STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

KENT, SC. **SUPERIOR COURT**

[FILED: July 3, 2019]

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ROBERT **FURLONG**	:	
	:	**C.A. No. KM-2018-0320**
v.	:	
	:	
STATE OF RHODE ISLAND and the RHODE ISLAND PAROLE BOARD	:	

DECISION

TAFT-CARTER, J. Before this Court for decision is Robert Furlong's (Petitioner) application for postconviction relief (Application). Petitioner asserts that he is entitled to postconviction relief for the following reasons: (1) his plea of *nolo contendere* was not knowing and voluntary; (2) his attorney rendered constitutionally ineffective assistance of counsel; (3) the community supervision statute violates the separation of powers; (4) the community supervision statute violates due process; and (5) the community supervision statute violates the Double Jeopardy Clause. Jurisdiction is pursuant to G.L. 1956 § 10-9.1-1.

I

Facts and Travel[1]

In June 2011, a 12-year-old girl disclosed that her father, the Petitioner, had sexually assaulted her on numerous occasions. Viol. Tr. 10:16-31:3. Following further police

[1] This Court gleans the following facts from the transcript of the probation violation hearing on October 24-25, 2012 (Viol. Tr.); the transcript of the plea hearing on February 12, 2014 (Plea Tr.); the transcript of the post-conviction relief hearing on September 17, 2018 (PCR Tr.); and the submissions of the parties.

investigation, Petitioner was charged with two counts of second degree child molestation in violation of G.L. 1956 §§ 11-37-8.3 and 11-37-8.4.[2] Viol. Tr. 31:9-47:25.

On February 11, 2014, Petitioner's case proceeded to trial before this Court. A jury was empaneled. On the morning of February 12, 2014, the State of Rhode Island (State) and Petitioner entered into plea negotiations. The Petitioner eventually agreed to enter a plea of *nolo contendere* to two counts of second degree child molestation. The Petitioner was sentenced to twenty years at the Adult Correctional Institutions, fifteen years to serve, the balance suspended with probation.

The Court conducted a plea hearing during which Petitioner confirmed that he had discussed the plea form with his attorney and understood its terms. Plea Tr. 2:3-3:13. During the plea colloquy, Petitioner affirmed that he understood the charges against him and further understood that he was waiving various constitutional rights. Plea Tr. 5:8-9:19. The plea colloquy then proceeded as follows:

> "THE COURT: . . . Now, sir, with respect to K2-2012-0l6lA, have any promises been made to you by your attorney, the police, counsel for the State or this Court other than the fact that if I accept your plea of nolo contendere or guilty, I have agreed to sentence you as follows: as to Counts I and II, second-degree child molestation, 20 years Adult Correctional Institution, 15 years to serve, five suspended with probation, retroactive to June 30th, 2011, sex offender registration as required by law, both counts concurrent with each other, concurrent with the sentence presently being served and concurrent with K2-2011-0853A? Specific conditions of this plea is that you shall engage in and participate in sex offender and substance abuse counseling. Sir, is that your understanding?
>
> "THE DEFENDANT: Yes.
>
> "THE COURT: Is that what you want to do today?
>
> "THE DEFENDANT: Absolutely.

[2] Petitioner's underlying criminal case is *State v. Furlong*, K2-2012-0161A.

"THE COURT: There is also a no contact order with [the victim].

"THE DEFENDANT: Yes." Plea Tr. 16:3-24.

The Court then accepted Petitioner's plea of *nolo contendere* to two counts of second degree child molestation. Plea Tr. 17:8-12. Petitioner was sentenced to serve the accepted term with both counts to be served concurrently. Plea Tr. 19:5-13. The Court also ordered Petitioner to participate in sex offender counseling and substance abuse counseling, and to have no contact with his daughter, the victim. Plea Tr. 19:14-17.

In 2016, as Petitioner was nearing eligibility for parole, a Parole Administrator presented Petitioner with a document entitled "Notice and Terms of Community Supervision"[3] and requested

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[3] The document provided, in pertinent part,

> "In accordance with Chapter 8, Title 13, of the General Laws of 1956, as amended, a person convicted of . . . second degree child molestation pursuant to § 11-37-8.3 *shall be subject to Community Supervision upon the person's completion of any prison sentence, suspended sentence, and/or probationary term imposed as a result of that conviction.* Said person under community supervision shall be under the jurisdiction, supervision and control of the Rhode Island Parole Board in the same manner as a person under parole supervision. The board is *authorized on an individual basis to establish any conditions of community supervision that may be necessary* to ensure public safety as well as to promote the rehabilitation of the person.
>
> "**NOW THEREFORE**, the Parole Board of the State of Rhode Island, acting in its capacity as the community supervision board, hereby imposes upon the aforesaid offender the following the [sic] terms and conditions . . . . In the case of an offender convicted of second degree child molestation, the term of the original sentence and the term of community supervision shall not exceed thirty (30) years.
>
> TERMS AND CONDITIONS
>
> "1. Observe the laws of the State of Rhode Island and of the United States and of every jurisdiction . . .

the Petitioner sign it. The document provided that the Parole Board of the State of Rhode Island (Parole Board), acting in its capacity as the community supervision board, "hereby imposes upon the aforesaid offender the following the [sic] terms and conditions to commence upon his/her completion of any prison sentence, suspended sentence, and/or probationary term imposed as a result of his/her conviction." *Id.* Next, the document stated that for persons convicted of second degree child molestation "the term of the original sentence and the term of community supervision shall not exceed thirty (30) years." *Id.* The document then listed nine terms and conditions that Petitioner would be required to comply with as part of his community supervision. *Id.* Petitioner refused to sign the document asserting that according to the document, he would be subjected to

