STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

KENT, SC. **SUPERIOR COURT**

[FILED: June 17, 2019]

STEPHEN R. MATTATALL	:	
	:	
v.	:	**C.A. No. KM-2019-0096**
	:	
STATE OF RHODE ISLAND	:	

DECISION

K. RODGERS, J. Before this Court is Stephen R. Mattatall's (Petitioner) Application for Post-Conviction Relief (Application). Petitioner asserts that his conviction should be vacated because the statute under which he was convicted in *State of Rhode Island v. Stephen R. Mattatall*, K1-1983-0012A (the underlying criminal case) is unconstitutional in that it fails to describe a crime and prescribe a penalty therein.

This Court's jurisdiction is pursuant to G.L. 1956 § 10-9.1-1. Having reviewed the parties' memoranda, and for the reasons set forth below, this Court finds that Petitioner's conviction was not unconstitutional. Accordingly, Petitioner's Application is denied.

I

Facts and Travel

On January 7, 1983, Petitioner was indicted on one count of murder under G.L. 1956 §§ 11-23-1 and 11-23-2, and two counts of possession of a firearm after being convicted of a crime of violence under § 11-47-5, all alleged to have occurred on September 24, 1982. On November 9, 1984, a jury found Petitioner guilty of one count of murder in the second degree. The remaining two counts were dismissed pursuant to Super. R. Crim. P. 48(a). He was sentenced to forty years, with thirty years to serve at the Adult Correctional Institutions (ACI), the balance of ten years

suspended, with probation. Petitioner was also sentenced to an additional ten years to serve as a habitual offender. On appeal, the Rhode Island Supreme Court vacated his conviction and remanded the case for a new trial. *State v. Mattatall*, 510 A.2d 947 (R.I. 1986). The United States Supreme Court granted the State's Petition for Writ of Certiorari and remanded to the Rhode Island Supreme Court instructing the court to reconsider its decision in light of *Kuhlmann v. Wilson*, 477 U.S. 436 (1986). On remand, the Supreme Court reaffirmed its prior ruling. *State v. Mattatall*, 525 A.2d 49 (R.I. 1987). Petitioner's second trial ended in a mistrial as a result of Petitioner's courtroom behavior.

On June 17, 1988, at the conclusion of Petitioner's third trial, a jury again found Petitioner guilty of murder in the second degree. On September 7, 1988, he was sentenced to sixty years, with fifty years to serve at the ACI, the balance of ten years suspended, with probation. The trial justice also sentenced Petitioner to an additional twenty years as a habitual offender, with eighteen years to serve at the ACI before becoming eligible for parole. The trial justice ordered the sentences to be served consecutively. Petitioner appealed his conviction and the Supreme Court affirmed. *State v. Mattatall*, 603 A.2d 1098 (R.I. 1992).

Petitioner has filed multiple applications for post-conviction relief prior to the instant Application. On December 28, 2000, Petitioner filed an application for post-conviction relief which was denied on September 28, 2004. *Mattatall v. State*, KM-2000-0956. Before his first application was decided, Petitioner filed a second application on November 29, 2001, which was denied on May 9, 2002. Petitioner appealed the denial of his second application, and the Supreme Court affirmed. *Mattatall v. State*, 947 A.2d 896 (R.I. 2008).

On July 17, 2007, Petitioner filed a third application for post-conviction relief regarding his eligibility for parole. The court granted the State's Motion to Dismiss on February 14, 2008.

Mattatall v. State, PM-2007-3645. On appeal, the Supreme Court remanded the case with instructions to provide Petitioner with an opportunity to be heard. *Mattatall v. State*, 966 A.2d 125 (R.I. 2009) (Mem).

On June 27, 2013, Petitioner filed another application for post-conviction relief, which was denied on June 17, 2014. *Mattatall v. State*, PM-2013-3120. Petitioner appealed, and the Supreme Court affirmed, finding that Petitioner's application was barred by the doctrine of *res judicata*. *Mattatall v. State*, 126 A.3d 480 (R.I. 2015) (Mem).

On September 15, 2016, Petitioner filed another application for post-conviction relief regarding his eligibility for parole, which was denied on July 25, 2018. *Mattatall v. State*, KM-2016-0922. Petitioner filed a petition for writ of certiorari in the Supreme Court, which was denied on June 7, 2019. *Mattatall v. State*, SU-2018-0267-MP.

Petitioner currently has an appeal from the denial of a Motion to Correct Illegal Sentence pending before the Supreme Court. *State v. Mattatall*, SU-2018-0263-CA.[1]

On January 24, 2019, Petitioner filed the instant *pro se* Application for Post-Conviction Relief, together with a supporting memorandum (Pet'r's Mem.) and a supplemental memorandum (Pet'r's First Supp. Mem.) asking this Court to vacate his conviction for second degree murder, alleging that his conviction is unconstitutional.[2] In addition to the constitutional infirmities that

[1] The pending appeal does not preclude this Court from considering the instant Application for Post-Conviction Relief. *See* R.I. Sup. Ct. R. App. P. 10(c).

[2] In his initial filing, Petitioner also raised a challenge to his conviction as a habitual offender under G.L. 1956 § 12-19-21. However, Petitioner does not provide any arguments in support of this challenge in either his original memorandum, his first Supplemental Memorandum, or his second Supplemental Memorandum submitted by Petitioner's court-appointed counsel. In any event, § 12-19-21, entitled "Habitual criminals," clearly does not raise the same constitutional challenge as the penalty is clearly provided in the same section as the proscribed conduct. As of September 24, 1982, the date of the offense to which Petitioner was found guilty, § 12-19-21(a) provided:

will be addressed herein, Petitioner also argues in his first Supplemental Memorandum that he is entitled to relief based upon the nature and cause of the accusation, the variance of proof and ineffective assistance of counsel, and he further argues that the State's answer to his original filing was deficient in numerous ways.

