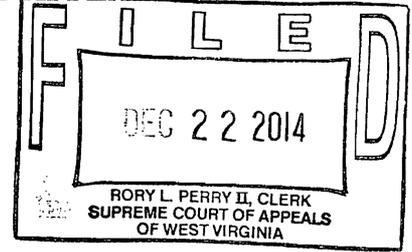


IN THE WEST VIRGINIA SUPREME COURT OF APPEALS

No. 14-0603



Orville Hutton,

Petitioner

v.

State of West Virginia,

Respondent.

RESPONDENT'S BRIEF

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INTRODUCTION

This appeal seeks relief under the writ of *coram nobis*, which is not authorized under the Constitution of this State or any other source of West Virginia law, for an alleged violation of the Sixth Amendment right to counsel. This relief cannot be granted because the courts of this state lack authority to issue a writ of *coram nobis*. But even if the common law writ of *coram nobis* were available, Petitioner is not entitled to relief because his claims fall outside the limited scope of that writ. Finally, Petitioner is not entitled to relief in any event because his ineffective assistance of counsel claim lacks merit for several independent reasons, including a finding of fact by the Circuit Court that Petitioner has not established the facts that underlie his claim.

STATEMENT OF THE CASE

Orville Michael Garth Hutton (also known as Mykal G. Rosyth) is a Jamaican national and a citizen of Jamaica, who has spent nearly his entire life in the United States. Supp. App. at 6. In 1971 when he was nine years old, Hutton came to the United States. App. at 45, Supp. App. at 6. Since 1972, he has been a lawful permanent resident of the United States. Supp. App. at 6. Hutton attended school, including three years of college, in the United States, Supp. App. at 50, and he testifies to knowing “nothing” about his native Jamaica. App. at 46, 165.

In early 2009, Hutton was arrested and indicted for battery of his girlfriend, Tamara Knox. Supp. App. at 124. A Harrison County Grand Jury returned a four-count indictment against Hutton. Supp. App. at 116–17. The indictment alleged one count of malicious assault and three counts of sexual assault in the second degree. Supp. App. at 116–17.

Represented by counsel, Hutton entered a guilty plea to the lesser included felony of unlawful wounding on May 21, 2010. At his plea colloquy, Hutton affirmed that his attorney,

Thomas Dyer, had answered all of his questions. Supp. App. at 50. Hutton also explained that he had met with his counsel in person “maybe half a dozen times,” communicated on the phone “fifteen times[,] maybe a little bit more,” and communicated through documents “about five or six times.” Supp. App. at 62–63. Hutton never told his counsel that he was not a citizen of the United States. App. at 39 (“No, I did not” tell trial counsel about citizenship status.). Hutton admitted that he thought that his attorney had spent enough time on his case and that he did not know of any further factual investigation or legal research that his attorney should have performed. Supp. App. at 64 (“Yes, I am” satisfied with counsel, and there is “not” further factual or legal investigation “that I know” should have been performed.).

The State proffered evidence to support Hutton’s guilty plea. The State explained that the victim was prepared to testify that Hutton had hit her with his fists, choked her until she almost passed out, threw her into a wall, and continued to beat her with his fists and hands. Supp. App. at 66. The evidence would show that, nine days after the battery, the victim needed assistance to get out of the house and could not walk on her own. Supp. App. at 66–67. Hospital records from nine days after the battery showed multiple bruising to the back, chest, abdomen, shoulders, and sides, and deep bruising inside her ribs. Supp. App. at 67. The court sentenced Hutton to a term of one to five years of imprisonment, which began on July 2, 2010. Supp. App. at 30.

While serving his sentence, Hutton brought an appeal and numerous post-conviction challenges, during which he could have, but did not, claim ineffective assistance of trial counsel. First, in August 2010, Hutton filed a notice of appeal and a motion for post-conviction bond or home confinement with the assistance of new post-conviction counsel, Courtenay Craig. Supp. App. at 240–45. In the notice of appeal, Hutton identified two issues: (1) ineffective assistance of

counsel; and (2) any other grounds that may be discovered during the investigation of this case. Supp. App. at 244. But in the motion, Hutton explained that he might waive his right to appeal and simply later “prosecute a Writ of Habeas Corpus for ineffective assistance of counsel.” Supp. App. at 241. Next, in September 2010, Hutton filed with the assistance of his new counsel a motion for a new trial based on newly discovered evidence and a motion to reconsider sentence. Supp. App. at 230–43. The Circuit Court of Harrison County denied these motions after a hearing. Supp. App. at 123–29. Through all of these proceedings, Hutton never pursued an argument that his trial counsel had been ineffective. Instead, his post-conviction counsel made a strategic decision to pursue claims about the adequacy of evidence and wait to raise claims of ineffective assistance of counsel later. App. at 91, 102–03. Claims of ineffective assistance of counsel were not raised until the instant proceedings.

Hutton was released on parole in August 2011, but was ultimately returned to state prison until May 25, 2013. App. at 47. Specifically, while on parole, he was arrested for domestic abuse of his then-wife in February 2012. App. at 47–48. The charges against him were dropped when the alleged victim failed to appear, and his parole was not revoked. App. at 48. His parole was eventually revoked in April 2012 when he contacted his wife and traveled across state lines without the permission of his parole officer. App. at 49–50. Hutton returned to prison until his sentence ended on May 25, 2013. Supp. App. at 22.