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> "2. Do not leave the State or Rhode Island without the written permission of your parole officer.
> "3. Reply promptly to any communication from the Probation & Parole division . . . .
> "4. Carry out all instructions of your parole officer, report as directed and permit him/her to visit your residence and place of employment whenever he/she deems such visits necessary.
> "5. Immediately inform your parole officer if you are arrested or charged with any criminal offense.
> "6. No ownership or possession of firearms or weapons of any description.
> "7. No contact with minors unless expressly approved by your parole officer.
> "8. Comply with all sex offender registration requirements as provided by law.
> "9. Sex offender specific counseling with a recognized treatment provider in the field and compliance with all conditions thereof.
>
> "Pursuant to Rhode Island Law, *these terms and conditions may be revised, altered, and amended by the Parole Board at any time. Any violation of the conditions of community supervision will result in a separate offense* and, upon conviction, shall result in a sentence of no more than one (1) year in prison." Pet'r's Mem. Supp. Appl. Ex. B. (emphasis added).

community supervision for up to thirty years—ten years more than the original sentence imposed by this Court.

On March 20, 2018, Petitioner filed the instant Application challenging the imposition of community supervision on five grounds. Petitioner asserts that he is entitled to postconviction relief for the following reasons: (1) he received ineffective assistance of counsel as his counsel did not inform him that he would be subject to community supervision, (2) his plea of *nolo contendere* was not knowing and voluntary as he was not informed that he would be subject to community supervision, (3) the imposition of community supervision violates his due process rights, (4) the imposition of community supervision under G.L. 1956 §§ 13-8-30 and 13-8-32 constitutes double jeopardy, and (5) §§ 13-8-30 and 13-8-32 violate the separation of powers doctrine. Appl. 4.

In response, the State asserts that Petitioner was rendered effective counsel because community supervision is a collateral consequence of his plea, and thus his attorney was not required to advise him of it. State's Answer to Appl. 5. Additionally, the State maintains that even if counsel's performance was deficient, Petitioner is not entitled to relief because he cannot demonstrate prejudice. *Id.* at 5-6. As the State maintains that community supervision is merely a collateral consequence of his plea, the State also asserts that Petitioner's plea was knowing and voluntary. *Id.* at 6. Next, the State contends there is no due process violation, either substantive or procedural, because the General Assembly's actions in enacting the statute were not arbitrary or unreasonable. *Id.* at 7-8. The State also asserts there is no double jeopardy violation because community supervision is a collateral consequence of his plea, and thus he was not resentenced for the same conviction. *Id.* at 8. Finally, the State maintains that the statute does not violate the separation of powers because the General Assembly is entitled to define criminal offenses and

their sentences, which includes community supervision for individuals convicted of child molestation offenses. *Id.* at 9.

II

Standard of Review

In Rhode Island, "[p]ost-conviction relief is available to a defendant convicted of a crime who contends that his [or her] original conviction or sentence violated rights that the state or federal constitutions secured to him [or her]." *Otero v. State*, 996 A.2d 667, 670 (R.I. 2010). A defendant may petition for postconviction relief by asserting:

> "(1) That the conviction or the sentence was in violation of the constitution of the United States or the constitution or laws of this state;
>
> "(2) That the court was without jurisdiction to impose sentence;
>
> "(3) That the sentence exceeds the maximum authorized by law, or is otherwise not in accordance with the sentence authorized by law;
>
> "(4) That there exists evidence of material facts, not previously presented and heard, that requires vacation of the conviction or sentence in the interest of justice;
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> "(5) That his or her sentence has expired, his or her probation, parole, or conditional release unlawfully revoked, or he or she is otherwise unlawfully held in custody or other restraint; or
>
> "(6) That the conviction or sentence is otherwise subject to collateral attack upon any ground of alleged error heretofore available under any common law, statutory or other writ, motion, petition, proceeding, or remedy;
> may institute, without paying a filing fee, a proceeding under this chapter to secure relief." Sec.10-9.1-1(a)(1)-(6).

"[A]n applicant bears the burden of proving, by a preponderance of the evidence, that he [or she] is entitled to postconviction relief." *Burke v. State*, 925 A.2d 890, 893 (R.I. 2007). "Generally, 'in the case of someone who has entered a plea of *nolo contendere*, [t]he sole focus of

an application for post-conviction relief . . . is the nature of counsel's advice concerning the plea and the voluntariness of the plea.'" *State v. Gibson*, 182 A.3d 540, 552 (R.I. 2018) (quoting *Guerrero v. State*, 47 A.3d 289, 300 (R.I. 2012)). Although a *nolo contendere* plea "'waives all nonjurisdictional defects,'" it does not prevent the petitioner from asserting that an applicable statute is unconstitutional. *Id.* at 553 (quoting *Torres v. State*, 19 A.3d 71, 79 (R.I. 2011)).

III

Analysis

The United States Supreme Court has recognized that "[s]ex offenders are a serious threat in this Nation." *McKune v. Lile*, 536 U.S. 24, 32 (2002). Most concerning is the fact that "the victims of sexual assault are most often juveniles." *Id.* A majority of states have concluded that "the individual rights of sex offenders are secondary to the safety of society at large." Eric M. Dante, *Tracking the Constitution—The Proliferation and Legality of Sex-Offender GPS-Tracking Statutes*, 42 SETON HALL L. REV. 1169, 1192 (2012). Furthermore, there is a high rate of recidivism among convicted sex offenders, and they are dangerous as a class. *McKune*, 536 U.S. at 33. The risk of recidivism posed by sex offenders is "frightening and high." *Id.* at 34. As a result, many legislatures, including the Rhode Island General Assembly, have enacted statutes that include provisions for more extensive monitoring for persons convicted of child molestation offenses. *See* §§ 13-8-30 through 13-8-33.