With the agreement of the Attorney General and by Order dated February 22, 2019, this Court limited all arguments[3] to "the constitutionality of a criminal statute which allegedly fails to

> "If any person who has been previously convicted in this or any other state of two (2) or more felony offenses arising from separate and distinct incidents and sentenced on two (2) or more such occasions to serve a term in prison shall, after said convictions and sentences, be convicted in this state of any offense punished by imprisonment for more than one year, such person shall be deemed an "habitual criminal." Upon such conviction, said person deemed a habitual criminal shall be punished by imprisonment in the adult correctional institutions for a term not exceeding twenty-five (25) years, in addition to any sentence imposed for the offense of which he was last convicted. . . ." Sec. 12-19-21(a) (as amended by P.L. 1982, ch. 226, §§ 1, 2, effective May 18, 1982).

Thus, as it appears that his conviction for violating § 12-19-21 is no longer being challenged, and because § 12-19-21 provides for the penalty, this Court will not address Petitioner's conviction as a habitual offender.

[3] This Court has been tasked with adjudicating the largely identical arguments raised by approximately ninety defendants to date who are serving time at the ACI for offenses including, but not limited to, varying degrees of sexual assault and child molestation, murder, kidnapping, robbery, indecent solicitation, and assault with intent to commit specified felonies. Indeed, the large majority of the filings in each of the roughly ninety cases appear to be the same photocopies of Petitioner's original filing herein with spaces provided to "fill in the blank" for information pertinent to this Petitioner, or a similar argument with similar citations. In many instances, the trial justice presiding over the respective cases is still an active member of the bench, and there may be meritorious issues that said trial justice would be required to adjudicate outside this Court's purview. Accordingly, this Court—with the State's agreement—has carved out the constitutional issues raised by this Petitioner and others from other matters that have been or may be raised in an application for post-conviction relief. It is with this context in mind that this Court—with the State's agreement—ordered that each petitioner should be permitted to raise the constitutional issue addressed herein notwithstanding that this Petitioner has taken numerous bites at the proverbial post-conviction relief apple to date.

state what constitutes the crime alleged and/or fails to provide for a penalty thereunder," without the State raising the affirmative defenses of *res judicata* and/or *laches*.[4]

On May 3, 2019, Petitioner's court-appointed counsel filed an additional Supplemental Memorandum in Support of Petitioner's Application for Post-Conviction Relief (Pet'r's Second Supp. Mem.). The State filed an objection and supporting memorandum thereto on May 20, 2019. On May 24, 2019, the Court provided notice to the State and Petitioner's court-appointed counsel that Petitioner's request for relief would be considered by this Court in the context of a summary disposition. The parties thereafter acknowledged that an evidentiary hearing was unnecessary to resolve the issues before this Court.

II

Standard of Review

Under § 10-9.1-1, any person who has been convicted of a crime may file an application for post-conviction relief to challenge the constitutionality of his or her conviction. Sec. 10-9.1-1(a)(1). Unlike the proceedings afforded to Petitioner for his underlying conviction, post-conviction relief motions are civil in nature. *Brown v. State*, 32 A.3d 901, 908 (R.I. 2011). Accordingly, the applicant bears "'the burden of proving, by a preponderance of the evidence, that such [postconviction] relief is warranted.'" *Motyka v. State*, 172 A.3d 1203, 1205 (R.I. 2017) (quoting *Anderson v. State*, 45 A.3d 594, 601 (R.I. 2012)). Additionally, because Petitioner

[4] Although there has been no motion to sever Petitioner's claims that fall outside the constitutionality of Petitioner's statute of conviction, in the spirit of the February 22, 2019 order, this Court orders that Petitioner's claims regarding the nature and cause of the accusation, the variance of proof, and ineffective assistance of counsel be severed from this Court's consideration. Accordingly, to the extent that any of the severed issues are not barred by *res judicata* given Petitioner's multiple previous applications for post-conviction relief, such issues will be afforded a separate Post-Conviction Relief docket number and transferred to the trial justice who presided over Petitioner's third trial in the underlying criminal case.

challenges the constitutionality of his conviction, Petitioner has the heightened burden of demonstrating unconstitutionality beyond a reasonable doubt. *See State v. Beck*, 114 R.I. 74, 77, 329 A.2d 190, 193 (1974).

When ruling on an application for post-conviction relief, if the court considers matters outside the pleadings, the court should "treat the [party's] motion as though it were a motion for summary disposition" as opposed to a motion to dismiss. *Palmigiano v. State*, 120 R.I. 402, 406, 387 A.2d 1382, 1385 (1978). As will be discussed, this Court has considered Petitioner's indictment and verdict form, which are outside the pleadings in the instant civil action. Accordingly, this Court will review Petitioner's Application in the context of a summary disposition motion under § 10-9.1-6(c), which "'closely resembles' a grant of summary judgment under Rule 56 of the Superior Court Rules of Civil Procedure." *Reyes v. State*, 141 A.3d 644, 652 (R.I. 2016) (quoting *Palmigiano*, 120 R.I. at 405, 387 A.2d at 1384).

