

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC.

SUPERIOR COURT

[Filed: May 6, 2015]

FELIX REYES ANDINO,  
*Petitioner*

v.

STATE OF RHODE ISLAND,  
*Respondent*

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C.A. No. PM-2014-3566

**DECISION**

**MONTALBANO, J.** Before the Court is an application for post-conviction relief filed by Felix Reyes Andino (Petitioner). Petitioner files his application on the basis that he received ineffective assistance of counsel. Petitioner also contends that he entered pleas, which were not voluntary, knowing, and intelligent. Jurisdiction is pursuant to G.L. 1956 § 10-9.1-1.

**I**

**Facts and Travel**

In 2012, Petitioner was charged in federal court for possession with intent to distribute cocaine. Attorney James McCormick represented Petitioner on his federal charge. While on bail, Petitioner was arrested for and charged with three additional felony cases in state court. Attorney Alberto Aponte Cardona entered his appearance for Petitioner in the new state cases. These cases included:

- P2-2012-1534A:
  - Count 1: Possession of a Controlled Substance
  - Count 2: Obstructing a Police Officer
- P2-2012-0431A:
  - Count 1: Felony Assault
  - Count 2: Felony Assault

- Count 3: Felony Conspiracy
- Count 4: Obstructing a Police Officer
  
- P2-2012-1846A:
  - Count 1: Possession of a Motor Vehicle with an Altered VIN Number
  - Count 2: Possession of a Stolen Motor Vehicle

On December 4, 2012, Petitioner pleaded to one count of possession with intent to distribute cocaine in federal court and was sentenced on February 28, 2013 to sixty months to serve. Subsequently, Attorney Cardona entered into plea negotiations with the State. As a result of the plea bargaining, the State offered to dismiss the following counts, pursuant to Super. R. Crim. P. 48A: (1) Count 2 of P2-2012-1534A (Obstructing a Police Officer); (2) Count 3 of P2-2012-0431A (Felony Conspiracy); (3) Count 4 of P2-2012-0431A (Obstructing a Police Officer); Count 1 of P2-2012-1846A (Possession of a Motor Vehicle with an Altered VIN Number). The State also amended Petitioner's two counts of felony assault—originally charged under P2-2012-0431A—to two counts of misdemeanor simple assault. Petitioner pleaded *nolo contendere* to Count 1 of P2-2012-1534A (Possession of a Controlled Substance). The Court accepted this plea, and Petitioner was sentenced to three years suspended with probation. Petitioner pleaded *nolo contendere* to Counts 1 and 2 of P2-2012-0431A, as amended (Simple Assault). The Court accepted this plea, and Petitioner was sentenced to one year suspended, one year probation for each count of simple assault. Petitioner pleaded *nolo contendere* to Count 2 of P2-2012-1846A (Possession of a Stolen Motor Vehicle). The Court accepted this plea, and Petitioner was sentenced to ten years full, three years to serve at the ACI, the balance suspended with probation. The three year sentence Petitioner was to serve at the ACI was applied consecutively to the sixty month sentence he received as a result of his plea in federal court.<sup>1</sup>

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<sup>1</sup> Although the Petitioner received his federal sentence first, he was required to serve his state sentence first. After serving approximately 2.5 years in the Adult Correctional Institution,

Thus, Petitioner was ultimately sentenced to a total of eight years to serve in state and federal prison. The Petitioner is currently serving five years in the Federal Correctional Institute in Berlin, New Hampshire.

Petitioner filed the instant motion for post-conviction relief on July 17, 2014, averring that he did not consent to this disposition. Specifically, Petitioner claims that Attorney Cardona informed Petitioner that his federal and state sentences were to run concurrently, rather than consecutively. As a result, Petitioner claims that Attorney Cardona's representation was ineffective, and therefore violated Petitioner's Sixth Amendment right to counsel. Petitioner also raises the issue of the voluntariness of his plea in state court.<sup>2</sup> Each of Petitioner's arguments is supported by Petitioner's claim that had he been fully advised of the consequences of his pleas in state court, he would not have pleaded *nolo contendere*.