A person convicted of first or second degree child molestation "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." Sec. 13-8-30. If a person is convicted of first degree child molestation, he or she is subject to community supervision and electronic global positioning system (GPS) monitoring for

life. *Id.* A person convicted of second degree child molestation is subject to community supervision so long as "the term of the original sentence imposed and the term of community supervision shall not exceed thirty (30) years." *Id.* While a person is under community supervision, he or she is "under the jurisdiction, supervision and control of the parole board in the same manner as a person under parole supervision." Sec. 13-8-32(b).

The parties both interpret the statute[4] to find it is the Parole Board which imposes the community supervision for the individual defendant. If the sentencing judge imposes the community supervision, the consequence would be direct. Furthermore, Petitioner would then not have standing to challenge the constitutionality of the community supervision statutes because he was not sentenced to it. However, if the Parole Board is authorized to impose community supervision after the completion of the Petitioner's sentence, then the consequence is less clear with respect to direct and collateral effect. Thus, the threshold inquiry for this Court is who imposes community supervision[5] under §§ 13-8-30 and 13-8-32.

When interpreting a statute, this Court's "'ultimate goal is to give effect to the purpose of the act as intended by the Legislature.'" *Rose v. State*, 92 A.3d 903, 906-07 (R.I. 2014) (quoting *Swain v. Estate of Tyre ex rel. Reilly*, 57 A.3d 283, 289 (R.I. 2012)). It follows that when statutory

[4] Based on their submissions to the Court, both parties interpret §§ 13-8-30 and 13-8-32 to mean that the Parole Board imposes a sentence of community supervision after the trial justice has already imposed the initial sentence for the underlying conviction. However, for the reasons discussed below, this Court finds this issue requires greater discussion.

[5] Both parties rely on the language of the Notice and Terms of Community Supervision as evidence that the Parole Board imposes community supervision toward the end of a person's release from prison. However, a document provided by the Parole Board is not binding upon this Court. *See Lerner v. Gill*, 463 A.2d 1352, 1359 (R.I. 1983) (holding that the Legislature "did not vest the [B]oard with official authority to promulgate rules in interpretation of statutes. . . . [Thus] [i]ts decisions did not have the force of law."). Therefore, this Court will look only to the governing statutes and the canons of statutory construction to determine who is tasked with imposing community supervision.

language '"is clear and unambiguous, this Court must interpret the statute literally and must give the words of the statute their plain and ordinary meanings."' *Id.* at 906 (quoting *State v. Hazard*, 68 A.3d 479, 485 (R.I. 2013)). However, if the statutory language is ambiguous, this Court must seek to '"ascertain the legislative intention from a consideration of the legislation in its entirety, viewing the language used therein in the light, nature, and purpose of the enactment thereof.'" *Hazard*, 68 A.3d at 485 (quoting *State v. Clark*, 974 A.2d 558, 571 (R.I. 2009)). Additionally, this Court will utilize "'our well-established maxims of statutory construction in an effort to glean the intent of the Legislature.'" *In re Proposed Town of New Shoreham Project*, 25 A.3d 482, 505 (R.I. 2011) (quoting *Town of Burrillville v. Pascoag Apartment Assocs., LLC*, 950 A.2d 435, 445 (R.I. 2008)).

While the statute is clear in its mandate of imposing community supervision upon any person convicted of first or second degree child molestation, it is unclear in defining who imposes the supervision. *See* § 13-8-30. It is clear that judges impose sentences. *See State v. Monteiro*, 924 A.2d 784, 794 (R.I. 2007) (finding that it is the judicial task to impose the sentence authorized by the Legislature). However, pursuant to § 13-8-32(a), "[t]he parole board shall impose terms and conditions for [those placed on community supervision] within thirty (30) days of sentencing." Furthermore, the Parole Board has discretion to revise, alter, and amend the terms and conditions for sentences at any time. *Id.* While § 13-8-32(a) clearly provides that the parole board determines the terms and conditions of community supervision, unlike the community supervision statutes in other jurisdictions, it does not answer the question of who imposes the community supervision. *Compare* § 13-8-32, *with* McKinney's Penal Law § 70.45 (providing that "[w]hen a court imposes a determinate sentence it shall in each case state . . . an additional period of post-release supervision"); N.R.S. § 176.0931 (providing that "the court shall include in sentencing . . . a special

sentence of lifetime supervision"); N.J.S.A. § 2C:43-6.4(a) (providing that "a judge imposing sentence . . . shall include . . . a special sentence of parole supervision for life"); and T.C.A. § 39-13-524(b) (requiring the judgment of conviction to "include that the person is sentenced to community supervision for life").

Moreover, the phrase "of sentencing" in § 13-8-32(a) has a dual interpretation. The language could be interpreted to mean the original sentencing by the sentencing justice immediately following conviction or the sentence of community supervision imposed by the Parole Board at the completion of the initial sentence. For these reasons, this Court finds that the language of §§ 13-8-30 and 13-8-32 is ambiguous as to who should impose community supervision, and thus, it will look to the cannons of statutory construction to determine the Legislature's intent and purpose.

Based on the language of the statutes, it appears that the Legislature intended for community supervision to be a sentence imposed separately from the initial criminal sentence imposed by the trial judge. First, the Legislature uses the word "and" when providing the maximum number of years a person convicted of second degree child molestation is subject to community supervision. Sec. 13-8-30. The statute requires that "the term of the *original sentence* imposed *and* the term of community supervision shall not exceed thirty (30) years." (Emphasis added.) It would be reasonable to conclude that if the Legislature intended for the trial justice to impose community supervision at the initial sentencing, the community supervision would be part of the "original sentence" already, and the two sentences would not need to be added together. *See* § 13-8-30. "'[T]he Legislature is presumed to have intended each word or provision of a statute to express a significant meaning, and the [C]ourt will give effect to every word, clause, or sentence, whenever possible.'" *State v. LeFebvre*, 198 A.3d 521, 524 (R.I. 2019) (quoting *Clark*, 974 A.2d

at 571). Here, in order to give effect to the Legislature's use of the words "original sentence" and "and," this Court concludes that community supervision is to be imposed separately from the sentence imposed by the trial justice.