Under § 10-9.1-6(c), the court may grant summary disposition when it finds, based on "the pleadings, depositions, answers to interrogatories, and admissions and agreements of fact, together with any affidavits submitted, that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law." Sec. 10-9.1-6(c). The standard for granting summary disposition on an application for post-conviction relief is the same as in granting summary judgment under Super. R. Civ. P. 56(c)—the "trial justice must consider the affidavits and pleadings . . . in the light most favorable to the party against whom the motion is made." *Palmigiano*, 120 R.I. at 406, 387 A.2d at 1385. The trial justice may not resolve genuine issues of material fact or adjudge the weight or credibility of the evidence. *Reyes*, 141 A.3d at 653.

III

Analysis

Petitioner asserts that his conviction violated his due process rights under both the Fifth and Fourteenth Amendments of the United States Constitution and article I, section 10 of the Rhode Island Constitution because the single statute of conviction, § 11-23-1, fails to state what conduct qualifies as a crime and fails to provide a penalty. In response, the State contends that Petitioner cannot prove that § 11-23-1 is unconstitutional beyond a reasonable doubt because Chapter 23 of Title 11 of the Rhode Island General Laws, when read as a whole, clearly and unambiguously provides a description of the criminalized conduct and states a penalty.

Petitioner was convicted of one count of second degree murder in violation of § 11-23-1.[5] Section 11-23-1 provides:

> "The unlawful killing of a human being with malice aforethought is murder. Every murder perpetrated by poison, lying in wait, or any other kind of wilful, 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 of the general laws, rape, burglary or robbery, or while resisting arrest by, or under arrest of, any state trooper or policeman in the performance of his duty; or perpetrated from a premeditated design unlawfully and maliciously to effect the death of any human being other than him who is killed is murder in the first degree. Any other murder is murder in the second degree. The degree of murder may be charged in the indictment or information, therefor, and the jury may find the degree of murder, whether the same be charged in the indictment or information or not, or may find the defendant guilty of a lesser offense than that charged in the indictment or information, in accordance with the provisions of § 12-17-14." Sec. 11-23-1

[5] Section 11-23-1 has been amended since September 24, 1982, the date of the offense to which Petitioner was found guilty. P.L. 1990, ch. 259, § 1, effective July 10, 1990; P.L. 1990, ch. 284, § 4, effective July 10, 1990. Thus, this Court will refer only to the earlier version of the statute in effect at that time.

The penalty for second degree murder is set forth in § 11-23-2, which at all material times provided:

> "Every person guilty of murder in the first degree, except as hereinafter provided, shall be imprisoned for life. Every person guilty of murder in the second degree shall be imprisoned for not less than ten (10) years and may be imprisoned for life. Every person who shall commit murder while committed to confinement to the adult correctional institutions or the state reformatory for women shall be punished by death. The punishment of death shall be inflicted by the administration of a lethal gas." Sec. 11-23-2.[6]

As previously noted, Petitioner was charged in the indictment of violating *both* §§ 11-23-1 and 11-23-2.

A

Statutory Construction and Due Process

The due process clauses of both the Fifth and Fourteenth Amendments of the United States Constitution and article I, section 10 of the Rhode Island Constitution provide that no person "shall . . . be deprived of life, liberty, or property" without being afforded due process of law. For a criminal statute to comply with constitutional due process requirements, "fair warning should be given to the world in language that the common world will understand, of what the law intends to do if a certain line is passed." *McBoyle v. United States*, 283 U.S. 25, 27 (1931); *see also United States v. Lanier*, 520 U.S. 259, 265 (1997). The test to determine if a criminal statute provides sufficient notice is whether '"that law[] give[s] the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly."' *State v. Russell*, 890 A.2d 453, 460 (R.I. 2006) (quoting *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972)). Thus,

[6] Section 11-23-2 has been amended since September 24, 1982, the date of the offense to which Petitioner was found guilty. P.L. 1984, ch. 221, § 1, effective May 9, 1984. Thus, this Court will refer only to the earlier version of the statute in effect at that time.

it falls upon the Legislature to adequately describe both '"the forbidden conduct and a prescribed penalty."' *State v. Maxie*, 187 A.3d 330, 340 (R.I. 2018) (quoting 1 Wayne R. LaFave et al., *Substantive Criminal Law* § 1.2(d) at 18 (3d ed. Oct. 2018 update)).

This case is not a void for vagueness case. The issue before this Court is simply whether or not having a penalty provision in a statute following the statute setting forth the proscribed conduct is constitutional. To that end, our Supreme Court has made it clear that if a statute does not provide a penalty, a conviction under the statute cannot stand. *State v. DelBonis*, 862 A.2d 760, 768 (R.I. 2004) (dismissing a defendant's conviction because the statute failed to provide a penalty for specific conduct for which defendant was charged); *State v. Berberian*, 112 R.I. 745, 315 A.2d 743 (1974) (dismissing a defendant's conviction when the city never established a schedule of fines for parking violations); *State v. Tessier*, 100 R.I. 210, 211, 213 A.2d 699, 699 (1965) (dismissing a defendant's conviction for violating a city ordinance because "the ordinance as it appears on the record before [the court] d[id] not fix a penalty"). Additionally, the court may not step into the shoes of the Legislature to fill in gaps. *Maxie*, 187 A.3d at 341 ("This Court does not draft laws, it interprets and construes them. We simply cannot construe that which is not there to be construed."); *DelBonis*, 862 A.2d at 768 ("No authority exists for this Court or the trial court in a criminal case 'to supplement or to amend a statute enacted by the General Assembly.'"); *see also United States v. Evans*, 333 U.S. 483, 486 (1948) (holding that "[i]n our system, so far at least as concerns the federal powers, defining crimes and fixing penalties are legislative, not judicial, functions").

