STATE OF VERMONT

Vermont Superior Court **Addison Unit**
Civil Division **Docket No. 2-1-19 Ancv**

REIN KOLTS,
Plaintiff

v.

STATE OF VERMONT,
Defendant

DECISION AND ORDER
PETITION FOR POST-CONVICTION RELIEF

Findings of Fact, Conclusions of Law, and Order

Introduction

The Plaintiff, Rein Kolts, brought this complaint for Post-Conviction Relief (PCR) on the grounds that his attorney, Mark Furlan, failed to effectively advise him with respect to a plea offer made by the State. Plaintiff had been charged by the State with aggravated sexual assault on a child in violation of 13 V.S.A. § 3253a(a)(8). The offense carries a mandatory minimum sentence of 25 years to serve and a maximum sentence of life imprisonment upon conviction. On January 20, 2017, Plaintiff was found guilty following trial by jury and the mandatory minimum sentence was imposed. The conviction was affirmed in *State v. Kolts*, 2018 VT 131, 209 Vt. 351.

The Post Conviction Relief trial was held before the Court on January 17 through January 19, 2023. The Plaintiff was represented by Annie Manhardt, Esq. The State was represented by Addison County Deputy State's Attorney Kim McManus, Esq. Based upon the credible evidence presented, the Count finds that the following facts have been established by a preponderance of the evidence.

Findings of Fact

1. Plaintiff is serving a mandatory minimum sentence of 25 years to life following his conviction for aggravated sexual assault of a child, repeated, in violation of 13 V.S.A. § 3253a(a)(8). The 25-year mandatory minimum could not have been suspended or reduced in any way. 13 V.S.A. § 3253a(b).

2. Plaintiff confessed twice to sexually assaulting his niece, A.H. The first confession was to two plainclothes police officers after about thirty minutes of questioning. The second confession was made without any questioning to a family friend who worked as a court officer. Plaintiff told the court officer that he "take[s] accountability for [his] actions" and wanted to plead guilty at his arraignment.

3. Plaintiff was represented at his arraignment by Jerry Schwarz, Esq. Attorney Schwarz does not specifically recall reviewing the charges with the Plaintiff. It was not his practice to provide clients with copies of the Information and charging documents unless specifically requested.

4. Attorney Schwarz's usual practice at arraignment was to gather the paperwork, and then review the paperwork with his client. He would read the charge and the penalty to the client.

5. The 25-year mandatory minimum was not mentioned during the arraignment. *See* Ex. 1.

6. Plaintiff's copy of the information listed the penalty for 13 VSA § 3253a(a)(8) as twenty-five years to life. It further stated that the twenty-five-year term must be served. It may not be suspended, deferred, or served in the community. Ex. #10.

7. Plaintiff had a meeting soon after his arraignment with Attorney Schwarz at which time he received copies of "documents." Plaintiff could not remember whether the information was part of the documents provided by Attorney Schwarz.

8. Attorney Schwarz's practice was that if a client asked for their paperwork, "we would copy what we had, which would have been the staple[d] information, affidavit and any, you know, minimal discovery that was attached there to it – the arraignment packet. We would have copied it all." Trial Tr. 1/18/23, 235:25 – 236:4.

9. Shortly after his arraignment, Plaintiff hired Attorneys Peter Langrock and Devin McLaughlin to represent him.

10. In the early days of the case, Deputy State's Attorney Dennis Wygmans made the following plea offer to Attorneys Langrock and McLaughlin: If the Plaintiff would plead guilty to the lesser charge of aggravated sexual assault under 13 V.S.A. § 3253(a)(8), the State would agree to a sentence of ten years to life, split to serve five years.

11. Attorney Langrock does not recall discussing a plea offer with the Plaintiff.

12 Attorney Langrock was sure that he had discussed with Plaintiff that jail time was a possibility and "not only jail but serious amount of time in jail." Trial Tr., 01/18/23, 243:3-9.