Additionally, prior to June 28, 2006, the second sentence of § 13-8-32(a) read "[t]he parole board shall impose terms and conditions for the sentence within thirty (30) days *prior to the commencement of community supervision*." P.L. 2006, ch. 206, § 5, effective June 28, 2006; P.L. 2006, ch. 207, § 5, effective June 28, 2006 (emphasis added). In 2006, the last phrase of the sentence was amended to read "within thirty (30) days *of sentencing*." *Id.* (emphasis added). Thus, under the previous version of the statute, the Parole Board did not impose the terms and conditions of a person's community supervision until immediately before his or her criminal sentence was ending and the term of community supervision was about to begin. According to the statute, as amended, the Parole Board is required to impose the terms and conditions within thirty days "of sentencing." *See* § 13-8-32(a). If the Legislature intended for the "sentencing" to refer to the sentence imposed by the trial justice upon conviction, the Parole Board would now be required to impose the terms and conditions of community supervision years before community supervision would begin. It is unlikely that the Legislature intended for the Parole Board to impose the conditions of community supervision so long before the term of community supervision actually begins as §13-8-32(b) instructs the Parole Board to establish the conditions "on an individual basis." *See State v. Morrice*, 58 A.3d 156, 160 (R.I. 2013). Accordingly, a more sensical interpretation would be that the Parole Board must impose the terms and conditions of community supervision within thirty days of when the Parole Board itself sentences a person to community supervision upon the completion of his or her criminal sentence.

Furthermore, when viewing the statutory scheme as a whole, as the Court is required to do, it is evident that the Legislature intended for the Parole Board to impose community supervision. *See Billington v. Fairmount Foundry*, 724 A.2d 1012, 1013-14 (R.I. 1999) ("It is well settled that '[i]n construing the provisions of statutes that relate to the same or to similar subject matter, the court should attempt to harmonize each statute with the other so as to be consistent with their general objective scope.'"); *see also In re Brown*, 903 A.2d 147, 149 (R.I. 2006) (providing that "individual sections must be considered in the context of the entire statutory scheme, not as if each section were independent of all other sections"). The Parole Board is given broad authority over the administration of community supervision. *See* §§ 13-8-30 through 13-8-33. It has authority to both impose and amend the terms and conditions of community supervision. *See* § 13-8-32(a). Also, under § 13-8-32(b),

> "[t]he board is authorized on an individual basis to establish any conditions of community supervision that may be necessary to ensure public safety, which may include protecting the public from a person committing a sex offense including child molestation or child kidnapping as well as promoting the rehabilitation of the person." Sec. 13-8-32(b).

Furthermore, the Parole Board is required to terminate a person's community supervision if the person demonstrates that certain conditions are met showing that he or she is no longer a threat to others. *See* § 13-8-32(i). It is also notable that the statute governing community supervision is located in Chapter 8 of Title 13, which is entitled "Parole." The Parole Board is given authority to grant parole to persons sentenced to greater than six months imprisonment, not the trial justice. *See* §§ 13-8-8 and 13-8-9; *see also Skawinski v. State*, 538 A.2d 1006, 1007 (R.I. 1988) ("The Legislature has provided a statutory scheme that creates a parole board and generally empowers the parole board to grant parole to any prisoner within its control upon completion of a specified portion of the sentence imposed.").

Moreover, a contrary interpretation would mean in effect that the trial justice imposes community supervision initially and then has no control over the terms and conditions of community supervision or even whether to terminate community supervision prior to completion. Such an interpretation would be problematic as "the power to reduce the length of a sentence imposed by a justice of the Superior Court is a judicial one [and] may not be exercised by the Legislature, either directly or indirectly." *See Rose*, 92 A.3d at 911; *see also Morrice*, 58 A.3d at 160 ("[U]nder no circumstances will this Court 'construe a statute to reach an absurd result.'"). Therefore, this Court finds that under §§ 13-8-30 and 13-8-32, the Parole Board is responsible for imposing community supervision.

A

Voluntariness of Plea and Due Process

The consideration of Petitioner's due process and involuntary plea claims may be considered as one claim. *See* 16C C.J.S. *Constitutional Law* § 1645 (June 2019 Update) ("Due process embraces a requirement that a guilty plea be made voluntarily and intelligently."). Petitioner asserts that he is entitled to relief because his plea was not made knowingly and voluntarily since he was not informed that as a direct consequence of his plea, he would be subject to community supervision. In response, the State contends that Petitioner's lack of knowledge that he would be subject to community supervision did not render his plea involuntary as community supervision is only a collateral consequence of his plea.

It is well-settled that in order for a plea to comply with constitutional requirements, "a court which accepts a plea of guilty or nolo must determine that the defendant offers the plea voluntarily and intelligently." *State v. Feng*, 421 A.2d 1258, 1266 (R.I. 1980). "Waivers of constitutional rights not only must be voluntary but must be knowing, intelligent acts done with sufficient

awareness of the relevant circumstances and likely consequences." *Brady v. United States*, 397 U.S. 742, 748 (1970). Furthermore,

> "the voluntariness of a plea should not be determined by whether 'a ritualistic litany of the formal legal elements of an offense was read to [a] defendant,' but by examining 'the totality of the circumstances' and determining 'whether the substance of the charge, as opposed to its technical elements, was conveyed to the accused.'" *State v. Williams*, 122 R.I. 32, 39, 404 A.2d 814, 819 (1979) (quoting *Henderson v. Morgan*, 426 U.S. 637, 644 (1976)).