Since his release from state prison, Hutton has been in the custody of the Department of Homeland Security due to the immigration consequences of his conviction for unlawful assault. Supp. App. at 1–9. Ten days before his release, Hutton had received notice from United States Immigration and Customs enforcement that he was subject to removal because of his conviction for unlawful assault. App. at 46; Supp. App. at 6 (notifying Hutton that he was subject to

removal because he had been “convicted of an aggravated felony as defined in Section 101(a)(43)(F) of the [Immigration and Nationality] Act”). The Department of Homeland Security took him into custody after his release from state prison. Supp App. at 7–9. He remains in custody today at a federal facility in York County, Pennsylvania. App. at 30.

Several months into his federal detention, Hutton filed an emergency petition for a writ of error *coram nobis* in the Circuit Court of Harrison County, seeking to have his state conviction vacated. App. at 155. In his petition, filed on September 4, 2013, Hutton argued that his state trial counsel had failed to advise him of the potential immigration consequences of a guilty plea and that this failure constituted ineffective assistance of counsel under *Padilla v. Kentucky*, 559 U.S. 356 (2010). App. at 157–66. The Prosecuting Attorney for Harrison County moved to dismiss. App. at 149.

The Circuit Court held an evidentiary hearing, at which Hutton introduced two pieces of evidence to establish that his counsel had failed to advise him about immigration consequences. App. at 5–6. *First*, Hutton introduced an affidavit in which his counsel said that he did not remember advising Hutton about immigration consequences of a guilty plea. Supp. App. at 251 (“I . . . have no memory of speaking with Mr. Hutton regarding his immigration status nor the consequences he may face as a[n] immigrant if found guilty.”). Hutton did not call his counsel to testify in person at the evidentiary hearing. *Second*, Hutton testified at the hearing that his trial counsel had failed to advise him of immigration consequences. App. at 45.

In an order issued on April 28, 2014, the Circuit Court denied Hutton’s petition on several independent grounds. App. at 25. The Circuit Court first concluded that the writ of *coram nobis* is no longer available in West Virginia in either civil or criminal proceedings. Next, the Circuit Court determined that Hutton would not be entitled to *coram nobis* relief even if the

writ were still available in West Virginia. App. at 9–20. And finally, the Circuit Court found that, in any event, Hutton had not established that his counsel failed to advise him of immigration consequences because his counsel’s affidavit did not admit that counsel failed to provide this advice and Hutton’s own testimony was not credible. App. at 20–21. Hutton appealed.

SUMMARY OF ARGUMENT

This appeal seeks relief under the writ of *coram nobis*, which is not authorized under the Constitution of this State or any other source of West Virginia law. The Constitution of this State specifically delineates the authority of the state courts to issue extraordinary writs, but it specifically excludes the writ of *coram nobis*. Moreover, though the writ of *coram nobis* existed at common law, it was not part of the common law of Virginia when this State adopted that common law in 1863. For much of the history of this State, the authority to grant the writ of *coram nobis* was provided only by statute, but that grant of authority was repealed in 1998, leaving no basis in current West Virginia law for proceedings in *coram nobis*.

Even if the common law writ of *coram nobis* were available in this State, as Petitioner asserts, his claims fall outside the limited scope of that writ. This case involves a claim of ineffective assistance of counsel. But the common law writ of *coram nobis* applies only to certain errors of fact that would have prevented a court from entering a judgment. Ineffective assistance of counsel is ultimately a legal issue that is not within the scope of the writ.

Finally, Petitioner is not entitled to relief in any event because his ineffective assistance of counsel claim lacks merit for several independent reasons. *First*, Hutton claims that his counsel was constitutionally ineffective because counsel failed to advise him about immigration consequences of his guilty plea. But the Circuit Court found that Hutton had failed to establish, as a factual matter, that counsel did not provide the advice at issue. Hutton has not shown that

the Circuit Court’s finding was clearly erroneous. *Second*, counsel is not required to advise a client about the immigration consequences of a plea where, as here, nothing about the circumstances would have suggested to reasonable counsel that immigration status might be an issue. *Third*, because he would have faced overwhelming evidence of guilt if he had gone to trial, Hutton cannot establish that he was prejudiced by the alleged failure of his counsel.

STATEMENT REGARDING ORAL ARGUMENT

Oral argument is unnecessary because the facts and legal arguments are adequately presented, and the decisional process will not be aided by oral argument. *See* W. Va. R. App. P. 18(a). But should this Court choose to require it, the State requests oral argument pursuant to West Virginia Rule of Appellate Procedure 20 because the appeal raises a matter of first impression and issues of fundamental public importance to the administration of justice in West Virginia.

ARGUMENT

I. The Writ of Coram Nobis Is Not Available in West Virginia.

The writ of *coram nobis* is an extraordinary writ that existed at common law. *United States v. Denedo*, 556 U.S. 904, 910 (2009). “At common law, the writ . . . existed to correct errors of fact.” *Trujillo v. State*, 310 P.3d 594, 601 (Nev. 2013). The writ could be issued to “address errors of fact outside the record that affect the validity and regularity of the decision itself and would have precluded the judgment from being rendered.” *Id.* Historically, use of the writ has been rare. *Id.* 597. And though it is expressly recognized in the federal courts, “*coram nobis* is a rarer creature in state courts.” *Id.* at 598.