13 Attorney McLaughlin "absolutely" reviewed the charges and the potential consequences with Plaintiff during one of their meetings. *See* Trial Tr., 01/19/23, 7:7-13. He further testified that he has discussed with Plaintiff the offer the State had made.

> So there was a discussion of the plea offer. I doubt there was a lot of discussion about what the mins and maxes and all that other kind of stuff were, but there was a concrete discussion about that's what the offer was on the table, which was therefore animating him, motivating him to defend against it. (at 7-8).

14 Attorneys McLaughlin and Langrock did not discuss the 25-year mandatory minimum with the Plaintiff.

15 Attorneys McLaughlin and Langrock did not have a conversation with the Plaintiff about the weaknesses of his defense.

16 Attorney McLaughlin was certain that Plaintiff understood the gravity of his situation evidenced by Plaintiff being "fully and actively involved in the defense of this case." Trial Tr. 1/19/23, 11:12-13.

17 The Plaintiff hired Mark Furlan to take over the case in November 2014.

18 Attorney Furlan felt strongly that the Plaintiff's confessions could and should be suppressed. He filed a motion to suppress Plaintiff's first confession, but the motion did not address Plaintiff's confession to the court officer. The suppression motion was denied about six months prior to trial.

19 Attorney Furlan also filed a motion to depose A.H., which the State opposed on the grounds that A.H. was a fragile witness and would be traumatized by the experience. The motion to depose A.H. was denied about three months prior to trial.

20 After it became apparent that he would not be able to retain a forensic psychologist to opine about Plaintiff's confessions, Attorney Furlan noticed as expert witnesses two psychotherapists who had treated the Plaintiff. Neither of the therapists had any experience with forensic psychology or false confessions. Approximately six weeks prior to trial, the State filed a motion in limine to exclude the therapists' testimonies. The State's motion was granted at a hearing on January 13, 2017, four days before the jury draw.

21 Attorney Furlan reviewed the charges with the Plaintiff.

22 Attorney Furlan and Plaintiff discussed Plaintiff's charges and Plaintiff's penal exposure.

23 Attorney Furlan believed that the Plaintiff knew that he faced twenty-five years to life. Plaintiff wanted to be found not guilty because if he were found guilty, Plaintiff knew

that he was "looking at going to jail for the rest of [his] life." Trial Tr. 1/19/23, 41:21 – 41:2.

24 Attorney Furlan reviewed the Amended Information with Plaintiff prior to the Motion in Limine hearing held on January 13, 2017. Attorney Furlan did not have a clear recollection of that specific event, but testified that when reviewing an amended information with a client, he would show the document to the client and read it out loud, that he would read the essential elements and the penalty. *See* Trial Tr., 01/19/23, 59:11-24.

25 Atty Furlan did not recall Plaintiff being surprised by the penalty when he reviewed the Amended Information.

26 The penalties for both counts were discussed at the Motion in Limine hearing. Ex. # 3, p. 9-10.

27 On the morning of the jury draw, the State renewed its offer of ten years to life, split to serve five years. Attorney Furlan conveyed the offer to the Plaintiff and his wife but did not give his client any advice as to whether to accept it.

28 Plaintiff rejected the offer.

29 Shortly before or during the trial, Attorney Furlan attempted unsuccessfully to prepare the Plaintiff to testify. Following counsel's advice, Plaintiff did not take the stand.

30 Plaintiff's criminal trial took place January 18 through 20, 2017.

31 The State presented substantial evidence against Plaintiff, including testimony from the officers who investigated the case, the officers to whom he had confessed, the complainant, the complainant's mother, and the Sexual Assault Nurse Examiner. The State also played for the jury the full video of Plaintiff's first confession.

32 The defense case consisted of testimony from Plaintiff's physician regarding his history of self-reported erectile dysfunction; testimony from his sister-in-law about the layout of the property where one of the assaults allegedly took place; and testimony from Plaintiff's neighbor who sometimes had game cameras recording the area where some of the assaults allegedly occurred. (Ex. 5; Ex. 6).

