

**STATE OF MICHIGAN
IN THE SUPREME COURT**

**PEOPLE OF THE STATE OF MICHIGAN
Plaintiff-Appellant,**

v

**DAVID CHARLES ROARK,
Defendant-Appellee.**

No. 152562

**L.C. No. 08-9312-01
Court of Appeals No. 316467**

**THE PEOPLE'S SUPPLEMENTAL BRIEF IN SUPPORT OF THE APPLICATION
FOR LEAVE, AS DIRECTED BY THIS COURT'S ORDER OF 4/1/2016**

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Statement of the Question

I.

Should defendant's convictions and sentences be affirmed if this Court's holding in *People v. Comer* renders him not subject to lifetime electronic monitoring, or, if he is subject to lifetime electronic monitoring, because he has failed to show prejudice under either MCR 6.508(D)(3)(b)(ii) or principles of plain error?

Defendant answers: NO

The People answer: YES

Statement of Facts

See application for leave to appeal.

Argument

I.

Defendant's convictions and sentences should be affirmed if this Court's holding in *People v. Comer* renders him not subject to lifetime electronic monitoring, or, if he is subject to lifetime electronic monitoring, because he has failed to show prejudice under either MCR 6.508(D)(3)(b)(ii) or principles of plain error.

Introduction

This Court's order directed the parties to file supplemental briefs addressing the following issues:

- whether the defendant was accurately advised of the direct consequences of his guilty plea, including lifetime electronic monitoring;
- whether the defendant has demonstrated actual prejudice pursuant to MCR 6.508(D)(3)(b); and in particular,
- whether the defendant must demonstrate that he would not have pleaded guilty if he had known about the lifetime electronic monitoring requirement. See, e.g., *United States v Timmreck*, 441 US 780, 783-784; 99 S Ct 2085; 60 L Ed 2d 634 (1979) (holding that a conviction based on a guilty plea is not subject to collateral attack when all that can be shown is a formal violation of Rule 11); *Williams v Smith*, 591 F 2d 169 (CA 2, 1979) (recognizing that the test applied by the Second Circuit for determining the constitutional validity of a state court guilty plea that was based on inaccurate sentencing information is whether the defendant was aware of actual sentencing possibilities, and, if not, whether accurate information would have made any difference in his decision to enter a plea).

In its order the same day in *People v. Comer*, No. 152713, this Court issued an order directing oral argument on several questions, including

whether the defendant's original sentence for first-degree criminal sexual conduct was rendered invalid because it did not include lifetime electronic monitoring, pursuant to MCL 750.520b(2)(d), i.e., whether MCL 750.520n requires that the defendant, who pled guilty to MCL 750.520b(1)(c), be sentenced to lifetime electronic

monitoring, compare *People v. Brantley*, 296 Mich.App 546 (2012) with *People v. King*, 297 Mich.App 465 (2012).

The difference of opinion between the *Brantley*¹ and *King*² majority opinions concerns whether the modifying phrase “by an individual 17 years old or older against an individual less than 13 years of age” pertains only to convictions under 520c (CSC 2) or applies also to convictions under 520b (CSC 1). *Brantley* is the controlling opinion, holding that the limiting trailing modifier “by an individual 17 years old or older against an individual less than 13 years of age” applies only to convictions under 520c, over a vigorous dissent, *King* agreeing with the dissent, but the Court of Appeals declining to convene a conflict-resolution panel. This Court denied leave to appeal in both.

Because the defendant in this case pled guilty to CSC 1 where the victim was not under the age of 13, the People moved to add this issue to the issues to be briefed in this case. This Court denied the motion. The People are confident that, should the Court decide in *Comer* that the trailing modifier applies to *both* 520b and 520c, it would not find in this case that error occurred on the ground that defendant was not warned of a sentence term that in fact does not apply to him; nor, on the other hand, would it allow that term to stand if it is an invalid sentence term in this case. But because this Court denied the motion to add the issue, the People can say nothing further here,³ other than that if this Court finds in *Comer* that the trailing modifier applies to both 520b and 520c the issues here become moot. Assuming, then, that instead the Court finds in *Comer* that the trailing modifier of 520n applies only to the 520c, the People turn to the issues specified in this Court’s order.