West Virginia is among the majority of States whose laws no longer recognize the writ of *coram nobis*. It is well-settled that the jurisdiction of the courts of this State “is fixed by the constitution and statutes,” and a court may not exercise jurisdiction “except in those cases warranted by the constitution or statutes.” *State v. Shumate*, 48 W.Va. 359, 37 S.E. 618, 618 (1900); *see also State ex rel. Dale v. Stucky*, 232 W. Va. 299, 303–04, 752 S.E.2d 330, 334–35 (2013) (“[I]t is fundamental doctrine that jurisdiction of the subject-matter can only be acquired by virtue of the Constitution or of some statute.”) (quotations and citations omitted). Thus, the Constitution of West Virginia includes both specific grants of jurisdiction to this Court and the various circuit courts, as well as broad statements recognizing “such other jurisdiction, authority, or power . . . as may be prescribed by law.” W. Va. Const. art VIII, § 6 (circuit courts); *see also id.* § 3 (this Court); Brief of Petitioner at 10. As shown below, however, neither the Constitution itself nor any other source of West Virginia law currently recognizes the writ of *coram nobis*.

A. The Constitution of West Virginia specifically provides the courts of the State with a limited authority to issue extraordinary writs, but it conspicuously omits the writ of *coram nobis*. Both this Court and the circuit courts are granted power to hear “proceedings in habeas corpus, mandamus, prohibition and certiorari.” W. Va. Const. art. VIII, §§ 3 & 6. The circuit courts are also granted jurisdiction over proceedings in quo warranto. W. Va. Const. art VIII, § 6. No provision of the Constitution, however, provides any court of this State jurisdiction to grant a writ of *coram nobis*. This Court has long explained that the “principle of interpretation . . . that the express mention of one thing implies the exclusion of another . . . extends to . . . constitutions.” *Harbert v. Harrison Cnty. Court*, 129 W. Va. 54, 64, 39 S.E.2d 177, 186 (1946).¹

¹ *See also State ex rel. Discover Fin. Servs., Inc. v. Nibert*, 231 W. Va. 227, 243, 744 S.E.2d 625, 641 (“[I]f the language of the constitutional provision is ambiguous, then the ordinary principles employed in statutory construction must be applied to ascertain such intent.”); *State ex rel. West*

A straightforward application of this principle leads inexorably to the conclusion that the Constitution does not grant the courts of this State the authority to grant a writ of *coram nobis*.

B. The Constitution and statutes of West Virginia have also granted the courts of this State common law jurisdiction, but the writ of *coram nobis* has never been a part of that common law. *See State ex rel. Summerfield v. Maxwell*, 148 W. Va. 535, 539, 135 S.E.2d 741, 745 (1964) (acknowledging that some jurisdiction comes from the common law). The common law of West Virginia never included all of English common law, but rather began with essentially that which existed in Virginia at the time that West Virginia became a State. The 1863 Constitution of West Virginia adopted “such parts of the common law and the laws of the state of Virginia as are in force within the boundaries of the State of West Virginia” at the time of that Constitution and were not repugnant to it. W. Va. Const. art. XI, § 8 (1863). In turn, the current Constitution of West Virginia—adopted in 1872—provided that “such parts of the common law, and of the laws of this state as are in force on the effective date of [the 1872 Constitution] and are not repugnant thereto, shall be and continue the law of this state until altered or repealed by the Legislature.” W. Va. Const. art. VIII, § 13. And the Legislature has adopted “[t]he common law of England, so far as it is not repugnant to the principles of the constitution of this state . . . except in those respects wherein it was altered by the general assembly of Virginia before the twentieth day of June, eighteen hundred and sixty-three, or has been, or shall be altered by the Legislature of this state.” W. Va. Code § 2-1-1; *see also State ex rel. Knight v. Pub. Serv. Comm’n*, 161 W. Va.

Virginia Citizen Action Grp. v. Tomblin, 227 W. Va. 687, 694, 715 S.E.2d 36, 43 (2011) (“This Court . . . has indicated that in construing a constitution, what is implied is as much a part of the instrument as what is expressed.”) (quotations, citations, and alterations omitted); *Lane v. Bd. of Educ. of Lincoln Cnty.*, 147 W. Va. 737, 745, 131 S.E.2d 165, 170 (1963) (“[U]nder the well established principle which governs the interpretation of written instruments, including contracts, deeds, statutes and constitutions, . . . the express mention of one thing implies the exclusion of another . . .”).

447, 456 n.4, 245 S.E.2d 144, 149 n.4 (1978) (“Our link with Virginia common law, and thus indirectly with English common law, was provided by the original West Virginia Constitution.”).

