NINETEENTH JUDICIAL CIRCUIT OF VIRGINIA

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October 24, 2019

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Re: Yenifer A. Jurado-Alcantara v. Stacey A. Kinkaid
CL-2019-0001231

Dear Counsel,

Yenifer Jurado-Alcantara ("Petitioner") filed a Petition for a Writ of Habeas Corpus seeking to vacate a petit larceny conviction that occurred in the Fairfax County General District Court on February 26, 2018. Petitioner is a lawful permanent resident subject to removal proceedings due to this conviction. Petitioner asserts that her trial counsel provided constitutionally ineffective assistance. On July 23, 2019, this Court held an evidentiary hearing and received supplemental briefs from the parties, which are part of the case record.

The Petition for a Writ of Habeas Corpus is granted, and the Court vacates the petit larceny conviction.

OPINION LETTER

I. Findings of Fact

The following constitutes this Court's factual findings. Petitioner was born in El Salvador, arriving in the United States in 2008. On April 10, 2015, Petitioner became a lawful permanent resident of the United States, commonly referred to as "green card holder." Petitioner cares for her eight-year-old daughter, who was born in the United States and is a United States citizen. Petitioner's primary language is Spanish.

On December 10, 2017, Petitioner was charged in Fairfax County with three felony larceny offenses and three misdemeanor larceny offenses. Sometime between December 10, 2017, and January 30, 2018, Petitioner left the United States to visit her ailing father in El Salvador, who has since died. Upon her return to the United States on January 30, 2018, Petitioner was detained at Washington-Dulles International Airport. Rather than being granted re-admission to the United States as a returning resident, she was paroled for a deferred inspection at that time. This allowed Petitioner to remain in the United States until her criminal case was resolved.

Petitioner then met with her trial counsel before the General District Court proceeding. At this meeting, trial counsel learned that Petitioner was a lawful permanent resident who arrived in the United States in 2008. He did not inquire when she became a green card holder, which was on April 10, 2015. Trial counsel also learned before the court hearing that Petitioner had been detained at the airport over an immigration issue. The record does not indicate that trial counsel made further inquiry after being informed of Petitioner's temporary detention.

Petitioner informed trial counsel that she did not want to go to jail. Trial counsel advised Petitioner that the six criminal charges were serious and that she probably could not stay in the country if convicted of these charges. Trial counsel never questioned Petitioner as to whether she would be willing to allow him to propose to the prosecutor that she serve some period of active incarceration as part of a plea deal that avoided or reduced the risk of adverse immigration consequences.

On February 26, 2018, Petitioner accepted a plea offer consisting of pleading guilty to and being found guilty of one count of petit larceny in exchange for the remaining five charges being dismissed pursuant to a *nolle prosequi*. As part of the agreement, the General District Court of Fairfax County imposed a twelve-month suspended jail sentence and a $1,000 fine, along with ordering Petitioner to refrain from entering Springfield Mall. The suspended jail sentence was conditioned upon Petitioner's good behavior for one year.

Trial counsel recommended that Petitioner accept this plea agreement in his mistaken belief that it carried no adverse immigration consequences for Petitioner. He never advised Petitioner of the likelihood of adverse immigration consequences resulting from this plea offer.

Moreover, although trial counsel testified that he tried to negotiate a suspended jail sentence of one hundred eighty days, he did not have a specific discussion with the prosecutor about the immigration consequences to Petitioner.

Petitioner erroneously assumed that trial counsel would have advised her of any unfavorable immigration consequences if they existed, and therefore she believed that the plea agreement would avoid harmful immigration consequences. Petitioner testified that she would not have accepted the plea agreement if she had been advised of the adverse immigration consequences.

Trial counsel had access to an immigration specialist. He did not consult with this individual about Petitioner's case or the plea offer. He also did not advise Petitioner to speak with an immigration specialist prior to accepting the plea offer.

After recommending the plea offer to Petitioner, trial counsel had Petitioner sign a form titled *Trial Advisement and Plea*, which states that pleading guilty or being found guilty may result in the "consequences of deportation, exclusion from admission into the United States, or denial of naturalization pursuant to the laws of the United States." The form is written in English. Petitioner did not have an interpreter assist her when reviewing the form with trial counsel. She would have benefitted from the assistance of a Spanish interpreter at the preliminary hearing to understand the *Trial Advisement and Plea* form.