¹ *People v. Brantley*, 296 Mich.App 546 (2012).

² *People v. King*, 297 Mich.App 465 (2012).

³ In denying the motion to add issue, this Court invited this Office to file as amicus curiae in the *Comer* case; that pleading is filed simultaneously with the present one.

A. Defendant Was Not Advised of the Requirement of Lifetime Electronic Monitoring By the Court During the Plea Taking

Defendant was not informed by the trial judge at the plea of the requirement of lifetime electronic monitoring as part of his sentence (if there actually is such a requirement). At that time, MCR 6.302 did not include this requirement, requiring that the defendant be informed of “the maximum possible prison sentence for the offense and any mandatory minimum sentence required by law.” This Court, some four years after the plea here, held that a trial judge is required to inform the defendant of lifetime electronic monitoring where that is a mandatory part of the sentence.⁴

B. Defendant has not shown that he is entitled to relief under MCR 6.508(D)(3)(b)(ii), as he has not shown that his convictions are a “a complete miscarriage of justice,” nor has he shown he is entitled to relief under principles of plain error, as he has not shown that he was unaware of the requirement of lifetime electronic monitoring, or that if he was unaware, there is a reasonable probability that he would not have pled had he been aware

1. Defendant has not shown cause for his procedural default

Defendant here forfeited his direct appeal—that is, the opportunity to file an application for leave to appeal from the plea and judgment of sentence—by his untimely request for counsel. This Court said in its order of 11-19-2014 that “Because the defendant waited more than five months before filing an untimely request for the appointment of appellate counsel, *the defendant is not entitled to review under the standard applicable to direct appeals.*”⁵ But because defendant had, after his untimely request, been appointed counsel, and that counsel had neither filed anything with

⁴ *People v. Cole*, 491 Mich. 325, 331 (2012). The People believe it doubtful before this time that in very many pleas to CSC 1 the defendant was warned at the plea taking of lifetime electronic monitoring, though his or her counsel may very well have discussed the point with the defendant in these cases.

⁵ *People v. Roark*, 497 Mich. 895 (2014) (emphasis supplied).

the appropriate court—the trial court, by way of a motion for relief from judgment, the only option then available—or consulted with his client, this Court disciplined the attorney for violation of the Minimum Standards for Indigent Criminal Appellate Defense Services.⁶ This Court also remanded to the Court of Appeals to consider as on leave granted defendant’s application for leave to appeal from the denial of the motion for relief from judgment he had filed in pro per; the Court of Appeals then ordered the appointment of counsel.

As the application concerned the denial of a motion for relief from judgment, it raised an issue that could have been brought had the defendant not forfeited his direct appeal, and thus a showing of cause and prejudice was required under MCR 6.508(D)(3)(a),(b)(ii).⁷ The Court of Appeals found good cause based on this Court’s order finding that defendant’s appointed counsel

⁶ “However, the defendant's previously appointed appellate attorney failed to comply with Administrative Order 2004–6, Minimum Standards for Indigent Criminal Appellate Defense Services, Standard 5. Counsel did not seek to withdraw pursuant to *Anders v. California*, 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed.2d 493 (1967). Therefore costs are imposed against the attorney, only, in the amount of \$1,000 to be paid to the Clerk of this Court.” *People v. Roark*, 497 Mich. 895 (2014).

⁷ “The defendant has the burden of establishing entitlement to the relief requested. The court may not grant relief to the defendant if the motion

(3) alleges grounds for relief, other than jurisdictional defects, which could have been raised on appeal from the conviction and sentence or in a prior motion under this subchapter, unless the defendant demonstrates

(a) good cause for failure to raise such grounds on appeal or in the prior motion, and

(b) actual prejudice from the alleged irregularities that support the claim for relief. As used in this subrule, "actual prejudice" means that,

(ii) in a conviction entered on a plea of guilty, guilty but mentally ill, or nolo contendere, the defect in the proceedings was such that it renders the plea an involuntary one to a degree that it would be manifestly unjust to allow the conviction to stand[.]