When interpreting a statute, the "ultimate goal [of the Court] is to give effect to the General Assembly's intent." *Olamuyiwa v. Zebra Atlantek, Inc.*, 45 A.3d 527, 534 (R.I. 2012); s*ee also Brennan v. Kirby*, 529 A.2d 633, 637 (R.I. 1987) (holding that the court's role is "to determine and

effectuate the Legislature's intent and to attribute to the enactment the meaning most consistent with its policies or obvious purposes"). Accordingly, if a statute is clear and unambiguous, this Court must construe the statute literally as to give effect to its plain meaning. *State v. Diamante*, 83 A.3d 546, 550 (R.I. 2014); *State v. Briggs*, 934 A.2d 811, 814 (R.I. 2007); *see also Martone v. Johnston Sch. Comm.*, 824 A.2d 426, 431 (R.I. 2003) ("The best evidence of [the General Assembly's] intent can be found in the plain language used in the statute."). However, if the statutory language is susceptible to more than one reasonable meaning and thus, is ambiguous, "'this Court will employ our well-established maxims of statutory construction in an effort to glean the intent of the Legislature.'" *Balmuth v. Dolce for Town of Portsmouth*, 182 A.3d 576, 580 (R.I. 2018) (quoting *In re Proposed Town of New Shoreham Project*, 25 A.3d 482, 505 (R.I. 2011)) (internal quotation marks omitted).

Unlike remedial statutes that must be liberally construed, "'penal statutes must be strictly construed in favor of the party upon whom a penalty is to be imposed.'" *State v. Carter*, 827 A.2d 636, 644 (R.I. 2003) (quoting *State v. Calise*, 478 A.2d 198, 200 (R.I. 1984)). Thus, a penal statute "'must be read narrowly . . . and [the] defendant must be given the benefit of any reasonable doubt as to whether the act charged is within the meaning of the statute.'" *Id.* at 643-44 (quoting *State v. Simmons*, 114 R.I. 16, 18, 327 A.2d 843, 845 (1974)).

It is well-settled that statutes related in subject matter and enacted by the same jurisdiction are considered *in pari materia* and should "be read in relation to each other." *Such v. State*, 950 A.2d 1150, 1156 (R.I. 2008). "[S]tatutes *in pari materia* should be considered together in order that they may be in harmony with each other and consistent with their general scope and purpose." *State v. St. Pierre*, 118 R.I. 45, 51, 371 A.2d 1048, 1051 (1977) (reading numerous possessory offenses in separate statutes as falling within the ambit of "larceny" when strictly construing statute

of limitation for larceny in favor of defendant). The Court '"must consider the entire statute as a whole; individual sections must be considered in the context of the entire statutory scheme, not as if each section were independent of all other sections."' *State v. Briggs*, 58 A.3d 164, 168 (R.I. 2013) (quoting *Mendes v. Factor*, 41 A.3d 994, 1002 (R.I. 2012)); *State v. Poulin*, 66 A.3d 419, 423 (R.I. 2013) (considering consecutive statutes G.L. 1956 §§ 12-1-12 and 12-1-12.1 to determine eligibility for sealing a criminal sentence). "[U]nder no circumstances will this Court 'construe a statute to reach an absurd result.'" *Mendes*, 41 A.3d at 1002 (quoting *Generation Realty, LLC v. Catanzaro*, 21 A.3d 253, 259 (R.I. 2011)); *State v. Flores*, 714 A.2d 581, 583 (R.I. 1998).

Petitioner asserts that his statute of conviction, § 11-23-1, fails to provide a penalty and therefore, a conviction under that statute cannot stand. *See* Pet'r's Mem. at 6-9; Pet'r's Second Supp. Mem. at 11-19. The cases upon which Petitioner relies, however, are distinguishable from the case at bar.

In *Maxie*, the case upon which Petitioner principally relies, the defendant was convicted of sex trafficking of a minor pursuant to § 11-67-6. 187 A.3d at 331. The version of § 11-67-6 in effect on the date the crime allegedly occurred read, in pertinent part, as follows:

> "(b) Any person who:
>
> "(1) Recruits, employs, entices, solicits, isolates, harbors, transports, provides, persuades, obtains, or maintains, or so attempts, any minor for the purposes of commercial sex acts; or
>
> "(2) Sells or purchases a minor for the purposes of commercial sex acts; or
>
> "(3) Benefits, financially or by receiving anything of value, from participation in a venture which has engaged in an act described in subdivision (1) or (2); or
>
> "(c) Every person who shall commit sex trafficking of a minor, shall be guilty of a felony and subject to not more than forty (40) years

> imprisonment or a fine of up to forty thousand dollars ($40,000), or both." Sec. 11-67-6.[7]

The section describing the prohibited conduct, § 11-67-6(b), consisted of an incomplete sentence ending with what the parties and the court referred to as a "hanging or." *Maxie*, 187 A.3d at 338-39. The defendant asserted that his conviction under § 11-67-6 could not stand because, as a result of the "hanging or," the statute of conviction failed to state a crime. *Id.* at 339. Our Supreme Court agreed and concluded that the unambiguous language of § 11-67-6 failed to state a crime because "it [wa]s missing one of the two essential components of an effective criminal statute—the statement that the acts that it describes are crimes." *Id.* at 340. The court reasoned that the statute included a drafting error that could not be remedied by statutory construction because "[the court] simply cannot construe that which is not there to be construed." *Id.* at 341. The court also emphasized that "the power to define crimes rests not with [the] Court, but with the General Assembly." *Id.*

