In The

Supreme Court of Virginia

RECORD NO. 141890

BETTY BUSTILLO FUENTES,

Appellant,

v.

HAROLD CLARKE, Director, Virginia Department of Corrections,

Appellee.

BRIEF OF APPELLANT

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I. STATEMENT OF THE CASE

A. STATEMENT OF FACTS

Ms. Fuentes is a Honduran national and lawful permanent resident of the United States. App. at 27. Abandoned by her parents in Honduras, Ms. Fuentes lived with her grandfather. App. at 28. Life with her grandfather was horrific. Ms. Fuentes was punished with "sticks, wire, leather belts and anything that was a potential for him to use." App. at 28.

As horrific as life with her grandfather was in Honduras, Ms. Fuentes suffered more intense abuse from her uncle. For two years, Ubense Bustillo, Ms. Fuentes's uncle, sexually abused her. App. at 28.

In addition, the criminal gangs of Honduras threatened with raping Ms. Fuentes. Ubense Bustillo saw the gangs rape a young girl. App. at 29. Ubense warned the town that the gangs raped a child. A gang member went to Ubense's house and told him to either stop talking about the rape or the gang would "rape every child that was living in the house." App. at 29.

On April 25, 2000, Ms. Fuentes's uncle Tim Bustillo, was shot and killed. App. at 29. The violence endured by her family, in addition to the numerous acts of child abuse, motivated Ms. Fuentes to make the perilous journey from Honduras to the United States at the age of sixteen. App. at 27-29.

In the United States, Ms. Fuentes formed a family; she has three United States born children. App. at 134. In addition, Ms. Fuentes obtained lawful permanent residency. App. at 203.

On March 5, 2012, about twelve years after Ms. Fuentes arrived to the United States and about nine months after she obtained lawful permanent residence, she pled guilty to the offense of grand larceny. App. at 1, 6. On that same day, Ms. Fuentes signed a plea memorandum agreement. App. at 88, 92. The agreement was signed by Ms. Fuentes's attorney, Mr. Hasan, Attorney for the Commonwealth, Mr. Porter and Chief Deputy Commonwealth Attorney, Ms. Newton. App. at 92. Of relevance to this case is paragraph 14 of the

agreement. That paragraph states: “I acknowledge that my plea of guilty may place me at risk for deportation if I am not a citizen of the United States.” App. at 90. The immigration statute unambiguously placed Ms. Fuentes at risk of deportation. 8 U.S.C. § 1227(a)(2)(A).

The Court asked Mr. Hasan whether he had an opportunity to investigate. App. at 11. Although it appears that the Court only asked Mr. Hasan whether he had investigated the facts behind the accusation of grand larceny, Mr. Hasan owed a duty to investigate Ms. Fuentes’s immigration status as well. American Bar Association (ABA) Criminal Justice Standards for the Defense Function (ABA Standard) 4-5.5. The ABA imposes a duty on criminal defense attorneys who represent immigrants to investigate the legal status of the immigrant; the immigration consequences of a guilty plea to the immigrant’s legal status; and the harsh penalties for reentry after deportation. ABA Standard 4-5.5 (b)-(d).

The ABA Standard is routinely practiced in the Circuit Court of Arlington, VA. The criminal defense bar practice in Arlington, VA is to inquire about the immigration status of a foreign born defendant and advise the client that a guilty plea for larceny "would lead to almost definite deportation." App. at 54.

Ms. Fuentes was unaware of the certainty of deportation until June 2012. App. at 141. Immigration officers knocked on Ms. Fuentes's door and handed her a Notice to Appear, the charging document placing her in removal proceedings. App. at 36, 140. Ms. Fuentes could not be aware of how her guilty plea affected her lawful permanent residency. Her attorney, Mr. Hasan, at the time of her guilty plea, was not aware that Ms. Fuentes was a lawful permanent resident. App. at 177. According to Mr. Hasan, Ms. Fuentes discussed her legal status with Ms. Bianchi, an attorney who speaks fluent Spanish. App. at 177. Mr. Hasan claims that Ms. Fuentes told Ms. Bianchi that she was in the United States illegally and had no papers. App. at 177.

