to the Rhode Island District Court Bench prior to the sentencing phase of the instant matter, and his participation in the matter ended at that time. The Petitioner was also represented by the late John Hardiman, Rhode Island Public Defender, during his plea and sentencing phases.

III

Analysis

A

Plea Colloquy

Petitioner alleges that he was not competent when he entered his guilty plea on April 17, 2008 because the prescribed anti-psychotic medications he was on at the time, in combination with side effects of his mental illness, prevented a knowing, voluntary, and intelligent waiver of his constitutional rights as required by Rule 11. According to Rule 11, the court "shall not accept [a guilty] plea . . . without first addressing the defendant personally and determining that the plea is made voluntarily with understanding of the nature of the charge and the consequences of the plea." Rule 11.1; s*ee also Njie v. State*, 156 A.3d 429, 434 (R.I. 2017). Pursuant to Rule 11, the trial justice must speak with the defendant to the extent necessary to establish that '"the defendant understood the nature of the charge and the consequences of the plea."' *Njie*, 156 A.3d at 434 (quoting *State v. Frazar*, 822 A.2d 931, 935 (R.I. 2003)).

In addition, the focus of a competency probe is whether a defendant has the capacity to understand the proceedings. *State v. Cook*, 104 R.I. 442, 446, 244 A.2d 833, 835 (1968). A defendant's competency to plead guilty is contingent on his capacity to '"first, . . . understand[ ] the nature of the charges brought against him; second, . . . appreciate[ ] the purpose and object of the trial proceedings based thereon; and third, that defendant has the mental capacity to assist reasonably and rationally his counsel in preparing and putting forth a defense to the criminal charges of which he stands accused."' *State v. Thomas*, 794 A.2d 990, 994 (R.I. 2002) (quoting *Cook*, 104 R.I. at 447, 244 A.2d at 835-36). Finally, the party challenging the validity of a plea has the burden of establishing "by a preponderance of the evidence, that he did not already understand

the nature of the charges and the rights he was giving up, either through prior experience with the criminal courts of this state or by reason of having been so advised by counsel." *Ouimette v. State*, 785 A.2d 1132, 1136 (R.I. 2001) (citing *Hall v. Langlois*, 105 R.I. 642, 645, 254 A.2d 282, 284 (1969)).

During the plea proceedings, the justice questioned Petitioner thoroughly before accepting his plea as knowing and voluntary. First, the trial justice established that the Petitioner had his GED, could read and write, and was not under the influence of alcohol or drugs at the time of the plea.[2] Next, the trial justice asked Petitioner's counsel, John Hardiman (Attorney Hardiman), if he had reviewed the rights form with the Petitioner. Attorney Hardiman replied "[a] number of times . . . not only today, yesterday, and again on Tuesday, earlier this week, when we went over it very extensively . . . ." (Plea Hr'g Tr. 9:17-20, Apr. 17, 2008.) Attorney Hardiman further advised the Court that he was "satisfied not only that [Petitioner] understands the entire process that he is giving up, I'm also satisfied he understands each and every one of the rights on the rights form and that he is competent to acknowledge those rights and understands the reading of them." *Id*. at 10:11-15. The Court further questioned Attorney Hardiman as to the Petitioner's understanding of his plea and subsequently confirmed Petitioner's desire during the following exchange:

> "THE COURT: Did you go over with him the possible penalties that could be imposed as a result of this plea?
>
> "MR. HARDIMAN: I indicated to him that when he did plead, that he was going to be acknowledging to the three counts, of murder in the first degree, first degree child molestation and kidnapping of a minor, which all carries a penalty of life, with the condition that first degree murder also had a possibility of life without parole. I told him the life criteria for life with parole would be satisfied. The issues of whether or not the killing was done by torture or aggravated battery

[2] Petitioner contends that he was unaware that the question relating to drugs by the trial justice included prescription medications. Moreover, Petitioner contends that the failure of the trial justice to inquire further into this area renders his plea void. This contention will be discussed *infra*.

> or by felony murder, by his very plea, he is acknowledging that that has been satisfied for the purpose of this plea and he could be facing a sentence of life without parole as related to the murder charge.
>
> "THE COURT: Now, you heard the recitation of your attorney, Mr. Davis, is what he said to you; correct?
>
> "THE DEFENDANT: Yes.
>
> "THE COURT: And after talking to him about this and hearing from him about this, is it still your desire to go forward at this time and plead guilty to these three charges?
>
> "THE DEFENDANT: Yes, it is, your Honor." *Id*. at 10:16-11:1-13.

Next, the trial justice reviewed the possible sentences which Petitioner may receive, including the possibility of life without parole, which the Petitioner then acknowledged. Specifically, the following exchange occurred during the colloquy:

> "THE COURT: Now, the proposed sentence in this matter, as to Count I, which is first degree murder, the sentence is life in prison with the possibility in this case of life without parole; and then with regard to Count II, the potential sentence is up to life in prison, and that's the child molestation charge; and then on Count III, which is the kidnapping of a minor charge, again, the potential is for up to life in prison. Those sentences could be meted out by me so that they could be concurrent with each other, meaning running together, or they could be consecutive. So, there's a potential that you could have three consecutive life imprisonments as a sentence, and in addition, because of the nature of this particular murder and the other charges that are involved, you're looking at the possibility of life without parole; do you understand that?
>
> "THE DEFENDANT: Yes, I do.
>
> "THE COURT: And specifically, our statute speaks to situations when a person is either found guilty or pleads guilty to first degree murder, while not only is there a mandatory life sentence, if certain circumstances exist in this case, that that the murder was committed intentionally while engaged in another capital offense, such as Counts II and III, and/or that it was committed in a manner involving torture or an aggravated battery to the victim, that those components and circumstances would trigger the ability to have me consider the

> possibility of sentencing you to life without parole; do you understand that?
>
> "THE DEFENDANT: Yes; your Honor.
>
> "THE COURT: And do you understand today that not only are you pleading guilty to these three counts, but in addition, you're acknowledging your guilt as to those two issues; in other words, that they were committed either by aggravation or torture or that the murder was committed in conjunction with another capital offense. Are you acknowledging that to me today?
>
> "THE DEFENDANT: Yes, your Honor." *Id*. at 13:5-14:1-16.

Based on the Petitioner's responses during the plea colloquy and repeated assertions that he understood, accepted, and desired to plead guilty, this Court is satisfied that the trial justice complied somewhat adequately with Rule 11 and conducted a sufficiently detailed exchange with Petitioner to ensure that he "understood the nature of the charge and the consequences of the plea" in relation to Counts I and III. *Njie*, 156 A.3d at 434. The Court further notes that the Petitioner acknowledged the rights he would be giving up and the potential serious consequences which could result from his decision to plead guilty. *See United States v. Pulido*, 566 F.3d 52, 59-60 (1st Cir. 2009) (citing *United States v. Butt*, 731 F.2d 75, 80 n.5 (1st Cir. 1984)).

1

Inquiry into Medications at Plea Hearing

Petitioner now contends that his plea violated Rule 11 because the trial justice specifically failed to ask if he was under the influence of medications that might have affected his ability to make a knowing and voluntary plea. Rather, Petitioner asserts that trial justice's inquiry—"[a]re you presently under the influence of alcohol or drugs?"—to which Petitioner responded "No," was insufficient as Petitioner did not understand that "drugs" also encompassed prescription medications. (Plea Hr'g Tr. 9:12-14, Apr. 17, 2008.) First Circuit cases on this topic indicate that

a duty is only placed upon the hearing justice to inquire about potential impairment once he or she has been informed that a defendant has recently ingested medication. *See United States v. Parra-Ibanez*, 936 F.2d 588, 595-96 (1st Cir. 1991) (holding that trial justice's failure at plea hearing to inquire regarding the dosages and effects of medications on Defendant's "clear-headedness," once informed, rendered plea invalid).

Our Supreme Court has found that inquiring whether Petitioner has ingested medication may be a "better practice" but has nonetheless consistently upheld the validity of a colloquy which posits questions involving only the ingestion of alcohol or drugs. *See Jolly v. Wall*, 59 A.3d 133, 139 n.8 (R.I. 2013) (finding that "[t]he better practice may be for the court to specifically inquire whether a defendant has taken 'any drugs, alcohol or medication' before the plea hearing"); *see also Njie*, 156 A.3d at 435 (discussing a trial justice's determination that a plea was knowing, intelligent, and voluntary after establishing, among other things, that the defendant "was not under the influence of alcohol or narcotics" while entering the plea); *Thomas*, 794 A.2d at 993 (holding that *nolo contendre* plea was not invalid on grounds plea colloquy did not address defendant's mental illness despite admission that he had been "off" his medication for schizo-affective disorder).

Here, the record is silent as to any indication or notice to the trial justice that the Petitioner was taking medication at the time of his plea; therefore, no duty can be imposed on the trial justice to question dosage and effect as seen in *Parra-Ibanez*. Rather, substantial evidence indicates that the trial justice was not informed of the Petitioner's alleged mental illness until after the change of plea hearing and in preparation for the subsequent sentencing hearing. During the trial justice's plea colloquy, he asked Petitioner, "Are you presently under the influence of alcohol or drugs?" Petitioner responded "No" and did not indicate any other drugs, prescribed or illicit, that he may

have been using at that time. (Plea Hr'g Tr. 9:12-14, Apr. 17, 2008.) Moreover, the Petitioner addressed the Court at his plea hearing and subsequent sentencing hearing and failed to raise the issue of any medications he was taking at that time. Rather, Petitioner remained consistent in his remorse and indicated that his guilty plea was entered to "help [the victim's family] find some closure." (Plea Hr'g Tr. 18:14, Apr. 17, 2008.) Moreover, this Court is satisfied that the Petitioner's perceived challenge to his change of plea is separate and distinct from an analysis from information before the Court at sentencing. Indeed, the record is devoid of any indication that the trial justice was versed in the Petitioner's mental health history at the time of the change of plea, nor is the Court required to investigate such condition absent notice by a party. *See Parra-Ibanez*, 936 F.2d at 596-97. Accordingly, this Court is satisfied that the colloquy conducted by the trial justice adequately evaluated the competency of the Petitioner at the time of his change of plea. *See Weisberg v. State of Minnesota*, 29 F.3d 1271, 1278 (8th Cir. 1994) ("Retrospective determinations of whether a defendant is competent to stand trial or to plead guilty are strongly disfavored.").