In *DelBonis*, the Supreme Court reversed the defendant's conviction for driving under the influence of drugs or alcohol because the applicable statute failed to state a penalty for the prohibited conduct the defendant was found to have violated. 862 A.2d at 769. The statute in effect at that time was § 31-27-2, as amended by P.L. 2000, ch. 264, § 1 (effective July 13, 2000), which provided for a penalty based upon the level of the operator's blood alcohol content (BAC). *Id*. at 765-66. The defendant, however, refused to submit to a Breathalyzer test and therefore his BAC was not determined. *Id.* at 762. The defendant was nonetheless accused of operating under the influence of drugs or alcohol "to a degree which rendered the person incapable of safely

[7] The Legislature has since repealed § 11-67-6. P.L. 2017, ch. 232, § 1, effective July 18, 2017; P.L. 2017, ch. 260, § 1, effective July 19, 2017.

operating a vehicle" as then set forth in § 31-27-2(b)(1).[8] *Id.* at 766. Recognizing the attempt by the Legislature to amend the statute, the court reasoned:

> "[T]he 2000 amendment was a comprehensive revision of the state's DUI statute. Not only were the elements of the offense redefined and classified according to the driver's blood alcohol level, but also the penalty provisions were amended significantly and were explicitly linked to the operator's BAC. Every penalty provision set forth in the amendment was based on the operator's BAC, but there was *no penalty* provision for a DUI offense in which the driver was found to be intoxicated 'to a degree which rendered the person incapable of safely operating a vehicle.' Section 31-27-2(b)(1). We deem this omission determinative to the case before this Court." *DelBonis*, 862 A.2d at 765 (emphasis added).

Thus, the court concluded that "[i]t is the obligation of the trial court and the duty of this Court to dismiss a criminal complaint based on a statute that does not contain a penalty provision." *Id.* at 770 (citing *Tessier*, 100 R.I. at 211, 213 A.2d at 700).

In *Tessier*, the defendant was convicted of violating a municipal ordinance for acting in a disorderly manner. 100 R.I. at 211, 213 A.2d at 699. Although not raised on appeal, the Supreme Court vacated the conviction and directed that the trial court dismiss the criminal complaint because "the [municipal] ordinance as it appear[ed] on the record before us [did] not fix a penalty" for the offensive conduct with which defendant was charged. *Id.* In *State ex rel. Campbell v. Fortier*, the court reaffirmed its holding in *Tessier* and "reverse[d] the defendants' convictions because no penalty provision appear[ed] in the record." 122 R.I. 559, 560, 409 A.2d 1223, 1224 (1980). In *Campbell*, the defendants were convicted of parking on a sidewalk in violation of a city traffic regulation that did not state a penalty within the same provision nor reference a separate penalty provision. *Id.* n.*. The court dismissed the defendants' convictions due to the state's failure to introduce the penalty provision of the regulation into evidence. *Id.*

[8] Section 31-27-2 has since been amended to rectify the issues raised in *DelBonis*.

This case is also distinguishable from *State of New Jersey v. Fair Lawn Service Ctr.*, upon which Petitioner relies. *See* Pet'r's Second Supp. Mem. at 9-10. In that case, the court held that a person could not be convicted under the state's disorderly conduct statute because the legislature failed to provide a penalty. 20 N.J. 468, 474, 120 A.2d 233, 236 (1956). After quoting the statute under which the defendant was convicted, the court noted that "[n]either this section *nor the ensuing sections* . . . contain any statutory penalty." *Id.* at 471, 120 A.2d at 235 (emphasis added). The court reasoned that "while it may be said that it is to be presumed that the Legislature would not denounce certain acts without providing a penalty, [] penal consequences cannot rest upon a mere presumption." *Id.* at 472, 120 A.2d at 235. Here, unlike in *Fair Lawn*, the penalty for violating § 11-23-1 is provided in the very next section. *See id.*; *cf.* § 11-23-2. Thus, there is no need to presume what penal consequences the Legislature intended to impose for a violation thereof.

Here, unlike in *Maxie*, *DelBonis*, *Tessier*, *Campbell* and *Fair Lawn*, § 11-23-1 contains no gap or drafting error that would require this Court to redraft the statute and thus exceed its powers, nor is the record before this Court bereft of a penalty provision. The prohibited conduct is plainly laid out in § 11-23-1, and the penalty for committing second degree murder is clearly established in § 11-23-2. These two statutory provisions are part of the same statutory scheme, are closely related in subject matter inasmuch as they both address the crime of murder, and are considered *in pari materia* and therefore, must be read in relation to each other. *Such*, 950 A.2d at 1156. To read § 11-23-1 in isolation, as Petitioner would have this Court do, would be contrary to legislative intent as the criminal statute would have no force or effect and lead to an absurd result. *See Flores*, 714 A.2d at 583 (upholding trial judge's consideration of § 11-37-16 and § 11-37.1-18 in concluding that defendant must register as a sex offender). When the two statutory sections are

read together, as this Court is required to do, the Legislature's intent is clear as to the conduct that is proscribed and the penalty for such conduct.

