SCV: Submitted on 11-30-2015 16:01:55 EST for filing on 11-30-2015

IN THE

SUPREME COURT OF VIRGINIA

RECORD NO. 141487

ELDESA C. SMITH,

Appellant,

v.

TAMMY BROWN, WARDEN,
VIRGINIA DEPARTMENT OF CORRECTIONS,

Appellee.

BRIEF OF THE COMMONWEALTH

MARK R. HERRING
Attorney General of Virginia

STEVEN A. WITMER
Senior Assistant Attorney General

OFFICE OF THE ATTORNEY GENERAL
900 East Main Street
Richmond, Virginia 23219
Telephone: (804) 786-2071
Facsimile: (804) 371-0151
oagcriminallitigation@oag.state.va.us

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

STATEMENT OF THE CASE 1

Smith's Guilty Plea 1

Smith's Habeas Corpus Petition 3

ASSIGNMENT OF ERROR 4

STATEMENT OF FACTS 4

Facts of the Underlying Criminal Case 4

ARGUMENT

Standard of Appellate Review 7

Ineffective Assistance as it Relates to Pleas of Guilty 10

The Court Below Correctly Found Smith's Guilty Plea Waived any Challenge to the Sufficiency of the Evidence 11

The Court Below Did not Err in Finding Counsel's Performance was not Deficient so as to Render Smith's Guilty Plea Involuntary 13

Smith Failed to Demonstrate Prejudice Because She did not Demonstrate a Reasonable Likelihood She Would have Insisted Upon Going to Trial 17

CONCLUSION 24

CERTIFICATE OF TRANSMISSION AND SERVICE 25

TABLE OF AUTHORITIES

Page

Cases

Anderson v. Warden,
222 Va. 511, 281 S.E.2d 885 (1981) 12

Blackledge v. Allison,
41 U.S. 63 (1977) 12, 13

Buckner v. Polk,
453 F.3d 195 (4th Cir. 2006) 9

Carrowiano v. Commonwealth,
2009 Va. App. LEXIS 548 (December 8, 2009) 15

Commonwealth v. Catalina,
556 N.E.2d 973 (Mass. 1980) 14

Coyle v. Commonwealth,
50 Va. App. 656, 653 S.E.2d 291 (2008) 15

Cullen v. Pinholster,
563 U.S. 170 (2011) 8

Dominguez v. Pruett,
287 Va. 434, 756 S.E.2d 911 (2014) 7

Dutton v. State,
970 P.2d 925 (Alaska Ct. App. 1999) 20

Fields v. Taylor,
956 F.2d 1290 (4th Cir. 1992) 10

Fuentes v. Clarke,
290 Va. ___, 777 S.E.2d 550,
2015 Va. LEXIS 143 (October 29, 2015) 7

Harrington v. Richter,
562 U.S. 86 (2011) 8, 9

Hash v. Director,
278 Va. 664, 686 S.E.2d 208 (2009) 7

Heacock v. Commonwealth,
228 Va. 397, 323 S.E.2d 90 (1984) 14

Hedrick v. Warden,
264 Va. 486, 570 S.E.2d 840 (2002) 7

Hickman v. Commonwealth,
11 Va. App. 369, 398 S.E.2d 98 (1990) 15

Hill v. Lockhart,
474 U.S. 52 (1984) ..... *passim*

Hooper v. Garraghty,
845 F.2d 471 (1988) 10, 18

Hylton v. Commonwealth,
60 Va. App. 50, 723 S.E.2d 628 (2012) 15

Kornahrens v. Evatt,
66 F.3d 1350 (4th Cir. 1995) 16

Lenz v. Warden of the Sussex I State Prison,
267 Va. 318, 593 S.E.2d 292 (2004) 16