2

Information at Sentencing

As previously stated, this Court is satisfied that the Petitioner's perceived challenge to his change of plea is separate and distinct from an analysis from information before the Court at sentencing. However, the availability of information regarding prescribed medications and discussion of such on the record reveal a continuous, singular, and unabated desire to plead guilty by the Petitioner. Indeed, the record of the Petitioner's sentencing hearing does contain instances indicating the ingestion of medication and possible mental health issues. Specifically, the Court was able to review the presentence report, discussed in depth *infra*, which indicated ingestion of certain anti-psychotic medications and the Petitioner's overall health during the interim period

between his change of plea and sentencing. Specifically, during the sentencing hearing, Attorney Hardiman instructed the Court that:

> "[Petitioner] had a psychiatric history, hospitalizations and attempted suicides to the point - - even one point ingesting antifreeze into his body. We know that presently he is on some pretty powerful antipsychotics at the ACI; Haldol, Cogentin, Effexor, Seroquel, Mirtazapine, Trazodone, Amitriptyline, Wellbutrin, Hydroxyzine in the course of his stay at the ACI." (Sentencing Hr'g Tr. 76:14-21, June 25, 2008.)

Attorney Hardiman sought leniency despite his crimes and acknowledged the "most difficult aspect . . . [of] law is to argue for the life of another human being."[3] *Id*. at 68:23-24. Attorney Hardiman implored the Court to review all circumstances of the Petitioner's life including substance abuse, his psychiatric history, and sexual abuse as a child. *See id*. at 70:11-12; 76:14-22. Attorney Hardiman continued that Petitioner had "finally [ ] gotten all the effects of his drugs and his alcohol out of his body and he is now thinking more straight than he had before." *Id*. at 79:2-5.

Regardless of Attorney Hardiman's representations, the Petitioner addressed the Court and again indicated his desire to plead guilty in order to spare the victim's family the trauma of trial. Indeed, the Court recognized that the Petitioner had been treated with various drugs while at the ACI for psychological conditions but that "his condition and behavior has improved dramatically" as a result of these medications. *Id*. at 89:19-20. Nevertheless, the Court upon review of letters, testimony presented, and the presentence report, found that the progress made by the Petitioner constituted a "last-ditch effort by a desperate man to try to avoid the ultimate penalty." *Id*. at 95:10-11. The Court further informed the Petitioner that none of the previous twenty-six instances where

[3] It should be noted that Attorney Capraro indicated he had started preliminary work on Petitioner's sentencing phase but did not participate in the hearing as he was elevated to the bench during this period.

life without parole were administered, "none were more cruel, heartless, inhumane, malicious, savage or vicious . . ." than that committed by the Petitioner. *Id.* at 100:2-4. Accordingly, this Court is satisfied that the evidence and findings by the justice at the sentencing hearing sheds light upon the mental state of the Petitioner at the time of his change of plea. When presented with an opportunity to elaborate on any mental illness or medication that may have clouded his judgment, the Petitioner remained silent in that respect, yet adamant in his desire to plead to spare the victim's family.

Notwithstanding the adequacy of the trial justice's colloquy, Petitioner further contends that his "belief" that he would receive a lesser sentence if he pled guilty is evidence that his plea was not knowing, intelligent, and voluntary. In furtherance, Petitioner proffers the opinion of Dr. Wade Myers (Dr. Myers), Director of Forensic Psychiatry at Rhode Island Hospital, who was engaged by the Petitioner to review Petitioner's mental health history—including Petitioner's prescribed anti-psychotropic medications—and perform two interviews in 2017.[4] Dr. Myers noted that during the interviews, Petitioner "[came] across as [ ] straightforward and frank" and "that [Petitioner] had trouble with interpersonal relationships." (PCR Hr'g Tr. 13:9, 21-22, Nov. 15, 2018.)

During these interviews, Dr. Myers conducted a Personality Assessment Inventory (PAI) and the Montreal Cognitive Assessment (MoCA). In relation to the PAI, Dr. Myers asked the Petitioner 350 questions "in a broad range of areas and the validity scales on this test that [*sic*] is reflecting whether the person answering the question is being forthright or whether they seem to be trying to exaggerate . . . . *Id.* at 13:10-14. Consequently, the test ". . . didn't indicate that

[4] At the time, Petitioner was prescribed Haloperidol (Haldol), a medication for treating psychotic disorders primarily schizophrenia; Benztropine (Cogentin), prescribed to treat the side effects of Haldol; and Venlafaxine (Effexor), an antidepressant medication.

[Petitioner] was presenting himself in either an overly positive or overly negative way." *Id*. at 14:22-23. Dr. Myers then conducted the MoCA test "[a]s a check to see if I'm seeing the same thing that has been seen by others . . ." and determined his findings were consistent with previous evaluations which found mild problems with verbal and visual memory tasks. *Id*. at 16:9-10.

After conducting the aforementioned tests and interviewing the Petitioner, Dr. Myers diagnosed Petitioner with three disorders: (1) mild neurocognitive disorder due to multiple ideologies; (2) schizoid personality disorder; and (3) schizotypal personality disorder. *Id*. at 23:13-15. Dr. Myers further elaborated that individuals with schizotypal personality disorder "often have odd beliefs and can sometimes have magical thinking about the world." *Id*. at 23:19-20. In the opinion of Dr. Myers, the Petitioner was not competent to enter his plea:

> "At the time, because of his psychiatric diagnoses that we've gone over, as well as the effects of the psychotropic medications he was on, including an antipsychotic medication, Haldol, primarily, but he was also on Cogentin, which is a medicine to treat the side effects of Haldol, and he was also on Effexor. So the combination of the psychiatric disorders and the combined effects with the medication, I believe impaired his ability to knowingly and intelligently and voluntarily waive his constitutional rights and enter a plea of guilty." *Id*. at 24:13-23.

Essentially, Dr. Myers believes that a combination of Petitioner's psychotropic medication and "magical thinking" prevented him from entering a knowing, voluntary, and intelligent plea. *Id*. at 24:11. Further, it is Dr. Myers' belief that this "magical thinking" was a "symptom of [Petitioner's] underlying mental illness," particularly of Myers' diagnosis of schizotypal disorder. Consequently, the alleged "magical thinking" shown by the Petitioner was articulated by an illogical understanding that by pleading guilty, the Petitioner would receive a lesser sentence, or at a minimum, he "was not going to end up in the worst sentence . . . because that's the way the system seemed to always worked." *Id*. at 27:22-25; 28:1-3; 29:6-8. Accordingly, it is Dr. Myers'

opinion that "[i]n a magical way, [Petitioner] didn't understand how the court system would perceive the really enormity of these crimes" *Id*. at 29:20-22.

Specifically, Dr. Myers testified that Petitioner's magical thinking led to Petitioner's belief that ". . . if he pled guilty, expressed remorse, threw himself on the mercy of the Court, didn't put the family through a trial, and just played along with this . . . he would [ ] get a lesser sentence. . . ." *Id*. at 27:24-28:2. According to Dr. Myers, Petitioner believed the consequences of his plea would be lessened because of his "understanding that it was an unofficial plea bargain." *Id*. at 27:19-20. Moreover, the magical thinking resulted in the Petitioner "saying what he feels he is supposed to say. He's being as cooperative and basically vulnerable and obsequious as he can be." *Id*. at 55:15-17. The Court at Petitioner's PCR hearing directly inquired to Dr. Myers ". . . that [Petitioner] thought he had a chance of getting a lesser sentence, that that means his plea was not knowingly and intelligently given; is that your testimony?" *Id*. at 69:7-10. Dr. Myers answered, "[y]es, Because there is repeated incidents of magical thinking being documented and this also, to me, seemed magical." *Id*. at 69:11-13. Moreover, Dr. Myers indicated that "I'm not saying [Petitioner] doesn't know the role of the attorney . . . of the Judge . . . of the jury or what have you. I didn't see deficits in that area." *Id.* at 74:25-75:1-3.) Rather, Petitioner "didn't appreciate the consequence of his plea basically because of his mental disorders." *Id*. at 74:23-25.

The Petitioner testified that his "magical thinking" led to an assumption that by pleading guilty, he would receive a lesser sentence. It was his belief that ". . . [prosecutors] would take life without parole off the table and [he would] get the mandatory life sentence instead." *Id*. at 120:6-7. However, the record is silent as to any promises or indications that a plea bargain absent life without parole was ever offered. Rather, Attorney Capraro testified that "there was no offer that the Attorney General would give us other than life without parole" and that this information was

subsequently relayed to Petitioner during the pendency of his case. (PCR Hr'g Tr. 193:22-23, Nov. 27, 2018.) In Petitioner's initial meeting with his attorneys, Petitioner acknowledged that there would be no guaranteed sentence in exchange for his plea and that ". . . because one of the charges was life without parole eligibility. It was a mandatory life sentence if you were found guilty. So I assume[d] by pleading guilty I would get life with parole as opposed to life without parole." (PCR Hr'g Tr. 113:4-8, Nov. 15, 2018.) Petitioner based this reasoning on the fact that he had "never seen that happen before. Nobody entered a plea and still ended up with the maximum sentence for the charges." *Id*. at 115:1-3.

The Court is unpersuaded by repeated assertions by the Petitioner that "magical thinking" led him to a belief that by pleading guilty he would be entitled to a lesser sentence. The Petitioner was repeatedly informed by his attorneys that no deal or promises had been made which would lessen the high probability that he may receive life without parole as a consequence of his plea. Moreover, Petitioner acknowledged in open Court at his plea hearing that no promises had been made to him immediately after the trial justice laid out in great detail the possible sentences which may be imposed during the following exchange:

> "THE COURT: Very well, Other than the sentences that I have just outlined for you, have any other promises been made to you?
>
> ''THE DEFENDANT: No.
>
> ''THE COURT: Either by the Court, your attorneys or the attorney general?
>
> ''THE DEFENDANT: No" (Plea Hr'g Tr. 14:17-23, Apr. 17, 2008.)

It is the opinion of Dr. Myers that Petitioner's assertions immediately after his change of plea, that he was proud of himself for doing the right thing, remained as symptomology of his magical thinking. Particularly, Dr. Myers believed that Petitioner—even after pleading guilty to

serious crimes—was trying to convince the system that he was a "good guy" in an effort to mitigate the forthcoming sentence. PCR Hr'g Tr. 42:7-9, Nov. 15, 2018.) Even after the Petitioner changed his plea, he was still "trying to convince the system he's a good guy because he's waiting for a sentence to come down." *Id.* Similarly, Dr. Myers believes that the Petitioner contorted his behavior to other mental health professionals before and after his plea change. Specifically, Dr. Myers believed that Dr. Penn's report which found that "[Petitioner] exhibited logical, goal directed, organized thinking . . ." was a direct result conforming his behavior "trying to be as perfect and normal a person as he can . . ." *Id.* at 70:17-18; 23-24.