Petitioner also argues that § 11-23-1 fails to indicate if the offense is a felony or misdemeanor and that it also fails to establish the criminal character of that crime. Pet'r's First Supp. Mem. at 25; Pet'r's Second Supp. Mem. at 22, 29. As to Petitioner's first assertion, there is no requirement that a criminal statute identify the crime as a felony or misdemeanor. *See* 1 Wayne R. LaFave et al., *Substantive Criminal Law* § 1.6(a) (3d ed. Oct. 2018 update) ("[I]n the United States most criminal statutes defining specific crimes do not themselves label as felonies or misdemeanors the crimes which they describe, leaving the matter to be determined by reference to the punishment provided (according to the place or to the length of confinement)."); *see also State v. Wolford Corp.*, 689 N.W.2d 471, 473 (Iowa 2004) ("It is not essential for a criminal statute to include language that the violation of the statute constitutes a misdemeanor or felony."). In Rhode Island, crimes are classified as a felony, a misdemeanor or a petty misdemeanor based on the possible punishment, as set forth in § 11-1-2. It is unnecessary that each criminal statute under Rhode Island law further identify the offense as a felony, misdemeanor or petty misdemeanor. As to Petitioner's second assertion, § 11-23-1 begins, "[t]he unlawful killing of a human being with malice aforethought is murder," and establishes the criminal nature of the act. The word "unlawful," means "not lawful; illegal." *Unlawful*, MERRIAM-WEBSTER.COM, https://www.merriam-webster.com/dictionary/unlawful. A person of ordinary intelligence would clearly understand that the conduct described in § 11-23-1 is punishable as a crime. *See Russell*, 890 A.2d at 460. Accordingly, this Court rejects Petitioner's argument that § 11-23-1 fails to declare that a violation thereof constitutes a crime in general or a felony more specifically.

B

The Separate Penalty Provision Is Not Unconstitutional

Beyond the general premise that Petitioner would like this Court to ignore the existence of § 11-23-2, entitled "Penalties for murder," Petitioner contends that there are only three ways in which a penalty provision for a criminal offense passes constitutional muster: (1) within the same all-encompassing paragraph-like statute that defines the prohibited conduct; (2) within a single statute that has multiple subsections including the prohibited conduct and the penalty in different subsections; or (3) if cross-referenced in the statute identifying the criminal conduct. S*ee* Pet'r's Mem. at 2; Pet'r's First Supp. Mem. at 5; Pet'r's Second Supp. Mem. at 19-22. There is no such hard and fast rule as Petitioner asserts. Instead, § 11-23-2, following § 11-23-1, is an acceptable structure of specifying the prohibited conduct and the prescribed penalty for a person of ordinary intelligence to understand both what is prohibited and what the penalty is so that he may act accordingly. *See Russell*, 890 A.2d at 460; *see also* 1 Wayne R. LaFave et al., *Substantive Criminal Law* § 1.2(d) (3d ed. Oct. 2018 update).

Indeed, the Supreme Court has recognized that a criminal penalty for specified conduct "may be provided by a separate enactment." *State v. Kalian*, 122 R.I. 443, 444, 408 A.2d 610, 611 (1979). The *Kalian* Court held: "Unquestionably a criminal statute is of no force and effect if no penalty whatsoever is provided for its violation, but there is no necessity that the penalty be included within the same proviso." *Id.*; *see also* 22 C.J.S. *Criminal Law: Substantive Principles* § 24 (March 2019 update) ("Generally, a criminal statute without a penalty clause is of no force and effect, so that no conviction may be had thereunder; however, it is not necessary that the same act which defines the crime also provides its penalty.").

There is also no legal authority for the proposition that a state criminal statute must cross-reference a separate penalty provision, as Petitioner repeatedly contends. *See* Pet'r's Mem. at 2; Pet'r's First Supp. Mem. at 3, 5, 21; Pet'r's Second Supp. Mem. at 21-23. As recognized by the renowned Professor Wayne R. LaFave, to whom Petitioner also cites, *see* Pet'r's First Supp. Mem. at 34; Pet'r's Second Supp. Mem. at 19-22, criminal statutes are formatted in various ways:

> "In many cases the section of the statute which describes the forbidden conduct concludes with a statement of the punishment; *or perhaps one section sets forth the forbidden conduct and the next section the punishment*. Sometimes, however, the statute forbidding the conduct may refer to another statute for the punishment, such as the rather common statute which provides that whoever commits embezzlement (defining it) shall be punishable as if he committed larceny, and the larceny statute provides for a certain penalty of fine or imprisonment. . . . *In all of these cases* there is little difficulty in concluding that, since the statutes set forth both forbidden conduct and criminal penalty, the legislature has created a crime." *See* 1 Wayne R. LaFave et al., *Substantive Criminal Law* § 1.2(d) (3d ed. Oct. 2018 update) (emphasis added).

Thus, Prof. LaFave, upon whom Petitioner relies, endorses the practice of identifying the forbidden conduct in one section of a statutory scheme and the punishment in the next section for the legislature to have properly created a crime. This is squarely the issue before this Court. It is wholly acceptable and proper for the General Assembly to describe the conduct in § 11-23-1 and set forth the penalty for such conduct in § 11-23-2.

C

Petitioner's Indictment Informed Him of the Penalty Provision

Importantly, Petitioner was charged in Count one of the indictment of violating *both* §§ 11-23-1 *and* 11-23-2. Under article I, section 10 of the Rhode Island Constitution a person criminally accused has the right "to be informed of the nature and cause of the accusation." *See State v. Domanski*, 57 R.I. 500, 504, 190 A. 854, 857 (1937) (recognizing that "[t]he accused

undoubtedly has the constitutional right to be clearly informed of the accusation against him so that he may defend the same and later plead a conviction or acquittal in bar of a subsequent charge for the same offense"). As Petitioner's indictment included both the statutory reference for the criminal conduct for which he was charged with committing and the statutory reference to the possible penalty, he received fair notice "of the nature and cause of the accusation" to enable him to defend his case. *See* R.I. CONST. art. I, § 10. A person of ordinary intelligence does not need to go on a hunt to find a penalty when it was expressly provided in one of the two statutes he was charged with violating in Count one of his indictment.[9] *See Russell*, 890 A.2d at 460.