At the time that this State adopted the common law of Virginia in 1863, the Virginia legislature had already replaced the common law writ of *coram nobis* with a statutory motion. Cf. *Knight*, 161 W. Va. at 456 n.4, 245 S.E.2d at 149 n.4 (examining how “Virginia changed the common law . . . in the period from 1776 to 1863”). In 1849, Virginia enacted a statute that provided that “[f]or any clerical error, or error in fact for which a judgment or decree may be reversed or corrected on writ of error *coram nobis*, the same may be reversed or corrected, on motion after reasonable notice” Va. Code ch. 181 § 1 (1849); see also Va. Code § 8.01-677 (similar statute in effect today). As the Supreme Court of Virginia has explained, this statutory motion replaced the writ of *coram nobis* as it existed at common law: “[a]s a common law writ, *coram vobis* has been substantially limited by the General Assembly” *Neighbors v. Commonwealth*, 650 S.E.2d 514, 517 (Va. 2007); see also *Blowe v. Peyton*, 155 S.E.2d 351, 356 (Va. 1967) (“In Virginia, we have by statute provided for a proceeding by motion to correct ‘any clerical error or error in fact for which a judgment or decree may be reversed or corrected,’ as a substitute for the common law writ of error *Coram vobis*, sometimes called *Coram nobis*.”).²

Accordingly, instead of adopting the writ of *coram nobis* from Virginia as part of the common law, West Virginia adopted the statutory motion from Virginia. “By the West Virginia Constitution of 1863, article 11, section 8, the laws of the State of Virginia then in force within the boundaries of the State of West Virginia were adopted in this state.” *State ex rel.*

² See also *Goolsby v. St. John*, 66 Va. 146, 157 (1874) *rev’d in part on other grounds by Staunton Perpetual Building & Loan Co. v. Haden*, 23 S.E. 285, 287 (Va. 1895) (explaining that the remedy “which would formerly have been by a writ of error *coram vobis* . . . is now by a mere motion to the court”); *New York Life Ins. Co. v. Barton*, 186 S.E. 65, 68 (Va. 1936) *rev’d in part on other grounds by Council v. Commonwealth*, 94 S.E.2d 245, 247 (Va. 1956) (describing the statutory motion as “the motion substituted” for a “writ of error *coram nobis*”).

Shenandoah Valley Nat'l Bank v. Hiett, 127 W. Va. 381, 32 S.E.2d 869, 872 (1945). Borrowing directly from the Virginia Code, this State's first Code provided that "[f]or any clerical error or error in fact for which a judgment or decree may be reversed or corrected on writ of error *coram nobis*, the same may be reversed or corrected, on motion after reasonable notice" W. Va. Code. ch. 184 § 1 (1868).³ In several cases, this Court specifically recognized that this statutory provision was intended to provide the relief that would have been available under the common law writ of *coram nobis*. Like the Virginia Supreme Court, this Court has acknowledged that "the motion takes the place of a writ of error *coram nobis*." *McClure-Mabie Lumber Co. v. Brooks*, 46 W. Va. 732, 34 S.E. 921, 922 (1899). The statute "gives jurisdiction to correct any error in fact for which a judgment might be reversed or corrected on writ of error *coram nobis*." *Lynch v. West*, 63 W. Va. 571, 60 S.E. 606, 608 (1908). Thus, as this Court explained in one case, an error "reviewable formerly by writ of error *coram nobis*" is reviewable instead "by motion, and by appeal to this court," under the statutory grant of authority. Syl. Pt. 3, *Curtis v. Deepwater Ry. Co.*, 68 W. Va. 762, 70 S.E. 776, 777 (1911).

The statutory grant of the writ of *coram nobis* was repealed by the Legislature in 1998, however, leaving no basis in current West Virginia law for proceedings in *coram nobis*. See Acts 1998, Chapter 110 ("Be it enacted by the Legislature of West Virginia: [t]hat articles one and two, chapter fifty-eight of the code of West Virginia, one thousand nine hundred thirty-one, as amended, be repealed."). The Legislature did not enact another statute in place of the repealed provision. Nor did the repeal cause the law in this State to revert to the common law writ of

³ See *Taylor v. Miller*, 162 W. Va. 265, 268 n.2, 249 S.E. 2d 191, 193 n.2 (1978) (describing the 1868 Code as "our first Code").

coram nobis because that writ was not originally adopted by this State as part of the common law.⁴

Hutton argues that the 1998 statutory repeal only eliminated *coram nobis* in civil proceedings, Brief of Petitioner at 10, but this argument does not survive scrutiny. To begin, nothing in the Act that effectuated the repeal even remotely suggests that the repeal was limited to civil proceedings. Moreover, Hutton’s reading would deprive the repeal law of any meaning because, in 1998, this Court had *already* repealed *coram nobis* in civil proceedings. As Hutton admits in his brief, Pet’r’s Br. at 10, Rule 60 of the West Virginia Rules of Civil Procedure eliminated the writ of *coram nobis* in civil proceedings in 1960. *See* W. Va. R. Civ. P. 60(b) (“Writs of *coram nobis*, *coram vobis*, petitions for rehearing, bills of review, and bills in the nature of a bill of review, are abolished.”); *see also Isenhart v. Vasiliou*, 187 W. Va. 357, 360 n.6, 419 S.E.2d 297, 300 n.6 (1992) (observing that West Virginia Rules of Civil Procedure 60(b) has abolished the writ of *coram nobis* in civil cases). But under Hutton’s reading, the 1998 statutory repeal did no more than that and was entirely duplicative. This runs afoul of the basic principle of statutory interpretation that “[e]very provision of a[n act of the Legislature] must be