The State filed its objection on August 25, 2014. On December 9, 2014 and February 19, 2015, this Court held evidentiary hearings and heard the testimony of Petitioner and Attorney Cardona. On April 7, 2015, this Court heard oral arguments by the Petitioner and Respondent.<sup>3</sup> This Court also reviewed the transcript of the Petitioner's July 10, 2013 plea colloquy.

The accounts of Petitioner and Attorney Cardona are completely at odds with each other. Petitioner testified that Attorney Cardona met with Petitioner only twice, and that during those meetings, Petitioner specifically requested that his federal sentence run concurrently, rather than consecutively. Petitioner testified that he does not recall Attorney Cardona telling Petitioner any of his rights, or going over the plea form with Petitioner. Petitioner also claims that Attorney

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Petitioner was transferred to a federal prison, where he is currently serving his five year federal sentence.

<sup>2</sup> While the Petition does not raise the issue of the voluntariness of Petitioner's plea, both the Petitioner and the State argued the issue during the hearing on the petition before this Court.

<sup>3</sup> Petitioner attended each of the evidentiary hearings and arguments via video conference from FCI Berlin, a Federal Correctional Institution located in Berlin, New Hampshire.

Cardona promised Petitioner that his state sentences would run concurrently with his federal sentences.

Attorney Cardona recalls a much different version of events. Attorney Cardona testified that once he entered his appearance for Petitioner, he filed motions, met with Attorney McCormick (Petitioner's counsel in the federal matter), and conferenced the case at least seven times with the trial justice. Attorney Cardona testified that he met with Petitioner at least thirteen times—both at the ACI and at the courthouse cellblock. During their meetings, Attorney Cardona and Petitioner discussed the likelihood of success at trial compared to the disposition after a plea. As to the likelihood of success at trial, Attorney Cardona noted to this Court that Petitioner's co-defendant had already pleaded to his charge, that there was video surveillance that implicated Petitioner as having committed the crime and serious bodily injuries were involved.<sup>4</sup> Therefore, Attorney Cardona advised Petitioner to consider a plea bargain. Attorney Cardona testified that the focus of Petitioner's concern was to remain eligible for a drug program in the federal system. After conferring with Attorney McCormick, Attorney Cardona confirmed that Petitioner would not be eligible for the drug program if he was convicted of a felony assault.<sup>5</sup> Thus, as Attorney Cardona explained, Petitioner's expressed goal during plea bargaining was to request that the State amend the felony assault charges in state court to simple assaults. This amendment would result in preserving Petitioner's eligibility for the federal drug program.

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<sup>4</sup> Petitioner was accused of firing a paintball gun at the victim's face, which almost blinded the victim.

<sup>5</sup> Petitioner's attorneys also determined that by pleading first to the federal charges, Petitioner avoided the enhanced federal sentence that would have resulted had he pleaded to the state charges first.

After approximately seven conferences, Attorney Cardona was able to work out a disposition with the State, which the Court was willing to accept, resulting in the amendment of the felony assault charges to misdemeanor simple assaults, and imposing the time to serve required by the Petitioner's plea in state court as part of the sentence on the possession of a stolen motor vehicle charge.<sup>6</sup> Attorney Cardona testified that prior to the plea colloquy, Attorney Cardona informed Petitioner of his rights and went over the plea forms with Petitioner. Attorney Cardona also testified that he believed Attorney McCormick informed him that Petitioner's federal and state sentences would run concurrently, but Attorney Cardona could not be sure. Attorney Cardona did testify that he may or may not have informed Petitioner that his state sentence would run concurrently with his federal sentence, but again, he could not be sure. Nevertheless, Attorney Cardona was confident that the focus of his conversations regarding the plea dispositions involved eligibility for the federal drug program, not whether the time served would be concurrent.