* * *

In sum, the Legislature provided fair notice of the consequences of committing the conduct proscribed in § 11-23-1 as the penalty for second degree murder is clearly provided in the following section, § 11-23-2, which must be read together. *See Such*, 950 A.2d at 1156; *see also Poulin*, 66 A.3d at 423; *Briggs*, 58 A.3d at 166. Additionally, Petitioner's indictment stated that he was being charged under both §§ 11-23-1 and 11-23-2. For all the reasons discussed in Sections III.A-C, *supra*, this Court finds that Petitioner was afforded due process and that his conviction for one count of second degree murder is constitutionally sound.

D

Equal Protection

Petitioner also asserts that his conviction under § 11-23-1 violated his equal protection rights under the Fourteenth Amendment of the United States Constitution and article 1, section 2 of the Rhode Island Constitution by depriving him of a fundamental right without satisfying strict

[9] This Court notes that Petitioner's indictment complies with the requirements of Super. R. Crim. P. 7(c) and § 12-12-1.4.

scrutiny. *See* Pet'r's First Supp. Mem. at 1-3. Relying upon the Equal Protection Clause, Petitioner maintains that strict scrutiny should apply to his conviction under § 11-23-1 "because it is a fundamental concept that penal statutes must be strictly construed against the state and limited in application to cases falling clearly within the language of the statute in question." Pet'r's First Supp. Mem. at 2.

Article 1, section 2 of the Rhode Island Constitution provides that no person shall be "denied equal protection of the laws." To maintain an equal protection claim, Petitioner must show that the State has acted in a way that "treats one class of people less favorably than others similarly situated." *Perrotti v. Solomon*, 657 A.2d 1045, 1049 (R.I. 1995). So long as the government's action does not affect a fundamental right or involve a suspect classification, the action will be upheld unless it "'bears no reasonable relationship to the public health, safety, or welfare.'" *Moreau v. Flanders*, 15 A.3d 565, 587 (R.I. 2011) (quoting *Kaveny v. Town of Cumberland Zoning Bd. of Review*, 875 A.2d 1, 11 (R.I. 2005)); *State v. DeJesus*, 947 A.2d 873, 884 (R.I. 2008) (quoting *Massachusetts Bd. of Ret. v. Murgia*, 427 U.S. 307, 312 (1976)).

Here, Petitioner asserts that this case involves a fundamental right, namely, "the deprivation of a person's 'life, liberty or property without due process of law.'" Pet'r's First Supp. Mem. at 2. In so arguing that this fundamental right implicates his right to equal protection, Petitioner seems to confound the principles of due process and equal protection, a distinction that has warranted an explanation by the United States Supreme Court. In *Ross v. Moffitt*, 417 U.S. 600 (1974), the United States Supreme Court explained the distinction between the due process and equal protection clauses of the United States Constitution as they apply to the States:

> "'Due process' emphasizes fairness between the State and the individual dealing with the State, regardless of how other individuals in the same situation may be treated. 'Equal protection,' on the other hand, emphasizes disparity in treatment by a State

> between classes of individuals whose situations are arguably indistinguishable." *Id.* at 609.

The nature of Petitioner's equal protection argument is more akin to due process, as the focus of his argument is on the alleged unfairness of convicting a person under a statute that does not provide a penalty. *See* Pet'r's First Supp. Mem. at 3. This is simply not a case which implicates the equal protection clause. For all the reasons discussed in Section III.A-C, *supra*, this Court finds Petitioner's conviction did not violate his due process rights as Petitioner was given adequate notice of the penalty for second degree murder as set forth in §§ 11-23-1 and 11-23-2 and in Count one of the indictment.

E

Judicial Notice

Similar to Petitioner's claim that a criminal statute must cross-reference a separate penalty statute, Petitioner next contends that Rhode Island courts "will not take judicial notice that a criminal sanction exists in another statutory section without reference thereto." Pet'r's First Supp. Mem. at 5. To support his contention, Petitioner cites the Supreme Court decisions in *Berberian* and *Kalian*. However, Petitioner's reliance on the principle of judicial notice generally, and *Berberian* and *Kalian* specifically, is misplaced.

First, the Advisory Committee Notes for Rule 201 of the Rhode Island Rules of Evidence, which addresses judicial notice of adjudicative facts, explains that "Rhode Island courts will take judicial notice of its own public laws, . . . but they will *not* take judicial notice that a criminal sanction exists in another, uncharged section of municipal ordinances." The *Berberian* court applied this principle wherein that case involved a conviction of a municipal ordinance. *See Berberian*, 112 R.I. at 745, 315 A.2d at 743. In this case, however, Petitioner challenges his

conviction of violating the Rhode Island General Laws, not a municipal ordinance. Accordingly, this Court can indeed take judicial notice of Rhode Island General Laws to the extent necessary.[10]

