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IN THE

SUPREME COURT OF VIRGINIA

RECORD NO. 141890

BETTY BUSTILLO FUENTES,

Appellant,

v.

HAROLD CLARKE, DIRECTOR,
VIRGINIA DEPARTMENT OF CORRECTIONS,

Appellee.

BRIEF FOR THE COMMONWEALTH

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BRIEF FOR THE COMMONWEALTH

STATEMENT OF THE CASE

The petitioner, Betty Bustillo Fuentes, filed a petition for a writ of habeas corpus in the Circuit Court of Arlington County on March 14, 2014, attacking her March 12, 2012 grand larceny conviction on the basis of the ineffective assistance of counsel. (App. 15-56). A court-ordered evidentiary hearing was held on August 11, 2014. (App. 126-201). After taking the matter under consideration, the circuit court determined that the petitioner had established neither deficient performance nor prejudice

under Strickland v. Washington, 466 U.S. 668 (1984), Hill v. Lockhart, 474 U.S.52, 59 (1985), and Padilla v. Kentucky, 559 U.S. 356 (2010). The circuit court dismissed the petition, making findings of fact and conclusions of law in accordance with Virginia Code § 8.01-654(B)(5). (App. 223-36). On June 2, 2015, this Court granted Fuentes' petition for appeal from the judgment of the circuit court.

ASSIGNMENTS OF ERROR

Fuentes assigns the following errors:

> **I.** The Circuit Court erred in holding that trial counsel properly informed Ms. Fuentes of the immigration consequences of her guilty plea.
>
> **II.** The Circuit Court erred in holding that Ms. Fuentes has not shown prejudice as a result of her trial counsel's performance.

(Appellant's Br. at 8).

STATEMENT OF FACTS

On December 19, 2011, an Arlington County grand jury indicted Fuentes for grand larceny, in violation of § 18.2-95, for stealing over $200 worth of clothing from Macy's department store. (App. 263). On March 5, 2012, Fuentes, who was represented by attorney Nader Hasan, pled guilty in the Arlington County Circuit Court. (App. 257-58). At the plea hearing, the prosecutor made the following proffer of the evidence:

> [O]n August 25th of 2011 at about 6:30 in the evening, at the Macy's Store located inside the Ballston Commons Mall in Arlington County, the defendant selected numerous items of clothing that she concealed in a large gift bag that she was carrying. The defendant went to numerous areas in the store, selecting merchandise, and then exited the store, passing points of sale, having never paid for any of the items she concealed.
>
> The defendant admitted to loss prevention officers that she had stolen the merchandise. The total amount of the merchandise stolen was $1,540.11 and was over 50 items of clothing. The defendant had neither permission nor authority to take, remove, and exit the store with the merchandise.

(App. 10-11). Mr. Hasan stated that he had the opportunity to investigate the allegations and he agreed that the proffer of the evidence represented "substantially the facts that the Commonwealth would have been able to place into evidence had the matter gone to trial." (App. 11).

Prior to accepting the petitioner's guilty plea, the circuit court judge questioned her regarding the voluntariness of her plea. The circuit court judge instructed the petitioner that he would be happy to explain any questions she did not understand and that he would give her more time to speak with her attorney if necessary. (App. 3). The petitioner, through an interpreter, stated that she understood the nature of the crime and its elements and she had discussed any possible defenses with trial counsel. (App. 3, 5). She affirmed that she had decided "for [her]self to enter a plea of guilty" because she was "in fact, guilty." (App. 6).

The circuit court also questioned the petitioner regarding the negotiated plea agreement. (App. 4). In exchange for the petitioner's guilty plea, the Commonwealth agreed to a sentence of three years' incarceration, all suspended. (App. 9, 251-55). Additionally, in the plea agreement, the petitioner acknowledged that her "plea of guilty may place [her] at risk for deportation if [she was] not a citizen of the United States." (App. 253, ¶ 15). Furthermore, in the plea agreement, she averred, "I have read all of the above paragraphs, I have reviewed them with my attorney, and I agree to all the provisions of this agreement." (App. 254, ¶ 20).

The petitioner stated that she understood the written plea agreement, had the opportunity to discuss it with her attorney, and signed it. (App. 4, 8-9). She told the circuit court that she did not require additional time to discuss the plea agreement with her attorney. (App. 4). Finally, the petitioner affirmed, both orally and in writing, that she was "entirely satisfied with the services" of trial counsel. (App. 8, 253).

On March 12, 2012, the circuit court convicted the petitioner of grand larceny and sentenced her to three years in jail, all suspended, in accordance with the plea agreement. (App. 257-58). Fuentes did not appeal this conviction.