The Court has also reviewed the transcript of Petitioner's July 10, 2013 plea colloquy, and this Court finds that it resolves the major contradictions in the testimony. During the plea colloquy, Petitioner assured the Court that he was competent, both mentally and intellectually, to understand that he was entering a plea of *nolo contendere*. See Tr. of Plea Colloquy at 4, State v. Reyes-Andino, Nos. P2-2012-1846A, P2-2012-0431A, P2-2012-1534A (R.I. Super. Ct. July 10, 2013). Petitioner also informed the Court that he had discussed his pleas with Attorney Cardona and that Attorney Cardona had answered all of his questions concerning the pleas of *nolo*

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<sup>6</sup> During plea negotiations, the trial justice indicated that jail time of three years to serve, with a full sentence of ten years, would be required. Originally, this sentence was to be imposed on the felony assault pleas. However, Mr. Cardona was able to shift the time to serve required by the trial justice to the possession of a stolen motor vehicle plea, which ultimately facilitated the amendment of the felony assault charges.

*contendere*. Id. at 4-5. Petitioner testified that he was informed of the plea negotiations that took place and was satisfied with Attorney Cardona's representation. Id. at 5. The Court read the Petitioner his rights and Petitioner stated that he was voluntarily and freely giving up those rights. Id. at 6-7.<sup>7</sup> When asked if he had any questions regarding the sentencing recommendations that the Assistant Attorney General read into the record on behalf of the State, Petitioner replied in the negative. Id. at 11-12. Those recommendations did not make any mention of running consecutively to or concurrently with Petitioner's federal sentences. Id. Finally, the Petitioner testified that no other promises had been made to him by Attorney Cardona, the police, the State, or the Court. Id. at 12-13.

After reviewing the transcript of the plea colloquy, this Court finds that Attorney Cardona did inform Petitioner of his rights, as well as go over the plea forms with Petitioner. Because the plea colloquy comports with Attorney Cardona's testimony, and contradicts Petitioner's testimony, this Court finds Attorney Cardona's testimony to have been far more credible than Petitioner's. Specifically, this Court determines that Attorney Cardona was credible in admitting that he may have told Petitioner that Petitioner's state sentence would run concurrently with his federal sentence, but that the focus of his conversations regarding the plea dispositions involved eligibility for the federal drug program, not whether the time served would be concurrent.

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<sup>7</sup> The Court also informed Petitioner of immigration consequences and the loss of the right to vote upon incarceration. Id. at 7-8.

## II

### Standard of Review

Post-conviction relief is “available to any person who has been convicted of a crime and who thereafter alleges either that the conviction violated the applicant’s constitutional rights or that the existence of newly discovered material facts requires vacation of the conviction in the interests of justice.” Higham v. State, 45 A.3d 1180, 1183 (R.I. 2012) (quoting DeCiantis v. State, 24 A.3d 557, 569 (R.I. 2011)). This Court notes that the applicant for post-conviction relief bears the burden of proving, by a preponderance of the evidence, that post-conviction relief is warranted in his case. Hazard v. State, 64 A.3d 749, 756 (R.I. 2013).

## III

### Analysis

Petitioner argues that his plea should be vacated on constitutional grounds because he received ineffective assistance of counsel from Attorney Cardona. Specifically, Petitioner contends that he was not fully advised by Attorney Cardona of the consequences of his *nolo contendere* pleas. Additionally, Petitioner states that he would not have pleaded *nolo contendere* in the state cases had he known that his state sentence to be imposed as a result of his pleas would run consecutively to—rather than concurrently with—his federal sentence. Therefore, Petitioner’s two arguments in support of post-conviction relief each involve the consequence of receiving federal and state sentences.

By way of background, federal judges have the discretion to select whether the sentences they impose will run concurrently with or consecutively to state sentences. Setser v. United States, 132 S. Ct. 1463, 1468 (U.S. 2012). Moreover, a federal district court has the discretion to order that a federal sentence run consecutively to an *anticipated* state sentence that has not yet

been imposed. Id. State judges do not have any discretion over how a state sentence will run against a federal sentence. See id. If the federal judgment is silent on how the sentence will be imposed, the sentence is assumed to be consecutive. 18 U.S.C. § 3584(a). Thus, whether Petitioner’s federal sentence would run consecutively to or concurrently with his state sentence would have been determined at Petitioner’s plea to his federal charge on December 4, 2012—and not at Petitioner’s pleas to his amended state charges on July 10, 2013.