33 It took the jury less than two hours over lunch to find Plaintiff guilty.

34 Immediately following the jury's guilty verdicts, the trial court proposed that Plaintiff apply for home detention, stating, "It is not my desire to have Mr. Kolts spend a single day in jail." Ex. 6 at 137:1–6. The court also said that it "would have a hard time concluding that conditions of release would be necessary to protect the public." *Id.* at 130:4–6

35 At a post-trial hearing, Attorney Furlan told the court:

> [F]rankly, I knew -- I'm not sure Mr. Kolts understood as well as I did -- that the -- once it became evident that the -- his confession was going to be entered into evidence, that the likelihood of prevailing at trial had dimmed considerably.

36 The Plaintiff filed a motion to discharge Attorney Furlan on February 16, 2017. James Gratton, Esq., was assigned to represent Plaintiff at his sentencing.

37 Attorney Gratton wrote a letter to Plaintiff in March 2017, in which he explained that Mr. Kolts would receive a mandatory sentence of 25 years to life. Ex. 21. Plaintiff responded with a letter stating that he believed he had already been sentenced to "11 years to life." Ex. 19. Mr. Gratton visited Plaintiff in prison and testified that he seemed surprised to learn about the 25-year mandatory minimum.

38 Plaintiff reviewed his case file several times at Attorney Furlan's office. He recalled that he "came across charges" but he did not "recognize a penalty."

39 Plaintiff testified that he did research about the law - DNA testing, trial strategies, and false confessions - but claimed that he had never read the penalty to count one, sexual assault of a child, repeated, offense before trial.

40 The Plaintiff discussed with his therapist, Charles Rossi, the sentence he was facing, and Plaintiff talked about the "severity of what the punishment could be." Trial Tr., 01/17/23, 67:12-19. When asked whether Plaintiff had ever discussed a mandatory minimum, Mr. Rossi replied "I knew the stakes were high. Yes." *Id*. at 68:21.

41 Plaintiff discussed with Mr. Rossi the parameters of what his sentence could be, and Mr. Rossi believed that Plaintiff told him twenty-five years. Mr. Rossi could not recall whether twenty-five years was the minimum or maximum number of years but that there was "a possibility of twenty-five years." Mr. Rossi testified that it was possible that Plaintiff used the phrase "twenty-five years to life." Trial Tr 1/17/23 at 72: 3-5.

42 Going into the criminal trial, Plaintiff and his wife were confident that he would be acquitted. Attorney Furlan recognized that Plaintiff's optimism was not realistic; however, he still believed there was a chance he could win the case.

43 Attorney Furlan did not have any meaningful conversations with Plaintiff about pleading guilty pursuant to the plea offer. He never advised Plaintiff that it was in his best interest to accept the State's offer. Attorney Furlan's justification is that any attempts he made to have those conversations with his client were "shut down" by Mr. Kolts saying he did not want to plead guilty. Trial Tr 1/19/23 at 79:10–80:5. However, Attorney Furlan described Plaintiff as, at worst, "a little bit forceful" in his desire not to discuss a plea. *Id.* at 60:5–13. There is no evidence that Plaintiff was verbally or physically aggressive, that he ever threatened to fire Attorney Furlan for attempting to discuss the plea offer, or that he ever ended his meetings with Attorney Furlan when the topic of pleading guilty arose.

44 Attorney Furlan did have a conversation with Plaintiff "that there was an offer outstanding." Trial Tr., 01/19/2023, 42:15-16. However, Plaintiff did not want to discuss that offer. Attorney Furlan testified that "it was understood between the two of us that there was an offer on the table," but that Plaintiff did not hire Furlan so that he could take a plea offer. "[H]e wasn't interested in discussing, you know, plea agreement or plea negotiations or plea anything." (Trial Tr 1/19/23: 43, 6-7).

45 Attorney Furlan knew that the Plaintiff did not understand the gravity of the situation; of the likelihood that he would be found guilty at trial. Nevertheless, Attorney Furlan did not write a letter to Plaintiff in which he set forth the plea offer; his assessment of the strengths and weaknesses of the State's case and of the Plaintiff's defense; his own assessment of the likelihood of the Plaintiff's prevailing at trial; or a balancing of the mandatory minimum sentence against the State's plea offer.