Fuentes is not a citizen of the United States; she is a citizen of Honduras. (App. 36). Her immigration status was adjusted to that of lawful permanent resident on June 2, 2011. (App. 36, 135). Her conviction for grand larceny rendered her removable pursuant to 8 U.S.C. §§ 1227(a)(2)(A)(i) and 1227(a)(2)(A)(iii).[1]

On March 12, 2014, Fuentes filed a petition for a writ of habeas corpus in the circuit court, in which she alleged Mr. Hasan failed to advise her of the immigration consequences of her guilty plea. (App. 15). Fuentes alleged that Mr. Hasan told her that "if she wanted to minimize risk of separation from her [three minor] children, she should accept the plea deal because it guaranteed no jail time, and thus no separation from her children for whom she had primary custody." (App. 24). Fuentes alleged that if she had been properly advised, she would have pled not guilty and gone to trial. (App. 24). She stated her "ties to this country are so strong, her ties to Honduras so weak, and her life in Honduras so much more dangerous and impoverished than her life here, that it [was] an easy

[1] Pursuant to 8 U.S.C. § 1227(a)(2)(A)(i), "[a]ny alien who – (I) is convicted of a crime involving moral turpitude within five years . . . after the date of admission, and (II) is convicted of a crime for which a sentence of one year or longer may be imposed" is subject to removal. Additionally, pursuant to 8 U.S.C. § 1227(a)(2)(A)(iii), "[a]ny alien who is convicted of an aggravated felony [defined by 8 U.S.C. § 1101] at any time after admission is deportable."

decision for [her] to face the uncertainties of trial and a possible conviction with even more jail time, than to face certain deportation to Honduras for the rest of her life." (App. 24-25).

After the respondent filed his responsive pleadings, the petitioner filed a reply in the circuit court. (App. 107-117). Fuentes attached a sworn declaration to the reply. (App. 118-19). In it, she swore that she made no statements to a female loss prevention officer. (App. 118). She further averred that she told her lawyer that it was not possible that she was charged with stealing in excess of $1500 worth of clothing, because she "had about ten items of children's clothes, each worth $25 or $30." (App. 118). She further averred in the declaration that Mr. Hasan told her that "it was not important, because with the plea agreement [she] could avoid jail time and separation from [her] children." (App. 119).

On August 11, 2014, the circuit court held an evidentiary hearing. (App. 126-201). The parties stipulated that Fuentes left Honduras to "escape . . . the violence in her town [in Honduras] and the abuse she received from her grandparents." (App. 145, 204, 207). Fuentes, with the assistance of an interpreter, testified she had three minor children who were American citizens. (App. 134). She further testified that Mr. Hasan represented her in her criminal case. (App. 139). She stated that she met

with him only one time for about 10 to 15 minutes the day she pled guilty to grand larceny. (App. 139). She testified that she pled guilty because Mr. Hasan told her that "if [she] didn't plead guilty, [she] would go to jail and [be] separated from [her] children." (App. 140).

She stated that she first learned she was subject to removal as a result of her criminal conviction when immigration authorities served her with a notice in June 2012. (App. 140). She testified that had she known that her guilty plea would have led to her deportation, she would have gone to trial. (App. 144). She further testified that she would have gone to trial even if she faced up to twenty years in prison as a result of her conviction. (App. 144-45).

During cross-examination by the Director's counsel, Fuentes stated that she reviewed the affidavit attached to her habeas petition with an interpreter and signed it, but she "didn't understand the English very well." (App. 146). Nonetheless, she had signed the affidavit under penalty of perjury and, in the affidavit, she averred that the facts contained in the petition were "true to the best of [her] information and belief." (App. 27-29). She also stated she did not review the plea agreement with a translator. (App. 147). However, she later acknowledged that during the plea hearing, she told the trial court that the plea agreement was read to her in Spanish.

(App. 4, 153). She acknowledged that she had discussed the plea agreement with Mr. Hasan and signed it. (App. 147-48). She further acknowledged that during the plea hearing, she had told the circuit court that she was pleading guilty because she had stolen the items. (App. 152).

Fuentes stated that, prior to her guilty plea, Mr. Hasan told her that there were witnesses who would testify against her if she went to trial. (App. 149). She denied that Mr. Hasan told her that there was a videotape of her stealing items from Macy's. (App. 149). She stated that he told her that a police officer would testify that she apologized for stealing the clothing and that she claimed the items were for her children. (App. 149). She further stated that he told her the only chance of avoiding an active sentence was pleading guilty. (App. 149).

Fuentes made several claims regarding the extent she discussed immigration issues with Mr. Hasan. She stated that Mr. Hasan did not advise her of the immigration consequences of her guilty plea. (App. 147). She also claimed that she did not discuss her immigration status with Mr. Hasan and denied that he referred her to an immigration attorney. (App. 149-50). She denied that she spoke with a female attorney who discussed the immigration consequences of her guilty plea. (App. 150).

Shell'e Washington, an employee at Macy's, testified that she observed the petitioner, who was alone, taking merchandise from the children's department, juniors' department, and the women's sportswear department. (App. 163-64, 169). Washington saw Fuentes conceal the merchandise and leave the store without paying for it. (App. 165). Subsequently, Washington apprehended Fuentes outside the department store. (App. 165). According to Washington, Fuentes attempted to steal approximately 35 items worth $1540.11. (App. 165-66).

