STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC. **SUPERIOR COURT**

(Filed March 1, 2012)

ANTHONY PERKINS	:	
	:	
vs.	:	**Case No. PM 06-4832**
	:	
STATE OF RHODE ISLAND	:	

DECISION

DARIGAN, J. The matter before the Court is an Application for Post-Conviction Relief filed by Applicant Anthony Perkins ("Perkins"). Jurisdiction is pursuant to chapter 9.1 of title 10 of the Rhode Island General Laws.

I

Facts and Travel

On June 29, 1997, Perkins was arraigned on a charge of committing first-degree robbery on the previous day, June 28, 1997. On October 15, 1999, he submitted a plea of nolo contendere to the charge. As a result, he was sentenced to serve a twenty-year term of imprisonment, eleven of which were suspended with probation.

On December 6, 2002, while on parole from the robbery conviction, Perkins was indicted on two counts of second-degree child-sexual molestation. The molestation activity allegedly took place between February 1, 1996 and January 31, 1997; consequently, it allegedly occurred prior to the robbery incident. A second-degree child-sexual molestation conviction carries a maximum term of thirty years of imprisonment and a minimum of six years of imprisonment. See G.L. 1956 § 11-37-8.4. Thus, if convicted on the molestation charge, Perkins faced the

possibility of being sentenced to two, consecutive thirty-year terms of imprisonment for a total of sixty years of imprisonment.

On July 25, 2003, Perkins submitted a plea of nolo contendere on the two counts of second-degree child-sexual molestation. After a plea colloquy, the Court accepted the plea and sentenced Perkins to serve a ten-year term of imprisonment, which it then suspended with probation. The Court ordered that the sentence run concurrently with the first-degree robbery conviction. The Court further ordered Perkins to register as a sex offender pursuant to chapter 37.1 of title 11 (entitled the "Sexual Offender Registration and Community Notification Act"), and it recommended that Perkins undergo sexual offender treatment counseling.

Perkins now seeks post-conviction relief. He contends that but for the erroneous advice that he received from his former attorney, he would not have pled to the molestation charge.[1] Specifically, he maintains that his former attorney told him that if he failed to offer a plea on the molestation charge, he would be violated and sent to prison on the robbery conviction. He asserts that it was not possible for him to have been violated on the robbery conviction because the alleged molestation predated the robbery; consequently, he avers that his former attorney's advice to the contrary amounted to ineffective assistance of counsel.

During the pendency of the within application, the Court granted Perkins' Application for Stay of Probationary Conditions. Said stay was limited only to the extent that Perkins was required to attend sexual offender counseling or classes. All other probationary conditions remained in full force and effect.

[1] At the post-conviction relief hearing, Perkins was represented by different counsel.

II

Standard of Review

As an initial matter, "[i]t is well settled in this state that, '[a] plea of nolo contendere is the substantive equivalent of a guilty plea . . . .'" Rodrigues v. State, 985 A.2d 311, 315 (R.I. 2009) (quoting LaChappelle v. State, 686 A.2d 924, 927 (R.I. 1996)). In Rhode Island, "post-conviction relief is available to a defendant convicted of a crime who contends that his [or her] original conviction or sentence violated rights that the state or federal constitutions secured to him [or her]." State v. Laurence, 18 A.3d 512, 521 (R.I. 2011) (quoting Otero v. State, 996 A.2d 667, 670 (R.I. 2010)). Post-conviction relief also is available in situations where "the existence of newly discovered material facts requires vacation of the conviction in the interest of justice." Mattatall v. State, 947 A.2d 896, 901 (R.I. 2008).

Section 10–9.1–1(a) sets forth the statutory right to post-conviction relief. It provides:

> "(a) Any person who has been convicted of, or sentenced for, a crime, a violation of law, or a violation of probationary or deferred sentence status and who claims:
>
> (1) That the conviction or the sentence was in violation of the constitution of the United States or the constitution or laws of this state;
>
> (2) That the court was without jurisdiction to impose sentence;
>
> (3) That the sentence exceeds the maximum authorized by law, or is otherwise not in accordance with the sentence authorized by law;
>
> (4) That there exists evidence of material facts, not previously presented and heard, that requires vacation of the conviction or sentence in the interest of justice;
>
> (5) That his or her sentence has expired, his or her probation, parole, or conditional release unlawfully revoked, or he or she is otherwise unlawfully held in custody or other restraint; or
>
> (6) That the conviction or sentence is otherwise subject to collateral attack upon any ground of alleged error heretofore available under any common law, statutory or other writ, motion, petition, proceeding, or remedy; may institute,

> without paying a filing fee, a proceeding under this chapter to secure relief." Section 10–9.1–1(a).