46 Attorney Furlan did not engage in any strategy to either educate the Plaintiff or to convince him of the wisdom of accepting the State's plea offer.

47 Attorney Furlan did not engage with Dennis Wygmans, the prosecuting attorney, in any plea negotiations. However, it was the position of Mr. Wygmans that if the Plaintiff were to enter a plea pursuant to the offer that he would have to plead guilty; that the State would not have been satisfied with a *nolo contendere* plea. The reason for this is that the State would have insisted as a condition of probation that the Plaintiff be required to successfully complete a sex-offender program. An offender cannot complete such a program unless he admits that he committed the offense for which he had been convicted.

48 Attorney Richard Rubin, the Plaintiff' expert witness, concurred in this assessment. Mr. Rubin also testified, and the Court finds, that it was common for prosecutors in sexual assault cases to insist on a guilty plea because successful completion of sex offender treatment as a condition of probation would be required.

49 Mr. Wygmans testified, and the Court finds, that in approximately three years as a deputy state's attorney focusing on sexual assault trials, he handled 25 or 30 such cases. He always insisted that a defendant plead guilty if accepting a plea agreement. He further testified, and the Court finds, that in all that time, he permitted only one defendant to plead no contest and that was because the defendant appeared to be drunk at the time of the offense and said that he could not remember the particulars. He further testified, and the Court finds, that he would have insisted that the Plaintiff plead guilty if he agreed to accept the plea offer.

50 Plaintiff testified to his robust experiential education to become an engineer, and his career path as a civil engineer.

51 Plaintiff explained that he often had job meetings for work and that he was often the "top dog" in those meetings. Plaintiff described that these meetings were detail-oriented and required focused listening.

52 Plaintiff testified that a strategy that helped him to remember details was to write things down. Plaintiff stated, "I can *See* it on paper, and I can process it."

53 Attorney Richard Rubin testified at the Plaintiff's expert witness on the proper standard of care for a defense lawyer in the State of Vermont. Mr. Rubin is an experienced lawyer with over 40 years of experience in criminal defense work. He has represented clients in serious felonies such as murder and sexual assault.

54 Mr. Rubin had read and was familiar with the defense file in the Plaintiff's criminal case. He also had read the trial transcripts. Mr. Rubin opined that the criminal case "should never have gone to trial." Taking into account the understanding of the undersigned judge of the evidence presented in that case, as well as the very brief period of time that transpired, the Court agrees that the likelihood of the Plaintiff prevailing at trial was very low.

55 Mr. Rubin opined, and the Court finds, that Attorney Furlan fell below the standard of care by failing to ensure that the Plaintiff understood the 25-year minimum that the statute provided was really mandatory. That is, if he were convicted of aggravated sexual assault that the trial judge would have no option except to sentence him to 25 years to serve in jail. Mr. Rubin further opined, and the Court finds, that Mr. Furlan's representation fell below the standard of care by reason of his failure to explain to the Plaintiff that he had virtually no chance of being acquitted at trial. Mr. Furlan should have explained that the State's evidence was very strong: the child was a credible witness, and the State would be able to present two convincing confessions made by him.

56 Mr. Rubin also opined that Mr. Furlan's representation was deficient because he failed to engage in plea negotiations with Deputy State's Attorney Wygmans. Although nothing was to be lost by negotiations, the pivotal issue of the State's offer—the requirement that Plaintiff plead guilty, not *nolo contendere*, to a reduced charge—was not negotiable.

57 Mr. Rubin was aware that the Plaintiff was highly resistant to accepting the State's plea offer. Mr. Rubin therefore opined, and the Court finds, that Mr. Furlan's representation fell below the standard of care by failing to engage in strategies to convince the Plaintiff that it would have been in his best interest to accept the State's offer. Strategies could include taking measures to gain his client's trust and confidence, and enlisting the assistance of family members and other support persons (such as therapists) to help convince the Plaintiff to accept the offer.