After Fuentes was apprehended, she was in Washington's custody for over an hour. (App. 167-68). During this time, Fuentes was cooperative and answered approximately 20 questions, including Fuentes' "name, address, date of birth, occupation, things of that nature." (App. 168). She claimed the items were "for her kids." (App. 167).

Arlington County Police Officer Krista Balderrama testified at the evidentiary hearing. She responded to Macy's after Washington reported the larceny. (App. 184). Balderrama, who spoke fluent Spanish, spoke to Fuentes in Spanish. (App. 186). Fuentes told Balderrama that she took the items for her children. (App. 186). Balderrama further testified that Fuentes told the magistrate that "she knew what she did was wrong but she did it for her kids." (App. 187).

Mr. Hasan testified that he was in his fifteenth year practicing law and his practice consisted of criminal defense, family law, immigration law, and business law. (App. 170). When asked how many criminal cases he had handled in his career, Mr. Hasan answered, "Too many to count." (App. 170). He further stated that between 30 to 50 percent of his criminal clients had "immigration issues." (App. 170).

Mr. Hasan was familiar with Padilla v. Kentucky at the time he represented the petitioner and had a standard procedure that he followed with non-citizen clients:

> I would ask any client whether or not they had any immigration issues or specifically what their status was and once they would advise me they were not a citizen of the United States, I would advise them, depending on what type of charge they had and the level of the offense, as well as whether it was a crime of moral turpitude, the impacts it could have on them, always including deportation.

(App. 171). Hasan testified there was nothing about the petitioner's case that would have caused him to deviate from this practice. (App. 171).

Mr. Hasan testified that he conducted discovery in the petitioner's criminal case and received in writing the petitioner's statements. (App. 172). He further stated that there was a preliminary hearing, at which Balderrama and Washington were present. (App. 172, 179). He also testified that Fuentes was aware that a video existed of her crime, because

one court hearing was continued due to its unavailability. (App. 172). Mr. Hasan testified that he discussed the preliminary hearing testimony and the contents of the police incident report and Washington's written narrative of the incident with the petitioner. (App. 172-73). The police incident report and Washington's written narrative were admitted as exhibits at the habeas evidentiary hearing. (App. 173, 213-18).

Mr. Hasan testified he met with the petitioner in his office one or two times and at the courthouse at least four or five times. (App. 174, 178). He stated that she had never told him that his understanding of the evidence against her was incorrect. (App. 175). She never provided him with any defenses for her actions. (App. 175).

Mr. Hasan stated that every time he and the petitioner met, they discussed her immigration consequences and the risk of deportation in English and Spanish.[2] (App. 175, 180, 181). Mr. Hasan understood that Fuentes' "biggest concern" was to avoid being "detained by immigration" officials. (App. 176). According to Mr. Hasan, Fuentes told him in Spanish that she was "illegal and had no papers." (App. 177, 180, 181). Mr. Hasan further testified that Fuentes also spoke about her immigration issues with

[2] Mr. Hasan spoke Spanish, but he also used an interpreter when meeting with Fuentes. (App. 180-81).

one of his associates, Ms. Bianchi, who spoke fluent Spanish. (App. 177-78).

Before the preliminary hearing, Mr. Hasan discussed possible plea agreements with the petitioner. (App. 175). He stated that there was a possibility as to whether the Commonwealth would reduce the charge to a misdemeanor "because of the immigration consequence related to a felony conviction or any conviction involving a crime of moral turpitude." (App. 175-76). He advised her that if the charge was reduced to a misdemeanor, it was likely that the petitioner would serve an active jail sentence. (App. 176). Hasan told her this option was a "double-edged sword" because it would likely lead to her detention by immigration authorities. (App. 176). He advised that she would have to get an "immigration bond" and that it was possible that deportation would be waived because of her children. (App. 176).

Prior to her guilty plea, Mr. Hasan told the petitioner the plea would have "immigration consequences to include the likelihood of deportation ***unless*** she was able to find some remedy through immigration" and that "deportation was the most likely consequence ***unless*** she could come up with a remedy . . . ." (App. 177, 183 (emphasis added)). He also advised her to speak to an immigration attorney. (App. 177, 182-83).

At the hearing, Mr. Hasan stated that the felony grand larceny conviction rendered the petitioner equally removable regardless of whether she was an undocumented alien or a "green card holder." (App. 182).

At the close of the hearing, the respondent, by counsel, argued that Mr. Hasan correctly advised the petitioner that she would be removed "absent some form of immigration relief." (App. 192). The respondent further argued that to the extent Mr. Hasan believed the petitioner was not in the country legally, his misapprehension of her status was based on her own statements to him. (App. 193).