This Court is satisfied that many of the clinicians providing services to Petitioner immediately before and after his April 17, 2008 change of plea indicate that Petitioner understood, accepted, and explained the motivation for his plea. Consequently, Petitioner's testimony given ten years after his plea contradicts the entirety of the record indicating a knowing and voluntary guilty plea was entered. Specifically, Mental Health Clinician Scott Tirocchi (Mr. Tirocchi) met with Petitioner at approximately 4:30 p.m. on the day of Petitioner's plea. Mr. Tirocchi assessed Petitioner for psychiatric stability in the immediate aftermath of his plea change and noted that Petitioner informed him that he is proud of himself for "doing the right thing" and that Petitioner acted against the advice of his attorneys to spare the victim's family of having to go to Court. (PCR Hr'g Tr. 171:2-14, Nov. 27, 2018.) Mr. Tirocchi further testified at Petitioner's PCR hearing that he did not see any evidence of any physical abnormalities or illogical thinking when he interviewed Petitioner on that day, nor is any such activity noted in his notes from that day. *Id.* at 171:20-22. In addition, Mr. Tirocchi's Progress Note from that date indicates that the Petitioner "denies suicidal ideation, intent or plan. No signs/symptoms of psychosis/mania" and that since pleading guilty, "[the Petitioner] feels a bit relieved." (Ex. C at 1.)

Mr. Tirocchi previously met with the Petitioner at the ACI on July 18, 2006 after a referral by nursing staff indicating that the Petitioner had stopped taking his medication. The staff was also in possession of a letter written by the Petitioner to his girlfriend which staff perceived as illustrating "suicidal ideation overtones." (Ex. 5 at 1.) Mr. Tirocchi's report for that day indicates that the Petitioner was "mild[ly] irritable" and informed Mr. Tirocchi that he had stopped taking his medication because "[i]t was doing nothing for me." *Id*. Moreover, Mr. Tirocchi indicates that that Petitioner denied suicidal thoughts and that the letter was an attempt to "persuade his [girlfriend] to plead for his bail." *Id*. Mr. Tirocchi further notes that, in his opinion and based on the meeting that day, the Petitioner "exhibits dereistic thinking in that he believes he can make bail if only his [girlfriend] were to actively petition the court." *Id*.; *see also* PCR Hr'g Tr. 167:7-9, Nov. 27, 2018.) Subsequently, Mr. Tirocchi testified that dereistic thinking can be categorized as "day dream," fantasy, and "not rooted in the actual reality of the situation."[5] (Plea Hearing Hr'g Tr. 180:24-25; 181:1.) Further, Mr. Tirocchi acknowledged that dereistic thinking can be a sign of mental illness; however, he had no further observations of it in subsequent meetings with the Petitioner.

Records reveal Petitioner reiterated his reasoning for changing his plea when interviewed by Kerin Hagan, a social worker for the Rhode Island Public Defender's office. Ms. Hagan compiled a subsequent Mitigation Report, dated May 16, 2008, in which Petitioner states: "I belong [here]," referring to the Adult Correctional Institutions where the interview occurred. (Mitigation Report 1, May 16, 2008.) When Ms. Hagan inquired why Petitioner decided to plead

[5] The American Psychological Association defines dereism as "mental activity that is not in accord with reality, experience, or logic. It is similar to autistic thinking." https://dictionary.apa.org/dereism.

guilty, Petitioner commented "[w]hen you put someone through that kind of pain . . . [t]he least I could do is not put them through more." *Id*.

Dr. Joseph Penn (Dr. Penn) interviewed the Petitioner on May 18, 2007 and July 24, 2007, at the request of Petitioner's attorneys, in order to evaluate potential mitigating factors for Petitioner's current criminal proceedings. Dr. Penn noted that Petitioner's thought pattern was "logical and goal directed," and Petitioner denied any history of delusions or magical thinking. (Penn Report 26, June 9, 2008.) According to Dr. Penn, Petitioner appeared "alert and oriented to person, place, time, and the purpose of the evaluation" during the duration of their meetings. *Id*. at 24. Specifically, the Petitioner indicated he understood that his statements given during the evaluations were confidential "unless we use it in a trial." *Id*. at 10. Further, Dr. Penn observed no evidence of odd beliefs or abnormal thought processes which would have indicated a diminished capacity or inability by Petitioner to appreciate his surroundings. *Id*. at 26. In none of these instances, nor anywhere else in the record, is there any indication that he did not understand the plea and the nature of its consequences.

At the request of the Court, Probation Officer Laura Zarski (Ms. Zarski) interviewed the Petitioner on May 15, 2008 and compiled a Presentence Report. (State's Ex. E at 2.) During the interview, Ms. Zarski indicates that the Petitioner was "reserved and calm," he "made eye contact . . . and appeared to consider his words before speaking." *Id*. Again, the Petitioner resolutely indicated "it is what it is. It's a horrible thing. I can't downplay it" and that he ". . . fully expect[s] to get the worst of what I can get, and, as a father, this is what I would want if it was my daughter, so this is what I am willing to accept." *Id*. In addition, the report indicates that the [Petitioner] reported he is in good physical health. He denied having any disabilities or chronic illnesses." *Id*. at 5.

Moreover, the Petitioner did indicate two instances of mental illness which resulted in admittance to Butler Hospital as a teenager. In the first instance, the Petitioner reported his Junior High School social worker directed he be admitted after Petitioner revealed suicidal thoughts. He remained at Butler Hospital for approximately one week but Petitioner neither is unaware of any mental health diagnosis upon his release nor was he placed on any medication. Noticeably, Ms. Zarski's report indicates that the Petitioner met with a counselor for a period after his release but "told the counselor what he wanted to hear," and the counseling ended. *Id*. at 6. The second admittance to Butler Hospital occurred in high school after Petitioner admitted to drinking antifreeze in an attempt to kill himself and was transported to the hospital by ambulance. Petitioner remained at Butler Hospital for approximately one week and again reveals he was released without a mental health diagnosis or medication.

In relation to the Petitioner's mental health status at the time of Ms. Zarski's interview, the Petitioner informed her that he was meeting monthly with a psychiatrist and was currently prescribed Haldol, Effexor, and Cogentin. Petitioner further represented that these medications have helped him and would have "probably" helped him as a teen. *See id*.

Dr. Jody Underwood, a psychiatrist with the Rhode Island Department of Corrections, interviewed the Petitioner on June 27, 2008, two days after his sentence was imposed. In her report, Dr. Underwood noted that Petitioner indicated that "[c]onsidering – I'm alright" and that "you get what comes to you I guess." (Underwood Report 1, June 27, 2008.) Further, Dr. Underwood notes that Petitioner's mood is "good" and Petitioner denies any delusions. *Id*. Moreover, the Petitioner does not seem surprised by the sentence, is coping well, and even "expected it." *Id*.

Our Supreme Court in *Thomas* addressed a similar claim that a *nolo contendere* plea should be invalidated on the grounds the defendant was not competent at the plea hearing because he was

off his medication for schizo-affective disorder. 794 A.2d at 990. In *Thomas*, the Supreme Court held that the trial justice did not abuse his discretion in determining that a defendant was mentally competent to plead after "extensive consideration" of the defendant's demeanor. *Id*. at 995. The Court then found the plea was not invalid, noting that that the defendant first alleged that he was mentally incompetent to enter a valid plea approximately three years after the plea was accepted and after his "substantial sentence of life plus twenty years was solidified." *Id*. at 994-95.

As did the Court in *Thomas*, this Court finds that the Petitioner was competent at the time of his plea and able to understand the consequences of such. When questioned directly by the Court at his PCR hearing regarding whether he made the decision to plead guilty—"not because there was anything wrong with you at that time, you weren't thinking straight, you made that decision because you thought it was going to get you a certain goal: life with parole, right?"—the Petitioner responded "[r]ight, that was one of the reasons." (PCR Hr'g Tr. 156:6-11, Nov. 27, 2018.) The Petitioner would continue, "I assumed by entering the plea I knew life without parole was on the table, but I didn't believe it was actually going to happen." *Id.* at 155:19-22.) Moreover, Dr. Myers indicated that the "I'm not saying [Petitioner] doesn't know the role of the attorney . . . of the Judge . . . of the jury or what have you. I didn't see deficits in that area." (PCR Hr'g Tr. 74:25-75:1-3, Nov. 15, 2018.) Rather, Petitioner "didn't appreciate the consequence of his plea basically because of his mental disorders." *Id*. at 74:23-25.

Significantly, Dr. Myers concedes that there are no records—absent an indication that Petitioner was prescribed Cogentin as possible treatment for the side effects of Haldol—indicating any actual side effects of Petitioner's medications. *Id*. at 75:13-17. Instead, Dr. Myers necessarily had to rely only on the self-reporting of the Petitioner over ten years after the change of plea hearing occurred. Dr. Myers noted that Petitioner informed him that he was "foggy and spacey,

and [his] lips twitch[ed]" as a result of the medication that he was prescribed. *Id*. at 75:6-9. Later, Petitioner would testify that "[he] was more tired, more like not really with the program, kind of in my own world." *Id*. at 123:8-9. It is Dr. Myers' opinion that Petitioner's competency "appears to have been hindered to some extent"; however, the Court places greater weight on the observations and diagnoses of medical professionals prior to, contemporaneous with, and immediately following Petitioner's change of plea. (Myers' Psychiatric Evaluation 14, Mar. 8, 2018); *see also Thomas*, 794 A.2d at 995.

In addition, the decision by Petitioner to plead guilty was not made overnight, nor was it instantly regretted. Petitioner reiterated his reason for pleading guilty at his sentencing hearing more than a month after his change of plea when he addressed the Court:

> "I pled guilty because I'm responsible for the death of your daughter and I don't think you should have to go through a trial and the added pain it would bring. It was all I could do to spare you the trauma and the heartache of reliving all of this over again. So, once again, I'm so sorry for all the pain I brought upon your family." (Sentencing Hr'g Tr. 81:19-25, June 25, 2008.)