⁴ Although this Court has held that it may “evol[ve] common law principles,” *Morningstar v. Black and Decker Mfg. Co.*, 162 W. Va. 857, 874, 253 S.E.2d 666, 676 (1979), that power does not apply here because the availability and scope of the writ of *coram nobis* are jurisdictional questions. While the courts of this State may have authority to alter the common law in areas over which they have jurisdiction, allowing the courts to expand their own jurisdiction by common law would be contrary to this Court’s long-standing and continuing view of the limits on its jurisdiction. *See, e.g., Shumate*, 48 W. Va. at ___, 37 S.E. at 618 (“[T]he jurisdiction of this court is fixed by the constitution and statutes, and that there can be no writ of error or appeal, except in those cases warranted by the constitution or statutes.”); *Deitz Colliery Co. v. Ott*, 99 W. Va. 663, 129 S.E. 708, 709 (1925) (“this court does not have jurisdiction of the common-law writ of error, except in those cases warranted by the Constitution or by statute”); *Stucky*, 232 W. Va. at 303–04, 752 S.E.2d at 334–35 (“[I]t is fundamental doctrine that jurisdiction of the subject-matter can only be acquired by virtue of the Constitution or some statute.”) (quotations and citations omitted).

given some meaning, if possible.” *State ex rel. Thomas v. Board of Ballot Commissioners of Kanawha County*, 127 W. Va. 18, 31 S.E.2d 328, 336 (1944).

C. Four recent majority opinions of this Court and one concurring opinion have suggested that the writ of *coram nobis* might still be available in West Virginia courts in some circumstances, but these opinions do not alter the analysis above. *First*, two of the majority opinions in question pre-date the 1998 statutory repeal. It is hardly surprising for this Court to have observed then that *coram nobis* might have still been available in some circumstances—because it was. *See State v. Eddie “Tosh” K*, 194 W. Va. 354, 363 n.10, 360 S.E.2d 489, 498 n.10 (1995); *Kemp v. State*, 203 W. Va. 1, 2 n.4, 506 S.E.2d 38, 39 n.2 (1997).

Second, although the other two majority opinions post-date the 1998 statutory repeal, neither one includes any substantive analysis or addresses the effect of repeal in any way. The first case relies solely on the two pre-1998 decisions discussed above, *see State ex rel. Richey v. Hill*, 216 W. Va. 155, 162 n.10, 603 S.E.2d 177, 184 n.10 (2004) (citing *Kemp*, 203 W. Va. at 2 n.4, 506 S.E.2d at 39 n.4, and *Eddie “Tosh” K*, 194 W. Va. at 363 n.10, 460 S.E.2d at 498 n.10), and the second case merely cites to the first, *see State ex rel. McCabe v. Seifert*, 220 W. Va. 79, 84 n.9, 640 S.E.2d 142, 147 n.9 (2006) (citing *Richey*, 216 W. Va. at 162 n.10, 603 S.E.2d at 184 n.10). Moreover, neither case offers anything more than passing speculation in footnotes in *dicta* about the availability of *coram nobis* relief. *See Richey*, 216 W. Va. at 162 n.10, 603 S.E.2d at 184 n.10 (“[C]oram nobis . . . may still be available in a post-conviction context when the petitioner is not incarcerated.”); *McCabe*, 220 W. Va. at 84 n.9, 640 S.E.2d at 147 (same). As this Court has explained, “language in a footnote generally should be considered obiter dicta, which, by definition, is language ‘unnecessary to the decision of the case and therefore not precedential.” *State ex rel. Med. Assurance of W. Va., Inc. v. Recht*, 213 W. Va. 457, 471, 538

S.E.2d 80, 94 (2003); *see also* Syl. Pt. 1, in part, *State v. McKinley*, 234 W. Va. 143, --, 764 S.E.2d 303, 306 (2014) (“[T]he Court uses original syllabus points to announce new points of law or to change established patterns of practice by the Court.”).

Finally, the recent concurring decision in *Cline v. Mirandy*, -- S.E.2d --, --, 2014 WL 5800682, at *8 (Nov. 3, 2014) (Ketchum, J., concurring), similarly does not cite or discuss any authority that in any way suggests that the writ of *coram nobis* has survived in West Virginia past the 1998 statutory repeal. The *only* authority mentioned in the opinion is a treatise—Justice Cleckley’s *Handbook on West Virginia Criminal Procedure*—that includes a *single* citation to a West Virginia authority on *coram nobis*. That citation is this Court’s 1997 *Kemp* decision, which, as noted above, pre-dates the 1998 statutory repeal and thus says nothing about whether *coram nobis* survived in West Virginia past that repeal. *See* Franklin D. Cleckley, *Handbook on West Virginia Criminal Procedure, 2014 Cumulative Supplement*, § II-509, pp. 431 (citing *Kemp*). The remainder of the treatise’s discussion of *coram nobis* consists entirely of *federal law*, which is wholly inapplicable to West Virginia. As the treatise itself explains, the authority of federal courts to issue the writ of *coram nobis* arises solely under the federal All Writs Act. Cleckley, *Handbook on West Virginia Criminal Procedure, 2014 Cumulative Supplement*, § II-509, pp. 430–31; *see also United States v. Morgan*, 346 U.S. 502, 506 (1954) (ability of federal courts to issue the writ of *coram nobis* “if it exists must come from the all-writs section of the Judicial Code”). West Virginia courts have no similar grant of power.