The respondent further argued the petitioner was incredible and noted the numerous inconsistencies in her previous statements and instances where the petitioner's testimony was impeached, including but not limited to, her claim that she had not understood the plea agreement, despite the fact that she had previously averred that she had reviewed it and it was read to her in Spanish; her claim regarding the number of items that she stole and their value; her claim that she stole items from the juniors' and women's departments for her children; and her claim that she only met with Mr. Hasan one time. (App. 194-95).

With respect to the prejudice prong, the respondent argued that the circuit court had to consider the strength of the Commonwealth's case, the

petitioner's lack of defenses, and the sentencing benefit she received by pleading guilty, in determining whether it would have been objectively reasonable for her to go to trial. (App. 196-97). The respondent further asserted that an argument that the petitioner would have engaged in further plea negotiations was not a viable argument in habeas corpus, as the Fourth Circuit found in Fields v. Attorney General, 956 F.2d 1290, 1297 (4th Cir. 1992) (holding allegation that petitioner "would have pled to a different plea bargain and received a more favorable sentence" is insufficient to establish prejudice under Hill and Strickland"). (App. 197).

Finally, the respondent reiterated that the petitioner would have been found guilty had she gone to trial. (App. 198). Accordingly, the real choice before her at the time she pled guilty was whether she wanted to plead guilty and avoid an active sentence or go to trial and risk a lengthy prison term. (App. 198). Under either scenario, the petitioner was removable, so it was rational to choose the option wherein she would not be incarcerated. (App. 198).

After hearing the argument from counsel, the circuit court took the matter under advisement. (App. 200). In an August 12, 2014 letter to counsel, the circuit court stated, "The Court has considered all the evidence presented by the parties and finds Respondent's argument more

persuasive." (App. 218). Thereafter, the circuit court entered an order finding that the petitioner failed to satisfy either the performance or the prejudice prong of the Strickland test. (App. 223-36).

ARGUMENT

Standard of Review on Appeal

Whether an inmate is entitled to habeas corpus relief is a mixed question of law and fact, which this Court reviews *de novo* on appeal. Laster v. Russell, 286 Va. 17, 22, 743 S.E.2d 272, 274 (2013). "The [habeas] court's factual findings, however, are entitled to deference and are binding upon this Court unless those findings are plainly wrong or without evidence to support them." Hedrick v. Warden, Sussex I State Prison, 264 Va. 486, 496, 570 S.E.2d 840, 847 (2002). On appeal, this Court determines "whether the [habeas] court correctly applied the law to the facts." Hash v. Director of the Dep't of Corr., 278 Va. 664, 672, 686 S.E.2d 208, 212 (2009) (quoting Curo v. Becker, 254 Va. 486, 489, 493 S.E.2d 368, 369 (1997)).

The petitioner argues that the first assignment of error is reviewed under the *de novo* standard because the circuit court "did not engage in any meaningful factual analysis." (Appellant's Br. at 8-9). However, the circuit court stated in its August 12, 2014 letter that it found the

respondent's argument to be more persuasive. (App. 218). In the September 28, 2014 final order, the circuit court held, "Having considered the testimony of the petitioner and trial counsel and the argument of counsel at the August 11, 2014 hearing, the Court finds trial counsel adequately advised the petitioner of the immigration consequences of her guilty plea." (App. 230). Accordingly, the circuit court made implicit findings of fact with respect to the credibility of the witnesses and these factual findings are entitled to deference. Hedrick, 264 Va. at 496, 570 S.E.2d at 847 (2002).

Governing Legal Principles for Ineffective Assistance of Counsel Claims

The petitioner alleges she received ineffective assistance of counsel; however, the petitioner cannot meet the highly demanding standard set forth for such claims in Strickland v. Washington, 466 U.S. 668 (1984). Under Strickland, the petitioner has the burden to show both that her attorney's performance was deficient ***and*** that she was prejudiced as a result. 466 U.S. at 687. An ineffective counsel claim may be disposed of on either prong because deficient performance and prejudice are "separate and distinct elements." Spencer v. Murray, 18 F.3d 229, 232-33 (4th Cir. 1994) (citing Strickland, 466 U.S. at 687).

The first prong of the Strickland test, the "performance" inquiry, "requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." Strickland, 466 U.S. at 687. There are "'countless ways to provide effective assistance of counsel,'" as "'[e]ven the best criminal defense attorneys would not defend a particular client in the same way,'" and only in "'[r]are . . . situations'" is counsel "'limited to any one technique or approach.'" Harrington v. Richter, 562 U.S. 86, 106 (2011) (quoting Strickland, 466 U.S. at 689).

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." Strickland, 466 U.S. at 694 (emphasis added). A reasonable probability is a "probability sufficient to undermine confidence in the outcome." Id.