In order to succeed on an application for post-conviction relief, an applicant has "the burden of proving, by a preponderance of the evidence, that such relief is warranted . . . ." Mattatall v. State, 947 A.2d 896, 901 n. 7 (R.I. 2008) (internal citations omitted). Furthermore, post-conviction relief applications are "civil in nature" and as such, "[a]ll rules and statutes applicable in civil proceedings shall apply." Ferrell v. A.T. Wall, 889 A.2d 177, 184 (R.I. 2005).

In reviewing an application for post-conviction relief, the Court considers "questions of fact concerning whether a defendant's constitutional rights have been infringed, and mixed question of law and fact with constitutional implications . . . ." Mattatall, 947 A.2d at 901. However, the Court may not vacate a plea "unless the record viewed in its totality discloses no facts that could have satisfied the trial justice that a factual basis existed for a defendant's plea." Rodrigues, 985 A.2d at 315 (R.I. 2009) (quoting State v. Frazar, 822 A.2d 931, 935-36 (R.I. 2003)).

III

Analysis

Perkins asserts that he was denied his Sixth Amendment right to effective assistance because his former attorney advised him to plead on the child-sexual molestation charge in order to avoid being violated on the robbery conviction. He contends that this advice was improper because it was not possible for him to have been violated for behavior that allegedly occurred prior to the occurrence of the robbery, and that but for this erroneous advice, he never would have agreed to plea to the molestation charge. In light of this allegation, the first issue for the Court to address is whether Perkins could have been violated on the robbery conviction for conduct that allegedly occurred prior to the robbery.

It is well settled that "[t]he purpose of a probation violation hearing is to determine whether a condition of the probation has been breached." State v. McCarthy, 945 A.2d 318, 326 (R.I. 2008) (citing State v. Znosko, 755 A.2d 832, 834 (R.I. 2000)). Those conditions are to "[k]eep[] the peace and remain[] on good behavior . . . ." McCarthy 945 A.2d at 326 (quoting State v. Waite, 813 A.2d 982, 985 (R.I. 2003)). As such, "[t]he sole issue for a hearing justice to consider at a probation[-]violation hearing is whether or not the defendant has breached a condition of his or her probation by failing to keep the peace or remain on good behavior." State v. Shepard, 33 A.3d 158, 163 (R.I. 2011) (quoting State v. English, 21 A.3d 403, 406 (R.I. 2011)). In conducting a hearing on an alleged probation violation, "the hearing justice weighs the evidence and assesses credibility to determine whether a defendant has breached any of the conditions of probation." McCarthy, 945 A.2d at 326.

In the instant matter, Perkins was convicted of committing first-degree robbery stemming from an incident that occurred on June 28, 1997. He was sentenced to serve twenty years of imprisonment, with eleven of those years being suspended with probation. While on parole from the robbery conviction, Perkins was charged with second-degree molestation based upon actions he allegedly made prior to the June 28, 1997 robbery.

It is clear to this Court that the conditions of probation—keeping the peace and remaining on good behavior—are prospective in nature; otherwise, someone potentially could be violated for conduct already performed prior to a conviction. This would lead to an absurd result.

In the instant matter, the fact that the alleged child-sexual molestation allegedly occurred prior to the robbery for which Perkins was convicted, he could not have been violated on this conviction for failure to keep the peace and remain on good behavior before the occurrence of the crime itself. Consequently, assuming that Perkins received advice from his former attorney

to submit a plea of nolo contendere on the molestation charge in order to avoid being violated on the robbery conviction, such advice would have been erroneous. However, even if Perkins did receive erroneous advice, the next issue to be addressed is whether such advice amounted to ineffective assistance of counsel.

Our Supreme Court has recognized that "the Sixth Amendment right to effective assistance of counsel attaches during the plea-negotiation process." Chapdelaine v. State, 32 A.3d 937, 943 (R.I. 2011) (citing Moran v. Burbine, 475 U.S. 412, 431, 106 S. Ct. 1135, 89 L. Ed. 2d 410 (1986)). The Court further has decreed that when considering a claim of ineffective assistance of counsel, "[t]his Court adheres to the standard set forth by the United States Supreme Court in Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)." Chapdelaine, 32 A.3d at 941.