D. Hutton argues that this Court must recognize the writ of *coram nobis* because he “must have a means to vindicate [his] rights,” Brief of Petitioner at 12, and in particular his right to advice about immigration consequences as recognized by the Supreme Court of the United States in *Padilla*, *see id.* at 7. But courts have long acknowledged that convictions become final

at some point. As the U.S. Supreme Court has explained, “[w]ithout finality, the criminal law is deprived of much of its deterrent effect.” *Teague v. Lane*, 489 U.S. 288, 309 (1989). “No one, not criminal defendants, not the judicial system not society as a whole is benefited by a judgment providing a man shall tentatively [be punished for a crime today], but tomorrow and every day thereafter his [conviction and sentence] shall be subject to fresh litigation.” *Mackey v. United States*, 401 U.S. 667, 691 (1971) (Harlan, J., concurring in the judgments in part and dissenting in part) (available at 91 S. Ct. 1171). In the interest of finality, defendants sometimes simply can no longer vindicate their rights. Thus, the U.S. Supreme Court has specifically held that “defendants whose convictions became final prior to *Padilla* . . . cannot benefit from its holding,” even if their right to effective counsel recognized in *Padilla* was violated. *Chaidez v. United States*, 133 S. Ct. 1103, 1113 (2013).

The removal of the writ of *coram nobis* from the law of West Virginia reflects the Legislature’s policy choices about finality when a sentence has been served. *Cf. Mellon-Stuart Co. v. Hall*, 178 W. Va. 291, 298, 359 S.E.2d 124, 131 (1987) (*Res judicata* serves the policy goal of “promot[ing] finality by bringing litigation to an end.”); *State ex rel. Richey v. Hill*, 216 W. Va. 155, 163 n.12, 603 S.E.2d 177, 185 n.12 (*Res judicata* protects an “important finality interest.”). West Virginia has a post-conviction review system that allows for the review of the conviction of “[a]ny person convicted of a crime and incarcerated under sentence of imprisonment therefor.” W. Va. Code § 53-4A-1. And this post-conviction review system provides for the appointment of counsel when necessary. W. Va. Code § 53-4A-4. In light of these protections, the Legislature has determined that the interest in finality outweighs the need for an additional safeguard that would apply after a sentence has been served. As one federal court has explained, “Where sentences have been served, the finality concept is of an overriding

nature, more so than in other forms of collateral review such as habeas corpus, where a continuance of confinement could be manifestly unjust.” *United States v. Osser*, 864 F.2d 1056, 1059 (3d Cir. 1988).

This decision by the West Virginia Legislature and its recognition of the importance of finality is hardly unusual. “Only [a minority of] states recognize the writ of *coram nobis*.” *Trujillo v. State*, 310 P.3d 594, 598 (Nev. 2013). And some of those states rely on an explicit statutory grant of authority—rather than the common law—to issue the writ. *Neighbors*, 650 S.E.2d at 517 (“As a common law writ, *coram vobis* has been substantially limited by the General Assembly”); Tenn. Code § 40-26-105 (“There is made available to convicted defendants in criminal cases a proceeding in the nature of a writ of error *coram nobis*.”). In explaining the limited scope of *coram nobis* in California, the Supreme Court of California has said that “expanding *coram nobis* to create a generalized common law postconviction, postcustody remedy would accord insufficient deference to a final judgment.” *People v. Hyung Joon Kim*, 202 P.3d 436, 456 (Cal. 2009). “Endless litigation, in which nothing was ever finally determined, would be worse than occasional miscarriages of justice”; at some point, “the interest in finality of judgments predominates” even if a judgment is not “just and error free.” *Id.* at 456. Similarly, the Supreme Court of Nevada has refused to expand the scope of the writ of *coram nobis* out of concern for the “proliferation of stale challenges to convictions long since final.” *Trujillo*, 310 P.3d at 601.⁵

II. Hutton’s Claim Falls Outside the Common Law Writ of *Coram Nobis*.

⁵ States, of course, have no constitutional obligation to provide for post-conviction review or to provide appointed counsel in such proceedings. See *Pennsylvania v. Finley*, 481 U.S. 551, 557 (1987); see also *Lackawanna Cnty. Dist. Attorney v. Coss*, 532 U.S. 394, 402 (2001).

A. Even if the common law writ of *coram nobis* is still available in West Virginia, as Hutton contends, his claim is well beyond the scope of that writ. In Hutton’s view, “[p]ost-conviction *coram nobis* is part of the common law” in West Virginia, and “[t]he repeal of West Virginia’s *coram nobis* statute . . . did not apply to post-conviction *coram nobis* as a common law remedy.” Brief of Petitioner at 10–11. For the reasons explained above, this argument fails because the common law writ of *coram nobis* was never adopted by West Virginia as part of the common law. But even if Hutton is correct, his claim exceeds the scope of the common law writ.