> [T]he question is not whether a court can be certain counsel's performance had no effect on the outcome or whether it is possible a reasonable doubt might have been established if counsel acted differently. See Wong v. Belmontes, 558 U.S. 15, ___ (2009) (per curiam) (slip op., at 13); Strickland, 466 U.S., at 693. Instead, Strickland asks whether it is "reasonably likely" the result would have been different. Id., at 696. This does not require a showing that counsel's actions "more likely than not altered the outcome," but the difference between Strickland's prejudice standard and a more-probable-than-not

> standard is slight and matters "only in the rarest case." Id., at 693, 697. The likelihood of a different result must be substantial, not just conceivable. Id., at 693

Harrington, 562 U.S. at 111-12.

To satisfy Strickland's prejudice prong in the context of a guilty plea, the court must decide if "there is a reasonable probability that, but for counsel's errors, [the defendant] would not have pleaded guilty and would have insisted on going to trial." Hill v. Lockhart, 474 U.S. 52, 59 (1985); accord Premo v. Moore, 562 U.S. 115, 131-32 (2011). In setting forth that standard, the Court in Hill emphasized the "fundamental interest in the finality of guilty pleas." Hill, 474 U.S. at 58 (citing United States v. Timmreck, 441 U.S. 780, 784 (1979)). Because "[p]lea bargains are the result of complex negotiations suffused with uncertainty, and defense attorneys must make careful strategic choices in balancing opportunities and risks," strict adherence to the deferential Strickland standard is "all the more essential when reviewing the choices an attorney made at the plea bargain stage." Premo, 562 U.S. at 125.

"Although this [test] focuses the inquiry on a subjective question, the answer to that question must be reached through an objective analysis." Hooper v. Garraghty, 845 F.2d 471, 475 (4th Cir. 1988). Hill's objective prejudice analysis means that a petitioner's after-the-fact claim that she

would have chosen to go to trial but for counsel's alleged error counts for little. Instead, "such a statement . . . must be evaluated in light of the circumstances the defendant would have faced at the time of [her] decision." Id. "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.

Additionally, absent a valid reason to the contrary, a petitioner is bound by the statements she made to the trial court.

> ***[T]he truth and accuracy of representations made by an accused as to the adequacy of his court-appointed counsel and the voluntariness of his guilty plea will be considered conclusively established*** by the trial proceedings, unless the prisoner offers a valid reason why he should be permitted to controvert his prior statements.

Anderson v. Warden, 222 Va. 511, 516, 281 S.E.2d 885, 888 (1981) (emphasis added).

The purpose of this colloquy is to "forestall 'the spin-off of collateral proceedings'" such as this. Id. at 516, 281 S.E.2d at 888 (quoting Boykin v. Alabama, 395 U.S. 238 (1969)); see also Via v. Superintendant, 643 F.2d 167 (4th Cir. 1981). As noted by another court:

> [The] colloquy between a judge and a defendant before accepting a guilty plea is not pro forma and without legal significance. Rather, it is an important safeguard that protects

> defendants from incompetent counsel or misunderstandings. At these colloquies, judges take the time to insure that defendants understand the consequences of a guilty plea.

Fields v. Gibson, 277 F.3d 1203, 1214 (10th Cir. 2002); accord United States v. Hyde, 520 U.S. 670, 677 (1997) ("[A] guilty plea is no such trifle, but a 'grave and solemn act,' which is accepted only with care and discernment.")).

Applying the Strickland standard of review, the circuit court properly denied Fuentes' petition for a writ of habeas corpus.

I. Trial counsel properly advised the petitioner that, absent relief in the immigration court, "deportation was the most likely consequence" of her conviction.

For the first time in Padilla v. Kentucky, 559 U.S. 356 (2010), the Supreme Court held that the Sixth Amendment right to counsel, as articulated in Strickland, required trial counsel to provide advice relating to deportation in certain circumstances. Padilla, 559 U.S. at 366. The Supreme Court then held that "when the deportation consequence is truly clear, as it was in [Padilla's] case, the duty to give correct advice is equally clear." Id. at 369. Padilla, a legal permanent resident, had pled guilty to distributing drugs. Federal law required automatic deportation for any conviction relating to controlled substances other than simple possession of marijuana. Thus, because on the face of the immigration law itself the deportation

consequences were "succinct, clear, and explicit," Padilla's counsel had a duty to give correct advice about the immigration consequences. Id. at 368-69.

Fuentes' conviction for grand larceny rendered her subject to removal under two federal immigration provisions. Pursuant to 8 U.S.C. § 1227(a)(2)(A)(i), "[a]ny alien who – (I) is convicted of a crime involving moral turpitude within five years . . . after the date of admission, and (II) is convicted of a crime for which a sentence of one year or longer may be imposed" is subject to removal. Additionally, pursuant to 8 U.S.C. § 1227(a)(2)(A)(iii), "[a]ny alien who is convicted of an aggravated felony [defined by 8 U.S.C. § 1101] at any time after admission is deportable." Grand larceny is both a crime involving moral turpitude and aggravated felony. See Bell v. Commonwealth, 167 Va. 526, 531, 189 S.E. 441, 443-44 (1937) (stating that larceny is a crime involving moral turpitude); 8 U.S.C. § 1101(a)(43)(G) (defining an aggravated felony as "a theft offense . . . for which the term of imprisonment [is] at least one year).