The Fourteenth Amendment made this requirement applicable to the states. *See Williams*, 122 R.I. at 37, 404 A.2d at 818. Rule 11 of the Superior Court Rules of Criminal Procedure, "adopted [] to formalize procedures for attainment of that constitutional requirement[,] requires that the trial court shall not accept a plea of guilty or nolo contendere 'without first . . . determining that the plea is made voluntarily with understanding of the nature of the charge and the consequences of the plea.'" *Feng*, 421 A.2d at 1266-67 (quoting Super. R. Crim. P. 11); *see also Williams*, 122 R.I. at 37, 404 A.2d at 817. Therefore, a plea that is not entered into knowingly and voluntarily constitutes a violation of both due process and Rule 11 entitling an individual to postconviction relief. *See* § 10-9.1-1(a)(1).

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)). At issue is whether the community supervision statute imposing community supervision is a collateral or direct consequence of a sentencing. "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.'" *Beagen*, 705 A.2d at 175 (quoting *Figueroa,* 639 A.2d at 499) (holding that a federal sentencing enhancement imposed based on a state conviction was a collateral consequence to a person's plea in state court because

"the federal criminal justice system is outside the authority or control of a Superior Court justice, or any other agent of the State of Rhode Island"); *see also Cote v. State*, 994 A.2d 59, 63 (R.I. 2010) (holding that the Department of Corrections' refusal to award good time credits or denial of work release was a collateral consequence). Examples of consequences other jurisdictions have held to be collateral include: "ineligibility for public benefits, possible deportation, ineligibility to possess and own a firearm, loss of a business license, mandatory sex offender registration, civil commitment, and sentence enhancement in later convictions." Paisly Bender, *Exposing the Hidden Penalties of Pleading Guilty: A Revision of the Collateral Consequences Rule*, 19 GEO. MASON L. REV. 291, 292 (Fall 2011).

A direct consequence of a plea "is one that definitely, immediately, and largely automatically follows the entry of a plea of guilty, or one which has a definite, immediate, and largely automatic effect on a defendant's punishment or range of punishment." 21 Am. Jur. 2d *Criminal Law* § 599 (May 2019 Update); *see also* 5 Wayne R. LaFave et al., *Criminal Procedure* § 21.4(d) (4th ed. Nov. 2018 Update). Examples of consequences that other jurisdictions have held to be direct include "the maximum sentence to be imposed; any mandatory minimum punishment; the possibility that a sentence will be made consecutive to a prior sentence; the amount of any fine; a term of probation; the fact that the particular offense does not permit a sentence to be suspended; and the imposition of mandatory post-release supervision." 21 Am. Jur. 2d, *Criminal Law* § 599 (May 2019 Update).

The General Assembly has prescribed the offenses which subject a person to community supervision:

> "Notwithstanding any other provision of the general laws to the contrary, any person convicted of . . . 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 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." Sec. 13-8-30.

The terms and conditions of community supervision are detailed in § 13-8-32, which provides in pertinent part:

> "(a) Except as otherwise provided in this section, a person who has been placed on community supervision shall be subject to the provisions of law governing parole as if the person were a parolee. The parole board shall impose terms and conditions for the sentence within thirty (30) days of sentencing. The terms and conditions may be revised, altered, and amended by the parole board at any time."
>
> "(b) A person under community supervision shall be under the jurisdiction, supervision and control of the parole board in the same manner as a person under parole supervision. The board is authorized on an individual basis to establish any conditions of community supervision that may be necessary to ensure public safety, which may include protecting the public from a person committing a sex offense including child molestation or child kidnapping as well as promoting the rehabilitation of the person." Sec. 13-8-32(a)(b).

The issue of whether community supervision is a direct or collateral consequence of conviction is one of first impression in this jurisdiction. Secs. 13-8-30 through 13-8-33. Many other courts, however, have addressed the issue and found it to be a direct consequence of a plea as it is punitive in nature. This finding requires that defendants be made aware of the consequence prior to a plea of guilty or *nolo contendere*. *See State v. Schubert*, 53 A.3d 1210, 1216-17 (N.J. 2012); *Ward v. State*, 315 S.W.3d 461, 474 (Tenn. 2010); *People v. Catu*, 825 N.E.2d 1081, 1082 (N.Y. 2005); *Palmer v. State*, 59 P.3d 1192, 1196-97 (Nev. 2002). It is also notable that Rule 11(b)(1)(H) of the Federal Rules of Criminal Procedure requires the court to inform a defendant of any term of supervised release prior to accepting a plea of guilty or *nolo contendere*.

When reviewing its own community supervision statute, the Tennessee Supreme Court considered whether the language of the statute was "strongly indicative of punitive intent" and whether the statute was punitive in effect.[6] *Ward*, 315 S.W.3d at 474. The court found that the Legislature's use of "in addition to the punishment" and repeated use of the term "sentence" indicated punitive intent and also noted that "[t]he imposition of lifetime supervision and the attendant consequences placed on an individual after having served his or her entire sentence of incarceration and/or regular parole are significant." *Id.* Ultimately, the Tennessee Supreme Court held that "the mandatory sentence of lifetime supervision imposed in addition to other statutorily authorized punishment is a direct and punitive consequence of a plea of guilty . . . . Consequently, trial courts have an affirmative duty to ensure that a defendant is informed and aware of the lifetime supervision requirement prior to accepting a guilty plea." *Id.* at 476.

The New Jersey Supreme Court, when addressing a similar community supervision statute,[7] rejected the state's argument that the community supervision statute was remedial because

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[6] The Tennessee community supervision statute, which is very similar to §§ 13-8-30 and 13-8-32, provides:

> "(a) In addition to the punishment authorized by the specific statute prohibiting the conduct, a person shall receive a sentence of community supervision for life . . .
> . . . .
>
> "(c) The sentence of community supervision for life shall commence immediately upon the expiration of the term of imprisonment imposed upon the person by the court or upon the person's release from regular parole supervision, whichever first occurs.
>
> (d)(1) A person on community supervision shall be under the jurisdiction, supervision and control of the department of correction in the same manner as a person under parole supervision. The department is authorized on an individual basis to establish such conditions of community supervision as are necessary . . . ." T.C.A. § 39-13-524(a), (c) and (d)(1).