Similar to the Petitioner in *Thomas*, Petitioner alerted the Court to a competency issue, years after his decision to plead was made and a "substantial sentence" was imposed. The Court fails to see how self-reporting side effects from medications years later can lead to anything more than speculation from a doctor as to the Petitioner's mental state at the time of the plea. S*ee id*. at 995. The record is replete with instances, before and after the change of plea, in which the Petitioner made abundantly clear his desire to plead guilty in order to spare the victim's family the emotional trauma of a trial. Moreover, Petitioner's later reported symptoms that he was "not really with the program" appear incompatible with his "magical thinking" that he would receive a lesser sentence if he pled guilty. Rather, this thinking appears calculated, albeit misplaced, and tends to indicate an end goal beneficial to him; *i.e.*, a life sentence with the possibility of parole. Therefore,

the Petitioner has not established "by a preponderance of the evidence, that he did not already understand the nature of the charges and the rights he was giving up, either through prior experience with the criminal courts of this state or by reason of having been so advised by counsel." *Ouimette*, 785 A.2d at 1136 (citing *Hall*, 105 R.I. at 645, 254 A.2d at 284). Accordingly, this Court finds that Petitioner's pleas in relation to Counts I and III, made knowingly and intelligently, are valid.

B

Validity of Plea Relating to Count II – Child Molestation

1

Sex Offender Registration

In his second amended petition for postconviction relief, Petitioner contends that his change of plea hearing did not conform to the due process clause of the United States Constitution or Rule 11 of the Superior Court Rules of Criminal Procedure. Specifically, the Petitioner contends that the trial court erred by failing to advise him that he would have to register as a sex offender pursuant to §§ 11-37.1-1 *et seq.* as a result of his guilty plea. Moreover, the Petitioner asserts that other state courts have held that mandatory sex offender registration is a direct and severe consequence of a guilty plea which requires disclosure of such to an individual by the Court and counsel prior to an entry of a plea.

Conversely, the State contends that the duty to register as a sex offender is required pursuant to § 11-37.1-1 and is imposed mandatorily by operation of law—thus, beyond the direct authority of the trial judge. As such, the State submits that the imposition of said registration should be deemed a collateral consequence of Petitioner's plea. Thus, neither the Court nor defense counsel were constitutionally obligated to disclose the consequences for his plea to be valid.

As Rhode Island cases have made clear, "'[a] defendant need only be made aware of the direct consequences of his plea for it to be valid.'" *Beagen v. State*, 705 A.2d 173, 175 (R.I. 1998) (quoting *State v. Figueroa*, 639 A.2d 495, 499 (R.I. 1994)); *see also Brady v. United States*, 397 U.S. 742, 755 (1970). A consequence is deemed collateral, rather than direct, if its imposition "is controlled by an agency which operates beyond the direct authority of the trial judge." *Figueroa*, 639 A.2d at 499. "The distinction between direct and collateral consequences of a plea 'turns on whether the consequence represents a definite, immediate, and largely automatic effect on the range of a defendant's punishment.'" *Steele v. Murphy*, 365 F.3d 14, 17 (1st Cir. 2004) (citing *United States v. Bouthot*, 878 F.2d 1506, 1511 (1st Cir. 1989)). Furthermore, when a Sixth Amendment claim of ineffective assistance of counsel rests on an attorney's "failure to inform a [defendant] of a particular consequence of a guilty plea, [the court] must first consider whether [the constitutional right] applies at all." *State v. Trotter*, 330 P.3d 1267, 1271 (Utah 2014) (citing *Chaidez v. United States*, 568 U.S. 342 (2013)).

Our Supreme Court has yet to directly address whether registration as a sex offender under §§ 11-37.1-1 *et seq.* is a direct or collateral consequence of a plea or verdict.[6] Many other courts, however, have addressed the issue and have reached conclusions based upon whether the required

[6] Sections 11-37.1-1 *et seq.*, also known as the "Sexual Offender Registration and Community Notification Act," provides in pertinent part:

> "(a) Any person who, in this or any other jurisdiction: (1) has been convicted of a criminal offense against a victim who is a minor, (2) has been convicted of a sexually violent offense, (3) has been determined to be a sexually violent predator, (4) has committed an aggravated offense as defined in § 11-37.1-2, or (5) is a recidivist, as defined in § 11-37.1-4, shall be required to register his or her current address with the local law enforcement agency having jurisdiction over the city or town in which the person having the duty to register resides for the time period specified in § 11-37.1-4." Sec. 11-37.1-3(a).

registration can be categorized as penal or civil in nature. Accordingly, those jurisdictions which held registration is penal in nature have found it to be a direct consequence of the sentence, thus requiring disclosure prior to entering a plea. *See Commonwealth v. Thompson*, 548 S.W.3d 881, 888-89 (Ky. 2018); *see also Taylor v. State*, 698 S.E.2d 384, 388 (Ga. Ct. App. 2010). Conversely, those jurisdictions which have found registration more in line with a civil regulatory or prophylactic scheme have held registration to be a collateral consequence, thus precluding a need for disclosure prior to a plea. *See Magyar v State*, 18 So.3d 807, 812 n.5 (Miss. 2009)].

The Supreme Judicial Court of Massachusetts held that sex offender registration—as it existed in 2002—was a consequence collateral to the defendant's conviction, of which defense counsel was not required to advise his client, in order to provide effective assistance. *Commonwealth v. Sylvester*, 62 N.E.3d 502, 508 (Mass. 2016). Specifically, the court determined that the consequences of sex offender registration in 2002, although '"practically inevitable,"' were not "so severe as to require defense counsel to advise . . . as a constitutional matter." *Id*. at 508 (quoting *Padilla v. Kentucky*, 559 U.S. 356, 364 (2010)). Similarly, the Wisconsin Supreme Court held sex offender registration is a collateral consequence of which neither courts nor counsel must inform defendants. *State v. Bollig*, 605 N.W.2d 199, 206 (Wis. 2000). The court so held despite "recogniz[ing] that sex offenders have suffered adverse consequences, including vandalism, loss of employment, and community harassment." *Id.* at 205. These burdens, however, did not outweigh the "primary and remedial goal underlying [sex offender registration statutes] to protect the public." *Id*. at 206.

To the contrary, the Kentucky Supreme Court held that sex offender registration is a direct consequence of sex crimes, about which defendants are constitutionally entitled to counsel. *Thompson*, 548 S.W.3d at 892. In *Thompson*, the court was persuaded by the "serious, potentially

lifelong, consequences which are the inseparable result," and not collateral to, a sex offender's conviction. *Id*. at 892. As such, the court concluded that defendants are entitled to effective representation with respect to the "significant, definite, and automatic" consequences of sex offender registration. *Id*. Additionally, the court felt that as a practical matter, such direct consequences are easily understood by an attorney when reading the statute, and thus, are "matter[s] that competent counsel would and should discuss with his client." *Id*. at 893.

Our Supreme Court has examined the registration requirement in relation to *ex-post facto* application challenges and has uniformly held that "[a]lthough it follows as a consequence of a criminal conviction sexual offender registration and notification is a *civil* regulatory process." *State v. Germane*, 971 A.2d 555, 593 (R.I. 2009); *see also DiCarlo v. State*, 212 A.3d 1191, 1198 (R.I. 2019) ("Sex-offender registration is a civil regulatory process for those convicted of sexual offenses"). In fashioning this non-punitive finding, the Court examined the legislative intent behind the required registration and found that:

> '"It is evident that the purpose of the Registration Act is not to punish the offending [individual], but rather to protect the safety and general welfare of the public. Supplying the names and addresses of sex offenders to law enforcement agencies enables the agencies to deal more successfully with the serious problem of recidivist sex offenders. . . . [T]he proceeding remains rehabilitative, rather than punitive . . . ."' *State v. Gibson*, 182 A.3d 540, 555 (R.I. 2018); *Germane*, 971 A.2d at 593 (quoting *In re Richard A.*, 946 A.2d 204, 213 (R.I. 2008)).

Accordingly, it is well-settled that the intent behind the registration requirement of §§ 11-37.1-1 *et seq.* is not punitive in nature but rather a civil regulatory process in place to protect the general public from recidivist acts. While the Court acknowledges that certain stigmas attach to those required to register, registration cannot be said to be a "largely automatic effect on the range of a defendant's punishment." *Steele*, 365 F.3d at 17. Likewise, these significant stigmas arise not

from the registration itself but from the fact that the registrant has been adjudicated guilty of a sex offense. *See Trotter*, 330 P.3d at 1275. Indeed, the imposition of such a requirement may not—and has not—been categorized as punishment within the confines of our state. *See Gibson*, 182 A.3d at 555.

Here, the Petitioner advances the argument that the purported severe and extensive restrictions that accompany registration within our state overcome the principal that registration is a collateral consequence of a plea. As such, Petitioner argues that registration constitutes a "drastic measure" with "severe ramifications for a convicted criminal" which would render his plea in relation to Count II invalid because he was unaware of the registration requirement at that time. Conversely, the State argues that the direct-collateral distinction—and its interplay with the Sixth Amendment—remains undisturbed. thus negating the requirement that the Petitioner be informed of the registration requirement prior to his plea. Moreover, the State refutes the Petitioner's claims that the severity of the registration requirement necessitates disclosure prior to an entry of a plea regardless of its classification as a direct or collateral consequence because the severity of the requirement does not rise to the level of deportation as enumerated in *Padilla*.

The Georgia Court of Appeals held that an attorney's failure to counsel his client that a guilty plea would result in sex offender registration is constitutionally deficient representation. *Taylor*, 698 S.E.2d at 388. Initially, the court noted that proper and prevailing professional norms support a requirement to advise clients about sex offender registration, and that such norms are reflected in the ABA Standards for Criminal Justice. *Id*. at 388. Next, the court found that registration as a sex offender is '"intimately related to the criminal process"' which is an '"automatic result"' of conviction because the applicable state statute provides that" [r]egistration . . . shall be required by any individual" convicted of certain sex crimes. *Id*. at 388 (quoting *Padilla*,

559 U.S. at 357, 366). Lastly, the court found that sex offender registration mirrored the "drastic measure" of deportation because an individual is subject to lifetime registration, community notification of their classification, and possible felony charges if the registration requirements are not met. *Id*. at 388-89.