On March 20, 2018, Petitioner personally was served with a notice to appear for removal proceedings under Section 240 of the Immigration and Nationality Act (8 U.S.C. § 1229a). The form indicates that Petitioner is the subject of removal proceedings from the United States due to the petit larceny conviction, which is considered a crime of moral turpitude. The form is written in English. The certificate of service indicates that the federal officer serving the notice advised Petitioner orally in Spanish of the time and place of the removal hearing and the consequences of failing to appear.

On January 25, 2019, Petitioner filed a Notice and Petition for a Writ of Habeas Corpus in this Court. Petitioner seeks to have this Court vacate the petit larceny conviction on the basis of ineffective assistance of counsel.

II. Analysis

The Court has jurisdiction to hear this matter. A petition for a writ of habeas corpus must be brought within two years from the date of a final judgment in the trial court. Va. Code § 8.01-654(2). Petitioner was convicted on February 26, 2018, and the Petition was filed on January 25, 2019. The timing requirement is satisfied.

The Court is presented with a justiciable controversy. A justiciable controversy can exist due to the collateral consequence of a criminal conviction, even when a person is no longer in state custody. *E.C. v. Virginia Dept. of Juvenile Justice*, 283 Va. 522, 536 (2012). The recent case of *Zemene v. Clarke*, 289 Va. 303 (2015), is illustrative. In *Zemene*, the Supreme Court of Virginia considered the merits of a habeas petition involving ineffective assistance of counsel for a petitioner who had lost his lawful permanent residency status but was no longer in custody. *Id.* at 308-10.

The seminal case for defining the legal standard in ineffective assistance of counsel claims is *Strickland v. Washington*, 466 U.S. 668 (1984). A petitioner must prove that counsel's performance was deficient and that the deficiency prejudiced the defense. *Id.* at 687. This standard applies to claims in which a non-citizen alleges that a criminal conviction was the product of improper legal advice as to adverse immigration consequences. *Padilla v. Kentucky*, 559 U.S. 356, 365-66 (2010).

Trial counsel's performance is deficient when it falls below an objective standard of reasonableness viewed at the time of trial counsel's conduct. *Strickland*, 466 U.S. at 690. Trial counsel must inform a non-citizen criminal defendant whether a plea of guilt or a finding of guilt carries a risk of deportation. *Padilla*, 559 U.S. at 374. Trial counsel must provide correct advice when deportation consequences are clear. *Id.* at 369. When the consequences are uncertain, trial counsel must at least advise a client that the charge carries a risk of adverse immigration consequences. *Id.* Because "the negotiation of a plea bargain is a critical phase of litigation for purposes of the Sixth Amendment right to effective assistance of counsel," the performance analysis requires a court to assess both the advice provided to the client and the quality of the plea bargain negotiations with the prosecutor. *Id.* at 373-74.

This Court finds that Petitioner has proven that trial counsel's performance fell below an objective standard of reasonableness and that the first prong of *Strickland* is satisfied. As a result of deficient legal advice, Petitioner accepted the plea agreement without knowing the adverse immigration consequences ensuing from such decision.

The notice of removal proceedings form in this case specifically refers to Section 212(a)(2)(A)(i)(I) of the Immigration and Nationality Act as the basis for Petitioner's removal. *See* 8 U.S.C. § 1182(a)(2)(A)(i)(I) (determining when an alien is deemed inadmissible). The statute is clear that the plea agreement in this case made Petitioner inadmissible.

The statute indicates that a crime of moral turpitude renders a non-citizen inadmissible; however, a "petty offense" exception exists for a first-time conviction of a crime of moral turpitude if the offense is not punishable by more than one-year incarceration and the actual sentence imposed is not more than six-months incarceration. 8 U.S.C. § 1182(a)(2)(A)(i)-(ii).