Lovitt v. Warden,
266 Va. 216, 585 S.E.2d 801 (2003) 7, 8, 9

Mabry v. Johnson,
467 U.S. 504 (1984) 10

Murry v. Commonwealth,
288 Va. 117, 762 S.E.2d 573 (2014) 20

Nelson v. Estelle,
642 F.2d 903 (5th Cir. 1981) 16

Padilla v. Kentucky,
559 U.S. 356 (2010) 11

Peterson v. Commonwealth,
5 Va. App. 389, 363 S.E.2d 440 (Va. Ct. App. 1987) 20

Peyton v. King,
210 Va. 194, 169 S.E.2d 569 (1969) 10

Premo v. Moore,
562 U.S. 115 (2011) 11, 16, 18

Savino v. Commonwealth,
239 Va. 534, 391 S.E.2d 276 (1990) 10

Shaikh v. Johnson,
276 Va. 537, 666 S.E.2d 325 (2008) 7, 9

Smith v. McLaughlin,
289 Va. 241, 769 S.E.2d 7 (2015) 16

State v. Randolph,
676 S.W.2d 943 (Tenn. 1984) 14

State v. Thomas,
288 A.2d 32 (N.J. Super. Ct. App. Div. 1972) 14

State v. Wassil,
658 A.2d 548 (Conn. 1995) 14

Stillwell v. Commonwealth,
219 Va. 214, 247 S.E.2d 360 (1978) 22

Strickland v. Washington,
466 U.S. 668 (1984) 7, 8, 9, 10, 17, 21

United States v. Broce,
488 U.S. 563 (1989) 10

United States v. DiTommaso,
405 F.2d 385 (4th Cir. 1968) 16

United States v. Greatwalker,
285 F.3d 727 (8th Cir. 2002) 20

United States v. Johnson,
537 F.2d 1170 (4th Cir. 1976) 20

United States v. Moulder,
141 F.3d 568 (5th Cir. 1998) 20

Via v. Superintendent,
643 F.2d 167 (4th Cir. 1981) 13

Woodard v. Commonwealth,
61 Va. App. 567, 739 S.E.2d 220 (2013) 2, 3, 6, 16

Zemene v. Clarke,
289 Va. 303, 768 S.E.2d 684 (2015) 7

Statutes and Rules

Code of Virginia:

§ 18.2-33 14
§ 18.2-248(D) 22

Rules of the Supreme Court of Virginia:

Rule 5:17(C)(1) 19
Rule 5:25 19

IN THE

SUPREME COURT OF VIRGINIA

RECORD NO. 141487

ELDESA C. SMITH,

Appellant,

v.

TAMMY BROWN, WARDEN,
VIRGINIA DEPARTMENT OF CORRECTIONS,

Appellee.

BRIEF OF THE COMMONWEALTH

STATEMENT OF THE CASE

Smith's Guilty Plea

Eldesa Smith originally was charged by a Danville grand jury with felony murder and distribution of MDMA, also known as ecstasy (3,4-methylenedioxymethamphetamine). (JA 1-2). Her trial attorney secured for her an agreement whereby the Commonwealth, in exchange for

testimony against the co-defendant and her pleas of guilty, would reduce the charge of distribution of MDMA to distribution as an accommodation, and would recommend she be sentenced to 10 years with 6 suspended upon the charge of felony murder and to 5 years, all suspended, upon the lesser charge of distribution as an accommodation. (JA 61-63). Smith accepted the offer and pled guilty on July 13, 2011.

The Circuit Court of the City of Danville sentenced her in accordance with Commonwealth's recommendation. At the time of sentencing, the court found that "the dominoes in this case fell in such a way as to constitute felony murder." (JA 41). The court noted that the sentence was "a substantial departure below the guidelines." (JA 40). The court entered final judgment on July 21, 2011. (JA 82-84).

Smith's co-defendant, Timothy Woodard, went to trial on his charges and was convicted of felony murder, possession of MDMA with intent to distribute and distribution of MDMA. Woodard's conviction for felony murder subsequently was overturned on appeal, on the ground that the death of the victim, Kayla Beame, was not within the res gestae of the distribution of MDMA in this case. *Woodard v. Commonwealth*, 61 Va. App. 567, 739 S.E.2d 220 (2013). Upon the convictions that were not overturned, Woodard is serving twenty years in prison with twelve years

suspended for possession of MDMA with intent to distribute and five years in prison, with three years suspended, for distribution of MDMA.

After Woodard's trial, but before the action of the appellate court, Smith appeared on August 30, 2011, and requested the Court modify her sentence. The Court described the sentence pursuant to the plea agreement as "extremely generous," and "lenient" and denied Smith's motion. (JA 54-56). Smith did not appeal her convictions or sentences.

Smith's Habeas Corpus Petition

After co-defendant Woodard's conviction for felony murder was overturned on appeal, Smith timely filed a habeas corpus petition in the Circuit Court of the City of Danville on July 10, 2013. Smith attempted to challenge only her felony murder conviction, and alleged she was denied the effective assistance of counsel because her attorney allowed her to plead guilty to felony murder when she had a defense to the charge -- specifically the argument that the death of Kayla Beame was not within the res gestae of the distribution of MDMA.

The circuit court denied relief upon the petition. The circuit court held: "The colloquy before this Court demonstrates conclusively that petitioner's pleas were knowingly and voluntarily entered, and furthermore petitioner represented she was pleading guilty because she was actually

guilty of the charged offenses. Petitioner is bound by these representation to the Court made at the time of her plea." (JA 98).