According to the Strickland standard,

> "an applicant must establish two criteria. First, the applicant must demonstrate that counsel's performance was deficient, to the point that the errors were so serious that trial counsel did not function at the level guaranteed by the Sixth Amendment. This prong can be satisfied only by a showing that counsel's representation fell below an objective standard of reasonableness. The second criterion of the Strickland test requires the applicant to demonstrate prejudice emanating from the attorney's deficient performance such as to amount to a deprivation of the applicant's right to a fair trial. This prong is satisfied only when an applicant demonstrates that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Chapdelaine, 32 A.3d at 941-42 (internal citations and quotations omitted).

In considering the reasonableness of an attorney's performance under prevailing legal standards, the Court must remember that

> "[r]epresentation of a criminal defendant entails certain basic duties [:] . . . a duty of loyalty, a duty to avoid conflicts of interest . . . the overarching duty to advocate the defendant's cause and the

> more particular duties to consult with the defendant on important decisions and to keep the defendant informed of important developments in the course of the prosecution." Id. at 943 (quoting Strickland, 466 U.S. at 688, 104 S. Ct. 2052).

With these standards in mind, the Court next will address the plea agreement process.

It is well-settled that a "decision to plead nolo contendere is not one to be taken lightly." Cote v. State, 994 A.2d 59, 63 (R.I. 2010) (citing State v. Feng, 421 A.2d, 1258, 1266 (R.I. 1980)). The reason for this is because "[a] defendant entering such a plea 'waives several federal constitutional rights and consents to judgment of the court.'" Cote, 421 A.2d at 63 (quoting Feng, 421 A.2d at 1266). In accordance with Rule 11 of the Superior Court Rules of Criminal Procedure,

> "A defendant may plead not guilty, guilty or, with the consent of the court, nolo contendere. The 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. . . . The court shall not enter a judgment upon a plea of guilty or nolo contendere unless it is satisfied that there is a factual basis for the plea." Super. R. Crim. P. 11.

Thus, "'[t]he signal issue at a hearing for postconviction relief is whether a defendant knowingly and voluntarily entered his [or her] plea.'" Cote, 421 A.2d at 63 (quoting Beagen v. State, 705 A.2d 173, 175 (R.I. 1998)).

In Rhode Island, "[i]t is well settled that 'before accepting a plea of guilty or nolo contendere, the Superior Court justice [is] obliged to determine whether a criminal defendant was aware of the nature of a plea and its effect on his or her fundamental rights . . . .'" State v. Thomas, 794 A.2d 993 (quoting Ouimette v. State, 785 A.2d 1132, 1135 (R.I. 2002)). Our Supreme Court has recognized that "the United States Supreme Court [has] held that it was impermissible to presume a waiver of constitutional rights by a criminal defendant if the record

was silent in regard to the voluntariness of the plea." Frazar, 822 A.2d at 935 (quoting Ouimette, 785 A.2d at 1136). The reason for this is because "[b]y pleading guilty or nolo contendere, a defendant 'waiv[es] [the] right[ ] to a trial by jury, the presumption of innocence, the privilege against self incrimination, and the rights to confront and cross-examine [his or] her accusers, to testify and to call witnesses [in his] her own defense, to be proven guilty beyond a reasonable doubt and to appeal a conviction to this court.'" Moniz v. State, 933 A.2d 691, 695 (R.I. 2007) (quoting State v. Williams, 122 R.I. 32, 38-39, 404 A.2d 814, 818 (1979)). A plea "will be vacated unless the record shows that the court has conducted 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." Frazar, 822 A.2d at 935 (quoting Ouimette, 785 A.2d at 1136).

It is for these reasons that the Court is required to "engage in as extensive an interchange as necessary so that 'the record as a whole and the circumstances in their totality' will disclose to a court reviewing a guilty or nolo plea that the defendant understood the nature of the charge and the consequences of the plea." Frazar, 822 A.2d at 935 (quoting State v. Feng, 421 A.2d 1258, 1267 (R.I. 1980)). In situations "[w]here a plea has been accepted without conforming to the requirements of the rule, the defendant's plea must be set aside and he is entitled to plead anew." Frazar, 822 A.2d at 935 (quoting Reporter's Notes to Rule 11). As a result, "[t]he record must affirmatively disclose the voluntary and intelligent character of the plea because a valid waiver of constitutional rights cannot be presumed from a silent record." Frazar, 822 A.2d at 935 (quoting Feng, 421 A.2d at 1267). Accordingly, the Court must "examine the record [at the time the plea was entered] for all indices that a guilty or nolo plea was based on fact[,] [and] shall not vacate a plea unless the record viewed in its totality discloses no facts that could have satisfied

the trial justice that a factual basis existed for a defendant's plea." Frazar , 822 A.2d at 935-36 (quoting Feng, 421 A.2d at 1269).