Preliminarily, in the instant case, the circuit court implicitly credited the testimony of Mr. Hasan and found incredible the petitioner's testimony. This holding was not plainly wrong, given the many contradictions between the petitioner's habeas evidentiary hearing testimony and the sworn

statements she made both orally and in writing in the criminal proceedings. The most pertinent inconsistency was her evidentiary hearing claim that she and Mr. Hasan ***never*** discussed her immigration status, despite the fact that during the criminal proceedings she averred that she discussed with Mr. Hasan the plea agreement, which included a provision related to potential immigration consequences. (App. 147, 149-50, 253-54). Furthermore, the circuit court was entitled to disbelieve her statements that she met with Mr. Hasan only one time (App. 139), when she had ***at least*** two interactions with him at the preliminary hearing and the plea hearing and Mr. Hasan testified they met at least five times (App. 172, 174-75, 178).

To the extent Mr. Hasan offered advice based on his mistaken belief that the petitioner was not a legal permanent resident, his performance was not deficient. "The reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions. ***Counsel's actions are usually based, quite properly, on informed strategic choices made by the defendant and on information supplied by the defendant.***" Strickland, 466 U.S. at 691. Trial counsel was entitled to rely on the petitioner's affirmative assertion that she was "illegal and had no papers." (App. 177, 180, 181). Trial counsel acted

reasonably when he did not further investigate whether his client's assertion regarding her legal status was accurate. See Strickland, 466 U.S. at 691 ("[W]hen a defendant has given counsel reason to believe that pursuing certain investigations would be fruitless . . . , counsel's failure to pursue those investigations may not later be challenged as unreasonable."); Barnes v. Thompson, 58 F.3d 971, 979-80 (4th Cir. 1995) ("[T]rial counsel . . . may rely on the truthfulness of his client and those whom he interviews in deciding how to pursue his investigation."). Trial counsel cannot be found deficient for pursuing other endeavors, i.e., beneficial plea agreements, rather than needlessly researching whether the petitioner was actually a legal permanent resident.

In any event, regardless of whether the petitioner was present in the country illegally or she was a legal permanent resident, trial counsel's advice to her was correct. Mr. Hasan did not merely advise the petitioner that she "'may' be at risk of deportation.'" (Appellant's Br. at 5). He informed her that "deportation was the ***most likely consequence*** [of her guilty plea,] ***unless*** she could come up with a remedy."[3] (App. 177, 183 (emphasis added)). This advice closely mirrors the advice the petitioner

[3] Of course, if Fuentes was not lawfully admitted into the country, her mere presence in the country rendered her removable. A conviction would have merely brought her to the attention of the federal immigration authorities.

contends on appeal she should have been given: "The criminal defense bar practice in Arlington, [Virginia,] 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*** certain deportation.'" (Appellant's Br. at 4 (emphasis added) (citing App. 54)).

In effect, Mr. Hasan informed the petitioner that she was presumptively removable as required by Padilla. Other courts who have addressed this issue have found that "Padilla does not require that counsel use specific words to communicate to a defendant the consequences of entering a guilty plea." Chacon v. State, 409 S.W.3d 529, 537 (Mo. Ct. App. 2013) (finding trial counsel's advice that petitioner "would very likely be deported and wouldn't be able to come back" satisfied Padilla); accord Commonwealth v. Escobar, 70 A.3d 838, 841 (Pa. Super. Ct. 2013) (holding that correct advice did not require telling client that he "definitely would be deported"); Neufville v. State, 13 A.3d 607, 614 (R.I. 2011) (quoting Padilla, 559 U.S. at 368) ("Counsel is not required to inform their clients that they will be deported, but rather that a defendant's 'plea would make [the defendant] eligible for deportation.'"). But see Salazar v. State, 361 S.W.3d 99, 103 (Tex. App. 2011) (holding that correct advice required informing client that "the plea of guilty would result in certain

deportation" and "terms of 'likelihood' and possibility'" were insufficient to convey the certainty of deportation).

Accordingly, the petitioner has failed to show Mr. Hasan incorrectly advised her and the circuit court's finding that she failed to satisfy the performance prong of the Strickland test should be affirmed.

II. The petitioner failed to show that she was prejudiced by the advice of trial counsel.

Assuming *arguendo* that trial counsel provided deficient representation, Fuentes failed to show that an objectively reasonable defendant in her position would have insisted on pleading not guilty and proceeded to trial.[4] See Hill, 474 U.S. at 58-59; see also Padilla, 559 U.S. at 372 (citing Roe v. Flores-Ortega, 528 U.S. 470, 480, 486 (2000)) (holding that in cases involving a failure to advise regarding immigration consequences, "to obtain relief . . . , a petitioner must convince the court that a decision to reject the plea bargain would have been rational under the circumstances").