## A

### **Ineffective Assistance of Counsel**

Petitioner first argues that he received ineffective assistance of counsel because Attorney Cardona did not fully inform Petitioner of the consequences of his pleas in state court. When evaluating allegations of ineffective assistance of counsel, the standard employed by Rhode Island is identical to that set forth by the United States Supreme Court in Strickland v. Washington, 466 U.S. 668 (1984). “Applicants are required to demonstrate that: (1) counsel’s performance was deficient in that it fell below an objective standard of reasonableness . . . and (2) 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.” Tassone v. State, 42 A.3d 1277, 1284–85 (R.I. 2012) (internal quotation marks and citations omitted). Our Supreme Court has stated that when ruling on an ineffective assistance of counsel claim, courts should consider counsel’s performance in its entirety. Hazard, 64 A.3d at 756.

## 1

### **First Prong**

The first prong of the Strickland analysis requires the applicant to show that counsel’s performance was deficient. Perkins v. State, 78 A.3d 764, 767-68 (R.I. 2013). In other words,

Petitioner must prove that counsel made errors so serious that counsel was not functioning as “counsel,” as guaranteed by the Sixth Amendment. Neufville v. State, 13 A.3d 607, 610 (R.I. 2011). To do so, Petitioner must show that “counsel’s advice was not within the range of competence demanded of attorneys in criminal cases.” Id. “[E]ffective representation is not the same as errorless representation.” Rice v. State, 38 A.3d 9, 18 (R.I. 2012) (quoting United States v. Bosch, 584 F.2d 1113, 1121 (1st Cir. 1978)). “Thus, a choice between trial tactics, which appears unwise only in hindsight, does not constitute constitutionally deficient representation under [the Strickland] standard.” Id. (quoting Bosch, 584 F.2d at 1121). Moreover, this Court notes that there is a “strong presumption that counsel’s conduct falls within the permissible range of assistance.” Hazard v. State, 968 A.2d 886, 892 (R.I. 2009)).

After hearing the testimony of Petitioner and Attorney Cardona, and reviewing the plea colloquy, this Court does not find Attorney Cardona’s performance was deficient. See Lopes v. State, No. 11-380, 2015 WL 1401868 (Mar. 26, 2015). It is clear from the testimony that Attorney Cardona made a concerted effort to obtain a favorable disposition for Petitioner. Attorney Cardona successfully negotiated the dismissal of several of the counts brought against Petitioner. Notably, Attorney Cardona was able to convince the prosecutor to amend two felony assault charges to misdemeanor simple assaults, and have the time to be served imposed as part of the sentence resulting from the plea to the possession of a stolen motor vehicle charge (a nonviolent offense), rather than the assault pleas. Thus, Attorney Cardona’s advocacy preserved Petitioner’s eligibility for the federal drug program, which was the primary focus of Petitioner’s sentencing goals. Petitioner, by remaining eligible for the federal drug program, would have been in a position to significantly reduce his federal sentence had he subsequently completed the program. See Pelletier v. State, 966 A.2d 1237, 1241-42 (R.I. 2009) (holding that a petitioner

received effective assistance of counsel after finding that the petitioner’s attorney reviewed the facts of the case, conferred with the petitioner’s previous attorneys, and based on his experience as a criminal defense attorney recommended the petitioner enter *nolo contendere* pleas rather than go to trial and risk a far longer prison sentence).

Furthermore, this Court does not find Petitioner’s testimony during the post-conviction relief hearing to have been credible. During Petitioner’s post-conviction relief hearing, he testified that he did not recall being informed of his rights. However, during the plea colloquy, Petitioner informed this Court that he discussed the consequences of the *nolo contendere* pleas with Attorney Cardona:

“The Court: Did you discuss this matter with your attorney before today?”

“The Defendant: Yes, your honor.”

“The Court: Did you discuss the matter with your attorney before you signed the three affidavits?”