Conversely, the Utah Supreme Court held that sex offender registration is a collateral consequence which "neither defense counsel nor the trial court was obligated to disclose" after Petitioner raised a substantially similar argument to that now before this Court. *Trotter,* 330 P.3d at 1271. The *Trotter* court held that *Padilla* did not '"eschew the direct-collateral divide across the board,"' but rather created an exception in the deportation context because of its "unique nature." *Id*. at 1272 (quoting *Chaidez,* 568 U.S. at 355). The Court agreed that the best practice suggests that informing a defendant of a registration requirement but concluding that such practices in this instance extend beyond the "minimum level of professional competence mandated by the Constitution." *Id*. at 1273. Next, the Court acknowledged, yet downplayed, the automatic imposition of Utah's registration requirement. *Id*. Instead, the court cautioned that the automatic imposition must be examined in tandem with the severity of the registration requirement as other civil deprivations long held collateral would be improperly categorized as direct if the automatic imposition of the penalty was the determining factor. *Id*. Finally, the court found that the prohibitions accompanying registration are onerous but do not rise to the same level of *de facto* "banishment or exile" seen in deportation. *Id*. at 1274-75. Accordingly, an offender's mobility and activity are "relatively uninhibited" as a result of registration. *Id*. at 1275. The offender may still "go to work, to school, to the gym, to the grocery store . . . without violating any of the conditions set out by the registry laws." *Id*. Moreover, registration does not have the draconian effect on

familial relationships that deportation carries as registration allows offenders to remain with their families. *See id*.

Here, the Court agrees with the reasoning set forth by the *Trotter* court and declines to extend the *ex post facto* exception applied to deportation cases seen in *Padilla* to sex offender registration. The Court may agree that professional norms indicate that informing a client of registration implications may be the best practice but notes that norms are not law.[7] *See Whiting v. U.S.*, 231 F.3d 70, 76 (1st Cir. 2000) (stating "there is daylight between desirable policy and the bare minimum required by the Constitution"). This Court finds the Rhode Island registration requirement is inevitably imposed when an individual is convicted of a triggering offense. Pursuant to the plain language of Sec. 11-37.1-3, an offender "shall be required to register his or her current address with the local law enforcement agency" and "shall provide the local law enforcement agency the following information . . . ." *See* Sec. 11-37.1-3(a)(e). It is well-settled that "'[W]hen the language of a statute is clear and unambiguous, this Court must interpret the statute literally and must give the words of the statute their plain and ordinary meanings.'" *Rose v. State*, 92 A.3d 903, 906 (R.I. 2014) (quoting *State v. Hazard*, 68 A.3d 479, 485 (R.I. 2013)). Here, the only logical reading of 11-37.1 indicates an automatic requirement of registration upon conviction for certain crimes.

[7] The ABA advances Standard 14-1.4(c), which advises the court "to inform the defendant . . . that there may be 'additional consequences' from entering the plea, including but not limited to . . . the loss of certain civil rights . . . enhanced punishment if the defendant is convicted of another crime in the future . . . ." *See* ABA Standards for Criminal Justice, *Criminal Justice Pleas of Guilty Standards* 14-1.4(c) (3d ed. 1999). Of particular note, this section is divorced from other suggested practices regarding disclosures to a Defendant prior to a plea "to make clear that the court's advice concerning potential collateral consequences of a plea falls into a different category than its advice concerning the rights listed in Standard 14-1.4(a), and to avoid any implication that the omission of such advice would necessarily render a plea invalid." *Id.*

The Court is satisfied that the consequences of this registration do not rise to the severe level of consequences associated with deportation. Certainly, an offender required to register is not removed from the country. Rather, §§ 11-37.1-1 *et seq.* only require an offender to register his or her home address with local law enforcement and prohibits offenders from residing within three hundred feet (300') of a public or private school. The most severe possible ramification of registration—possibly felony conviction if registration is not complete or updated as needed—resides solely with the offender. Indeed, the offender is able to resume many of his or her normal daily activities and retains a good deal of freedom absent the relative minor duty to register. The Court does acknowledge many negative stigmas attach to registration but cautions that the information underlying said stigmas, such as the offender's criminal history, are readily available to the public by other means. Accordingly, the Court is unpersuaded that the perceived severity of registration rises to a similar level of that of an individual removed from this country. Registration does not permanently interfere with familial bonds nor does it physically remove the offender from this country.

The Court is satisfied that the well-settled principal enumerated by our Supreme Court that sex offender registration is a civil regulatory process in conjunction with the less severe nature of registration does not dictate its disclosure prior to entry of a valid plea. Consequently, the Court is unpersuaded that *Padilla* should be extended to cover registration at this time as significant differences exist in relation to the degree restrictions and hardship imposed upon an individual subject to deportation and registration respectively. The Court believes that sex offender registration is a prophylactic civil construct which acts as a collateral consequence of a plea, thus falling outside required disclosure and further does not rise to a level which would require disclosure, notwithstanding its collateral designation. While the Court does not believe registration

should be deemed a direct consequence, it is mindful of a recent decision which deemed the corollary community supervision statute as such. Accordingly, this Court declines to base its decision on the classification of registration and instead relies upon the classification of the community supervision statute discussed *infra*.

2

Community Supervision Statute

During the pendency of Petitioner's Second Amended Petition—after filing but prior to the evidentiary hearing—this Court, Taft-Carter, J.—issued a well-reasoned decision in *Furlong v. State*, No. KM-2018-0320, 2019 WL 3035444 (R.I. Super. July 3, 2019). Consequently, Petitioner in the present matter raised this decision and its implications during his July 10, 2019 hearing in relation to claims brought forth regarding registration. While not explicitly mentioned in Petitioner's Second Amended Petition, the Court is satisfied that the issue was sufficiently referenced and raised during the hearing to require analysis.

During his 2008 plea, the Petitioner pled guilty to Count II, first-degree child molestation sexual assault pursuant to § 11-37-8.1. As a result, the Community supervision for child molestation parole requirement outlined in § 13-8-30 was triggered. These requirements provide:

> "Notwithstanding any other provision of the general laws to the contrary, any person convicted of first degree child molestation pursuant to § 11-37-8.1 or second degree child molestation pursuant to § 11-37-8.3 shall, *in addition to any other penalty imposed*, be subject to community supervision upon that person's completion of any prison sentence, suspended sentence, and/or probationary term imposed as a result of that conviction.
>
> "In the case of a person convicted of first degree child molestation pursuant to § 11-37-8.1, community supervision shall be for life and pursuant to the provisions of § 11-37-8.2.1, community supervision shall include electronic monitoring via an active global positioning system for life. In the case of a person eighteen (18) years or older convicted of second degree child molestation pursuant to § 11-37-

> 8.3, the term of the original sentence imposed and the term of community supervision shall not exceed thirty (30) years." (emphasis added). Sec. 13-8-30.

During the pendency of Petitioner's Second Amended Petition, Associate Justice Taft-Carter issued the *Furlong* decision in which the Court determined that the community supervision statute was a direct consequence of a Defendant's *nolo contendere* plea for first-degree child molestation. In reaching this conclusion, the Court determined that the Parole Board, not the Court, is responsible for imposing the supervision and is given broad authority over the administration of the supervision by statute. Specifically, the use of conjunctive language within the statute implicated that the imposition of the supervision illustrated an intention by our Legislature that supervision be a separate and distinct sentence from the original criminal sentence imposed by the trial judge.

After a review of jurisdictions who have deemed their respective supervision statutes either direct or collateral, the Court reasoned that Rhode Island's supervision statute reflects those other jurisdictions where the imposition has been deemed a direct consequence.[8] The Court found that language in the statute refers to its imposition as a "sentence," and as being "in addition to any other penalty imposed." Based on this language and the broad authority granted to the Parole Board, the Court found the imposition of the community supervision statute to be a direct consequence of the Defendant's plea. Based on this finding, the Court vacated the Defendant's *nolo contendere* plea because he had not been advised of the mandatory imposition of the community supervision parole requirements upon release from incarceration prior to the entry of

[8] The Court found that our community supervision statute most closely aligns with those of Tennessee, New Jersey, and New York but is dissimilar to that of Missouri.

his plea. Accordingly, the *nolo contendere* plea was not made knowingly and voluntarily and thus did not comport with constitutional requirements.

This Court agrees and adopts the reasoning set forth in *Furlong* and is satisfied that the mandatory imposition of the community supervision requirements represent a direct and additional punishment which flows directly from the offender's court-imposed sentence. When the reasoning enunciated in *Furlong* is applied to the Petitioner's case, the Court is compelled to vacate the Petitioner's guilty plea entered in relation to Count II, first-degree child molestation, as the record is bare of any indication that the trial justice informed the petitioner during his colloquy of the extensive requirements of the supervision statute. *See Frazar*, 822 A.2d at 935; *see also Cote v. State*, 994 A.2d 59, 63 (R.I. 2010). Likewise, the record is devoid of any indication that Petitioner's counsel informed him of the mandatory imposition of the statute prior to his guilty plea. *See State v. Feng*, 421 A.2d 1258, 1267 (R.I. 1980) ("The record must affirmatively disclose the voluntary and intelligent character of the plea because a valid waiver of constitutional rights cannot be presumed from a silent record"). The Court acknowledges that the Petitioner faced the probable imposition of a most severe penalty—life imprisonment without the possibility of parole for first-degree murder—but is nonetheless entitled to the protections of our Constitution for all the pleas he planned to enter. The Court further notes the imposition of the community supervision requirement on the Petitioner may very well have made little to no difference in the Petitioner's continuous desire to plead guilty, but it is also clear he was not apprised of its nature and extent prior to the entry of his pleas. Accordingly, this Court is satisfied that the Petitioner has proven by a preponderance of the evidence that his plea was not entered knowingly or voluntarily thus requiring it be vacated in relation to Count II at this time. *See Brown*, 32 A.3d at 907.

Having found the Petitioner's plea invalid in relation to Count II, the Court must now determine the appropriate remedy. Our Supreme Court has held that the proper remedy for an involuntary plea is a remand to the Superior Court to allow that court to proceed as if the original plea was not entered. *Cole v. Langlois*, 99 R.I. 138, 146, 206 A.2d 216, 220-21 (1965). Likewise, the United States Supreme Court has similarly held "that a defendant whose plea has been accepted in violation of Rule 11 should be afforded the opportunity to plead anew." *McCarthy v. United States*, 394 U.S. 459, 472 (1969).