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[4] Padilla addressed only the performance prong of the two-part Strickland test. Indeed, the Supreme Court expressly held: "Whether Padilla is entitled to [habeas corpus] relief will depend on whether he can demonstrate prejudice as a result thereof, ***a question we do not reach because it was not passed on below***." Padilla, 559 U.S. at 374 (emphasis added). Accordingly, merely alleging that counsel misadvised her of the potential immigration consequences of his guilty plea, even if correct, does not relieve the petitioner of her burden to demonstrate Strickland prejudice.

A petition may be dismissed for failure to satisfy the prejudice prong "***even where counsel has committed serious error, particularly where the Government's case is strong***." United States v. Weisser, 417 F.3d 336, 343-44 (2d Cir. 2005) (citing Strickland, 466 U.S. at 697; Strouse v. Leonardo, 928 F.2d 548, 556 (2d Cir. 1991) (internal punctuation and citations omitted)).

This Court must consider the petitioner's desire to avoid a negative impact on his immigration status, see Zemene v. Commonwealth, 289 Va. 303, 316, 768 S.E.2d 684, 691 (2015); however, the petitioner's desire to avoid deportation is but one factor for this Court to consider in the objective analysis. See Ex Parte Yadher Murillo, 389 S.W.3d 922, 928-31 (Tex. App. 2013) (considering the evidence of applicant's guilt; factual or legal defenses; whether the petitioner stated that immigration status was his primary concern at the time of his plea; and the plea deal consequences compared to penalties risked at trial in determining whether it would have been rational to reject the plea agreement). To determine whether the decision to proceed to trial rather than plead guilty would have been rational, courts must also consider the weight of the evidence against the petitioner. See, e.g., Premo, 562 U.S. at 129-30; Pilla v. United States, 668 F.3d 368, 373 (6th Cir. 2012) (considering strength of government's case in determining whether it was

reasonable to go to trial under Padilla), cited with approval in United States v. Fugit, 703 F.3d 248, 260-61 (4th Cir. 2012).[5]

Given the testimony of Washington and Officer Balderrama, the evidence that Fuentes stole over $1500 worth of clothing from Macy's

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[5] See also Kovacs v. United States, 744 F.3d 44, 53 (2d Cir. 2014) (finding petitioner showed prejudice under Strickland where he had a defense had he gone to trial); Chhabra v. United States, 720 F.3d 395, 408 (2d Cir. 2013) (considering the strength of the government's case in rejecting Chhabra's claim he would have gone to trial had he been adequately advised of the immigration consequences of his guilty plea); United States v. Akinsade, 686 F.3d 248, 256 (2012) (finding prejudice established under Strickland when the petitioner argued he would have gone to trial and contested the allegation that he had embezzled over $10,000, when the $10,000 threshold was pertinent to whether he was subject to removal); Ostrander v. Green, 46 F.3d 347, 356 (4th Cir. 1995) (holding that in considering the prejudice prong of Strickland, "[t]he potential strength of the state's case must inform our analysis, inasmuch as a reasonable defendant would surely take it into account"); Francis v. United States, 2013 U.S. Dist. LEXIS 25470, at *22 (S.D.N.Y. Feb. 25, 2013) ("[E]ven if a petitioner can demonstrate extraordinary [immigration] circumstances that would make a seemingly irrational choice to go to trial appear more reasonable, that petitioner must still demonstrate that going to trial could have resulted in a different outcome."); Bhindar v. United States, 2013 U.S. Dist. LEXIS 11061, *13 (S.D.N.Y. Jan. 16, 2013) (stating "it is simply not rational that [p]etitioner would have rejected the plea agreement and instead, insisted on going to trial," where "the [g]overnment had a plethora of evidence establishing [the petitioner's] participation in the conspiracy"); Bahtiraj v. State, 840 N.W.2d 605, 611 (N.D. 2013) (holding that concern regarding immigration consequences is not the only factor in determining whether it is rational to plead guilty and that concerns regarding incarceration have greater weight when the prosecution's case is strong). But see DeBartolo v. United States, ___ F.3d ___, ___, 2015 U.S. App. LEXIS 10831, at *5-6 (7th Cir. 2015) (finding petitioner's "personal choice to roll the dice is enough to satisfy the 'reasonable probability' standard" of Strickland).

department store was overwhelming. Fuentes' actions were captured on video and she confessed to the theft at least three times. At no time, either in the criminal or habeas proceedings has Fuentes offered any argument or evidence that she had defenses had she gone to trial.[6] ***Thus, there is nothing in the record to support a conclusion that a trial would have resulted in anything other than a conviction for grand larceny.*** See Sigmon v. Director, 285 Va. 526, 535-36, 739 S.E.2d 905, 909-10 (2013); Hedrick, 264 Va. at 521, 570 S.E.2d at 862. "A defendant has no entitlement to the luck of a lawless decisionmaker" and "[a]n assessment of the likelihood of a result more favorable to the defendant must exclude the possibility of arbitrariness, whimsy, caprice, 'nullification,' and the like." Strickland, 466 U.S. at 695. Where the evidence was overwhelming and the petitioner offers no defenses, this Court must presume that the petitioner would have been convicted had she gone to trial.