“The Defendant: Yes, your honor.”

“The Court: Did your attorney answer all of your questions regarding the forms and concerning your request to enter a plea of *nolo* in all three cases?”

“The Defendant: Yes, your honor.”

Tr. of Plea Colloquy at 4-5, Andino, Nos. P2-2012-1846A, P2-2012-0431A, P2-2012-1534A.

Additionally, Petitioner testified that he was satisfied with Attorney Cardona’s representation:

“The Court: Did you discuss with your lawyer the negotiations that took place to arrive at these pleas?”

“The Defendant: Yes, your honor.”

...

“The Court: Are you satisfied with the manner in which your attorney has represented you in this case?”

“The Defendant: Yes, I am.”

Id. at 5. Thus, based on Petitioner’s own testimony during his plea colloquy, this Court finds that not only did Attorney Cardona advise Petitioner of the immigration and constitutional consequences of his plea, but also that Petitioner was satisfied with his representation at the time of his plea. See Azevedo v. State, 945 A.2d 335, 339 (R.I. 2008).

Petitioner also claimed that Attorney Cardona promised that Petitioner’s federal and state sentences would be served concurrently. However, Petitioner neglected to raise this issue prior to entering his plea when this Court specifically asked Petitioner whether other promises had been made to him by Attorney Cardona:

“The Court: Do you understand that any other promises that have 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, I’ve agreed to sentence you as recommended just now by the prosecution?”

“The Defendant: I understand, your Honor.”

“The Court: No other promises have been made to you?”

“The Defendant: No, no other promises.”

Id. at 12-13. Petitioner made no mention of any alleged promises of a concurrent sentence at the time he made his pleas, and during the post-conviction relief hearing Attorney Cardona testified that any such promises—if made—were not the focus of Petitioner’s plea goals. This Court finds Attorney Cardona’s testimony that prior to entering the pleas Petitioner was primarily concerned with his eligibility for the federal drug program was credible. See Lopes, No. 11-380, 2015 WL 1401868, \*2-\*3 (Mar. 26, 2015). Consequently, this Court is not persuaded that the issue of concurrent versus consecutive sentences was paramount in Petitioner’s mind when considering whether he should plead to the amended state charges. His primary goal was to

remain eligible for the federal drug program. Accordingly, this Court finds no basis to decide that Attorney Cardona's performance was in any way deficient.

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**Second Prong**

Even if this Court had found that counsel's performance was deficient, the second prong of the Strickland analysis requires the Petitioner to demonstrate prejudice resulting from counsel's deficient performance. Perkins, 78 A.3d at 768. To demonstrate prejudice, the Petitioner must demonstrate "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." In the context of a plea, this means that the Petitioner must demonstrate that he would not have pleaded *nolo contendere* to the state charges, but rather would have elected to go to trial. Neufville, 13 A.3d at 611. Importantly, a demonstration of prejudice also requires a demonstration that the outcome at trial would have been more favorable than the outcome after a plea. Id. To establish prejudice, it is the Petitioner's burden to show some evidence of his innocence or reason why the outcome of the trial would have been more favorable than his disposition. Perkins, 78 A.3d at 769. A petitioner's mere statements that he or she would have been acquitted, absent any evidence to support those statements, fail to meet this burden. Id. Moreover, our Supreme Court has said that "when counsel has secured a shorter sentence than what the defendant could have received had he gone to trial, the [petitioner] has an almost insurmountable burden to establish prejudice." Neufville, 13 A.3d at 614.

In this case, Petitioner was originally charged in state court with two counts of felony assault for causing serious bodily injuries to two victims. In Rhode Island, the maximum penalty for felony assault (G.L. 1956 § 11-5-2) is twenty years to serve at the Adult Correctional

Institution. The presumptive sentence indicates one to ten years for conviction after trial, and the Benchmark sentence is four to five years to serve. As a result of the plea negotiations, Petitioner's felony assault charges were amended to simple assault charges. Consequently, Petitioner was sentenced to one year at the Adult Correctional Institution, all suspended, with one year probation on each simple assault count. He served no time for the assault charges, and remained eligible for the federal drug program after his plea in state court. See Neufville, 13 A.3d at 614. Thus, Petitioner was sentenced to significantly less time for the negotiated two counts of simple assault than the time he would have been sentenced to had he been convicted of the original two counts of felony assault after trial.