Here, the Court is confronted with guilty pleas in relation to three separate and distinct offenses. *See State v. Rodriguez*, 822 A.2d 894, 905 (R.I. 2003) (quoting *Blockburger v. United States*, 284 U.S. 299, 304 (1932) (holding that in relation to double jeopardy clause determination of separate offenses '"[t]he applicable rule is that where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not"')). Likewise, "[w]hen a criminal defendant pleads guilty, he admits not only that he committed the factual predicate underlying his conviction, but also 'that he committed the crime charged against him.'" *United States v. Grant*, 114 F.3d 323, 329 (1st Cir. 1997) (quoting *United States v. Broce*, 488 U.S. 563, 570 (1989)). Similarly, "[j]ust as a defendant who pleads guilty to a single count admits guilt to the specified offense, so too does a defendant who pleads guilty to two counts with facial allegations of distinct offenses concede that he has committed two separate crimes." *Broce*, 488 U.S. at 570.

The Court is satisfied that the Petitioner knowingly and intelligently entered his guilty pleas in relation to Count I (first-degree murder)[9] and Count III (kidnapping of a minor)[10] for reasons discussed in depth earlier. Likewise, the actions constituting each Count do not arise out of the "same act or transaction" as each charge necessitated unique elements which require independent proof. *See State v. Scanlon*, 982 A.2d 1268, 1278 (R.I. 2009).

While no case has been brought to the Court's attention that directly aligns with the situation now before it, an analogy may be drawn with those cases in which a petitioner advances a double jeopardy challenge. For example, in *Rodriguez*, 822 A.2d 894, the defendant was charged with violating three separate statutory provisions. Specifically, count 1 accused defendant of murder in the first degree and count 2 accused him of using a firearm while committing a crime of violence, which in this case was murder. *Id*. at 899. Section 11-47-3.2 ("[u]sing a firearm when committing a crime of violence") required proof of a fact (using a firearm) that § 11-23-1 ("[m]urder") did not. *Id*. at 906. Each count required proof of a separate and additional fact that the other did not. *Id*. Accordingly, the Court found that the crimes cannot merge because each

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[9] In Rhode Island, first-degree murder is "[t]he unlawful killing of a human being with malice aforethought is murder. Every murder perpetrated by poison, lying in wait, or any other kind of willful, deliberate, malicious, and premeditated killing, or committed in the perpetration of, or attempt to perpetrate, any arson or any violation of §§ 11-4-2, 11-4-3, or 11-4-4, rape, any degree of sexual assault or child molestation . . . ." Sec. 11-23-1.

[10] In Rhode Island, the Kidnapping of a minor statute provides in pertinent part:

> "Whoever, without lawful authority, forcibly or secretly confines or imprisons any child under the age of sixteen (16) years within this state against the child's will, or forcibly carries or sends the child out of this state, or forcibly seizes, confines, inveigles, or kidnaps the child with intent either to cause the child to be secretly confined or imprisoned within this state against his or her will, or with the intent of sexually assaulting or molesting the child as defined in chapter 37 of this title, or with the intent to abuse the child as defined in chapter 9 of this title, shall be guilty of a felony and, upon conviction, shall be punished by imprisonment for life or for any term not less than twenty (20) years." Sec. 11-26-1.4.

required proof of a separate element (murder and using a firearm, respectively) that the other did not; thus, they constituted separate crimes. *Id*. at 906-07. As such, count 2 qualified as a separate criminal offense, and the trial justice did not violate Rhode Island's double jeopardy clause when he sentenced defendant on count 2 to a term of life imprisonment, to be served consecutively to the life sentence imposed on count 1.

Likewise, our Supreme Court has had the opportunity to deal with the interplay of kidnapping of a minor and a corollary charge of child molestation in *State v. Suero*, 721 A.2d 426 (R.I. 1998). In *Suero*, the Defendant maintained that the charge of kidnapping a minor was merely incidental to, and in furtherance of, the misconduct that led to his first-degree child molestation charge. *Id*. at 428. In rejecting this argument, our Supreme Court indicated that the plain and ordinary meaning of the kidnapping statute expressly prohibits the confinement or seizure of a child less than sixteen years of age "with the intent of sexually assaulting or molesting the child[,]" thus negating the requirement that any "independent significance" is required. *Id*. at 428-29. However, the Court would continue and find that that the forcible abduction at knifepoint and subsequent drive from Providence to Central Falls did exceed what was necessary for the defendant "to commit the child-molestation and thus had independent significance." *Id*. at 429.

Again, the Court is satisfied that the Petitioner was well aware of the consequences of pleading guilty to Counts I and III after repeated advice by his counsel and the trial justice that life without parole was possible and even probable. *See State v. Garcia*, 743 A.2d 1038, 1056 (R.I. 2000); *see also State v. Brown*, 898 A.2d 69, 86 (R.I. 2006). Likewise, the Court is satisfied that the three offenses Petitioner pled guilty to constituted separate and distinct offenses, thus necessarily rendering the plea entered for each offense separate and distinct. Accordingly, the Court now finds that the Petitioner's plea in relation to Count II (first-degree child molestation)

was not made knowingly and voluntary; thus, it is vacated and remanded. Petitioner's pleas in relation to Counts I and III were made knowingly and voluntarily and shall remain in place for the reasons discussed *infra*.

C

Ineffective Assistance of Counsel

Petitioner asserts that he was denied effective assistance of counsel because his trial attorneys (1) failed to question Petitioner's competency or request a competency evaluation prior to Petitioner's change of plea; (2) failed to advise the Court that Petitioner was being prescribed anti-psychotic medications at the time of the plea hearing; (3) failed to raise the issue of the impact of the anti-psychotic medications on Petitioner's competency to plead guilty; (4) failed to advise the Petitioner of required sex offender registration; and (5) failed to advise the Petitioner about the imposition of the community supervision statute. In response, the State asserts that Petitioner's attorneys at the time of his guilty plea acted reasonably by meeting with Petitioner numerous times leading up to his decision to change his plea and appropriately relied upon medical reports provided before the change of plea which indicated the Petitioner was alert and showed no signs of mental incapacitation. Moreover, the State asserts that sex offender registration is a collateral consequence of the Petitioner's plea and is thus not a required disclosure by counsel.

In *Strickland v. Washington*, 466 U.S. 668 (1984), adopted by our Supreme Court, is the benchmark decision regarding when the court is faced with a claim of ineffective assistance of counsel. *Navarro v. State*, 187 A.3d 317, 325 (R.I. 2018); *LaChappelle v. State*, 686 A.2d 924, 926 (R.I. 1996). A *Strickland* claim entails a two-part inquiry, and a petitioner must satisfy both requirements to prevail. First, a petitioner must prove that counsel's performance was deficient in such a way that counsel's errors were so serious that the attorney was "not functioning as the

'counsel' guaranteed the defendant by the Sixth Amendment." *Strickland*, 466 U.S. at 687; *Neufville v. State*, 13 A.3d 607, 610 (R.I. 2011). Second, a petitioner must show that, even if counsel's performance was deficient, the attorney's shortcomings "prejudiced" [petitioner's] defense. *Id*. at 687.

The first prong of the *Strickland* analysis evaluates whether counsel's performance "fell below an objective standard of reasonableness." *Id*. at 688. *Reyes v. State*, 141 A.3d 644, 654 (R.I. 2016). However, the Sixth Amendment standard is "'very forgiving,"' *United States v. Theodore*, 468 F.3d 52, 57 (1st Cir. 2006) (quoting *Delgado v. Lewis*, 223 F.3d 976, 981 (9th Cir. 2000)), and there is a strong presumption that counsel performed competently. *Gonder v. State*, 935 A.2d 82, 86 (R.I. 2007). "As the *Strickland* Court cautioned, a reviewing court should strive 'to eliminate the distorting effects of hindsight."' *Clark v. Ellerthorpe*, 552 A.2d 1186, 1189 (R.I. 1989) (quoting *Strickland*, 466 U.S. at 689).

A petitioner claiming ineffective assistance of counsel must overcome a heavy burden in proving his claim. *See Rice v. State*, 38 A.3d 9, 17 (R.I. 2012); *Ouimette*, 785 A.2d at 1139. In the case of a plea, the petitioner must show there is a reasonable probability that "he would not have entered a guilty plea and would have instead proceeded to trial were it not for the attorney's errors." *Hassett v. State*, 899 A.2d 430, 434 (R.I. 2006).

1

Failure to Request Competency Hearing

'"The failure of trial counsel to request a competency hearing where there was evidence raising a substantial doubt about a petitioner's competence to stand trial may constitute ineffective assistance of counsel."' *Vogt v. United States*, 88 F.3d 587, 592 (8th Cir. 1996) (quoting S*peedy v. Wyrick*, 702 F.2d 723, 726 (8th Cir. 1983)). Indeed, the First Circuit has held that, "where there

are substantial indications that the defendant is not competent to stand trial, counsel is not faced with a strategy choice but has a settled obligation . . . under federal law . . . to raise the issue with the trial judge and ordinarily to seek a competency examination." *Robidoux v. O'Brien,* 643 F.3d 334, 338-39 (1st Cir. 2011).

In *Robidoux*, the First Circuit upheld a Massachusetts Supreme Judicial Court decision which found that a Defendant's trial counsel did not provide ineffective assistance of counsel when he failed to raise the issue of competency before or during trial. The Court found the Defendant to be intelligent and articulate during colloquies with the judge; there was no evidence that he did not understand the proceedings; and there was no evidence he was unable to cooperate with counsel. *Id*. at 340. Rather, the only piece of direct evidence to suggest that the Defendant may not have understood the nature of the proceedings took place on the first day of the trial when the Defendant tendered a "long, rambling and [ ] almost incoherent request to proceed *pro se* and to change his plea . . . . " *Id*. at 339. Accordingly, the Court failed to see "substantial indications that the defendant is not competent to stand trial," thus providing that trial counsel's performance did not fall outside the effective level of representation mandated by *Strickland*. *Id*. at 338.

Here, Petitioner alleges that trial counsel were ineffective because they failed to raise the question of Petitioner's competency to enter his guilty pleas, either prior to or at the time of the change of plea hearing. At the time Petitioner was represented by Rhode Island Public Defender John Hardiman and Assistant Public Defender Anthony Capraro. Both men were veteran attorneys who had represented clients in numerous capital cases.[11] Attorney Capraro testified during

[11] Attorney Capraro indicated that he had handled "thousands" of criminal cases during his twenty-one years at the Public Defender's Office. Approximately 80 of those cases were trials that went to verdict. Furthermore, Attorney Capararo testified that he had handled approximately ten to twelve capital cases, and ten to twelve life without parole cases during this period. *See* PCR Hr'g Tr. 186:15-187:1-19, Nov. 27, 2018.