On July 25, 2003, Perkins appeared before the Court to change his not-guilty plea to one of nolo contendere. Before accepting the change of plea, the Court engaged in a discussion with Perkins to ascertain whether Perkins was knowingly, willingly and voluntarily entering into the plea agreement, that he understood the consequences of his plea, and that the change in his plea would constitute an admission of his "participation in two serious felonies." (Transcript (Tr. I), dated July 25, 2003, at 2). The Court informed Perkins that by making such an admission, he was giving up all of his rights as a defendant before the Court, including the right: (a) to a trial; (b) to his presumption of innocence and his privilege against self-incrimination; (c) to confront and cross-examine the State's witnesses; (d) to testify in his own defense; (e) to have the State prove beyond a reasonable doubt each and every element of the charges; (f) to obtain and consider a presentence report; and (g) to an appeal to the Supreme Court. Id. at 2-4. The Court specifically asked Perkins whether he had discussed these issues with his then-attorney, to which Perkins answered in the affirmative. Id. at 3. The Court also offered Perkins the opportunity to question his then-attorney about procedural matters. Id. at 4. Perkins declined the opportunity. Id.

After the State recited the facts which it intended to prove at trial beyond a reasonable doubt, the Court asked Perkins whether he acknowledged responsibility for the alleged acts. Id. at 4-5. Perkins answered: "Yes, sir." Id. at 5. Thereafter, the following colloquy took place:

> THE COURT: The sentence recommended to this Court on both counts is to sentence you to ten years at the Adult Correctional Institution, suspend that sentence and place you on ten years probation and that sentence be concurrent with the remainder of the sentences that you are already presently on parole for . . . . Is

> that your understanding of the disposition that you are to receive in this case?
> [PERKINS]: Yes, sir, your Honor.
> THE COURT: [Prosecutor], is this plea being made with the knowledge of the victim in this matter?
> [PROSECUTOR]: Yes it is. However, there are other conditions of defendant's suspended sentence and probation. A condition is that this defendant had to have no contact with the victim in this case . . . .
>
> Further, this defendant must register under the requirements of law as a sex offender periodically. I'm sure his attorney has explained that to him as we have discussed it in the past.
>
> And the other condition, although not a statutory condition, but which has been discussed and defense counsel was prepared to put on the record as well is that this defendant undergo sex offender treatment counseling and the duration of the counseling and the service is to be determined by the probation department.
> THE COURT: Mr. Perkins, you acknowledge your participation with these conditions recited by the State?
> [PERKINS]: Yes, sir, your Honor.
> THE COURT: You were aware of those prior to this plea?
> [PERKINS]: Yes, your Honor.
> THE COURT: All right. They will become part of the plea. No contact with the child victim. Register as a sex offender and sex treatment as determined by probation. Is there anything you would like to say to the Court with regard to this matter before I impose sentence here today?
> [PERKINS]: No, sir, your Honor.
> THE COURT: All right. The Court finds as a fact that the defendant Anthony G. Perkins here represented by counsel does understand the nature of the charges that have been lodged against him. The Court finds that he has made a knowing willing and intelligent waiver of his rights and he has admitted facts which are sufficient to convict him of these two offenses. The Court will accept the recommendation for sentencing and sentence him accordingly. And I think the record should note that the victim is in the courtroom today.
> [PROSECUTOR]: That's correct, your Honor. I explained to her that as a victim she had the opportunity to be heard before the Court and express her feelings as far as the recommendation and explain the impact. She is in agreement and has chosen not to speak to the Court. Thank you. Id. at 5-7.

In accordance with the plea agreement, the Court sentenced Perkins to serve a ten-year suspended term of imprisonment, with probation. Said sentence was to run concurrently with his

October 15, 1999 twenty-year term of imprisonment on the first-degree robbery conviction. The Court then ordered Perkins to register as a sex offender and recommended that that he undergo sexual offender treatment counseling. It is from that sentence that Perkins now seeks post-conviction relief.