Based on the advise that Ms. Fuentes "may" be at risk of deportation, Ms. Fuentes entered a plea of guilty in the Arlington Circuit Court. App. at 88.

B. PROCEDURAL HISTORY

Ms. Fuentes filed a Petition for Writ of Habeas Corpus in the Arlington Circuit Court. App. at 15. In the Petition for Habeas Corpus, Ms. Fuentes alleged that Mr. Hasan did not inform her of the immigration consequences to her guilty plea. App. at 24. As such, Ms. Fuentes argued that trial counsel violated her Sixth Amendment Right to effective representation in a criminal proceeding. App. at 24.

In a fourteen page decision, the Arlington County Circuit Court denied the Writ of Habeas Corpus. App. at 223-235. The Arlington County Circuit Court analyzed *Strickland v. Washington*'s two prong test for ineffective assistance of counsel. 460 U.S. 668, 687 (1984). In *Strickland*, the Supreme Court held that a criminal defendant may obtain habeas relief as a result of ineffective assistance of counsel if counsel's

performance was deficient and the criminally accused was prejudiced because of counsel's performance. *Strickland* at 687.

The Circuit Court in Arlington County held in one sentence that prior counsel "adequately advised the petitioner of the immigration consequences of her guilty plea." App. at 230. In the habeas trial, the judge addressed the prejudice prong of *Strickland*. App. 230-235. The Circuit Court held that it would have been irrational for Ms. Fuentes to reject the plea agreement because "'[t]he government had a plethora of evidence establishing the [petitioner's] participation in the conspiracy.'" App. at 231, citing *Bhindar v. United States*, 2013 U.S. Dist. LEXIS 11061, * 13 (S.D. NY 2013).

This Court addressed the prejudice prong of *Strickland* in *Zemene v. Clarke*, 768 S.E.2d 684, 691-92 (Va. 2015). In *Zemene*, this Court held that an immigrant accused of criminal conduct may rationally decide to compel the Commonwealth to meet its

evidentiary burden rather than to face certain deportation. *Zemene* at 691-92. As this Court held in *Zemene*, "In such cases, the correct inquiry is whether the defendant would have 'gone to trial in the first place' because 'he might rationally be more concerned with removal than with a term of imprisonment. If this is the defendant's sentiment, 'the threat of removal provides [a] powerful incentive to go to trial' even if the evidence against him is strong." *Id.* at 691-92, citing *United States v. Orocio*, 645 F.3d 630, 643-645 (3d Cir. 2011).

It must be noted that the Arlington Circuit Court's decision, which is contrary to this Court's decision in *Zemene*, was issued months before this Court decided *Zemene.*

Ms. Fuentes disagreed with the Circuit Court's decision and sought review with this Court. App. at 237-238.

II. ASSIGNMENTS OF ERROR

I. The Circuit Court erred in holding that trial counsel properly informed Ms. Fuentes of the immigration consequences of her guilty plea. App. at 229.

II. The Circuit Court erred in holding that Ms. Fuentes has not shown prejudice as a result of her trial counsel's performance. App. at 230-235.

III. STANDARD OF REVIEW

Whether Ms. Fuentes is entitled to habeas relief is a mixed question of law and fact, which is subject to *de novo* review. *Dominguez v. Pruett*, 287 Va. 434, 440 (2014). This Court reviews whether the habeas corpus properly applied the law to the facts. *Id*. This Court defers to the habeas court's factual findings and will overturn the habeas court's factual findings if the findings are "plainly wrong or without evidence to support them." *Id*. citing *Hedrick v. Warden, Sussex I State Prison*, 264 Va. 486, 496 (2002).

The first assignment of error - whether Circuit Court erred in holding that Mr. Hasan provided competent representation - is reviewed *de novo*. *Dominguez* at 440. This Court must review whether Mr.

Hasan properly informed Ms. Fuentes of the immigration consequences if she pled guilty to grand larceny. The Circuit Court did not engage in any meaningful factual analysis. The Circuit Court simply stated that it "considered the testimony of petitioner and trial counsel and the argument of counsel at the August 11, 2014 hearing" and found that "trial counsel adequately advised the petitioner of the immigration consequences of her guilty plea." App. at 230. Thus, because the Circuit Court did not engage in factual findings, this Court does not review the first assignment of error under the more deferential "plainly wrong or without evidence" standard. *Hedrick* at 496. Instead, this Court reviews the first assignment of error under a *de novo* standard of review. *Dominguez* at 440.