The court declined to find the performance of Smith's counsel deficient for not predicting the Court of Appeals' holding in *Woodard*. The court also found Smith had not established prejudice: "[P]etitioner has failed to plead or to demonstrate a reasonable probability that, but for counsel's alleged errors, she would have pled not guilty and would have insisted instead on going to trial. Petitioner thus fails to plead or demonstrate prejudice as required by *Hill*, 474 U.S. at 59." (JA 98).

ASSIGNMENT OF ERROR

> The trial court erred by summarily dismissing Eldesa C. Smith's Pro Se Habeas Corpus Petition when the claims, if true, would entitle her to relief and reversal of conviction.

STATEMENT OF FACTS

Facts of the Underlying Criminal Case

The facts of the underlying criminal case were briefly summarized by the Commonwealth at the time Smith entered her plea. (JA 30-33). The facts, including all facts related to the question of whether the evidence established the homicide was within the res gestae of the predicate felony offense, were more fully developed during the jury trial of Smith's co-

defendant Woodard, and the Court of Appeals recited those facts in its opinion reversing Woodard's conviction:

> On November 16, 2010, Kayla Beame and Cynthia Crumpton were shopping at a store in Danville, Virginia. While there, Beame called Eldesa Smith to see if she could arrange a purchase of ecstasy from Woodard. Smith called Woodard and arranged the purchase. Woodard picked up Smith on his way to the store.
>
> Woodard and Smith pulled up to the entrance of the store where Beame was waiting. Beame got into the backseat of Woodard's car. Woodard parked his car in the store parking lot. Woodard then sold Beame ten to fifteen star-shaped ecstasy pills. After completing the transaction, Beame exited the car and Woodard and Smith left the parking lot. All of this occurred at approximately 7:00 p.m.
>
> Beame and Crumpton then met in the parking lot and got into Crumpton's van. Beame showed the ecstasy to Crumpton, but neither Beame nor Crumpton ingested any of the pills at that time. Beame, Beame's daughter, Crumpton, Crumpton's fiancé, and Smith's daughter then met for dinner at a restaurant. Beame consumed alcohol with her dinner. After dinner, Crumpton and Beame stopped at a convenience store and purchased beer and cigarettes. They then went to Crumpton's apartment in Danville. Smith arrived at the apartment later in the evening. Beame and Smith took some of the ecstasy pills. Smith left the apartment with her daughter at approximately 10:00 p.m.
>
> Crumpton fell asleep at approximately 11:00 p.m. Beame woke Crumpton up between 2:00 and 3:00 a.m. Sometime around 4:30 a.m., Beame and Crumpton fell asleep. Crumpton slept until approximately 1:00 p.m., when she was awakened by her fiancé, who expressed concern about Beame's condition.
>
> Beame was not breathing correctly. Crumpton's fiancé called 911 while Crumpton started CPR. Beame was in cardiac arrest

> and was not breathing when the paramedics arrived. Beame remained unresponsive on the way to the hospital, although her heart started beating again. Shortly after arriving at the hospital, Beame was found to be brain dead. Beame was pronounced dead on November 18, 2010.
>
> A search warrant was executed at Woodard's home. A large quantity of ecstasy pills and powder were found at the home. Woodard was arrested, and he was interviewed by Detective Goins of the Danville Police Department. Woodard made a verbal statement and signed several written statements. Woodard admitted meeting Beame and selling ecstasy to her. Woodard knew that Beame had never taken ecstasy before and that Beame was going to "party." Woodard further admitted that he was a past user of ecstasy and he knew "that ecstasy can kill a person."
>
> At trial, the evidence indicated that Beame's blood contained .48 mg/liter of ecstasy, which was a lethal level of the drug. Beame's blood also contained a non-toxic level of methadone. The Commonwealth presented an expert witness, Dr. Suzuki, who testified that Beame's death was caused by ecstasy intoxication. After hearing the evidence, the trial court held that there was a sufficient "causal connection" and "temporal connection" between the sale of the ecstasy and Beame's killing to constitute felony murder.

Woodard, 61 Va. App. at 569-71, 739 S.E.2d at 221-22.[1]

---

[1] Woodard pursued an appeal to this Court on a different issue. This Court granted his appeal but affirmed the judgment of the trial court. *Woodard v. Commonwealth*, 287 Va. 276, 754 S.E.2d 309 (2014). This Court refused the Commonwealth's cross-appeal from the reversal of the felony murder conviction. (Record No. 130853).