Moreover, *Kalian* stands for the opposite proposition that Petitioner posits and actually supports the State's case. The defendant in *Kalian* challenged his conviction on the basis that the prosecution failed to provide evidence that "the ordinance under which he was charged provided a penalty for its violation." 122 R.I. at 444, 408 A.2d at 610-11. The city ordinance included a general penalty provision that applied to violations of the ordinance for which no specific penalty was provided, including the section under which the defendant was convicted. *Id.* at 444, 408 A.2d at 611 n.1. The Supreme Court found that the prosecution's failure to introduce a copy of the general penalty provision into the record was of no consequence because "there is *no* necessity that the penalty be included within the *same proviso*." *Id.* at 444, 408 A.2d at 611 (emphasis added). In *Kalian*, the court distinguished the defendant's case from the holdings in *Berberian* and *Tessier* wherein there had been no "indication that a penalty had been established for the conduct complained of." *Id.* Here, the same distinction can be made with *Berberian* and *Tessier* as the penalty for second degree murder is not prescribed in § 11-23-1 itself but is provided in the subsequent proviso, which *Kalian* permits.

The Petitioner's contention as it relates to judicial notice is unavailing.

F

Notice Pleading in Civil Actions

Petitioner also contends that the State failed to comply with Super. R. Civ. P. 8(b) by responding to the allegations of Petitioner's Application with the phrase, "The State neither admits

[10] For all the reasons discussed in Section III.A-C, *supra*, it is unnecessary for this Court to take judicial notice of § 11-23-2 or any other statutory provision.

nor denies the allegations contained" in Petitioner's Application. *See* Answer; Pet'r's First Supp. Mem. at 8. Petitioner asserts that this Court should therefore deem the State's responses to be admissions and should also impose Rule 11 sanctions. Pet'r's First Supp. Mem. at 8-11.

Rule 8 of the Superior Court Rules of Civil Procedure provides:

> "**(b) Defenses; Form of Denials.** A party shall state in short and plain terms the party's defenses to each claim asserted and shall admit or deny the averments upon which the adverse party relies. If the party is without knowledge or information sufficient to form a belief as to the truth of an averment, the party shall so state and this has the effect of a denial. . . .
>
> . . .
>
> "**(d) Effect of Failure to Deny.** Averments in a pleading to which a responsive pleading is required, other than those as to the amount of damages, are admitted when not denied in the responsive pleading. Averments in a pleading to which no responsive pleading is required or permitted shall be taken as denied or avoided." Super. R. Civ. P. 8(b)(d).

Rule 8(b) does not require a party to specifically state that it "is without knowledge or information sufficient to form a belief as to the truth" for its response to comply with the rule. Moreover, the "[rules] shall be construed and administered to secure the just, speedy, and inexpensive determination of every action." Super. R. Civ. P. 1(a). "[T]he rules are designed to achieve a flexible procedural system conducive to prompt, efficient, and just disposition of litigation *on its merits*" and accordingly, should be construed liberally. 1 Robert B. Kent et al., *Rhode Island Civil and Appellate Procedure* §§ 1.5 and 1.6 (2018-2019 ed.). Therefore, this Court finds that the State's response that it "neither admits nor denies the allegations" is sufficient to indicate that it did not have sufficient information to respond to the Petitioner's allegations for purposes of Super. R. Civ. P. 8(b), and thus the State's responses have the effect of a denial. Accordingly, this Court will not impose Rule 11 sanctions.

G

Plausibility Standard

Lastly, Petitioner urges this Court to adopt the plausibility pleading standard adopted by the United States Supreme Court in *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) and *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007). Pet'r's First Supp. Mem. at 16-19. Specifically, Petitioner asks this Court to apply the heightened pleading standard to the State's affirmative defenses. *Id.* However, our Supreme Court has clearly refrained from adopting the plausibility standard utilized by the federal courts. *See Mokwenyei v. Rhode Island Hosp.*, 198 A.3d 17, 21 (R.I. 2018) ("[T]his Court was clear in *Chhun* that it was not adopting the federal courts' recently 'altered' interpretation of the legal standard employed with respect to a Rule 12(b)(6) motion to dismiss.") (citing *Chhun v. Mortg. Elec. Registration Sys., Inc.*, 84 A.3d 419, 422 (R.I. 2014)). Therefore, this Court declines to apply the plausibility pleading standard. Furthermore, this Court is deciding Petitioner's Application in the context of a summary disposition, akin to a Rule 56(c) motion under the Superior Court Rules of Civil Procedure, rather than on the pleadings. Thus, Petitioner's request in this regard is of no moment.

IV

Conclusion

For the reasons set forth herein, this Court finds that there are no genuine issues of material fact that exist and that Petitioner has failed to prove by any standard—beyond a reasonable doubt as to the unconstitutionality of his conviction or by the preponderance of evidence that he is entitled to post-conviction relief—that his request for relief should be granted. Petitioner's conviction under § 11-23-1 was not rendered unconstitutional because the proscribed criminal conduct and penalty are stated in two separate statutory provisions. In any event, the indictment charging him

with murder expressly charged him with violating both §§ 11-23-1 and 11-23-2. Accordingly, Petitioner's request for post-conviction relief is denied.

Counsel for the State shall prepare an appropriate order and judgment.

RHODE ISLAND SUPERIOR COURT

Decision Addendum Sheet

TITLE OF CASE:	Stephen R. Mattatall v. State of Rhode Island
CASE NO:	KM-2019-0096
COURT:	Kent County Superior Court
DATE DECISION FILED:	June 17, 2019
JUSTICE/MAGISTRATE:	K. Rodgers, J.
ATTORNEYS:	
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For Defendant:	Judy Davis, Esq.