Perkins now maintains that his July 25, 2003 admission was not a knowing, willing, and intelligent waiver of his rights because his former attorney erroneously advised him that if he did not plead to the charge, the State would violate him on the robbery conviction. He contends that had he known that it was not possible for the State to violate him on the robbery conviction, he never would have agreed to submit to the plea. On June 10, 2010, the Court conducted a hearing on the application.

During the hearing, the following colloquy took place between Perkins and his current attorney concerning the circumstances surrounding his plea.

> "Q. Did you discuss with your attorney the possibility of a plea agreement with respect to this matter?
> A. The day we were in the courtroom we discussed a plea agreement.
> Q. Was that the first time that you discussed a plea agreement with your attorney?
> A. Yes.
> Q. Had the case, in fact, been passed for trial?
> A. That is what I thought it was going to trial until he came across with the plea agreement." (Transcript, dated June 10, 2010 (Tr. II) at 7-8).

However, Perkins later stated under cross-examination that "[t]he conditions he [his former attorney] discussed with me was that I would only have to register as a sex offender. He did not explain to me I would have to do sex offender classes. I found out later in the courtroom." Id. at 24. This statement contradicts his assertion that he essentially was ambushed in the courtroom at what he believed was the beginning of his trial.

When later asked about his understanding of the options he had discussed with his former attorney, Perkins stated:

> "What he [his former attorney] explained to me was if I didn't take the plea that they were offering, I was going to prison that day to serve 11 years. I was being violated. I was not going to leave the courthouse. It was either take the plea or go to jail and fight the charge from jail. He told me, 'If you were my son, I would tell you to take this deal.'" Id. at 8.

In answer to the question, "If you had known that you could not be violated for conduct that occurred—or alleged to have occurred—prior to your conviction for the robbery, would you have pled to the charge on that day?" Perkins responded: "Never in my life would I have pled to it." Id. at 10-11.

On cross-examination, Perkins claimed that he had lied to the Court during the plea hearing because he wanted to avoid going to prison on the robbery conviction. He also suggested that his former attorney had advised him to lie to the Court.

> "Q. So when you stood here and made nice representations to this Judge, you were lying to him?
> A. I did not want to go to prison.
> Q. Answer my question. Did you lie to this Judge.
> A. I guess you have to say I did.
> Q. Today or back in 2003?
> A. Back in 2003.
> Q. Sir, when this Judge asked you if you understood the rights in this form, you told him yes, you did; isn't that right?
> A. Yes I did.
> Q. He asked you if you had gone over these rights with your attorney and you told him, yes, you did?
> A. Yes, I did. I went on my attorney's advice." Id. at 19-20.

However, when specifically asked whether his former attorney had advised him to lie to the Court, Perkins did not answer the question directly. Instead, he stated: "My attorney advised me to take the plea or I was going to prison for 11 years that day so I did what he advised me to do." Id. at 20. This pattern continued during the following colloquy:

"Q. Were you lying [to the Court] when you said that sir, 'Yes, sir'?
A. I went on the advice of my attorney and said what I had to say to stay out of prison, yes, I did.
Q. You lied to him[the Judge]?
A. I had to or I was going to prison for 11 years.
Q. Well you'd be going to prison for maybe 60 if you had got convicted.
A. I wouldn't have been convicted. That is hearsay. You're saying something you don't know is true or not.
Q. No, sir. I said if you were convicted of these two crimes, you were looking for up to 60 years in prison, wouldn't you sir?
A. If that is what it carries. That is a big if.
Q. And later in the plea, Mr. Perkins, the Court talks about further conditions of your sentence, that being a no contact order, sexual offender registration, sex offender counseling, do you recall that?
A. Yes, sir.
Q. And the Court asked you if you acknowledged your participation and your understanding, that was part of the plea?
A. Yes, sir.
Q. And you did acknowledge that, correct?
A. Yes, sir. Under the advice of my attorney, yes, I did.
Q. All right. That was something you had discussed with your attorney, was it not, that these were going to be conditions of your admission—let me finish, correct?
A. The conditions he discussed with me were that I would only have to register as a sex offender. He did not explain to me I would have to do sex offender classes. I found out later in the courtroom." Id at 23-24.

The record reveals that in 2003, Perkins convincingly represented to the Court that he knowingly, intelligently, and voluntarily was waiving his rights; however, he now seeks the Court to believe that he felt compelled to lie at that hearing due to erroneous advice, and that he presently is telling the truth. Thus, at issue in this case is whether Perkins received erroneous advice before submitting his plea to the Court on the child-sexual molestation charge and, if he did, whether such advice amounted to ineffective assistance of counsel.