ARGUMENT

Standard of Appellate Review

The habeas court's findings of historical fact are entitled to deference and binding unless plainly wrong or without evidence to support them *Fuentes v. Clarke*, 290 Va. ___, ____, 777 S.E.2d 550, ___, 2015 Va. LEXIS 143 at *8 (October 29, 2015); *Dominguez v. Pruett*, 287 Va. 434, 440, 756 S.E.2d 911, 914 (2014) (same). However, because entitlement to relief in habeas corpus is a mixed question of law and fact, a habeas trial court's ruling granting or denying the petition is subject to *de novo* review on appeal. *Zemene v. Clarke*, 289 Va. 303, 306-07, 768 S.E.2d 684, 686 (2015); *see Hash v. Director*, 278 Va. 664, 672, 686 S.E.2d 208, 212 (2009); *Shaikh v. Johnson*, 276 Va. 537, 544, 666 S.E.2d 325, 328 (2008).

Standards of Review Applicable to Smith's Habeas Claims

Ineffective Assistance of Counsel Generally:

Allegations of ineffective assistance of counsel are governed by *Strickland v. Washington*, 466 U.S. 668 (1984). *See Lovitt v. Warden*, 266 Va. 216, 248, 585 S.E.2d 801, 820 (2003); *Hedrick v. Warden*, 264 Va. 486, 496, 570 S.E.2d 840, 847 (2002). The petitioner bears the burden of showing that counsel's performance was deficient in that it fell below an objective standard of reasonableness, *and* that the deficient performance

actually prejudiced the defense. *Strickland*, 466 U.S. at 687; *Lovitt*, 266 Va. at 249, 585 S.E.2d at 820. The petitioner must establish under *Strickland* that trial counsel's conduct was professionally unreasonable and actually prejudicial within the context of all the circumstances facing counsel at the time, without hindsight, and with a strong presumption against ineffectiveness.

The first prong of the *Strickland* test, the "performance" inquiry, requires a showing "that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." 466 U.S. at 687. "The question [under Strickland] is whether an attorney's representation amounted to incompetence under prevailing professional norms, not whether it deviated from best practices or most common custom." *Harrington v. Richter*, 562 U.S. 86, 105 (2011). The deferential review that is due counsel's performance requires a reviewing court "to affirmatively entertain the range of possible 'reasons [ ] counsel may have had for proceeding as they did.'" *Cullen v. Pinholster*, 563 U.S. 170, 196 (2011). This deferential standard "must be applied with scrupulous care, lest "intrusive post-trial inquiry" threaten the integrity of the very adversary process the right to counsel is meant to serve." *Richter*, 562 U.S. at 105.

The second prong of the *Strickland* test, the "prejudice" inquiry, requires a showing that there is "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." 466 U.S. at 694. The likelihood of a different result must be substantial, not just conceivable. *Richter*, 562 U.S. at 112. "[T]he difference between *Strickland's* prejudice standard and a more-probable-than-not standard is slight and matters 'only in the rarest case.'" *Id.* (quoting *Strickland* 466 U.S. at 693, 697).

Finally, since the petitioner's burden is two-fold, the reviewing court "need not determine whether counsel's performance was deficient before examining the prejudice" issue. *Strickland*, 466 U.S. at 697; *Lovitt*, 266 Va. at 250, 585 S.E.2d at 821. Thus, if a court can dismiss an ineffectiveness claim on the ground of lack of prejudice, the court should do so without scrutinizing counsel's performance. *Id.*; *Buckner v. Polk*, 453 F.3d 195, 202 (4th Cir. 2006). Indeed, "[i]f the petitioner makes an insufficient showing on either component of the test, the other need not be considered." *Id.*; *Shaikh v. Johnson*, 276 Va. at 544, 666 S.E.2d at 328.

Ineffective Assistance As It Relates To Pleas Of Guilty

After a guilty plea conviction is final, inquiry is confined to whether the plea was counseled and voluntary. "It is well settled that a voluntary and intelligent plea of guilty by an accused person, who has been advised by competent counsel, may not be collaterally attacked." *United States v. Broce*, 488 U.S. 563 (1989) (quoting *Mabry v. Johnson*, 467 U.S. 504 (1984)). Smith's guilty plea was a self-supplied conviction which waived any defenses other than those based upon jurisdiction. *Savino v. Commonwealth*, 239 Va. 534, 391 S.E.2d 276 (1990); *Peyton v. King*, 210 Va. 194, 169 S.E.2d 569 (1969).