Petitioner's PCR hearing that he and Attorney Hardiman were prepared to go to trial, despite Petitioner's repeated indications that he wished to plead guilty. Furthermore, Attorney Capraro indicated that at no time was Petitioner informed that a deal for life with parole was on the table and that Capraro and Hardiman repeatedly advised Petitioner that his desire to plead guilty was unwise and it would be "like shutting the door on [Petitioner] at a trial." (PCR Hr'g Tr. 112:4-5, Nov. 15, 2018.) Further, Attorney Capararo testified that he and Attorney Hardiman met with the Petitioner the day before his scheduled plea hearing and "pleaded with [Petitioner] to let us at least do the suppression hearing." (PCR Hr'g Tr. 201:20-21, Nov. 27, 2018.) Attorney Capraro would further state: "[w]e actually told him, 'We'll get to whether you want to pick a jury, just let us move to protect your rights under the Constitution on the searches, the seizures, the statements you gave, and let's see after that."' *Id*. at 201:21-25. The Petitioner himself testified that his attorneys "were strongly against the idea [of changing the plea]. They said that you never know what is going to happen at a trial." PCR Hr'g Tr. 110:12-13, Nov. 15, 2018.) Moreover, the Petitioner further testified that his attorneys adamantly "wanted to proceed to trial" and advised him not to change his plea. *Id*. at 113:20.

Petitioner met with Attorneys Hardiman and Capraro a number of times during the pendency of his case. According to the Petitioner, he first met with Attorneys Hardiman and Capraro "around May 8th or 9th [2006], when my first court hearing [occurred]." *Id*. at 102:17-18. Petitioner further indicated that he primarily dealt with Attorney Hardiman and generally met with Attorney Capraro only when Attorney Hardiman was also present. One such meeting took place in the dining room of C mod at the Adult Correctional Institutions (ACI) "a couple of months before" Petitioner changed his plea. *Id*. at 109:22-25. Petitioner acknowledges that he raised the subject of changing his plea to guilty during this meeting, a suggestion that was strongly rebuffed

almost immediately by his attorneys. *See id*. at 110:5; 110:12. Furthermore, the Petitioner revealed that he remained steadfast in his desire to plead despite strong advice by counsel during the approximately thirty-minute long meeting. At the conclusion, the Petitioner acknowledged that there was no guaranteed sentence in exchange for his plea but that his counsel would meet with him at a later date after he had time to think about his decision. *See id*. at 112:20-22; 113:1-4.

Attorneys Hardiman and Capraro met with the Petitioner a few weeks after the May 8th or 9th meeting again in the dining room of C mod. It is Petitioner's contention that this meeting is when he actually decided to enter a plea in the matter, despite both attorneys advising that "it wasn't a good idea" but counsel "ultimately [ ] just went along." *Id*. at 116:5-6. During this meeting, Petitioner acknowledges that his counsel informed him that "[he] would be admitting to the fact that factors could be fulfilled with life without parole" but contends that he did not ask any questions relating to this admission because he did not believe that life without parole was actually possible. *Id.* at 117:18-19; *see id*. at 118:2-6.

Petitioner's counsel again met with him "probably a couple of weeks" after the second meeting took place in the C mod kitchen, this time in the cellblock, immediately prior to his change of plea hearing. Attorney Hardiman reviewed the change of plea paperwork with Petitioner, who consented to the change and proffered no questions to his attorney relating to the possible ramifications of such an action. Moreover, the Petitioner testified he had no conversations with his counsel on this day regarding his alleged symptoms of his medication despite feeling "detached, in my own world." *Id*. at 124:10-12.

In relation to a competency evaluation, Attorney Capraro testified at no time did it appear that the Petitioner was laboring or appeared disoriented. Rather, Attorney Capraro indicated that he and Attorney Hardiman met with Petitioner for over an hour on April 15, 2008, two days before

the change of plea. When questioned about this meeting at the PCR hearing, the following took place:

> "[Prosecutor]: Did he appear foggy or unable to answer your questions?
> "[Attorney Capraro]: No.
> "[Prosecutor]: Did he slur his words at all?
> "[Attorney Capraro]: No.
> "[Prosecutor]: Did he appear unable to focus on the conversations you were having with him?
> "[Attorney Capraro]: No.
> "[Prosecutor]: Did he seem disoriented?
> "[Attorney Capraro]: Absolutely not.
> "[Prosecutor]: Did he seem sedated to you?
> "[Attorney Capraro]: No." (PCR Hr'g Tr. 197:18-198:1-4, Nov. 27, 2018.)

Attorney Capraro would further elaborate that on April 17, 2008, the day of Petitioner's change of plea hearing, he and Attorney Hardiman again met with Petitioner in the cell block prior to the hearing. Attorney Capraro indicated that the Petitioner did not appear sedated or illustrated any behavior which would give him pause in relation to the Petitioner's competency. Furthermore, Attorney Capraro indicated he did not observe anything which would give him pause or raise competency concerns during the change of plea proceeding itself "[b]ecause if we did, after 50 years of doing this, Hardiman and I, we would have put a stop to it in mid plea." *Id*. at 205:23-25.

The Court is satisfied that Petitioner's trial counsel fell within an objective standard of reasonableness. Petitioner had the assistance of two seasoned trial attorneys, both particularly attuned to signs of competency problems. Moreover, the Court is confident that Petitioner's trial counsel met and observed Petitioner on numerous occasions prior to the change of plea hearing, including the morning of, and did not notice any outward indication that Petitioner was laboring or suffering from any type of mental impairment which would necessitate a competency hearing. Furthermore, the Petitioner was evaluated by multiple psychiatric practitioners beginning in April

2007 with Dr. Penn, continuing with Mr. Tirocchi the day of his change of plea, again with Dr. Penn in April of 2008, and finally with Ms. Hagan in May of 2008. None of the aforementioned practitioners indicated doubt relating to the Petitioner's ability to understand the nature of the proceedings, cooperate in his defense, or appreciate the nature of the charges. Rather, said practitioners uniformly indicated the Petitioner's clear focus and desire to change his plea in order to spare the family of the victim from trial. Based upon multiple interactions with Petitioner by his trial counsel and absent any evidence which tends to indicate outward signs of an issue of competency, the Court is satisfied that trial counsel acted reasonably in not requesting a competency evaluation. *See State v. Buxton*, 643 A.2d 172, 176 (R.I. 1994) (quoting *Commonwealth v. Banks*, 521 A.2d 1, 13, *cert. denied*, 484 U.S. 873 (1987)) ('"Lack of cooperation and the failure to heed counsel's advice and/or the failure to agree with counsel's strategy are certainly not to be equated with and do not establish legal incompetency.'").

Even assuming that Petitioner's trial counsel performance was deficient by not seeking a competency hearing, Petitioner retains the burden to show not only that the trial court would have ordered a reevaluation, but also that there was '"a reasonable probability that the defendant would have been found incompetent to stand trial had the issue been raised and fully considered."' *Stanley v. Cullen*, 633 F.3d 852, 862 (9th Cir. 2011) (quoting J*ermyn v. Horn*, 266 F.3d 257, 283 (3d Cir. 2001)).

Here, the Court is satisfied that the failure to raise the issue of competency did not prejudice the Petitioner. It is reasonable to assume that if trial counsel or the trial justice had observed any indications of incompetency, that an evaluation would have been ordered. Attorney Capraro made such clear when he testified that "we would have put a stop to it in mid plea" if Petitioner had illustrated indictors he was laboring or incompetent. (PCR Hr'g Tr. 205:24-25, Nov. 27, 2018.)

However, this Court is confident that even after an evaluation, the Petitioner would be found competent to stand trial based upon the record from that time. *See State v. Owen*, 693 A.2d 670, 671-72 (R.I. 1997). As previously stated, the record is silent as to any outward indications that could provide pause to multiple medical professionals, seasoned trial attorneys, and the trial justice. Moreover, Petitioner repeatedly indicated at the time of the change of plea that it was his decision and against the advice of his attorneys. Further, Petitioner confirmed that it was his decision at his PCR hearing, testifying that he believed his change of plea would result in a lesser sentence. Absent necessary indicators of competency issues in the record, this Court defers to the finding by the trial justice at Petitioner's plea. *See Thomas*, 794 A.2d at 994 (citing *Buxton*, 643 A.2d at 175) (finding that a trial justice's decision regarding competency will not be disturbed unless there is evidence of a clear abuse of discretion). Accordingly, the Court is satisfied that the Petitioner also fails to meet his burden on the second prong of *Strickland*.

2

Failure to Advise Court of Medications

The Petitioner next alleges that his trial counsel failed to request updated medical records from the Rhode Island Department of Corrections prior to the change of plea hearing and as a result were unaware of the medications he was taking. Consequently, Petitioner now asserts his trial counsel rendered ineffective assistance of counsel by failing to advise the Court before or during the change of plea that he was receiving "powerful anti-psychotic medications."

Here, the Court is satisfied that trial counsel requested and obtained necessary medical records in preparation of Petitioner's case and subsequent plea and sentencing hearings. Counsel obtained Petitioner's records, pursuant to releases executed by the Petitioner on two occasions, prior to Petitioner's entry of plea in April 2008, and before the sentencing in June 2008. *See Parkus*

v. Bowersox, 157 F.3d 1136, 1139-40 (8th Cir. 1998) (holding that counsel's failure to obtain medical records did not fall below reasonableness standards after conducting thorough search even though counsel did not seek records at appropriate facility). Upon review, the April 2007 records indicate a number of medications which Petitioner had been prescribed since the start of his incarceration up until the date of the request. Subsequent to the April 2007 records request, trial counsel met with Petitioner on at least two occasions prior to his change of plea. During said interactions, Attorney Capraro indicated that "[t]here was none of that" when testifying whether he had observed any physical manifestations, trembling or twitching, which could indicate side effects of medication or instability on the part of the Petitioner. (PCR Hr'g Tr. 198:11-14, Nov. 27, 2018); s*ee Wiggins v. Smith*, 539 U.S. 510 (2003) (holding on any claim of ineffective assistance of counsel based on failure to investigate, particular decision not to investigate must be directly assessed for reasonableness in all circumstances, applying heavy measure of deference to counsel's judgments).