[7] New Jersey's community supervision statute reads in pertinent part:

like registration requirements, "the purpose of the statute is to protect members of the community." *Schubert*, 53 A.3d at 1217. The court agreed that public safety was one purpose of the statute but ultimately held the statute to be "punitive rather than remedial at its core." *Id.* The court based its holding on the fact that unlike the registration requirements, the community supervision statute allowed the parole board to impose greater conditions that "significantly restrict[] the manner in which an individual may pursue his daily life."[8] *Id.* at 1216 Relying upon the court's holding in *Schubert*, the Appellate Division of the Superior Court of New Jersey held that "[a] defendant pleading guilty to an offense triggering the requirements of community supervision for life is entitled to expect his attorney to provide him with complete and accurate information concerning the ramifications of this material aspect of a plea agreement." *State v. Smullen*, 96 A.3d 317, 322 (N.J. Super. Ct. App. Div. 2014). Moreover, New Jersey courts have found that '"[c]ommunity supervision for life and its corollary parole supervision for life are merely indefinite forms of parole."' *State v. Hester*, 186 A.3d 236, 243 (N.J. 2018) (quoting *Riley v. New Jersey State Parole Bd.*, 98 A.3d 544, 555 (N.J. 2014)).

> "[A] judge imposing sentence on a person who has been convicted of aggravated sexual assault, sexual assault, aggravated criminal sexual contact . . . shall include, in addition to any sentence authorized by this Code, a special sentence of parole supervision for life . . . in addition to any sentence authorized by Title 2C of the New Jersey Statutes, unless the court finds on the record that the special sentence is not needed to protect the community or deter the defendant from future criminal activity." N.J.S.A. 2C:43–6.4(a).

[8] It should be noted, however, that the New Jersey court based some of its reasoning on the fact that its community supervision statute is located in the sentencing portion of the criminal code. In Rhode Island, the community supervision statute is located under Chapter 8 of Title 13, which governs parole. *See Schubert*, 53 A.3d at 1217.

The Court of Appeals of New York also held that "[p]ostrelease supervision is a direct consequence of a criminal conviction."[9] *Catu*, 825 N.E.2d at 1082 (holding that "[a] direct consequence 'is one which has a definite, immediate and largely automatic effect on defendant's punishment'"). In *Catu*, the court held that the defendant's plea was not knowing and voluntary because he was not advised that, in addition to his sentence of three years imprisonment, "his sentence included a mandatory period of five years' postrelease supervision." *Id.* at 1081. The court reasoned that "[p]ostrelease supervision is significant" as it imposes extensive restrictions such as "a curfew, restrictions on travel, and substance abuse testing and treatment." *Id.* at 1082. Accordingly, in *People v. Estremera*, the court again held that a defendant who was not informed of the term of post-release supervision did not make his guilty plea knowingly, voluntarily and intelligently and thus, his plea should be vacated. 88 N.E.3d 1185, 1186 (N.Y. 2017).

Missouri courts, on the other hand, have held that lifetime parole supervision is a collateral consequence and thus not a required disclosure prior to a defendant's plea. *Allen v. State*, 484 S.W.3d 808, 814 (Mo. App. E.D. 2015). The Missouri lifetime supervision statute mandates that all sexual offenders convicted of specified crimes shall be supervised for life as a result of their conviction. V.A.M.S. § 217.735(1). The statute also includes a mandate that all such offenders be electronically monitored. V.A.M.S. § 217.735(4). In *Allen*, the court found that the imposition

[9] In New York, postrelease supervision is implemented via McKinney's Penal Law § 70.45, which provides in pertinent part:

> "When a court imposes a determinate sentence it shall in each case state not only the term of imprisonment, but also an additional period of post-release supervision as determined pursuant to this article . . . provided, however, that a defendant serving a term of post-release supervision for a conviction of a felony sex offense . . . may be subject to a further period of imprisonment up to the balance of the remaining period of post-release supervision. Such maximum limits shall not preclude a longer period of further imprisonment for a violation where the defendant is subject to indeterminate and determinate sentences."

of lifetime supervision "definitely and largely automatically follows the entry of a guilty plea, [but] it neither enhances [a defendant's] sentence nor affects the range of his punishment and, accordingly, it is a collateral consequence, not a direct one." 484 S.W.3d at 813. The court also held that the "requirement of lifetime parole supervision advances the legitimate, non-punitive, and regulatory purpose of public safety" and that the "statute is not excessive in relation to the regulatory purposes since the supervision requirements 'do not impose substantial physical or legal impediments upon [a supervisee's] ability to conduct his or her daily affairs.'" *Id.* at 814 (quoting *In re R.W.*, 168 S.W.3d 65, 70 (Mo. 2005)).

Rhode Island's community supervision statute is similar to the statutes in Tennessee, New Jersey, and New York in that it is more punitive in nature. Like Tennessee's community supervision statute, Rhode Island's statute also refers to community supervision more than once as a "sentence," and as being "in addition to any *other penalty* imposed." Secs. 13-8-30 and 13-8-32 (emphasis added); *see also Ward*, 315 S.W.3d at 473. Such language indicates that the Legislature intended community supervision to be an additional punishment for persons convicted of child molestation offenses. *Id.* at 474. Black's Law Dictionary defines "sentence" as "[t]he judgment that a court formally pronounces after finding a criminal defendant guilty; the *punishment* imposed on a criminal wrongdoer." *Sentence* (14c), Black's Law Dictionary (10th ed. 2014) (emphasis added). Moreover, "penalty" is defined as "*[p]unishment* imposed on a wrongdoer, usu[ally] in the form of imprisonment or fine." *Penalty* (15c), Black's Law Dictionary (10th ed. 2014) (emphasis added). Missouri's community supervision statute, which was held to be a collateral consequence, does not contain such punitive language. *See* V.A.M.S. § 217.735. Thus, as the Legislature intended for the primary purpose of community supervision to be

providing additional punishment for persons convicted of child molestation, community supervision should be considered a direct consequence of Petitioner's plea.