The writ of *coram nobis* was available at common law only to correct certain errors of fact. *United States v. Morgan*, 346 U.S. 502, 507 (1954). As explained by the Supreme Court of Nevada, which recognizes the writ of *coram nobis* as it existed at common law, the writ applies only to factual errors that “affected the validity and regularity of the decision itself and would have precluded the judgment from being rendered had they been known.” *Trujillo v. State*, 310 P.3d 594, 597 (Nev. 2013). This instruction appears to mean that the writ is available to correct factual errors that would prevent the entry of any judgment. “At common law, many of the[] errors of fact” that gave rise to the issuance of the writ “involved personal jurisdiction—errors regarding the status of the party which would prevent a judgment from being entered against the party.” *Id.* at 601. Examples included that a woman was married when coverture prevented the entry of a judgment against a married woman or that a party was a child at a time when the law prevented a judgment against a child. *Id.* As explained by the Supreme Court of California, which also has retained the common law distinction between errors of law and errors of fact, “[n]ew facts that would merely have affected the willingness of a litigant to enter a plea, or would have encouraged or convinced him or her to make different strategic choices or seek a

different disposition are not facts that would have prevented rendition of the judgment.” *People v. Hyung Joon Kim*, 202 P.3d 436, 453 (Cal. 2009).

Hutton’s claim of ineffective assistance of counsel falls outside these narrow requirements for the common law writ of *coram nobis*. Although “[a]n ineffective assistance of counsel claim presents a mixed question of law and fact,” it is “ultimate[ly a] legal claim” that rests on “underlying predicate facts.” Syl Pt. 1, in part, *State ex rel. Vernatter v. Warden*, 207 W. Va. 11, 13, 528 S.E.2d 207, 209 (1999) (quotation marks and citation omitted). Hutton’s claim does not concern a factual error that, if known to the trial court at the time, would have prevented the entry of any judgment. Hutton argues that his claim of ineffective assistance of counsel “is properly considered a factual issue” because “factual issues predominate.” Brief of Petitioner at 13 n.9. But that view ignores that the common law writ applies only to *certain* factual errors and also would open the door to *coram nobis* review of every mixed question of fact and law that turns on an underlying factual issue.

This conclusion is consistent with the decisions of every state high court that has considered whether a claim of ineffective assistance of counsel is actionable under the common law limitations on the writ of *coram nobis*. Each of these courts has determined that “[i]neffective assistance claims are not usually cognizable in *coram nobis* proceedings.” *Gregory v. Class*, 584 N.W.2d 873, 880 (S.D. 1998); *see also State v. Diaz*, 808 N.W.2d 891, 897 (Neb. 2012) (Because a claim of ineffective assistance of counsel based on *Padilla* “involves a question of law and not solely an error of fact, relief was not available in a motion for a writ of error *coram nobis*.”); *Hyung Joon Kim*, 202 P.3d at 454 (“That a claim of ineffective assistance

of counsel, which relates more to a mistake of law than of fact, is an inappropriate ground for relief on *coram nobis* has long been the rule.”⁶

B. Relying mostly on federal case law, Hutton appears to suggest that the common law writ of *coram nobis* was not limited to the correction of certain factual errors. Brief of Petitioner at 14. But federal law has given the writ of *coram nobis* a scope far beyond the common law scope. *See Morgan*, 346 U.S. at 512 (expanding the writ of *coram nobis* to “errors of the most fundamental character”) (quotation marks and footnote omitted). Federal courts have used the writ to “correct violations and laws of the United States” but only after a “breathtaking expansion of the common-law writ.” *Trujillo*, 310 P.3d at 598.

Contrary to Hutton’s assertion, this Court has never held that the common law writ of *coram nobis* extends beyond the correction of certain factual errors. In neither of the two cases on which Hutton relies—*Eddie “Tosh” K* and *Kemp*—was this Court faced with a question about the scope of the common law writ of *coram nobis*. At most, this Court observed in *dicta* in both cases—at a time when the statutory right to a writ of *coram nobis* still existed in West Virginia—that “a writ of error known as *coram nobis* has been used to address post-conviction issues when the defendant is not incarcerated” and that such a writ might be a vehicle to raise a claim of ineffective assistance of counsel. *Eddie “Tosh” K*, 194 W. Va. at 363 n.10, 480 S.E.2d at 498 n.10; *see also Kemp*, 203 W. Va. at 2 n.4, 506 S.E.2d at 39 n.4. But it certainly cannot be said that this Court reached any binding conclusions about the scope of the common law writ of *coram nobis*.

⁶ Although the writ of *coram nobis* now exists by statute in Virginia, the statutory writ is limited to certain factual errors in the same way as the common law writ. Va. Code § 8.01-677. Applying those limitations, the Supreme Court of Virginia has concluded that “a claim of ineffective assistance of counsel does not constitute an error of fact for which *coram vobis* will lie.” *Commonwealth v. Morris*, 705 S.E.2d 503, 508 (Va. 2011).