The second assignment of error is also reviewed under the least deferential *de novo* standard of review. This Court held in *Zemene* that an alien may rationally decide that "'[p]reserving [his] right to remain in the United States may be more important . . . than any

potential jail sentence.'" *Id.* at 691, citing *Padilla v. Kentucky*, 559 U.S. 356, 368 (2010). The Circuit Court held that because of what it characterized as "overwhelming proof of her guilt," it would have been irrational for Ms. Fuentes not to accept the plea agreement. App. at 233. Thus, the Circuit Court held that Ms. Fuentes could not demonstrate prejudice in her ineffective assistance of counsel claim. App. at 231.

IV. LEGAL ARGUMENT

A. IMMIGRATION STATUTORY FRAMEWORK

The Supreme Court stated that immigration law is complex. *Padilla v. Kentucky* at 369. And the practice of immigration law has become "a legal specialty of its own." *Id.* Defense counsel representing immigrants in criminal proceedings must be versed in immigration law. After all, "if a noncitizen has committed a removable offense . . . his removal is practically inevitable but for the possible exercise of limited remnants of equitable discretion vested in the Attorney General to

cancel the removal for noncitizens convicted of particular classes of offenses." *Padilla* at 363-364.

The stakes for Ms. Fuentes are high. The Supreme Court has characterized an alien's deportation from the United States as a "particularly severe 'penalty'" although it is not a conviction in the criminal sense. *Padilla* at 365, citing *Fong Yue Ting v. United States*, 149 U.S. 698, 740 (1893).

The penalty of deportation is readily discernible from the statute. An alien who is removed from the United States and is an aggravated felon is inadmissible to the United States. 8 U.S.C. § 1182(a)(9)(A)(i). The Attorney General has sole discretion to waive the inadmissibility ground, but only if Ms. Fuentes applies for admission outside the United States. 8 U.S.C. § 1182(a)(2)(9)(iii). If the Attorney General refuses to exercise her discretion and permit Ms. Fuentes to return to the United States, that decision is not subject to judicial review. 8 U.S.C. § 1252(a)(2)(B)(ii).

For more than a century, Congress created two parallel expulsion processes, one known as exclusion proceedings and a second known as deportation proceedings. *Landon v. Plasencia*, 459 U.S. 21, 25 (1982). Aliens in deportation proceedings were generally afforded the right to contest his/her deportation near the alien's residence; aliens in deportation proceedings could seek voluntary departure and suspension of deportation. *Plasencia* at 25. Aliens in exclusion proceedings did not possess those rights.

When Congress enacted the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA), it merged deportation and exclusion proceedings into a single removal proceeding. Pub.L. 104-208. Although Congress created a single proceeding to expel aliens, Congress created two types of proceedings under the auspice of removal proceedings. Under 8 U.S.C. § 1182, Congress enumerated the class of aliens who are inadmissible from the United States and therefore removable. And under 8 U.S.C. § 1227, Congress created

a class of aliens subject to removal who are deportable. An alien charged with a deportable offense under 8 U.S.C. § 1227 must have been previously admitted to the United States. 8 U.S.C. § 1227(a). Instead, aliens who have never been admitted are subject to expulsion under 8 U.S.C. § 1182.

The difference between 8 U.S.C. § 1227 proceedings and proceedings under 8 U.S.C. § 1182 is evident in this case. First, an alien is removable for being convicted of an aggravated felon as defined in 8 U.S.C. § 1101. 8 U.S.C. § 1227(a)(2)(A). However, Congress did not create an expulsion ground for aggravated felons under 8 U.S.C. § 1182. Thus, if an alien who has been admitted to the United States, such as Ms. Fuentes, is convicted of an aggravated felony, she faces expulsion and banishment from the United States. 8 U.S.C. § 1227(a)(2)(iii). But had Ms. Fuentes not been admitted into the United States, she could not be charged with expulsion as an aggravated felon. Second, an alien who is convicted of a crime involving moral