58 Mr. Rubin opined, and the Court finds, that Mr. Furlan's representation fell below the acceptable standard of care because he failed to send the Plaintiff a letter outlining the strengths of the State's case and the weaknesses of his own; advising that conviction at trial was a near certainty; contrasting the

mandatory minimum with the State's offer; and expressing a strong opinion that accepting the offer was in his best interest.

59 As of the PCR trial, Plaintiff still claimed to be innocent of the charge. He testified that he would be willing to plead guilty and admit that he had committed the crime even though he claimed to be innocent. (Trial Tr 1/18/23, 161: 19-22. "My wife is so important to me that I am willing to do anything the Court desires to have me close to her." (24-25). Plaintiff admitted that if he were placed under oath at the change of plea hearing that he would lie under oath—that he would commit perjury—in order to plead guilty. (Trial Tr 1/18/23, 162: 5-16).

60 Mr. Rubin is aware, and the Court finds, that some judges place a defendant under oath when accepting a guilty plea, particularly in serious cases, "now more than previously." Trial Tr 1/18/23: 212

61 Plaintiff maintained his innocence at his sentencing hearing. *See* Ex.8, p. 28-32.

62 Plaintiff's first legal action, after conviction but before sentencing, was to sue the child-complainant and her parents. The suit alleged perjury and insubordination of justice. Plaintiff believed that he would be helping his niece by suing her so that she could address her lies. He testified that he filed this lawsuit to "resolve things." Trial Tr 1/18/23 at 92:21.

63 In Plaintiff's various filings with the courts, he continuously argued that his confession was false, that there was exculpatory DNA evidence, that the State had not shared the DNA evidence properly, that the complaining witness lied, that her parents made her lie, and that he was innocent. *See* Ex's. A, B, C, D, E, J, K, P, W, and X.

64 As recently as November 2022, Plaintiff filed a motion with a supporting affidavit filed in a new PCR complaint. Ex. X. In this motion, he requested that the court exonerate him. and he reiterated that "I have never raped the claimant, A.H." *Id.*

65 During Plaintiff's testimony at trial, he stated when he swore his innocence in his various filings, he was being truthful.

Conclusions of Law

The Plaintiff brought his complaint for post-conviction relief on the assertion that his attorney, Mark Furlan, failed to effectively advise him with respect to a plea offer made by the State.

The standard for evaluating post-conviction claims of ineffective assistance of counsel is well known and long standing.

> The appropriate standard for reviewing claims involving ineffective assistance of counsel is whether a lawyer exercised " 'that degree of care, skill, diligence and knowledge commonly possessed and exercised by reasonable, careful and prudent lawyers in the practice of law in this jurisdiction.' " *Russo v. Griffin,* 147 Vt. 20, 24, 510 A.2d 436, 438 (1986) (quoting *Cook, Flanagan & Berst v. Clausing,* 73 Wash.2d 393, 438 P.2d 865, 867 (1968)). To demonstrate ineffective assistance of counsel, a petitioner must show by a preponderance of the evidence that: (1) his counsel's performance fell below an objective standard of performance informed by prevailing professional norms; and (2) there is a reasonable probability that, but for counsel's unprofessional errors, the proceedings would have resulted in a different outcome. *In re Plante,* 171 Vt. 310, 313, 762 A.2d 873, 876 (2000); *State v. Bristol,* 159 Vt. at 337, 618 A.2d at 1291–92; see also *Strickland,* 466 U.S. at 687–94, 104 S.Ct. 2052. Unless petitioner is able to satisfy both prongs of the test, "it cannot be said that the conviction or ... sentence resulted from a breakdown in the adversary process that renders the result unreliable." *Strickland,* 466 U.S. at 687, 104 S.Ct. 2052. In making this showing, petitioner cannot rely on the distorting effects of hindsight, and must surpass the strong presumption that counsel's performance fell within the wide range of reasonable professional assistance. *Plante,* 171 Vt. at 313, 762 A.2d at 876; *In re Pernicka,* 147 Vt. 180, 183, 513 A.2d 616, 618 (1986); see also *Strickland,* 466 U.S. at 689, 104 S.Ct. 2052.