When evaluating a claim that a guilty plea was not voluntarily entered due to deficient performance of counsel, the *Strickland* standard applies. *Hill v. Lockhart*, 474 U.S. 52 (1984). To establish prejudice, Smith was required to plead and prove that there is a reasonable probability that, but for counsel's alleged errors, she would have pleaded not guilty and would have insisted instead on going to trial. *Hill*, 474 U.S. at 59; *Fields v. Taylor*, 956 F.2d 1290, 1297 (4th Cir. 1992). Although this is "a subjective question, the answer to that question must be reached through an objective analysis." *Hooper v. Garraghty*, 845 F.2d 471, 475 (1988). In order to obtain relief, Smith was not required to establish she had an available

defense, but was required to convince the court below that a decision to reject a plea agreement would have been rational under the circumstances. *Padilla v. Kentucky*, 559 U.S. 356, 371 (2010). Strict adherence to the *Strickland* standard is "all the more essential when reviewing the choices an attorney made at the plea bargain stage." *Premo v. Moore*. 562 U.S. 115, 125 (2011). "The plea process brings to the criminal justice system a stability and a certainty that must not be undermined by the prospect of collateral challenges in cases not only where witnesses and evidence have disappeared, but also in cases where witnesses and evidence were not presented in the first place." *Id*. at 132.

The Court Below Correctly Found Smith's Guilty Plea Waived Any Challenge to the Sufficiency of the Evidence

The circuit court below expressly held:

> Petitioner does not demonstrate she was misadvised about the consequences of her plea. The colloquy before this Court demonstrates conclusively that petitioner's pleas were knowingly and voluntarily entered, and furthermore petitioner represented she was pleading guilty because she was actually guilty of the charged offenses. Petitioner is bound by these representation[s] to the Court made at the time of her plea. This Court will not now consider claims of possible defenses.

(JA 98) (citations omitted).

Smith made no effort below – and makes none now – to show any reason why she should not be bound by her admission that she was

actually guilty of the charged offenses. Her guilty plea was supported by her confession and by other evidence, and she made no claim of incapacity or confusion about the proceedings. Petitioner is a high school and college graduate with a nursing degree. (JA 21). After being arraigned and the court reciting the charges against her (JA 20), Smith stated she fully understood the charges and had discussed with her lawyer any possible defenses to the charges and that she decided for herself to plead guilty to the charges. (JA 22). She told the trial court she was entering her pleas freely and voluntarily, because she was actually guilty of the charged offenses. (JA 24).

She further represented she understood she was waiving her right to a jury trial, her right to confront and cross-examine witnesses, and her right against self-incrimination. (JA 24). She represented that nobody in any manner had forced or coerced her to enter her pleas, that other than the promises in her plea agreement, she had been made no other promises or commitments, that she understood the potential punishments and that she was "entirely satisfied" with the services of her attorney. (JA 25-26).

The trial court did not err in applying extant law and in holding Smith bound by the statements that showed she voluntarily pled guilty. *Anderson v. Warden*, 222 Va. 511, 515-17, 281 S.E.2d 885, 888 (1981); *Blackledge*

v. Allison, 431 U.S. 63, 73-74 (1977) ("the representations of the defendant, his lawyer, and the prosecutor at [a plea hearing], as well as findings made by the judge accepting the plea, constitute a formidable barrier in any subsequent collateral proceedings."); *Via v. Superintendent*, 643 F.2d 167, 172 (4th Cir. 1981) (a petitioner must present compelling reasons why her statements at the plea colloquy are not conclusive).

The Court Below Did Not Err In Finding
Counsel's Performance Was Not Deficient
So As To Render Smith's Guilty Plea Involuntary

Smith asserted in habeas corpus, *only after she knew Woodard's argument had prevailed on appeal*, that her attorney should have advised her of this now-known-to-be-certain defense and advised her to plead not guilty and go to trial. The circuit court refused to view Smith's claim in the light provided by reversal of Woodard's conviction, and held:

> Counsel was not required to predict a change in the law that would affect his assessment of the strength of a possible defense to one of petitioner's charges. *Strickland* does not permit this Court to review counsel's performance through the distorting lens of hindsight.

(JA 98).