had violated the Minimum Standards for Indigent Criminal Appellate Defense Services, the Court of Appeals conflating those standards with ineffective of assistance of counsel under the Sixth Amendment:

Here, defendant demonstrated good cause for failing to raise this issue in a timely appeal or motion. Good cause can be established by proving ineffective assistance of appellate counsel. . . . In granting leave to appeal to this Court, the Michigan Supreme Court specifically found that defendant's initial appellate counsel failed to comply with the minimum standards for indigent defense counsel by abandoning defendant's appeal without withdrawing from representation, and imposed costs against the attorney. . . . After defendant's appellate counsel abandoned his appeal, defendant filed a motion for relief from judgment on his own behalf, which led to the current proceedings. Accordingly, we conclude that defendant has demonstrated good cause for his failure to raise the involuntary plea issue at an earlier time based on ineffective assistance of counsel.⁸

The standard cited by this Court in its order was Administrative Order 2004-6, Minimum Standards for Indigent Criminal Appellate Defense Services, Standard 5: "An appeal may never be abandoned by counsel; an appeal may be dismissed on the basis of the defendant's informed consent, or counsel may seek withdrawal pursuant to *Anders v California*, 386 US 738; 87 S Ct 1396; 18 L Ed 2d 493 (1967), and related constitutional principles." Counsel here was appointed, and thus, no matter the state of the proceedings at that time, he could not, under Standard 5, said this Court, simply abandon his client. But this does not mean that defendant, at that time, had a Sixth Amendment right to counsel, and thus a right to counsel performance that satisfied the *Strickland*⁹ standard. Again, *this* Court has found that defendant, by his own actions, was not "entitled to review under the standard applicable to direct appeals." The performance of counsel on a discretionary or

⁸ *People v. Roark*, 2015 WL 6161440, 1 (2015).

⁹ *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct 2052, 80 L Ed 2d 674 (1984).

collateral review is not subject to the *Strickland* standard, as defendant is not entitled to counsel on these matters. The United States Supreme Court has said that “[A] criminal defendant does not have a constitutional right to counsel to pursue discretionary state appeals,”¹⁰ and that “the right to appointed counsel extends to the first appeal of right, and no further.”¹¹ And this Court has specifically held, citing these cases, that “in accordance with *Coleman* and *Wainwright* . . . because a defendant has no constitutional right to appointed counsel in filing a motion for relief from judgment under subchapter 6.500 of the Michigan Court Rules, a defendant cannot claim constitutionally ineffective assistance of counsel by counsel's failure timely to file an application for leave to appeal from the denial of such a motion.”¹²

The Court of Appeals erred in conflating the indigent defense standards with a right to counsel,¹³ and applying a performance standard to find cause for defendant’s fault, where no such standard applies. Defendant has made no other claim of cause, and thus his appeal should founder there.

¹⁰ *Wainwright v. Torna*, 455 U.S. 586, 587, 102 S.Ct. 1300, 71 L.Ed.2d 475 (1982).

¹¹ *Pennsylvania v. Finley*, 481 U.S. 551, 555, 107 S.Ct. 1990, 95 L.Ed.2d 539 (1987).

¹² *People v. Walters*, 463 Mich. 717, 721 (2001).

¹³ And see *People v. Bass*, 457 Mich. 866 (1998): “we VACATE the decision of the Court of Appeals insofar as it may be read to conclude that compliance with the minimum standards for assigned appellate counsel is constitutionally required.”

2. Defendant cannot show prejudice under MCR 6.508(D)(3)(b)(ii), nor under plain error

Assuming, for the sake of argument, a defect in the plea, and, also for the sake of argument, cause for forfeiture of the direct appeal, under MCR 6.508(D)(3)(b)(ii) defendant may only be granted relief by showing actual prejudice, defined, in the case of a conviction entered on a plea of guilty, as when “the defect in the proceedings was such that it renders the plea an involuntary one *to a degree that it would be manifestly unjust to allow the conviction to stand*” (emphasis supplied). Defendant cannot meet this standard, nor can he meet the standard of plain error, applicable on direct review.