In re Grega, 2003 VT 77, ¶ 7, 175 Vt. 631.

Defendants are entitled to the effective assistance of counsel during the plea negotiation process. *Lafler v. Cooper*, 566 U.S. 156 (2012). Claims of ineffective assistance of counsel are subject to the two-prong test enunciated in *Strickland v. Washington,* 466 U.S. 668 (1984). Although the performance prong of *Strickland* is the usual one, the prejudice prong, when faced with rejection of a plea offer, has been explained as follows:

> In these circumstances a defendant must show that but for the ineffective advice of counsel there is a reasonable probability that the plea offer would have been presented to the court (i.e., that the defendant would have accepted the plea and the prosecution would not have withdrawn it in light of intervening circumstances), that the court would have accepted its terms, and that the conviction or sentence, or both, under the offer's terms would have been less severe than under the judgment and sentence that in fact were imposed.

Lafler v. Cooper. 566 U.S. 156 at 164.

1. **Attorney Furlan's representation of the Plaintiff fell below that degree of care, skill, diligence, and knowledge commonly possessed and exercised by reasonable, careful, and prudent lawyers in the practice of law in Vermont**.

Based upon the testimony of Richard Rubin, Esq., a Vermont lawyer with over 40 years' experience in criminal defense work, the Court concludes that the Plaintiff satisfied the first prong of the *Strickland* standard. In Mr. Rubin's opinion, which the Court has adopted, Mark Furlan, who represented the Plaintiff in the trial of the aggravated sexual assault charge and who represented him for more than two years prior to trial, fell below the objective standard of performance informed by prevailing professional norms. First, Mr. Furlan failed to review with the Plaintiff the evidence that would be presented at trial and failed to advise him about the strength of the State's case and the weakness of his own. Second, he failed to emphasize that the near-certainty of conviction and that it would result in a *mandatory* minimum jail sentence of 25 years. Third, he failed to weigh the near-certainty of a 25-year minimum sentence against the certainty of a 5-year minimum (to serve) if he were to accept the State's offer (and if the judge were to accept it). Fourth, he failed to strongly advise the Plaintiff that it was in his best interests to accept the State's offer and why. Fifth, he failed to engage in strategies to "sell" the offer to the Plaintiff and convince him to accept it.

As Mr. Rubin testified, the sexual assault case should never have gone to trial. Perhaps there was some reason to hope for a successful outcome if the Plaintiff's confessions had been suppressed.[1] But once the motion to suppress was denied, the outcome was not seriously in doubt. Though Mr. Furlan believed that he had "a chance" of prevailing, this was wishful thinking—which should have been obvious to Mr. Furlan prior to trial. Mr. Furlan was remiss in not carefully reviewing the anticipated evidence in order to demonstrate to the Plaintiff the unlikelihood of prevailing at trial.

Much effort was expended at the PCR trial to show that the Plaintiff either was or was not aware of the mandatory 25-year minimum sentence that awaited him should he be convicted at trial. The Court concludes that the Plaintiff had received information that the offense of aggravated sexual assault carried a mandatory 25-year minimum. He was given a copy of the information at arraignment or shortly afterward by attorney Jerry Schwarz. A short time later, he retained attorney Langrock and McLaughlin. Mr. McLaughlin advised him of the mandatory 25-year minimum. For a time, Plaintiff had in his possession and reviewed Mr. Furlan's file, including the information. In addition, there was evidence that prior to trial, the Plaintiff undertook his own research of some of the

[1] According to Mr. Rubin, Mr. Furlan moved to suppress only the first confession. It is evident why he did not move to suppress the second: the Plaintiff spontaneously confessed. Although in custody, he was not being interrogated. Consequently, there would be no basis to suppress the statement. *State v. Karov*, 170 Vt. 650, 653-54 (2000).

factual and legal issues, e.g., false confessions, DNA evidence, and trial strategies. During Plaintiff's career as a civil engineer, he was accustomed to scrutinizing and mastering details related to his work. According to the Plaintiff, he was "detail oriented." Given Plaintiff's background, the documents made available to him before trial, and the Plaintiff's active participation in his case, the Court is comfortable in concluding that he had actual knowledge of the 25-year mandatory minimum. But this conclusion begs the real issue.