turpitude within five years of admission is deportable under 8 U.S.C. § 1227(a)(2)(i). However, an alien who has not been admitted to the United States is inadmissible if she is convicted of a crime involving moral turpitude, irrespective of when she arrived. 8 U.S.C. § 1182(a)(2)(A). But aliens who are in 8 U.S.C. § 1182 proceedings may qualify for a petty offense exception exempting them from the harsh consequences of the conviction of a crime involving moral turpitude, if the alien receives a sentence of six months or less and the alien could not receive a sentence of more than one year under the statute. 8 U.S.C. § 1182(a)(2)(A)(ii)(II).

The disparate treatment of aliens under 8 U.S.C. §§ 1182 and 1227 requires a criminal defense attorney to first ascertain the alien's legal status. Without knowing the alien's legal status, it is impossible to properly advise a criminal defendant of the immigration consequences of a certain plea.

Thus, it is of utmost importance to understand Ms. Fuentes's immigration status before advising her of the immigration consequences of a plea agreement.

B. MS. FUENTES'S IMMIGRATION STATUS AND THE IMMIGRATION CONSEQUENCES OF HER PLEA.

On June 24, 2011, Ms. Fuentes became a lawful permanent resident of the United States.[1] Because of her legal status as a lawful permanent resident, Ms. Fuentes was admitted to the United States. *Matter of Rosas*, 22 I&N Dec. 616, 618 (BIA 1999). As such, the expulsion rules contained in 8 U.S.C. § 1227 governed her case.

Congress was unambiguous regarding Ms. Fuentes's expulsion. "Any alien who is convicted of a crime involving moral turpitude within five years . . . after admission and who is convicted of a crime for which the sentence of one year or longer may be imposed is

[1] The Immigration Court order has two dates on which it conferred Ms. Fuentes lawful permanent resident status, June 2, 2011 and June 24, 2011. For purposes of this brief, Ms. Fuentes will use the latter date of June 24, 2011. Whether she obtained her lawful permanent residency on June 2 or June 24, 2011 does not change the outcome of this case.

deportable." 8 U.S.C. § 1227(a)(2)(A)(i)(I) and (II). It is equally unambiguous that a crime of larceny necessarily involves moral turpitude. *Matter of Vo*, 25 I&N Dec. 426, 430 (BIA 2011).

Thus, on March 5, 2012, when Ms. Fuentes signed the plea agreement and pled guilty in open court, her deportation under 8 U.S.C. § 1227 was certain. App. at 6.

C. *PADILLA'S* TWO PRONG TEST MANDATED MR. HASAN TO INFORM MS. FUENTES OF THE IMMIGRATION CONSEQUENCES OF HER CRIMINAL PLEA.

In *Padilla*, the Supreme Court created two tests for the criminal defense bar. First, when the immigration law is not "succinct and straightforward," the criminal defense attorney must inform the noncitizen that the pending criminal charges carry a risk of deportation. *Padilla v. Kentucky* at 369. However, "when the deportation consequence is truly clear, as it was in this case, the duty to give correct advice is equally clear." *Id*.

In this case, deportation is "truly clear." Congress authorized the Attorney General to deport "any alien" who has been admitted to the United States and who has been convicted of a crime involving moral turpitude within five years of the admission. Ms. Fuentes was admitted on June 24, 2011 and she was convicted of grand larceny, a crime which involves moral turpitude, on March 5, 2012. Therefore, the statute is "succinct and straightforward" and Ms. Fuentes's deportation is "truly clear," Mr. Hasan's duty was to provide Ms. Fuentes with correct advice regarding her expulsion.

D. MR. HASAN'S REPRESENTATION OF MS. FUENTES FELL SHORT OF PREVAILING PROFESSIONAL NORMS.

There are two compelling reasons this Court must find Mr. Hasan's performance to fall short of the professional norms. First, the plea agreement states that Ms. Fuentes's guilty plea "may place [her] at risk of deportation." App. at 90. The language in the plea agreement mirrors the language in *Padilla* regarding the legal advice counsel must provide when deportation is

not truly clear. *Padilla* at 369. However, in this case, deportation is truly clear and the language in the plea agreement is insufficient to adequately inform Ms. Fuentes of the immigration consequences to her plea of grand larceny. The second compelling reason is that Mr. Hasan showed a limited understanding of immigration law and was unaware of Ms. Fuentes's legal status. Thus, it was impossible for him to provide proper legal advice in this case.