Defendant’s plea agreement included significant concessions. The People agreed to dismiss two additional counts of child sexually abusive activity, one count of kidnapping, and all of the charges against the defendant in three other cases: No. 08-009311-FC, which charged kidnapping, two counts of child sexually abusive activity, and one count of criminal sexual conduct in the second degree; No. 08-9313-FH, which charged three counts of child sexually abusive activity; and No. 08-9315-FH, which charged two counts of child sexually abusive activity and unlawful imprisonment. The prosecution also agreed not to bring charges with regard to distribution of child pornography concerning four other victims.

At the plea taking, the trial court inquired as to whether the full agreement had been stated, and the prosecutor answered “Yes, Judge. Other than sex offender registration is required by statute, which I also put on the form.” The trial judge asked the defendant “You understand?” and defendant answered “yeah.” The trial judge asked “is that your full and complete understanding of the

agreement?” and defendant answered “Yes.”¹⁴ At sentencing, when the court reporter asked if the judge had said “SORA” in imposing sentence, the court said “That includes lifetime electronic monitoring.” The court then inquired of defendant “*You also understand that includes lifetime electronic monitoring?*” and the transcript indicates “No verbal response—indicating.”¹⁵

On defendant’s motion for relief from judgment, after noting these facts, the circuit judge held that “Contrary to the defendant’s current contention, both the written plea form and defendant’s plea on the record reveal the defendant was subject to the mandatory electronic tethering specifically required by statute The defendant specifically indicated on the record he understood the requirements.”¹⁶ This is mistaken, as the Court of Appeals held. Lifetime electronic monitoring was not mentioned by the court until sentencing, where the defendant indicated he understood it was part of the sentence. The Court of Appeals held:

- In *Cole*, our Supreme Court held that mandatory lifetime electronic monitoring, required pursuant to MCL 750.520n(1), is not only a direct consequence of a defendant’s guilty plea, but part of the sentence itself. *Cole*, 491 Mich at 335-337. Therefore:

[W]hen the governing criminal statute mandates that a trial court sentence a defendant entering the plea that he or she will be subject to mandatory lifetime electronic monitoring, due process requires the trial court to inform the defendant entering the plea that he or she will be subject to mandatory lifetime electronic monitoring. And because MCR 6.302 is premised on constitutional due-process requirements, a defendant who will be subject to mandatory lifetime electronic

¹⁴ PT, 14.

¹⁵ ST, 16. It is plain that the court reporters transcription “indicating” is a shorthand for “indicated assent,” likely by nodding. Otherwise, further questions would have been posed by the judge.

¹⁶ Opinion, p. 4-5.

monitoring must be so advised by the trial court at the time of the plea hearing in order to satisfy the court rule's requirement that the plea be understanding and voluntary.

- There was no record evidence that defendant was informed of the impending imposition of lifetime electronic monitoring prior to entering his guilty plea. . . . we are not convinced that the trial court's belated and fleeting mention of lifetime electronic monitoring after the sentencing proceeding concluded rendered defendant's guilty plea knowing and voluntary.
- Contrary to the prosecutor's assertion on appeal, the fact that defendant's involuntary plea entered in 2008, several years prior to the 2012 *Cole* decision, does not render *Cole*'s holding inapplicable to the present case. . . . *Brady*'s constitutional requirement that defendant be apprised of the "direct consequences" of his guilty plea before his plea could be considered knowing and voluntary had been a rule for decades by the time defendant entered his plea . . . and the *Cole* decision did nothing to change *Brady*'s constitutional mandate.
- The defect in defendant's plea proceedings was such that it rendered the plea an involuntary one, and it would be manifestly unjust to allow the convictions to stand. This holding is mandated by due process and the severity of lifetime electronic monitoring as a sentencing requirement.¹⁷

To the Court of Appeals, then, there is essentially no difference between a plea that is considered involuntary on direct appeal and one that may be considered involuntary when review is on collateral attack. This renders the language of MCR 6.508(D)(3)(b)(ii), with its heightened prejudice requirements for review on collateral attack, nugatory in its requirement that relief not be granted unless that the plea is "*to a degree* that it would be manifestly unjust" to allow the plea to stand. In the rule this Court plainly contemplated degrees of involuntariness of pleas, with a heightened