Additionally, similar to the statutes in New Jersey and New York, Rhode Island's community supervision statute allows the Parole Board to impose significant restrictions on a person's ability to participate in society. *See* §§ 13-8-30 and 13-8-32. Section 13-8-32(b) authorizes the Parole Board "to establish *any* conditions of community supervision that may be necessary to ensure public safety." In the Notice and Terms of Community Supervision presented to Petitioner, the Parole Board sought to impose conditions requiring Petitioner to obtain written permission before leaving the state, to report to and allow the parole officer to enter Petitioner's residence or place of employment at any time, to obtain permission before having any contact with minors, and to participate in sex offender counseling. *See* Pet'r's Mem. Supp. Appl. Ex. B. These conditions are very similar to the conditions of supervision the court in *Catu* found to be significantly restrictive. *See* 825 N.E.2d at 1082. Here, the requirements of community supervision are more extensive than the registration and notification requirements that have been held to be only collateral consequences.[10] *See* § 11-37.1-4; *see also Schubert*, 53 A.3d at 1216-17. Moreover, the Parole Board is authorized to impose "*any* conditions" it deems necessary to public safety. *See* § 13-8-32(b). Thus, it can impose even greater conditions than those listed on the document given to Petitioner. Therefore, this Court finds that community supervision is a direct consequence due to the significant impact it places on a person's daily life. *See Schubert*, 53 A.3d at 1216-17.

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[10] The restrictions for persons convicted of first degree child molestation are even more significant as they are required to be monitored by an active GPS system for life. *See* § 13-8-30.

Further, unlike the terms and conditions of parole that last only as long as the original sentence imposed by the trial justice, community supervision can extend well beyond the original sentence imposed. Under § 13-8-30, a person convicted of second degree child molestation is subject to community supervision for any period of time so long as the term of the original sentence and the term of community supervision do not exceed thirty years. Here, Petitioner was sentenced to twenty years imprisonment, with fifteen years to serve, the balance of five years suspended with probation. Thus, he is subject to community supervision for at least ten years beyond his original sentence of twenty years. When Petitioner pled *nolo contendere* to second degree child molestation, he was not aware that as a result of his plea, he would be required to comply with the extensive requirements imposed by the Parole Board beyond the twenty-year sentence to which he agreed.

For these reasons, this Court finds that the Rhode Island community supervision requirement is a direct and punitive consequence of Petitioner's conviction. Accordingly, this Court also finds that Petitioner's plea was not knowing and voluntary as he was not informed that he would be subject to community supervision prior to his plea.

Although Petitioner asserts that his plea was not knowing and voluntary, he has repeatedly stated that he does not want this Court to vacate his plea. Instead, Petitioner asks this Court to order that his sentence be executed as originally imposed and find that he is not required to serve any term of community supervision.

In *Cole v. Langlois*, the Supreme Court held that the appropriate remedy for an involuntary plea was to remand the case to Superior Court and allow it to proceed as if the original plea was not entered. 99 R.I. 138, 146, 206 A.2d 216, 220-21 (1965). In *McCarthy v. United States*, the United States Supreme Court held that "a defendant whose plea has been accepted in violation of

Rule 11 [of the Federal Rules of Criminal Procedure] should be afforded the opportunity to plead anew." 394 U.S. 459, 472 (1969). The Supreme Court in *McCarthy* reasoned that allowing a defendant to plead anew "will insure that every accused is afforded those procedural safeguards, but also will help reduce the great waste of judicial resources required to process the frivolous attacks on guilty plea convictions that are encouraged, and are more difficult to dispose of, when the original record is inadequate." *Id.* Thus, when faced with an involuntary plea, as this Court has concluded is the case here, the appropriate remedy is to vacate the original plea and allow the case to proceed as if the plea was not entered. Therefore, this Court finds that Petitioner's plea is vacated and denies Petitioner's request to order his sentence be executed as originally imposed. Additionally, this Court refrains from ordering that Petitioner is not subject to any term of community supervision.

B

Ineffective Assistance of Counsel

When evaluating allegations of ineffective assistance of counsel, the Rhode Island courts employ a standard that is identical to that set forth by the United States Supreme Court in *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984). *Navarro v. State*, 187 A.3d 317, 325 (R.I. 2018). Under the *Strickland* analysis, '"applicants must demonstrate both that counsel's performance was deficient in that it fell below an objective standard of reasonableness and that such deficient performance was so prejudicial to the defense and the errors were so serious as to amount to a deprivation of the applicant's right to a fair trial."' *Njie v. State*, 156 A.3d 429, 433 (R.I. 2017) (quoting *Perkins v. State*, 78 A.3d 764, 767(R.I. 2013)) (internal quotation marks omitted).

The Rhode Island Supreme Court has stated that when ruling on an ineffective assistance of counsel claim, courts should consider "counsel's performance in its entirety." *Hazard v. State*, 64 A.3d 749, 756 (R.I. 2013). Moreover, courts assess performance with a '"strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance."' *Hazard v. State*, 968 A.2d 886, 892 (R.I. 2009) (quoting *Heath v. Vose,* 747 A.2d 475, 478 (R.I. 2000)); *see also Strickland,* 466 U.S. at 689). The benchmark issue in deciding postconviction relief is whether '"counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result."' *Ferrell v. Wall*, 889 A.2d 177, 191 (R.I. 2005) (quoting *Young v. State*, 877 A.2d 625, 629 (R.I. 2005)).