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[6] As the circuit court found below:

> While the petitioner stated in her "Declaration" that she denied stealing $1500 worth of clothing, she admitted she stole at least $250 worth of clothing. . . . [E]ven if the petitioner's declaration were accurate, by stealing $250 worth of clothing, she committed grand larceny pursuant to Code § 18.2-95.

(App. 232).

To the extent the petitioner argues that the prejudice analysis in Padilla cases turns on a non-citizen's "desire . . . to compel the Commonwealth to meet its evidentiary standard" (Appellant's Br. at 25), her argument should be rejected. A lack of citizenship does not confer on a petitioner rights greater than those afforded to citizens. In Hill, the Supreme Court of the United States held that the determination that an error "prejudiced" a defendant "by causing him to plead guilty rather than go to trial" necessarily turned on whether counsel's error "likely would have changed the outcome of a trial." 474 U.S. at 59. Thus, the United States Supreme Court determined that a defendant had to show that undiscovered exculpatory evidence likely would have led to an acquittal or an affirmative defense that was not discussed with the defendant would have likely succeeded at trial. Id. Similarly, a non-citizen should be required to show that there was some chance of success at trial to show that it would have been rational to proceed to trial.

Moreover, the petitioner received a sentencing benefit by pleading guilty. The Commonwealth ***agreed*** to no active period of incarceration. (App. 9, 251-55). Additionally, guilty pleas are expressions of remorse for one's actions. Meyer v. Branker, 506 F.3d 358, 369-70 (4th Cir. 2007) (holding a guilty plea demonstrates remorse and that because petitioner had

"virtually no chance to succeed on the merits at trial," he failed to show an "objective defendant would have insisted on going to trial").

Accordingly, petitioner could either plead guilty, receive no active jail sentence, and then be deported, or go to trial and be found guilty, face a sentencing exposure of twenty years, and then be deported. See Code § 18.2-95; see also App. 9, 253. Courts have found that the petitioner could not establish prejudice under similar circumstances. See, e.g., Pilla, 668 F.3d at 373 (finding that proceeding to trial would have been irrational where defendant "faced overwhelming evidence of her guilt" and "had no rational defense, would have been convicted and would have faced a longer term of incarceration"), cited with approval in Fugit, 703 F.3d at 260-61; Agyepong v. United States, No. 1:10CV621, 2011 U.S. Dist. LEXIS 14493, at *12 (M.D.N.C. Feb. 11, 2011) ("Whether he pled guilty or went to trial, the reality was that Petitioner would be convicted and probably deported. Petitioner had no real choice but to plead guilty in an attempt to reduce his prison time and then deal with his immigration issues as best he could. No rational defendant would have done otherwise.").

This case is distinguishable from Zemene v. Commonwealth, which was recently decided by this Court. There, Zemene pled guilty to a misdemeanor and was sentenced to the maximum sentence of 12 months,

all suspended. 289 Va. at 308, 768 S.E.2d at 687. This Court held that it would have been rational for Zemene to go to trial given that he faced no worse immigration consequence by going to trial and "stood to gain a significant benefit if he obtained a sentence ***of even a single day less*** than the maximum." Id. at 317, 768 S.E.2d at 692 (emphasis added). This Court emphasized, "A finding of prejudice in [the Padilla] context depends on the specific circumstances of each case." Id. at 314, 768 S.E.2d at 690. Here, the mere fact of conviction rendered the petitioner removable. See 8 U.S.C. §§ 1227(a)(2)(A)(i) and 1227(a)(2)(A)(iii). Going to trial, where a conviction was inevitable, would have led to the same negative immigration consequence for the petitioner.

Because a habeas petitioner may not ask this Court to indulge the presumption that the trier of fact in her case would have been a "lawless decisionmaker," she has not established a substantial likelihood of prejudice. Accordingly, the petitioner failed to satisfy the prejudice prong of the Strickland test.

CONCLUSION

For the foregoing reasons, this Court should find Fuentes failed to show deficient performance or prejudice under Strickland. Accordingly, the

finding of the Circuit Court for Arlington County should be affirmed and Fuentes' petition for habeas relief should be dismissed.

Respectfully submitted,

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CERTIFICATE OF TRANSMISSION AND SERVICE

On August 7, 2015, the required copies of this brief were filed electronically with this Court and hand-delivered to the Clerk's Office in compliance with Rule 5:26(e). A copy was e-mailed to Ivan Yacub, Esquire, counsel for the appellant, at iyacub@yacublaw.com. In accordance with Rule 5:6, I certify that this document contains 7123 words, in compliance with Rules 5:26(b) and 5:28.

A courtesy copy of this brief has been sent to the Honorable William T. Newman.

The Commonwealth desires to present oral argument in this case.

/s/
Katherine Quinlan Adelfio
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