¹⁷ Slip opinion, 3-4. Though the first case holding *Cole* retroactive on collateral attack, the opinion is, remarkably, unpublished.

standard of involuntariness on collateral attack. And the approach of the Court of Appeals is inconsistent with *United States v. Timmreck*,¹⁸ as well as MCL 768.29.¹⁹

In the *Timmreck* case, Timmreck pled guilty, and the judge “explained that [he] could receive a sentence of 15 years’ imprisonment and a \$25,000 fine, but the judge failed to describe the mandatory special parole term of at least 3 years required by the applicable statute.”²⁰ Federal Rule of Criminal Procedure 11 at the time of the plea provided, in pertinent part, that “The court . . . shall not accept such plea or 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.” That defendant was subject to a special parole term of at least 3 years (5 years of supervised parole were actually imposed) was thus *a direct and mandatory sentencing term* resulting from defendant’s plea,²¹ and it was undisputed that the failure to so inform the defendant was a violation of Rule 11’s requirement that the defendant be informed of the “consequences of the plea.” Defendant did not file a direct appeal, but raised the issue on collateral

¹⁸ *United States v Timmreck*, 441 U.S. 780, 99 S.Ct. 2085, 60 L.Ed. 2d 634 (1979).

¹⁹ The statute insists that “[n]o judgment . . . be set aside or reversed or a new trial . . . granted by any court of this state in any criminal case . . . for error as to any matter of pleading or procedure, unless in the opinion of the court, after an examination of the entire cause, it shall affirmatively appear that the error complained of has resulted in a miscarriage of justice.”

²⁰ *United States v Timmreck*, 99 S.Ct. at 2086.

²¹ As described by the Sixth Circuit opinion, “The three year minimum mandatory special parole term mandated by [the statute] is unlike ordinary parole in that it must be tacked onto the end of any other sentence and does not take effect until the expiration of the primary sentence, including ordinary parole.” *Timmreck v. United States*, 577 F.2d 372, 373 (CA 6, 1978). See also *Johnson v. United States*, 529 US 694, 725, 120 S.Ct. 1795, 146 L.Ed. 2d 727 (2000) (Scalia, J., dissenting) (“supervised release is a separate term imposed at the time of initial sentencing”).

review, under the federal analogue to Michigan’s motion for relief from judgment practice, and was granted relief by the Sixth Circuit. A unanimous Supreme Court reversed.

The Court observed that the “claim could have been raised on direct appeal . . . but was not,” and concluded that there was “no basis here for allowing collateral attack ‘to do service for an appeal.’”²² The Court emphasized that “the concern with finality served by the limitation on collateral attack has special force with respect to convictions based on guilty pleas,” and that

Every inroad on the concept of finality undermines confidence in the integrity of our procedures; and, by increasing the volume of judicial work, inevitably delays and impairs the orderly administration of justice. The impact is greatest when new grounds for setting aside guilty pleas are approved because the vast majority of criminal convictions result from such pleas. Moreover, the concern that unfair procedures may have resulted in the conviction of an innocent defendant is only rarely raised by a petition to set aside a guilty plea.²³

The Court concluded that it had no occasion to decide whether relief was appropriate in “the context of other aggravating circumstances,” deciding only that the defendant on postconviction review was not entitled to relief for a failure to inform him of a mandatory term of supervised relief that would be applied *after* his sentence of incarceration was complete,²⁴ for no “claim reasonably [can] be made that the error here resulted in a ‘complete miscarriage of justice’ or in a proceeding ‘inconsistent with the rudimentary demands of fair procedure.’”²⁵

²² *United States v Timmreck*, 99 S.Ct. at 2087.

²³ *United States v Timmreck*, 99 S.Ct. at 2087-2088..

²⁴ *United States v Timmreck*, 99 S.Ct. at 2088.