This Court has also considered the fact that Attorney Cardona shifted the proposed sentence of three years to serve away from the assault charges and onto the sentence imposed as a result of the Petitioner's plea to the possession of a stolen motor vehicle charge. Taking into account that Petitioner was sentenced to three years to serve, this Court nevertheless finds that his sentence falls below the felony assault sentencing guidelines of four to five years to serve. Finally, and perhaps most importantly, any disposition that Petitioner received after conviction at trial would have run consecutively—not concurrently—with his federal sentence.

In Petitioner's case, his counsel secured a shorter sentence than what he could and most likely would have received had he gone to trial. This makes the Petitioner's burden to establish prejudice "almost insurmountable." Neufville, 13 A.3d at 614. Here, Petitioner was originally charged in state court with two counts of felony assault for causing serious bodily injuries to two victims. Petitioner's co-defendant had already pleaded guilty to the crimes. Moreover, there was video evidence demonstrating that Petitioner had committed the assaults against the two victims. Thus, this Court believes that it is very likely that had Petitioner gone to trial, he would

have been convicted of both counts of felony assault. Indeed, Petitioner has failed to provide this Court with any evidence whatsoever that he would have been acquitted or received a more favorable disposition had he actually gone to trial. He has failed to meet his high burden. See id. For these reasons, this Court does not find prejudice resulting from counsel's performance in this case.

## **B**

### **Voluntary and Intelligent Nature of the Plea**

Petitioner also argues that his pleas in state court were not voluntary, knowing, and intelligent as he would not have entered the *nolo contendere* pleas had he known the consequences of these pleas. When a court “accepts a *nolo contendere* plea, [the Court] must determine that the defendant has entered the plea both voluntarily and intelligently.” Moniz v. State, 933 A.2d 691, 695 (R.I. 2007) (citing State v. Feng, 421 A.2d 1258, 1266 (R.I. 1980)). Rule 11 of the Rhode Island Superior Court Rules of Criminal Procedure sets forth the required procedures a trial justice must observe to assure that the constitutional requirement of a voluntary and intelligent plea is met. Id. at 1266-67. Rule 11 states, in pertinent part, that a court “shall not accept . . . a plea of *nolo contendere* without first addressing the defendant personally and determining that the plea is made voluntarily with understanding of the nature of the charge and the consequences of the plea.” R.I. Super. R. Crim. P. 11. Furthermore, this Court must conduct “an on-the-record examination of the defendant before accepting [the] plea [in order] to determine if the plea is being made voluntarily with an understanding of the nature of the charge and the consequences of the plea.” State v. Frazar, 822 A.2d 931, 935 (R.I. 2003) (quoting Quimette v. State, 785 A.2d 1132, 1136 (R.I. 2001)).

Nevertheless, “[a] defendant need only be made aware of the direct consequences of his plea for it to be valid.” State v. Figueroa, 639 A.2d 495, 499 (R.I. 1994). Our Supreme Court has held that 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 v. State, 705 A.2d 173, 175 (R.I. 1998) (quoting Figueroa, 639 A.2d at 499). For instance, our Supreme Court has held that “[t]he possibility that applicant could face a stiffer sentence in the federal courts in the future was a collateral consequence of his nolo plea,” and the applicant did not have to be made aware of this possibility in order for his plea to have been deemed voluntary or intelligent. Beagen, 705 A.2d at 175.

When accepting Petitioner’s *nolo contendere* plea, this Court conducted an on-the-record examination pursuant to Rule 11. Specifically, Petitioner assured this Court that he was mentally and intellectually competent enough to understand that he was entering into a plea of *nolo contendere*:

“The Court: Are you currently under the influence of any alcohol or drugs, have you suffered from any mental disability that would affect your ability to understand what we’re doing here today?”