The success of the defense Smith's co-defendant elected to raise always was uncertain. Woodard put on that defense at trial, but was convicted of murder nonetheless. At the time of Smith's case, there was

substantial authority supporting the Commonwealth's prosecution for felony murder. *See, e.g. State v. Wassil*, 658 A.2d 548, 551-558 (Conn. 1995) (victim's injection of heroin was reasonably foreseeable); *Commonwealth v. Catalina*, 556 N.E.2d 973, 980 (Mass. 1980) (reasonably foreseeable that heroin addict would inject herself outside defendant's presence after defendant had sold heroin to her); *State v. Thomas*, 288 A.2d 32, 34 (N.J. Super. Ct. App. Div. 1972) (heroin seller could be convicted of manslaughter notwithstanding victim's actions of injecting herself with heroin foreseeable); *State v. Randolph*, 676 S.W.2d 943, 948 (Tenn. 1984) (pretrial ruling stating that "act of the customer in injecting himself is not necessarily so unexpected, unforeseeable, or remote as to insulate the seller from criminal responsibility for victim's death as a matter of law").

Moreover, the courts of the Commonwealth also, at the time of petitioner's trial, very consistently had reached the same result. This Court in *Heacock v. Commonwealth*, 228 Va. 397, 323 S.E.2d 90 (1984), held that "where . . . death results from ingestion of a controlled substance, classified in law as dangerous to human life, the homicide constitutes murder of the second-degree within the intendment of Code § 18.2-33 if that substance had been distributed to the decedent in violation of the felony statutes of this Commonwealth." *Id*. at 405, 323 S.E.2d 95.

In *Hickman v. Commonwealth*, the Court of Appeals affirmed a conviction for felony murder, holding that the defendant, who jointly and feloniously possessed cocaine with the decedent, was a principal in the second-degree to the victim's felonious possessory act of ingestion of cocaine. 11 Va. App. 369, 398 S.E.2d 698 (1990). More recently, in *Coyle v. Commonwealth*, 50 Va. App 656, 653 S.E.2d 291 (2008), the Court of Appeals upheld a manslaughter conviction arising from distribution of large doses of a lawful substance (dextromethorphan) in a criminally negligent manner, specifically rejecting the contention that the victim's ingestion of the drug at a later time and different place, was the proximate cause of his death. *Id*. at 666-67, 653 S.E.2d at 296.

The Court of Appeals also affirmed the conviction in the unpublished case of *Carrowiano v. Commonwealth*, 2009 Va. App. LEXIS 548 (December 8, 2009), rejecting that defendant's argument that the death was not close in time or place to the felony. *Id*. at *11. In *Hylton v. Commonwealth*, 60 Va. App. 50, 723 S.E.2d 628 (2012), the Court of Appeals affirmed a conviction for felony murder, in a case where the defendant put illegally possessed methadone in the measuring cup usually used for her son's cough medicine, and her son drank the methadone and died while the defendant was in another room.

The Court of Appeals' decision in *Woodard* may have provided useful clarification of the application of the res gestae requirement in situations involving felony murder based on the distribution of dangerous drugs. However, at the time of Smith's plea, that clarification was unavailable. Smith's "prospects at trial were thus anything but certain." *Moore*, 562 U.S. at 127. The circuit court did not err in finding that counsel's advice to Smith to plead guilty to felony murder was not deficient performance. *Lenz v. Warden of the Sussex I State Prison*, 267 Va. 318, 324, 593 S.E.2d 292, 295 (2004), citing, *Kornahrens v. Evatt*, 66 F.3d 1350, 1360 (4th Cir. 1995); *Smith v. McLaughlin*, 289 Va. 241, 255, 769 S.E.2d 7, 14 (2015) (holding in legal malpractice action, "Smith did not breach its duty by failing to correctly anticipate a judicial ruling on an unsettled legal issue"); *United States v. DiTommaso*, 405 F.2d 385 (4th Cir. 1968) (counsel not required to be a seer); *Nelson v. Estelle*, 642 F.2d 903, 908 (5th Cir. 1981) ("Clairvoyance is not a required attribute of effective representation"). This Court should not reverse the judgment by evaluating counsel's advice in light of the outcome of Woodard's appeal.

Smith Failed To Demonstrate Prejudice
Because She Did Not Demonstrate A Reasonable Likelihood
She Would Have Insisted Upon Going to Trial

Under *Strickland* a petitioner is required to demonstrate that the outcome of the proceeding in which the attorney made the alleged error would have been different. The record in Smith's case demonstrates that even had she decided to plead not guilty and go to trial, she would have been convicted of felony murder – just as her co-defendant Woodard was convicted. The trial court expressly found at the time she entered her plea: "the dominoes in this case fell in such a way as to constitute felony murder." (JA 41).