Petit larceny under Virginia law is not punishable by more than twelve months in jail. Va. Code §§ 18.2-11, 18.2-96. When the Immigration and Nationality Act references a threshold of "one year," this has been treated as synonymous with a twelve-month sentence under the Code of Virginia. *See, e.g., Hernandez v. Holder*, 783 F.3d 189, 191, 197 (4th Cir. 2015). Thus, someone convicted of petit larceny under Virginia law could be eligible for the petty offense exception.

The problem with this plea agreement from Petitioner's perspective is that it calls for more than a six-month jail sentence. Regardless of whether the jail time was suspended or imposed, the amount exceeds the jail threshold for invoking the petty offense exception, thus making Petitioner inadmissible.[1]

Trial counsel knew that Petitioner was not a United States citizen and had been detained when re-entering the United States because of an immigration issue. If he had made further inquiry about Petitioner's immigration status—or sought the assistance of the available immigration specialist to make such inquiry—trial counsel would have learned that Petitioner merely was paroled for a deferred inspection when released from detention, rather than having been re-admitted into the United States as a returning resident. With an understanding of Petitioner's status, the applicability of Section 212(a)(2)(A)(i)(I) of the Immigration and Nationality Act to the plea agreement would have been clear.

Trial counsel never discussed with Petitioner the impact of the plea agreement on her immigration status, and he never advised her to consult with an immigration specialist. Additionally, while trial counsel tried to negotiate a reduced period for the suspended sentence, the record does not disclose that he explained to the prosecutor that entry of a plea and a finding of guilty, coupled with the contemplated suspended jail sentence, would make Petitioner inadmissible.

Two cases from the Supreme Court of Virginia are instructive. In *Fuentes v. Clarke*, a lawful permanent resident plead guilty to grand larceny as part of a plea agreement and received a sentence of three years of incarceration with all the time suspended. 290 Va. 432, 435 (2015). She subsequently was the subject of removal proceedings and filed petition for a writ of habeas corpus based on ineffective assistance of counsel. *Id.* at 435-36. Prior to accepting the plea, the trial court engaged in a plea colloquy with petitioner and determined that her plea was "freely,

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[1] In oral argument and through her pleadings, Petitioner also points out that besides the plea agreement eliminating the possibility of her invoking the petty offense exception contained in 8 U.S.C. § 1182, Petitioner believes the plea agreement also makes her deportable under 8 U.S.C. § 1227(a)(2)(A)(i), since the conviction occurred within five years of obtaining lawful permanent residency status. While this statute is not the basis of the current removal proceedings, reference to it does highlight the significance of trial counsel's failure to inquire as to when Petitioner obtained lawful permanent residency status (April 10, 2015), as opposed to when Petitioner first arrived in the United States (2008).

voluntarily, and intelligently entered with an understanding of the . . . consequences of entering a plea." *Id.* at 435. She also signed a written plea agreement acknowledging that her plea "may place her at risk for deportation if [she was] not a citizen of the United States." *Id.* She affirmed that she read the plea agreement in her native language. *Id.* Trial counsel met with his client between five to seven times before trial and discussed immigration consequences during each of these meetings. *Id.* at 437. Trial counsel informed petitioner that a guilty plea to grand larceny likely would result in her deportation unless she found a legal exemption, and he advised petitioner to consult with an immigration attorney because he lacked a specialization in immigration issues. *Id.* The Supreme Court of Virginia ruled that trial counsel's performance met the constitutional threshold of reasonableness. *Id.* at 441-42.

In contrast, *Zemene v. Clarke* involved a lawful permanent resident who plead guilty to petit larceny and received a twelve-month suspended jail sentence. 289 Va. at 308. He subsequently lost his status as a lawful permanent resident and, for some period, became the subject of removal proceedings. *Id.* Trial counsel met with petitioner once before trial and was informed that petitioner held a green card but was not a United States citizen. *Id.* In concluding that counsel's performance was deficient, the Court noted several deficiencies. *Id.* at 314. Namely, after being made aware that petitioner was not a United States citizen, he made "no effort to learn the precise nature of [petitioner's] immigration status." *Id.* He made no determination as to whether a suspended jail sentence of twelve months on a petit larceny conviction potentially would have negative immigration consequences. *Id.* He never discussed with the prosecutor the plea offer's potential impact on petitioner's immigration status. *Id.* Finally, in advising petitioner of the plea offer, he never informed petitioner that the conviction likely would result in the loss of petitioner's lawful permanent residency status and trigger removal proceedings. *Id.*