“The Defendant: No, your Honor.”

“The Court: How far did you go in school, sir?”

“The Defendant: Dropped out in Eleventh Grade.”

“The Court: Do you read and write the English Language?”

“The Defendant: Yes, your Honor.”

“The Court: English is your primary language?”

“The Defendant: Yes.”

“The Court: You’re asking the Court to allow you to enter pleas of *nolo contendere* in all three of these cases at this time?”

“The Defendant: Yes, your Honor.”

Tr. of Plea Colloquy at 4, Andino, Nos. P2-2012-1846A, P2-2012-0431A, P2-2012-1534A.

After being informed of his rights by this Court, Petitioner stated that he was voluntarily and freely giving up all of those rights:

“The Court: . . . You’re giving up the right to a trial either with a Judge or a Judge sitting with a jury, the right to appeal to the Rhode Island Supreme Court from a verdict or finding of guilty, you’re giving up that too. You’re giving up the right to have the state prove each and every element of all these different offenses charged against you by evidence and proof beyond a reasonable doubt, the presumption of innocence, the privilege against self-incrimination, the right to confront and cross examine the witnesses against you that the state would present, the right to present evidence and witnesses on your behalf and to testify, if you chose to do so, the right to appeal to the Rhode Island Supreme Court from the sentence imposed by this Court if I accept your pleas of nolo in these three cases, your right to have the Court obtain and consider a presentence report before imposing sentence and the right to file a motion to reduce the sentence imposed by this Court and the right of pretrial motions and appeal from a pretrial decision. Do you understand that with these nolo pleas, you are giving up all these rights?”

“The Defendant: Yes, I am.”

“The Court: Are you giving up these rights freely and voluntarily?”

“The Defendant: Yes, I am.”

Id. at 6-7. When asked if Petitioner had any questions related to the consequences of the plea or the state’s recommendation, Petitioner replied that he did not. Id. at 11-12. Notably, the State’s recommendations did not make any mention of running consecutively to or concurrently with Petitioner’s federal sentences. Id. Having reviewed the transcript of the plea colloquy in this case, this Court finds that Petitioner’s plea was voluntary and intelligent. See Lopes, No. 11-380, 2015 WL 1401868, \*4-\*5 (Mar. 26, 2015).

This Court also finds that whether a Petitioner's state sentence would run concurrently with or consecutively to his federal sentence is solely in the discretion of the federal court. See Setser, 132 S. Ct. at 1468 (holding that a federal district court has the discretion to order that a federal sentence run consecutively to an *anticipated* state sentence that has not yet been imposed). If the federal judgment is silent on how the sentence will be imposed, the sentence is assumed consecutive; the determination does not fall within the state court's discretion. See 18 U.S.C. § 3584(a); Setser, 132 S. Ct. at 1468. As this determination is outside the state court's authority, this Court finds the fact that Petitioner's state and federal sentences were to run consecutively was a collateral consequence of his pleas. Beagen, 705 A.2d at 175. Accordingly, this Court finds that Petitioner was aware of the nature of the charges against him and the direct consequences of his plea.

#### IV

#### **Conclusion**

Petitioner has not met his burden of proving, by a preponderance of the evidence, that post-conviction relief is warranted in this case. For all of the above reasons, the Court finds that Petitioner was not deprived of his Sixth Amendment right to counsel. This Court further holds that Petitioner made his pleas to the amended state charges voluntarily, knowingly, and intelligently, and that he understood the nature of his charges and direct consequences of his pleas. Post-conviction relief is denied. An order may enter to that effect.



**RHODE ISLAND SUPERIOR COURT**

*Decision Addendum Sheet*

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**TITLE OF CASE:** Felix Reyes Andino v. State of Rhode Island

**CASE NO:** PM 2014-3566

**COURT:** Providence County Superior Court

**DATE DECISION FILED:** May 6, 2015

**JUSTICE/MAGISTRATE:** Montalbano, J.

**ATTORNEYS:**

For Plaintiff: Chad F. Bank, Esq.

For Defendant: Maureen B. Keough, Esq.