The trial court thus correctly applied *Hill*. Smith asserted, below, after Woodard's argument had prevailed on appeal, that had she known of this now-known-to-be-certain defense, she would have rejected the plea agreement and insisted upon going to trial. In a case where Smith had received an "extremely generous," and "lenient" plea offer (JA 54-56), in which Smith had confessed, thus making some criminal conviction a near certainty, and where her core complaint is that counsel did not advise her to advance a then-uncertain defense, the court below ruled:

> The Court furthermore finds that petitioner has failed to plead or to demonstrate a reasonable probability that, but for counsel's alleged errors, she would have pled not guilty and would have

> insisted instead on going to trial. Petitioner thus fails to plead or demonstrate prejudice as required by *Hill*, 474 U.S. at 59.

(JA 98). Smith never asserted in her habeas corpus petition that she would have rejected the entirety of the plea agreement, because her petition attempted to address the felony murder conviction independent of her other charge.

Moreover, the court below was not required to credit Smith's assertion that, because of the availability of a potential defense, she would have rejected the plea agreement, pled not guilty to all charges, and risked a sentence of 40 years for distribution of MDMA, when her plea agreement guaranteed her an entirely suspended sentence for the reduced charge to which she pled. The trial court evaluated Smith's claim, "in light of the circumstances the defendant would have faced at the time of his decision." *Hooper*, 845 F.2d at 475. "The added uncertainty that results when there is no extended formal record and no actual history to show how the charges have played out at trial works ***against*** the party alleging inadequate assistance." *Premo*, 562 U.S. at 132 (emphasis added). The only weight to Smith's claim of prejudice was provided by the after-the-fact certainty that the defense Woodard raised would have succeeded. Absent such certainty her claim of prejudice, that evaded any discussion of her drug charge, properly was rejected by the circuit court.

In an attempt to portray the plea agreement as without benefit, Smith now argues, for the first time, that if she had gone to trial she would have actually been sentenced only for an accommodation distribution, and thus counsel was ineffective in not urging her to go to trial upon the distribution charge. This claim never was presented to the Court below and is not fairly presented in Smith's assignment of error. Rules 5:25 and 5:17(c)(1). Indeed, Smith attempted below to challenge her plea only as to the felony murder in an attempt to retain the benefit of her wholly suspended sentence for accommodation distribution. Smith identified only the conviction for felony murder in her habeas petition. (JA 70). This attempt to retain the benefit of the plea agreement undercut Smith's assertion that she would have insisted upon going to trial.

Smith, moreover cannot separate the charges. The plea agreement, the bargain it represented, and the guilty plea are inextricably intertwined. An essential part of Smith's claim under *Hill*, 474 U.S. at 59, is that Smith would have rejected the plea agreement and insisted upon going to trial on *all* of the original charges. Such a new trial on all charges is the relief the trial court was required to grant if it found her claim meritorious.

Smith was not entitled to retain the benefit of the negotiated limit on sentencing for her distribution of MDMA, but instead would be returned to

status quo ante prior to entering any of her pleas. *See Peterson v. Commonwealth*, 5 Va. App. 389, 400-401, 363 S.E.2d 440, 445-46 (Va. Ct. App. 1987) (collecting cases) (explained in *Dutton v. State*, 970 P.2d 925, 934-35 (Alaska Ct. App. 1999)); *see also United States v. Greatwalker*, 285 F.3d 727, 730 (8th Cir. 2002) (noting that Greatwalker's successful appeal following a plea agreement "may be costly" because on remand, the government could "reinstate the dropped charges"); *United States v. Moulder*, 141 F.3d 568, 571-72 (5th Cir. 1998) (explaining in detail that government can "refile charges against a defendant" when a "bargained-for guilty plea to a lesser charge has been withdrawn or overturned on appeal, provided that an increase in the charges is within the limits set by the original indictment") (citation omitted); *United States v. Johnson*, 537 F.2d 1170, 1175 (4th Cir. 1976) ("Retrial on the original indictment would simply return Johnson and the government to the status that existed before Johnson pleaded guilty"); *cf. Murry v. Commonwealth*, 288 Va. 117, 133, 762 S.E.2d 573, 583 (2014) (Mims, J. concurring) (after Murry successfully challenged his conditions of probation on appeal, trial court is allowed on remand to increase term of active incarceration if "it determines that no reasonable conditions would make suspension [of sentence] compatible with the public interest").