²⁵ *United States v Timmreck*, 99 S.Ct. at 2087. And see *United States v. Dominguez Benitez*, 542 U.S. 74, 124 S.Ct. 2333, 2341, 159 L.Ed.2d 175 (2004) (“Rule 11 error without more is not cognizable on collateral review”).

The Court noted that Timmreck did “not argue that he was actually unaware of the special parole term or that, if he had been properly advised by the trial judge, he would not have pleaded guilty.”²⁶ Defendant here in the Court of Appeals said that he “has asserted in his prior pleadings before this Court and the Michigan Supreme Court that he would not have entered his plea if he had known of lifetime electronic monitoring and he now wishes to withdraw his plea.”²⁷ Does this make a difference? Is it sufficient? The factual context is important. Defendant was told at sentencing that his sentence included lifetime electronic monitoring, and he acknowledged that he so understood. He could have at that time said he was unaware of that requirement, if that were the case, and moved to withdraw his plea, which almost certainly would have been granted.²⁸ Instead he indicated his awareness of the monitoring. Further, while the Court of Appeals premised its grant of relief by finding that “There was no record evidence that defendant was informed of the impending imposition of lifetime electronic monitoring prior to entering his guilty plea,”²⁹ there is

²⁶ *United States v Timmreck*, 99 S.Ct. at 2087. This is somewhat curious, given the statement in the circuit court opinion that “The record does not reflect, however, that the court informed Timmreck, or that he otherwise knew, about the three year minimum mandatory special parole term.” *Timmreck v. United States*, 577 F.2d 372, 373 (CA 6, 1978). The difference is likely simply that the Supreme Court was making clear that the burden with regard to the record was on the defendant.

²⁷ Defendant’s Brief in the Court of Appeals, p. 16.

²⁸ See MCR 6.310:

(B) Withdrawal After Acceptance but Before Sentence. Except as provided in subsection (3), after acceptance but before sentence, (1) a plea may be withdrawn on the defendant's motion or with the defendant's consent, only in the interest of justice, and may not be withdrawn if withdrawal of the plea would substantially prejudice the prosecutor because of reliance on the plea. If the defendant's motion is based on an error in the plea proceeding, the court must permit the defendant to withdraw the plea if it would be required by subrule (C).

²⁹ *People v. Roark*, 2015 WL 6161440, at 2.

also no evidence—nor, at least initially, a claim—that defendant was *unaware* of the consequence of his plea of lifetime electronic monitoring (if, indeed, that *is* a proper consequence). Defendant’s request in his pro per motion for relief from judgment was that he should be allowed to withdraw his plea not because he was unaware at the plea of lifetime electronic monitoring, but because, citing the unpublished *Bowman*³⁰ holding that lifetime electronic monitoring does not apply to 520b, that portion of his sentence was *unlawful*.³¹ On his application for leave from the denial of the motion for relief from judgment, defendant first cited *Cole*, still saying that the imposition of electronic monitoring was not authorized because his victim was not under 13 years of age, and also arguing that “it was imposed without the court letting him know it was a direct consequence of [sic] plea.”³² Defendant’s assertion of a lack of knowledge, and of the critical nature of the electronic monitoring requirement to his decision to plead, is late arrived at.

But even if given some credence, a point to which the People will return, it does not, on collateral review, make a difference. Federal courts have so said. In *Holloway v. United States*,³³ the defendant made the same argument as Timmreck regarding his plea, but attempted to distinguish his situation from that of Timmreck, pointing to the statement of the Court in that case that Timmreck did “not argue that he was actually unaware of the special parole term or that, if he had

³⁰ *People v. Bowman*, (No. 292415, 11-9-2010), 2010 WL 4483698 (2010).

³¹ Defendant’s Motion for Relief from Judgment: “had it not been for ineffective assistance of appellate counsel, he [defendant] would not have to submit to lifetime electronic monitoring, which is not permitted in the case as set forth in In [sic] an unpublished opinion *People v Bowman* . . . a defendant convicted of first-degree criminal sexual conduct with a victim 13 or older was not subject to lifetime electronic monitoring.”

³² Defendant’s application for leave, p. 6-7.