1. Ms. Fuentes could not have been aware of the certainty of deportation from the plea agreement.

Ms. Fuentes was not properly advised of the immigration consequences to her plea under the terms of the plea agreement. The plea agreement underestimates the risk of deportation. The agreement states that she "may" be placed "at risk for deportation."

In *Akinsade v. United States*, 686 F.3d 248 (4th Cir. 2012), the Fourth Circuit Court of Appeals reviewed a similar case to Ms. Fuentes's. In *Akinsade*, the noncitizen was improperly told by defense counsel

that his embezzlement conviction would not affect his immigration status. *Id*. at 250. After the incorrect advice, the Court conducted a Rule 11 Hearing. In that hearing, the Court told Mr. Akinsade that "if you are not a citizen, you could be deported." *Id*. Assured that Mr. Akinsade understood the consequences of pleading guilty, the Court accepted Mr. Akinsade's plea. *Id*.

The Fourth Circuit held that the district court's warning that he could face deportation was insufficient. The "admonishment did not 'properly inform' Akinsade of the consequences he faced by pleading guilty: mandatory deportation." *Akinsade* at 254.

Ms. Fuentes's case is more compelling than what the Fourth Circuit held to be insufficient. In this case, Ms. Fuentes was told that she "may be placed" "at risk for deportation." Thus, unlike *Akinsade*, where the noncitizen was told that he "could be deported," in this case, Ms. Fuentes was told that maybe she could be placed at risk of deportation. Thus, in the same manner

that the noncitizen in *Akinsade* "could not have known that deportation was a legally mandated consequence of his plea," Ms. Fuentes's plea agreement was also "was far from a 'careful explanation' of the consequences of deportation." *Akinsade* at 254. Thus, Mr. Hasan's advice was not reasonable under "'prevailing professional norms.'" *Padilla*, citing *Strickland v. Washington* at 688.

The plea agreement plainly underscores the immigration consequences to the plea of guilty. In the habeas proceedings, however, Mr. Hasan testified that he informed Ms. Fuentes that her deportation would be likely. App. at 177. Mr. Hasan's testimony must be reviewed in context. First, Mr. Hasan was unaware of Ms. Fuentes's legal status, App. at 177, (lawful permanent resident). Second, Mr. Hasan, through his testimony, showed that he has a rudimentary, if not erroneous, understanding of immigration law.

According to Mr. Hasan's testimony, he told Ms. Fuentes that if the charges were reduced to a

misdemeanor, she would be incarcerated. Once incarcerated, Mr. Hasan told Ms. Fuentes that she would have to obtain an immigration bond and "she may very well be able to get one and then also she may, because of her children, possibly be able to waive deportation." App. at 176.

Mr. Hasan's legal advice was provided under the erroneous information that Ms. Fuentes was in the United States unlawfully.

Mr. Hasan is simply wrong on his legal advice.[2] If this Court were to assume that Ms. Fuentes was in unlawful status, she would not be eligible for an immigration bond. Immigration bonds are governed by 8 U.S.C. § 1226. Congress placed severe limitations on criminal aliens from receiving immigration bonds. 8 U.S.C. § 1226(c). Under 8 U.S.C. § 1226(c)(1)(A), an alien who is inadmissible by reasons of committing an

[2] Mr. Hasan's legal advice could be correct if the charge were reduced to a misdemeanor and Ms. Fuentes received a sentence of six months or less. See 8 U.S.C. § 1182(a)(2)(A)(ii).

offense covered under 8 U.S.C. § 1182(a)(2) must be mandatorily detained.

Mr. Hasan testified that the immigration impact on a grand larceny case "is the same" irrespective of Ms. Fuentes legal status. App. at 182.