It also is logically and necessarily true that if Smith's plea was involuntary as to the felony murder it likewise was involuntary as to the offense of distribution of MDMA. In Smith's case all of the convictions and sentences are established by the very same final order. To vacate the final order and order a new trial is to vacate the judgment as to all of Smith's convictions. This Court never in any habeas appeal has attempted to re-write a final order to leave part of it in place for the purpose of securing, to a party who attempts to repudiate a plea agreement, part of the benefit of that bargain, and nothing in *Hill* or *Strickland* permits a petitioner to retain beneficial parts of a plea agreement she has repudiated. Had the circuit court below accepted Smith's assertion that she wanted to reject the plea agreement and go to trial, Smith would have faced a trial upon the original indictment for distribution of MDMA, and in all probability a new indictment for manslaughter (which is not a lesser-included offense of felony murder), and a possible sentence of up to 50 years.[2]

Moreover, Smith's newly coined claim that at trial she only would have been convicted and sentenced for an accommodation distribution is

[2] Likewise, if this Court were to reverse the trial court's denial of habeas relief, Smith, who has fully served the active portion of her sentence, surely will be sentenced to at least 5 years for a conviction of distribution of MDMA and possibly an additional sentence if convicted upon a new indictment for manslaughter.

without legal merit, and is founded upon a misunderstanding of the nature of an accommodation distribution. "[T]he General Assembly was cognizant of the fact that in some instances a sale or distribution of a drug would be made, not by a dealer in drugs, a pusher or one who was normally engaged in the drug traffic, but by an individual citizen who was motivated by a desire to accommodate a friend." *Stillwell v. Commonwealth*, 219 Va. 214, 219, 247 S.E.2d 360, 364 (1978). A sale is not an accommodation eligible for reduced sentencing under Code §18.2-248(D) when a defendant acts as the agent of a for-profit drug dealer and facilitates sales by relaying orders for drugs to a dealer, even if the customer is an acquaintance.

This is not a case in which Smith and the victim were using drugs together and Smith handed the victim some drugs to take. It is not a case in which the victim was a friend who suffered a painful injury, and whom petitioner accommodated by offering one of her own prescription painkillers. Smith admitted to the police she set up a drug sale. The victim called Smith because she knew Smith could put her in touch with Woodard in order to purchase drugs from him, and Smith was present during the

transaction.[3] Smith, at a minimum, was a principal in the second-degree to Woodard's for-profit distribution of MDMA to Kayla Beame, and if tried in the absence of the plea agreement would have been convicted of distribution and sentenced to between 5 and 40 years as her lawyer advised, rather than receiving a lesser sentence.[4]

Although Smith points to an apparently confused reference to manslaughter in counsel's letter of July 5, 2011 (JA 80), the trial court did not err in rejecting her claim, because the indictment is unambiguous (JA 2), the subsequent written plea agreement is unambiguous (JA 61-63), and Smith's representations to the Court when she entered her plea were unambiguous (JA 21-26). The circuit court did not err in finding Smith failed to demonstrate prejudice.

---

[3] The Attorney for the Commonwealth at trial remarked that Smith "accommodated the sale" (JA 32). The use of the word accommodate in the sense that she facilitated the transaction between Beame and Woodard is not the essence of the offense for which a sentence may be reduced. A contrary construction would lead to the conclusion that there is no liability for principals in the second degree to narcotics sales – an absurd result.

[4] And Smith's conviction upon retrial is a foregone conclusion. Not only would her confession to police be admissible, but all of her testimony from Woodard's trial would be admissible as well.

CONCLUSION

Smith failed to demonstrate that she should be permitted to recant her representations to the trial court that established her plea as knowingly and voluntarily entered, that counsel's performance was deficient, or that but for counsel's alleged errors she would have pled not guilty and gone to trial instead. This Court should affirm the judgment denying habeas relief to Smith.

Respectfully submitted,
TAMMY BROWN, WARDEN,
VIRGINIA DEPARTMENT OF CORRECTIONS
Appellee herein.

By:/s_____
Counsel

Mark R. Herring
Attorney General of Virginia

Steven A. Witmer
Senior Assistant Attorney General
Virginia Bar No. 33080
Office of the Attorney General
900 East Main Street
Richmond, Virginia 23219
Telephone: (804) 786-2071
Facsimile: (804) 371-0151
oagcriminallitigation@oag.state.va.us

CERTIFICATE OF TRANSMISSION AND SERVICE

On November 30, 2015, a copy of this Brief was filed electronically with this Court and the required paper copies were hand-delivered to the Clerk's Office in compliance with Rule 5:26. A copy the document was electronically mailed to Gregory R. Sheldon, Esquire, Bain-Sheldon, P.L.C., 9030 Three Chopt Road, Suite B, Richmond, Virginia 23229, at gsheldon@bainsheldon.com. A courtesy copy has been sent to the trial judge and the Commonwealth's Attorney. The undersigned certifies that the brief, excluding the cover page, table of contents, table of authorities and certificate, contains 5,205 words.

The Commonwealth does not waive oral argument.

/s _____
Steven A. Witmer
Senior Assistant Attorney General