³³ *Holloway v. United States*, 960 F.2d 1348, 1352 (CA 8, 1992).

been properly advised by the trial judge, he would not have pleaded guilty,” and arguing that *he* was in fact actually unaware, and that if properly advised he would not have pled guilty. On this distinction, he said he was entitled to relief. The court disagreed. As to cases on collateral review, the court held that even if defendant’s claim were true he would not be entitled to relief, for the failure to inform defendant of the mandatory sentence consequence of a term of monitored release after the completion of his term of incarceration simply, in the words of the Court in *Timmreck*, ““does not present ‘exceptional circumstances where the need for the remedy afforded by the writ of *habeas corpus* is apparent’” as it did not result ““in a complete miscarriage of justice,”” and was not ““inconsistent with the rudimentary demands of fair procedure.”” Though it was true, continued the court, that the fact that Timmreck had *not* argued he was actually unaware of the special parole term, or that, if he had been properly advised, he would not have pleaded guilty, “was enough to convince the *Timmreck* Court that the error before it was not of the character or magnitude cognizable under a writ of habeas corpus,” it did not follow that defendant was entitled to relief on collateral review “if the defendant alleges that he had no actual knowledge of the omitted matter and that he would not have pled guilty if he had possessed such knowledge.”³⁴ Rather, it remained the case of that that defect in the plea-taking “did not result in a complete miscarriage of justice and [was] not inconsistent with the rudimentary demands of fair procedure.”³⁵

But even if the matter were considered on the merits as on direct appeal, defendant cannot prevail. There was no objection to the absence of a warning regarding electronic monitoring, even

³⁴ *Holloway v. United States*, 960 F.2d at 1352-1353.

³⁵ *Holloway v. United States*, 960 F.2d at 1353. And see *Lucas v. United States*, 963 F.2d 8, 12-15 (CA 2, 1992); *United States v. DeLuca*, 889 F.2d 503, 507-08 (CA 3, 1989); *Malgeri v. United States*, 1996 WL 343049 (CA 1, 1996).

when defendant was so informed at sentencing and indicated he understood. Review is for plain error, then, or perhaps for ineffective assistance of counsel. In either circumstance, prejudice must be shown. Federally, review of an error at plea taking of failure to inform the defendant of a term of supervised release that will follow the period of incarceration is for plain error.³⁶ In determining whether plain error has occurred, the reviewing court, the United States Supreme Court has said, “must look to the entire record, not to the plea proceedings alone.”³⁷ And the defendant must show “a reasonable probability that, but for the error, he would not have entered the plea. A defendant must thus satisfy the judgment of the reviewing court, informed by the entire record, that the probability of a different result is ‘sufficient to undermine confidence in the outcome’ of the proceeding.”³⁸

Defendant’s task here, were the issue cognizable, would be to carry the burden on the questions of “whether the defendant was aware of actual sentencing possibilities, and if not, whether

³⁶ *United States v. Aplicano-Oyuela*, 792 F.3d 416, 422 (CA 4, 2015) (“when a defendant contests the validity of a guilty plea that he did not seek to withdraw, we also review that challenge solely for plain error”). And see *United States v. Hughes*, 726 F.3d 656, 660 (CA 5, 2013) (“Hughes argues that his change-of-plea hearing was procedurally deficient under Rule 11 in four ways: (A) the factual basis provided by the Government was insufficient; (B) the district court failed to explain fully the consequences of his guilty pleas to the telephone counts; (C) the district court misstated the mandatory minimum and statutory maximum sentences he faced; and (D) the district court failed to inform him of the mandatory special assessments that would form a part of his sentence. Because Hughes failed to object on any of these grounds before the district court, our review is for plain error only”).

³⁷ *United States v. Dominguez Benitez*, 542 U.S. 74, 124 S.Ct. 2333, 2338, 159 L.Ed.2d 157 (2004).