The important point in relation to the PCR proceeding is whether Plaintiff understood that the mandatory minimum was *actually mandatory*. More critically, he did not understand, because he had not been properly advised, that it was highly probable that he would be convicted and that the judge would have no option but to impose the 25-year minimum. Mr. Furlan's failure to explain the likelihood of conviction and, therefore, the likelihood of a 25-year minimum fell far below the acceptable standard or practice.[2]

Further, Mr. Furlan failed to provide *any* advice about the benefit of accepting the State's plea offer. He testified that he did not do so because the Plaintiff did not ask him for his advice. This is the equivalent of a physician failing to advise a patient about the benefit of amputating a gangrenous limb because the patient did not ask for her advice. There are many things—items too numerous to name—that *require* a professional to express his or her opinion whether or not the opinion has been requested. The advisability of accepting a plea offer is one of them, especially in a serious case. If the client refuses to listen, then the lawyer must outline his or her advice and the reasons supporting it in writing. Or, as Mr. Rubin testified, he can engage in a number of strategies to gain the client's trust and to "sell" his advice.

2. It is probable that Plaintiff would have accepted the plea offer but for Mr. Furlan's substandard legal representation.

Evidence of the probability of the Plaintiff's acceptance of the State's offer if Mr. Furlan's representation had been adequate is more equivocal. During the two-plus years of Mr. Furlan's representation, Plaintiff continuously insisted on his innocence and strongly resisted any efforts by Mr. Furlan to broach the subject.

During the PCR trial, Plaintiff continued to insist on his innocence. However, the Court concludes that if the Plaintiff had been confronted by the cold, hard facts, namely the near certainty of conviction and the absolute certainty of a 25-year minimum if he were convicted, he would have accepted the State's plea offer. As he testified, he'd have to be pretty dumb not to take a 5 year sentence instead of a

[2] These failures must be laid at the feet of Mr. Furlan and not the prior lawyers. Representation by Mr. Schwarz was very brief. Representation by Mr. Langrock and Mr. McLoughlin was only a few weeks and ended over two years prior to trial. The Court agrees with the opinion of Mr. Rubin that discussion of settlement should await full preparation of the case and the establishment of a trusting relationship with the client.

near-certain 25 year sentence. Also, he specifically said that he would do anything he had to in order to get back to his wife, i.e., to get out of jail.

The Plaintiff has not proved, however, that the State would have agreed to permit him to plead *nolo contendere* instead of guilty. Deputy State's Attorney Wygmans was firm in his practice of not accepting pleas of *nolo contendere* in sexual assault cases. For reasons set forth in section 4 below, the judge would not have been able to accept a no contest plea either.[3]

Plaintiff testified that he would have been willing to lie—even to lie under oath, in order to plead guilty (once he understood the wisdom of accepting the State's offer). Discussion of the impossibility of a judge accepting the plea is also set forth in section 4.

3. **The sentence proposed by the plea offer was less severe than the sentence Plaintiff received after trial.**

The sentence proposed by the State's plea offer was 10 years to life, suspended except for 5 years to serve. This sentence is undisputedly less severe than the sentence of 25 years to life which the Plaintiff received after trial. Although there was no evidence that intervening circumstances would have caused the offer to be withdrawn prior to trial—the offer was extended again by the State on the morning of the commencement of the trial—the Plaintiff has failed to prove that the State would have modified the offer in order to permit a no contest plea.

4. **A "guilty" plea could not have been accepted by the judge.**

The Plaintiff testified that if he had been properly advised about the benefit of the plea offer as opposed to the probable consequences of going to trial, he would have accepted the plea offer. He testified that he would plead guilty even though he claimed to be innocent. He understood that in order to plead guilty he would have to admit to the essential elements or underlying facts of the charge, and He testified that he would plead guilty even though he would be lying about the essential elements. He further testified that even if he were placed under oath before admitting to the facts, he would lie under oath.