The law is not the same for a lawful permanent resident and an undocumented alien. A lawful permanent resident is deportable under a conviction for larceny if the crime occurred within five years of admission to the United States. 8 U.S.C. § 1227(a)(2)(A). The lawful permanent resident does not have the benefit of the petty offense exception contained in 8 U.S.C. § 1182(a)(2)(A)(ii)(II). Further, with regards to bonds, a lawful permanent resident is eligible for bond after a conviction for a crime involving moral turpitude, unless the sentence is one year or longer. 8 U.S.C. § 1226(c)(1)(C). In contrast, an undocumented alien may be removed for a crime involving moral turpitude, irrespective of when the offense occurred. 8 U.S.C. § 1182(a)(2)(A). And although the undocumented

alien benefits from the petty offense exception, the undocumented alien, if incarcerated, is likely to remain detained. 8 U.S.C. § 1226(c)(1)(A).

Under a *de novo* review, this Court must conclude that Mr. Hasan's performance was below community standards. The plea agreement was insufficient to warn Ms. Fuentes of the immigration consequences of a grand larceny conviction. Mr. Hasan was unaware of Ms. Fuentes's legal status, and Mr. Hasan has a rudimentary understanding of immigration law. As such, the Circuit Court erred when it held that Mr. Hasan "adequately advised the petitioner of the immigration consequences of her guilty plea." App. at 230.

E. MR. HASAN'S INEFFECTIVE ASSISTANCE OF COUNSEL PREJUDICED MS. FUENTES.

In *Strickland v. Washington*, the Supreme Court held that the criminally accused must not only prove ineffective assistance of counsel, but also prove that because of the ineffective assistance, the accused was prejudiced. 466 U.S. at 694.

The Supreme Court addressed the prejudice prong in *Hill v. Lockhart*, 474 U.S. 52 (1985). In *Hill*, the Supreme Court held that an accused shows prejudice if she can show a reasonable possibility of compelling the Commonwealth to prove its case in chief rather than pleading guilty. *Hill* at 59. The decision to reject a plea agreement must be rational. *Id.*

This Court addressed the prejudice prong in *Zemene v. Commonwealth.* In *Zemene*, this Court held that an alien may rationally decide that "'[p]reserving [his] right to remain in the United States may be more important. . . than any potential jail sentence.'" *Zemene* at 691, citing *Padilla* at 368.

This Court rejected the rule that if the evidence against the alien is strong, accepting the plea agreement is a rational decision and the alien cannot meet the prejudice prong of *Strickland*. As this Court held, "'the threat of removal provides [a] powerful incentive to go to trial' even if the evidence against

him is strong." *Zemene* at 692, citing *United States v. Orocio*, 645 F.3d 630, 643 (3d Cir. 2011).

The Circuit Court decided this case before *Zemene* and held that Ms. Fuentes could not prove prejudice because of the strength of the evidence against her. App. at 231-232. This is clear error. *Zemene* at 691-92.

The Circuit Court erred in its decision. The issue of prejudice and whether it is rational for someone to reject a guilty plea does not turn on the strength of the evidence, but on the alien's desire to remain in the United States and compel the Commonwealth to meet its evidentiary standard.

V. CONCLUSION

This Court has three options. This Court may grant the Writ of Habeas Corpus and vacate the criminal conviction against Ms. Fuentes. In the alternative, this Court may remand this matter on the issue of whether Mr. Hasan's performance fell short of community standards because the Circuit Court did not engage in a meaningful factual finding. Finally, on its *de novo*

review, this Court may find that Mr. Hasan's performance was below community standards and remand this matter for the Circuit Court to decide the prejudice prong of *Strickland* consistent with this Court's holding in *Zemene*.

Respectfully submitted,

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CERTIFICATE

I hereby certify that pursuant to Rule 5:26(h), one electronic copy of the Brief of Appellant and Appendix have been filed, via VACES, and ten printed copies of the Brief of Appellant and three printed copies of the Appendix, were hand-filed with the Clerk of the Supreme Court of Virginia on July 13, 2015. On this same day, one electronic copy of the Brief of Appellant was served, via email, and one electronic copy of the Brief of Appellant and Appendix on a CD, were served, via UPS Ground Transportation, on:

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Counsel is retained.

Counsel hereby requests oral argument.

This brief contains 4,109 words.

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