The Tennessee and New Jersey Supreme Courts have held that the failure to inform a defendant about community supervision under their respective statutes constitutes deficient performance by counsel because the requirement is "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 failed to advise defendant of the statute and defendant testified that it would have made a difference in his decision making); *Smullen*, 96 A.3d at 322 (holding counsel's failure to be aware of the "penal consequences defendant was facing under [New Jersey's supervision statute]" amounted to deficient performance). Here, counsel's failure to bring the community supervision statute to Petitioner's attention prior to his plea amounted to deficient performance as community supervision is a direct consequence of his plea. Petitioner's counsel admits he was unaware of the statute and thus did not know to advise Petitioner about the possible consequences of his plea. Since community supervision is a direct and punitive consequence of the plea, Petitioner can establish that counsel's failure to advise him of such amounted to deficient performance.

This finding does not end the Court's analysis. The Petitioner must also demonstrate that the "deficient performance was so prejudicial to the defense and the errors were so serious as to amount to a deprivation of the applicant's right to a fair trial." *Perkins*, 78 A.3d at 767. In the context of entering a plea agreement, the petitioner must show there is a reasonable probability that "he would have not 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). Moreover, "in the context of a negotiated plea, to prevail on an allegation of ineffective assistance of counsel, the defendant must show that he would have insisted on going to trial and that the outcome of that trial would have been different." *Neufville v. State,* 13 A.3d 607, 614 (R.I. 2011) (citing *Hill v. Lockhart*, 474 U.S. 52, 59 (1985)); *see also Figueroa*, 639 A.2d at 500.

Here, Petitioner's trial had already begun when he made his plea, which implies that he would have proceeded with trial had he known his plea would still subject him to a total of thirty years of punishment.[11] Petitioner's refusal to sign the Notice and Terms of Community Supervision, which contained the thirty-year maximum community supervision term language, is also indicative of Petitioner's desire to reduce the full length of his sentence at the expense of time served. Pet'r's Mem. Supp. Appl. Ex. B. Petitioner placed substantial emphasis on the length of the full sentence, as he agreed to serve more time to avoid a longer probationary period with the remainder of his sentence suspended. This preference for a shorter probationary period indicates that Petitioner would have decided to continue with his trial had he known that he would be required to serve a thirty-year full sentence, whether he was found guilty or if he agreed to plead

[11] Section 13-8-30 provides that "the term of the original sentence imposed and the term of community supervision shall not exceed thirty (30) years"; thus, meaning once he served his sentence, the Board would have the opportunity to sentence him to community supervision for ten additional years due to the fact that he agreed to a full sentence of twenty years in the plea agreement.

guilty. Petitioner asserts he "effectively had nothing to lose, and potentially everything to gain if found not guilty, by going to trial if he had known" about the community supervision statute and its maximum of thirty years. Pet'r's Mem. Supp. Appl. 14.

Petitioner did not, however, provide any evidence or information to suggest the outcome—meaning, a disposition of not guilty—would have been possible had he proceeded with the trial. The State correctly points out that it is possible he would have been found guilty on both counts and sentenced to sixty years—with the maximum for each count running consecutively. This outcome would have subjected him to a sixty-year sentence, while his plea agreement subjected him to a full sentence of only twenty years. *See Hassett,* 899 A.2d at 437 (noting that because there was a strong possibility that the defendant may have received a more severe sentence had he not followed counsel's advice to accept a plea, the defendant could not demonstrate prejudice by counsel's allegedly deficient performance). Therefore, as Petitioner failed to provide any evidence to suggest he would have been acquitted of the charges had the trial proceeded or that his sentence would have been less than twenty years if convicted, this Court finds that he fails to meet the second prong of the *Strickland* analysis. *See Hassett,* 899 A.2d at 437. Accordingly, this Court finds that Petitioner's ineffective assistance of counsel claim must fail.

C

Constitutionality of §§ 13-8-30 and 13-8-32

Petitioner also asserts that §§ 13-8-30 and 13-8-32 violate the Double Jeopardy Clause of the United States Constitution and the Rhode Island Constitution and the separation of powers doctrine by impermissibly allowing the Parole Board to impose an additional penalty on top of the sentence the Petitioner already received from the trial justice. It is well-established that this Court should not "decide constitutional issues unless it is absolutely necessary to do so." *In re Brown*,

903 A.2d at 151; *see also State, Dept. of Corrections v. Rhode Island Broth. of Correctional Officers*, 115 A.3d 924, 929 n.3 (R.I. 2015). As this Court finds Petitioner is entitled to postconviction relief based on other grounds, it will refrain from addressing the constitutionality of §§ 13-8-30 and 13-8-32.

IV

Conclusion

For these reasons, this Court finds that Petitioner has proven by a preponderance of the evidence that he is entitled to postconviction relief. Specifically, Petitioner's plea was not knowing and voluntary as he was not informed that, as a result of his plea, he would be subject to community supervision under §§ 13-8-30 and 13-8-32. Accordingly, Petitioner's Application is granted and his plea of *nolo contendere* to two counts of second degree child molestation is vacated. Additionally, this Court finds that Petitioner was not denied effective assistance of counsel.

Counsel is instructed to prepare an appropriate judgment and order for entry.

RHODE ISLAND SUPERIOR COURT

Decision Addendum Sheet

TITLE OF CASE:	Robert Furlong v. State of Rhode Island, et al.
CASE NO:	KM-2018-0320
COURT:	Kent County Superior Court
DATE DECISION FILED:	July 3, 2019
JUSTICE/MAGISTRATE:	Taft-Carter, J.

ATTORNEYS:

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