In support of his claim, Perkins suggests that on the date his trial was scheduled to begin, he essentially was blindsided in the courtroom by his former attorney who, for the first time, presented a proposed plea agreement. He also avers that he did not know the full details of the plea agreement until he was in the courtroom.[2] Perkins also would have the Court believe that although he was given an opportunity to question the plea agreement in open Court, he declined the opportunity because his former attorney advised him that his failure to submit to the plea would result in his being violated on the robbery conviction.

The Court finds that apart from his self-serving statements and allegations, Perkins has failed to submit even a scintilla of evidence that his former attorney gave him erroneous advice. Indeed, while not required, it is noteworthy that Perkins did not call his former attorney as a witness to testify about the circumstances surrounding the plea agreement. Consequently, the Court concludes that Perkins has failed to satisfy his burden of proving that his former attorney erroneously advised him that he faced the possibility of being violated on the robbery conviction. See Mattatall, 947 A.2d at 901 n. 7 (observing that a post-relief applicant has "the burden of proving, by a preponderance of the evidence, that such relief is warranted . . . .")

However, assuming that Perkins did prove by credible evidence that he agreed to the plea based upon erroneous advice, which he did not, the Court is not convinced that this would have amounted to ineffective assistance of counsel. As previously stated, Perkins not only must show that his former attorney's performance was deficient, but he also must demonstrate that the resulting prejudice amounted to a deprivation of his right to a trial that is fair. See Chapdelaine, 32 A.3d at 942 (stating that an applicant must "demonstrate prejudice emanating from the

[2] Perkins stated at the plea hearing that he did not learn of the sex offender treatment recommendation until he was in the courtroom. See Transcript, dated June 10, 2010 at 24 ("The conditions he discussed with me was that I would only have to register as a sex offender. He did not explain to me I would have to do sex offender classes. I found out later in the courtroom.")

attorney's deficient performance such as to amount to a deprivation of the applicant's right to a fair trial"). Accordingly, Perkins is required to demonstrate that there was "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 942-43. Perkins has failed to make such demonstration.

At the post-conviction relief hearing, Perkins maintained that he "wouldn't have been convicted. That is hearsay." (Tr. II at 23). However, after reviewing the record, the Court concludes that Perkins has failed to show that there was a reasonable probability that the outcome of the proceedings would have been different had he not submitted to the plea. It is undisputed that if convicted on the two counts of child-sexual molestation, Perkins faced the possibility of being sentenced to two consecutive thirty-year terms of imprisonment.[3] However, as a result of representations he credibly made to the Court at his 2003 plea hearing, he instead received a suspended ten-year term of imprisonment, with probation, to run concurrently with the twenty-year term of imprisonment he previously had received for the 1998 robbery conviction.

Assuming that Perkins actually had gone to trial on the child-sexual molestation charge rather than submit to a plea, he has not provided a scintilla of evidence that there was reasonable probability the proceeding would have been different, i.e., that he would not have been convicted at trial. Perkins was cognizant of the fact that his alleged victim not only was willing to testify against him at the actual trial, but that she also was present at the plea hearing in order to "express her feelings as far as the recommendation and explain the impact[,]" had she not been in agreement with the recommendation. (Tr. I at 7). Because the alleged victim did not have an objection to the recommendation, however, she opted not to testify at the plea hearing. Id.

[3] Each count carried a maximum penalty of thirty years in prison. Had Perkins received the maximum penalty on each count, and had those penalties been ordered to run consecutively, then Perkins would have been sentenced to a sixty-year term of imprisonment.

Juxtaposed against the fact that his alleged victim almost certainly would have testified against him at trial is Perkins' conclusory statement that he "wouldn't have been convicted. That is hearsay." Such statement fails to rise anywhere near to the level required to overcome his burden of demonstrating, with a reasonable probability, that the outcome of a trial would have been different to that of the plea hearing. Consequently, the Court concludes that Perkins failed to prove his ineffective assistance of counsel claim.

IV

Conclusion

In view of the foregoing, the Court concludes that Perkins failed to sustain his burden of proving that his request for post-conviction relief is warranted. Consequently, his Application for Post-Conviction Relief is denied and dismissed. The Court orders that the Stay of Probationary Conditions previously entered in the within action hereby be lifted.

Counsel shall submit an appropriate Order for entry reflecting all of the above.