The facts of the instant case are more in harmony with the facts in *Zemene* than those in *Fuentes*. Trial counsel met with Petitioner once before the preliminary hearing and learned that she was a lawful permanent resident who arrived in the United States in 2008. He made no further inquiries as to her immigration status, such as when she obtained her green card or why she was detained at Washington-Dulles International Airport. Based on the six criminal charges pending at the time of the meeting, trial counsel advised Petitioner that convictions likely would result in deportation. While this was probably accurate, he mistakenly believed that the plea agreement he recommended would have no immigration consequences. As a result, he did not advise Petitioner of the likelihood of any adverse immigration consequences, nor did he advise her to consult with an immigration specialist.[2] Trial counsel did not ask a Spanish

[2] Trial counsel testified that he advised Petitioner that an outcome that would protect her to a "greater degree" might involve jail time. This statement must be considered in the context of trial counsel's mistaken belief that the plea agreement fully protected Petitioner. Without further explanation to Petitioner on his thought process, this advice does not meet an objective standard of reasonableness.

interpreter to assist Petitioner when reviewing the plea form with her, and the record also suggests that trial counsel did not broach the subject of Petitioner's immigration status with the prosecutor during plea negotiations.

This Court also finds that Petitioner has proven that trial counsel's performance prejudiced the defense and that the second prong of *Strickland* is satisfied. In making this determination, there must be a finding that "there [was] 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. Petitioner has the burden of providing evidence that "demonstrates a reasonable probability that, with an accurate understanding of the implications of pleading guilty, [s]he would have rejected the deal." *United States v. Murillo*, 927 F.3d 808, 816 (4th Cir. 2019).

In assessing the evidence, this Court concludes that Petitioner has met her burden of proving that she would not have accepted the plea offer if properly advised that a suspended jail sentence of twelve months would make her inadmissible under the Immigration and Nationality Act and ineligible for the petty offense exception. While Petitioner expressed a desire to avoid active jail time, trial counsel never explained to her that moderating her removal exposure required an agreement calling for a jail sentence of six months or less or, alternatively, an amendment from petit larceny to a criminal offense not considered to be a crime of moral turpitude. Moreover, Petitioner was never asked whether she would authorize trial counsel to make a counter-offer involving actual jail time in exchange for a more favorable disposition from an immigration perspective.

Petitioner testified that she would have been willing to serve an active jail sentence instead of entering into a disposition that makes her inadmissible. Alternatively, she would have rejected the plea offer. The Court finds Petitioner's testimony to be credible given the difficult familial options resulting from the plea agreement. Namely, if removed from the country, Petitioner either would have to leave behind her eight-year-old child, who is a United States citizen, or move the child from her home country to El Salvador.

III. Conclusion

For the reasons stated above, the Petition for a Writ of Habeas Corpus is granted. The Order vacating Petitioner's conviction is enclosed.

Sincerely,

[redacted]

Stephen C. Shannon
Circuit Court Judge

Enclosure

OPINION LETTER

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

Yenifer A. Jurado-Alcantara	)	
	)	
Petitioner,	)	
v.	)	CL-2019-1231
	)	
Stacey A. Kinkaid	)	
	)	
Respondent.	)	

ORDER

THIS CAUSE came to be heard on July 23, 2019, on a Petition for a Writ of Habeas Corpus seeking to vacate a conviction of petit larceny on February 26, 2018, in the Fairfax County General District Court in case number GC17244993-00.

IT APPEARING that the Petition has merit; it is therefore

ORDERED that the Petition is granted, and that the aforesaid conviction is vacated for the reasons set forth in this Court's Opinion Letter dated October 24, 2019.

ENTERED this 24th day of October, 2019.

[redacted]

Judge Stephen C. Shannon

ENDORSEMENT OF THIS ORDER BY COUNSEL OF RECORD FOR THE PARTIES IS WAIVED IN THE DISCRETION OF THE COURT PURSUANT TO RULE 1:13 OF THE SUPREME COURT OF VIRGINIA.