Moreover, the Court takes note that the Petitioner admitted that he did not inform his attorneys prior to pleading guilty that he was taking Haldol, Cogentin and Effexor. Petitioner continued, "I would assume they didn't," when asked if his attorneys were aware of his medication at the time he entered his plea. (PCR Hr'g Tr. 128:21, Nov. 15, 2018); *c.f. Jolly*, 59 A.3d at 139 (holding that defendant's counsel who "was well aware" of defendant's medications but did not inform the Court acted reasonably considering all the circumstances). In addition, the Petitioner indicated his desire to enter a plea from "day one" and expressed such wishes to Attorney Hardiman prior to receiving Haldol. (PCR Hr'g Tr. 136:14-22, Nov. 27, 2018.) Moreover, even assuming Petitioner's trial counsel was aware of the medications at the time of the plea hearing and informed the Court, it is still within the discretion of the Court after examination to determine

the Petitioner was competent to enter his plea. As such, it is presumptive to interpret a failure to inform the Court of information unknown to trial counsel as an objectively unreasonable act on their part. Furthermore, the Court is satisfied that the trial justice, two veteran attorneys, multiple doctors, and mental health professionals all agreed that Petitioner showed no outward indications of incompetence and was, in fact, competent to stand trial or enter his plea. Accordingly, the Court places no weight in the assertion that trial counsel was deficient in not requesting more up-to-date medical records and thus failing to inform the Court of the medications used by the Petitioner.

Again, even assuming trial counsels' representation fell below an objectively reasonable standard by not informing the Court of Petitioner's medications, the Court does not believe the Petitioner makes the appropriate showing of prejudice required by the second *Strickland* prong. Specifically, informing the Court that Petitioner was on certain medications does not on its own indicate that Petitioner would not be found competent had a hearing occurred. Rather, it would constitute but a factor in the Court's determination that Petitioner could understand the nature of the charges, appreciate the purpose of the proceedings, and assist in his defense. Accordingly, this Court is satisfied there is not a reasonable probability that the Petitioner would be found incompetent had the issue of the medications been raised during the plea hearing nor will it disturb the finding of the trial justice absent abuse of discretion. *See Buxton*, 643 A.2d at 175.

3

Failure to Raise Impact of Medications on Petitioner's Competency

Next, the Petitioner asserts that trial counsel were ineffective because their ignorance regarding Petitioner's medication regimen caused them to overlook the effect of those medications on Petitioner's competency to plead guilty. "When counsel has reason to question his client's competence to plead guilty, failure to investigate further may constitute ineffective assistance of

counsel." *United States v. Howard*, 381 F.3d 873, 881 (9th Cir. 2004). Moreover, "[a] fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." *Strickland*, 466 U.S. at 689. As such, "'scrutiny of counsel's performance must be highly deferential.'" *Lynch v. State*, 13 A.3d 603, 606 (R.I. 2011) (quoting *Strickland*, 466 U.S. at 689).

Here, the Court believes that Petitioner's trial counsel again acted reasonably, and his representation did not fall within the range of ineffective counsel. *See Strickland*, 466 U.S. at 690. The Court is satisfied that trial counsel requested Petitioner's medical records during preparation of the case. Accordingly, the opinions and observations contained in said records indicate that the Petitioner retained "mostly intact cognitive functioning, with only mild difficulties on aspects of memory." (Tremont Report 4, Jan. 11, 2007.) Furthermore, Petitioner's "intellectual abilities are generally within the average range," and he is "functioning quite well from a cognitive perspective." *Id*. Based on these reports, the Court finds assertions that trial counsels' alleged ignorance caused them to overlook their effect on competency unpersuasive. Rather, the Court believes the fact that Petitioner was prescribed Haldol only seven days prior to his change of plea is of no moment after his continued assertions of his desire to plead guilty "from day one," which predates the medication. The Court acknowledges that the Petitioner was taking certain medications other than Haldol during the pendency of the plea, but this fact alone should not distort the views held by medical professionals and veteran attorneys when no outward signs of competency issues were present.

Again, even assuming trial counsels' representation was ineffective by their failing to investigate and understand the effect of Petitioner's medication on his competency, the Court is

satisfied that this alleged ineffectiveness of counsel did not rise to the level of prejudice required by the second prong of *Strickland*.

4

Failure to Advise Petitioner Regarding Sex Offender Registration

The Petitioner asserts that trial counsel was ineffective because they failed to inform him that he would have to register as a sex offender under Rhode Island law as a consequence of his plea. Conversely, the State contends that registration is a collateral consequence of the Petitioner's plea thus falling outside the disclosures required by Petitioner's trial counsel.

Even assuming arguendo that the imposition of sex offender registration is a direct consequence, this Court is unpersuaded that Petitioner's counsels' failure to advise him of said requirement resulted in actual prejudice under *Strickland*. In the case of a plea, '"the defendant must demonstrate a reasonable probability that but for counsel's errors, he or she would not have pleaded guilty and would have insisted on going to trial . . . ."' *Neufville*, 13 A.3d at 610-11 (quoting *Figueroa*, 639 A.2d at 500).

Here, the Court believes that the Petitioner repeatedly and continually illustrated a desire to plead guilty in the buildup to his change of plea hearing. The Court will not rehash the specific instances of such as discussed *supra*. Furthermore, claims of ineffectiveness of counsel "must be established by legally competent evidence. Mere unfounded claims and unsupported charges of ineffectiveness are of no avail." *State v. Turley*, 113 R.I. 104, 109, 318 A.2d 455, 458 (1974). Accordingly, the Court fails to find any instances in the record, including at Petitioner's most recent PCR hearings, which evidence any hesitancy or concern relating to his registration as a sex offender. Indeed, registration as a sex offender upon release pales in comparison to the underlying guilty plea and subsequent life sentence which was imposed.

The Court reiterates that the Petitioner faced three serious charges—murder, first degree child molestation, and kidnapping of a minor—yet was adamant about entering a guilty plea and only now contends that sex offender registration may have changed his mind about entering his plea. As such, the Court is unpersuaded that had trial counsel informed Petitioner of the requirement to register as a sex offender, he would have changed his plea. Accordingly, even assuming arguendo that sex offender registration is a direct consequence of a plea, Petitioner has failed to meet his burden illustrating his decision to plead guilty would have been different had he known of the registration requirement. *See State v. Cochrane*, 443 A.2d 1249, 1251 (R.I. 1982).

5

Failure to advise Petitioner regarding the Community Supervision Statute

Lastly, the Petitioner asserts that his trial counsel was ineffective because they failed to inform him that his plea in relation to Count II would necessitate the imposition of the community supervision parole requirements upon a possible release from incarceration. Having determined that imposition of the community supervision statute is a direct consequence of Petitioner's plea, the failure to apprise the Petitioner of this consequence must necessitate a finding that his trial counsel's failure constitutes deficient performance under *Strickland*. This is buttressed by holdings in other jurisdictions which have found that a failure to inform a defendant about a community supervision parole requirement constitutes deficient performance because the requirements act as "an additional part of a defendant's sentence." *Calvert v. State*, 342 S.W.3d 477, 490 (Tenn. 2011) (finding ineffective assistance of counsel when counsel did not advise defendant of the statute and defendant testified this would have altered his decision making); *State v. Smullen*, 96 A.3d 317, 322 (N.J. Super. Ct. App. Div. 2014) (finding counsel's failure to alert defendant to the relevant supervision statute prior to entry of plea amounted to deficient performance.) Here, the record is

devoid of any indication that Petitioner's trial counsel informed him of the community supervision requirements accompanying Count II prior to the entry of his plea. Accordingly, this misstep by counsel represents deficient performance.

Next, the Court must determine whether the petitioner "would have not entered a guilty plea and would have instead proceeded to trial were it not for the attorney's errors." *Hassett*, 899 A.2d at 434. Here, the Court is satisfied the Petitioner repeatedly indicated his desire to plead guilty to all three counts prior to the entry and acceptance of the pleas. Furthermore, the Court notes the satisfaction and acceptance by the Petitioner of the pleas and subsequent sentences to multiple mental health professionals.

The record repeatedly indicates that Petitioner's seasoned trial counsel advised him that he should not plea to the charges levied against him and proceed to trial. Despite these attempts, Petitioner remained adamant that he enter guilty pleas, even in the face of a possible sentence of life without parole on Count I, and life with the possibility of parole on Counts II and III. Accordingly, the Court is satisfied that the possibility of the imposition of those sentences pales in comparison to the lifetime monitoring that accompanies a plea and/or conviction for first degree child molestation and its accompanying community supervision statutes. Indeed, the imposition of lifetime community supervision which includes electronic monitoring, the possibility of additional conditions of parole, and the possibly of additional jail time for supervision violations, logically implies that an individual has served their sentenced period of incarceration and has returned to the general populace. In light of this, the Court is satisfied that the Petitioner has failed to demonstrate that but for his counsels' ineffective representation, he would not have entered a plea and proceeded to trial.

Therefore, this Court finds the repeated representations of the desire to plead guilty to all three counts and the severe sentences which could possible accompany them indicates that the Petitioner had no intention to proceed to trial. Accordingly, the Court finds that the Petitioner has failed to demonstrate that his attorneys' actions prejudiced his defense.

IV

Conclusion

After reviewing the evidence before it, this Court concludes that the Petitioner's guilty pleas for Count I and Count III were entered in compliance with Rule 11's mandates and comport with Constitutional requirements and must stand. The Court further concludes that the Petitioner was not apprised that the community supervision statute would be mandatorily imposed as a result of his guilty plea for Count II, thus his plea to this charge was not knowing and voluntary. Accordingly, Petitioner's plea for Count II is vacated, and the matter is remanded. In addition, the Court is satisfied that Petitioner's trial counsel rendered effective assistance of counsel under *Strickland* in relation to Counts I and III, and those claims are denied. The Court declines to address the ineffective assistance claim regarding Count II at this time as the plea has been vacated on other grounds.

Counsel shall submit the appropriate order for entry.

RHODE ISLAND SUPERIOR COURT

Decision Cover Sheet

TITLE OF CASE:	Joshua Davis v. State of Rhode Island
CASE NO:	PM-2010-4824
COURT:	Providence County Superior Court
DATE DECISION FILED:	October 16, 2019
JUSTICE/MAGISTRATE:	McGuirl, J.
ATTORNEYS:	
For Plaintiff:	Judith Crowell, Esq.
For Defendant:	Jeanine P. McConaghy, Esq.; J. Patrick Youngs, III, Esq.