Some jurisdictions permit a defendant to plead guilty even though he claims to be innocent. See *North Carolina v. Alford*, 400 U.S. 25, 91 (1970). However, Vermont is not among them. Vermont requires that in making a guilty plea, a defendant must admit to the facts supporting each of the essential elements of the charge. *In re Bridger*, 2017 VT 79, ¶ 21, 205 Vt. 380 ("[W]e do require an inquiry that demonstrates the defendant's admission to the facts 'as they relate to the law for all elements of the ... charges.'") (citation omitted). See also, *In re Gabree*, 2017 VT 84, ¶ 10, 205 Vt. 478 and *State v. Rillo,* 2020 VT 82, ¶ 10, 213 Vt. 29.

[3] The Court would not have been able to accept a no contest plea over the State's objection. See *State v. Careau*, 2016 VT 18, ¶ 12, 201 Vt. 322 (2016) (When parties sign a plea agreement, both parties are bound by the agreement.)

It is clear that a judge cannot accept a guilty plea if he knows the defendant is lying and certainly cannot if the defendant is lying under oath.[4] If nothing else, a judge could not accept a plea if a defendant, not under oath, lied about the underlying facts. Such a plea would not only be unlawful, it would also open the door to post-conviction relief. Accepting a plea support by defendant's false statements under oath would be even more problematic.

Thus, although the sentencing judge may have personally felt that he did not the Plaintiff to spend even one day in jail, he could not have accepted the plea if he had been aware that the Plaintiff was lying about the underlying facts.

If post-conviction relief were to be granted based on Attorney Furlan's substandard representation, the Plaintiff would not thereby be entitled to a new trial but, at most, resentencing pursuant to the plea offer. The resentencing would be before the undersigned. See 13 V.S.A. 7133. The undersigned is obviously aware of the Plaintiff's persistent claim of innocence and of his intention to lie under oath in order to plead guilty. The undersigned could not thereby accept the plea. Nor could the situation be avoided by simply transferring the case to another judge.

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[4] V.R.Cr.P. 11(c)(6) provides:

> [In accepting a guilty plea, the court must advise the defendant};
> (6) if the court intends to question the defendant under oath, on the record, and in the presence of counsel about the offense to which the defendant has pleaded, that the *defendant's answers may later be used against the defendant in a prosecution for perjury or false statements.* (Emphasis added.)

When asked by the Court, Attorney Rubin conceded that a judge could place a defendant under oath when engaging in a Rule 11 colloquy in more serious cases, and that it now occurred "now more than previously." It has been the practice of the undersigned for many years to put a defendant under oath when taking a guilty plea in a serious case.

Attorney Rubin's testimony raised the question of whether—despite the general requirement that an attorney maintain as confidential communications with a client—in light of the attorney's oath of office, 12 V.S.A. § 5812, an attorney could knowingly permit a client to lie under oath in court.

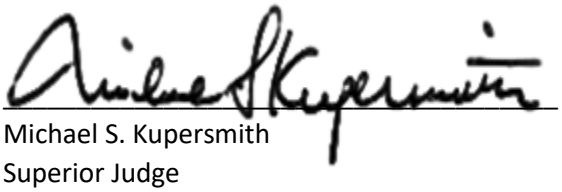
ORDER

The Plaintiff has failed to prove that he would have been able to plead guilty after accepting the State's plea offer.

The Plaintiff has also failed to prove that a guilty plea pursuant to the State's pre-trial plea offer would have been accepted by the judge. In the same fashion, he has failed to prove that a guilty plea would be accepted at this time if the Court were to grant post-conviction relief.

The petition for post-conviction relief is *denied.* Judgment is entered for the State.

Electronically signed 3/13/2023 pursuant to VREF 9(d)



Michael S. Kupersmith
Superior Judge