³⁸ 124 S.Ct. At 2340.

accurate information would have made any difference in his decision to enter a plea.”³⁹ A mere assertion either of unawareness of the sentence consequences or that the accurate information was critical to the decision to plead is not itself sufficient; “[f]actors to be considered by the . . . court in determining whether a defendant would have decided not to plead guilty and insisted instead on going to trial include (a) whether the defendant pleaded guilty in spite of knowing that the advice on which he claims to have relied might be incorrect, (b) whether pleading guilty gained him a benefit in the form of more lenient sentencing, (c) whether the defendant advanced any basis for doubting the strength of the government's case against him, and (d) whether the government would have been free to prosecute the defendant on counts in addition to those on which he pleaded guilty.”⁴⁰

Here, defendant may have been aware of the requirement of electronic monitoring before the plea.⁴¹ Further, as has been indicated, defendant received important charge and charging concessions, and a sentence agreement, where he faced life in prison on multiple counts, and other counts could have been brought that were foregone by the prosecution. Defendant was charged in 08-9311 with kidnapping (a maximum life penalty); two counts of child sexually abusive activity

³⁹ *United States v. Arteca*, 411 F.3d 315, 320 (CA2, 2005). *Williams v. Smith*, 591 F.2d 169 (CA 2, 1979), cited in this Court’s order, is a collateral-review case—a state conviction on habeas—but was pre-AEDPA, and also preceded *Timmreck* by some 4 months. See also *Moffitt v. State*, 817 N.E.2d 239, 249 (Ind.App. , 2004); *State v. Domian*, 668 A.2d 1333, 1338 (Conn., 1996).

⁴⁰ *Chhabra v. United States*, 720 F.3d 395, 408-409 (CA 2, 2013). And see *United States v. Arteca*, *supra*. See also *United States v. Bejarano*, 751 F.3d 280 (CA 5, 2014); *Hodges v. Colson*, 727 F.3d 517, 539 (CA 6, 2013).

⁴¹ The People would note that defendant has filed nothing from his trial counsel on the matter.

(20 year maximum penalties); and CSC 2 (15 year maximum penalty); in 08-9312, he was charged with CSC 1 (life maximum penalty); three counts of child sexually abusive activity (20 year maximum penalties); kidnapping (life maximum penalty); in 08-9313, he was charged with three counts of child sexually abusive activity (20 year maximum penalties); and in 08-9315, defendant was charged with two counts of child sexually abusive activity (20 year maximum penalties) and unlawful imprisonment (15 year maximum penalty). Defendant agreed to plead to one count of CSC 1, and one count of child sexually abusive activity, and the prosecution agreed to dismiss all other charges, and also agreed to forego *bringing* charges with regard to conduct involving *four* other victims.⁴² The parties also agreed that defendant would receive a sentence of 14-25 years on the CSC 1 conviction, and 10-20 years on the child sexually abusive activity conviction. And defendant has not “advanced any basis for doubting the strength of the government's case against him.” On this state of affairs, defendant has not shown “a reasonable probability that, but for the error, he would not have entered the plea.” He has not, then, shown plain error, even if his case were reviewed as though on direct appeal.

Conclusion

If this Court determines in *Comer* that a defendant convicted of CSC 1 is not subject to lifetime electronic monitoring unless his or her victim is under the age of 13, and the defendant is at least 17 years of age, then any failure to warn defendant of such a requirement when taking his plea was not error; rather, inclusion of that requirement was error, and the requirement should be stricken from his sentence. If this Court, on the other hand, determines in *Comer* that lifetime electronic monitoring *is* a mandatory part of the sentence of one convicted of CSC 1, then here

⁴² Plea transcript, 8-9.

defendant cannot satisfy the prejudice requirements of MCR 6.508(D)(3)(b)(ii). Nor can the defendant, if his claim were considered on the merits as though on direct appeal, show plain error, for he cannot show that there is a “a reasonable probability that, but for the error, he would not have entered the plea,” and has not shown he was unaware of this sentence consequence at the time of the plea, one he acknowledged awareness of at sentencing. His convictions and sentences should be affirmed.

Relief

WHEREFORE, for the reasons stated here, and in the People's application for leave to appeal, the People request that this Honorable Court reverse the Court of Appeals and affirm the convictions and sentences.

Respectfully submitted,

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