C. Even under the broader scope of *coram nobis* proffered by Hutton and which exists in the federal courts, he would not be entitled to relief. In the federal system, a writ of *coram nobis* is available when the petitioner meets a four part test: “(1) a more usual remedy is not available; (2) valid reasons exist for not attacking the conviction earlier; (3) adverse consequences exist from the conviction sufficient to satisfy the case or controversy requirement of Article III; and (4) the error is of the most fundamental character.” *United States v. Akinsade*, 686 F.3d 248, 252 (4th Cir. 2012) (quotations omitted). Hutton cannot meet this test.

Specifically, Hutton cannot satisfy at least the second and fourth prongs of this test. *First*, Hutton cannot establish that he had a valid reason for not attacking the conviction earlier. Hutton has already sought post-conviction remedies several times, and his post-conviction attorney has testified that he was aware that Hutton was not a United States citizen. Supp. App. at 90. That attorney has also admitted that he made a strategic decision to focus efforts on “the factual basis for the fact that this was a plea in error that could not be sustained by the evidence in place” and not to press a potential ineffective assistance of counsel claim. App. at 91; App. at 102–03 (“I chose strategically to make another decision to be able to preserve another bite at the apple”). Hutton’s post-conviction counsel knew enough to discover and advance the *Padilla* claim being made here, and his strategic decision not to do so is imputed to Hutton. *See Jennings v. Wiles*, 82 W. Va. 573, 96 S.E.2d 1009, 1010 (1918) (“Having employed counsel and entrusted his defense to him, defendant would have to suffer for the inexcusable negligence of his counsel, if he were guilty of any.”); *see also Edwards v. United States*, 265 F.2d 909, 910 (6th Cir. 1959) (strategic decision by trial counsel in criminal trial binding on client). *Second*, Hutton cannot establish that the error in this case “is of the most fundamental character” because,

as explained in detail in the following section, his claim of ineffective assistance of trial counsel lacks merit.

III. In Any Event, Hutton's Counsel Was Not Constitutionally Ineffective.

Regardless of this Court's conclusions on the availability and scope of the writ of *coram nobis* in West Virginia, Hutton's appeal fails in all events because his counsel was not constitutionally ineffective. To prevail on his claim, Hutton must show that his counsel's alleged failure to advise Hutton of the immigration consequences of his guilty plea was deficient and that his counsel's deficient performance prejudiced his defense. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). Hutton bears the burden of proving that his counsel was ineffective. See Syl. Pt. 22, *State v. Thomas*, 157 W. Va. 640, 643, 203 S.E.2d 445, 449 (1974) ("One who charges on appeal that his trial counsel was ineffective and that such resulted in his conviction, must prove the allegation by a preponderance of the evidence."); Syl. Pt. 2, in part, *State ex rel. Stapleton v. Boles*, 149 W. Va. 645, 645, 142 S.E.2d 896, 896–97 (1965) ("The petitioner in a habeas corpus proceeding has the burden of establishing by pleading and proof that ineffective assistance of counsel denied him his constitutional rights.").

Hutton fails to meet his burden in at least three ways. *First*, he has not shown clear error in the Circuit Court's finding that Hutton did not prove that counsel failed to inform him of the immigration consequences of a guilty plea. *Second*, he has not shown that it was objectively unreasonable for counsel not to investigate Hutton's immigration status and to inform him of potential immigration consequences. *Third*, he has not shown that he was prejudiced by any failure of his counsel to advise him about immigration consequences.

A. Hutton Has Not Shown Clear Error in the Circuit Court's Finding That Hutton Failed To Prove That Counsel Failed to Advise Him About Immigration Consequences.

The Circuit Court found that Hutton had failed even to prove the threshold fact that his counsel did not advise him of immigration consequences. App. at 20–21. On the one hand, the Circuit Court found that there was no admission from trial counsel that he did not advise Hutton of immigration consequences. On the other hand, the Circuit Court found Hutton’s “testimony that he was not advised of deportation consequences” to be “not credible.” App. at 21.

This Court reviews that factual finding “under a clearly erroneous standard,” which Hutton fails to meet. Syl Pt. 7, in part, *State v. Black*, 227 W. Va. 297, 301, 708 S.E.2d 491, 495 (2010). Under this standard, this Court may not reverse if the Circuit Court’s finding is “plausible when viewing the evidence in its entirety.” *Bd. of Educ. of Cnty. of Mercer v. Wirt*, 192 W. Va. 568, 579, 453 S.E.2d 402, 413 (1994). Critically, “when findings are based on determinations regarding the credibility of witnesses,” as here, this Court owes “even greater deference to the trial court’s findings.” *In re Jonathan Michael D.*, 194 W. Va. 20, 25, 459 S.E.2d 131, 136 (1995) (quoting *Anderson v. City of Bessemer City, N.C.*, 470 U.S. 564, 574 (1985)).

When the evidence is viewed in its entirety, the Circuit Court’s finding is more than plausible. *First*, as the Circuit Court observed, Hutton failed to elicit any admission from trial counsel that counsel did not advise Hutton of immigration consequences. Hutton offered the affidavit of his counsel, Dyer, Supp. App. at 251, which stated only that Dyer “ha[d] no memory of speaking with Mr. Hutton regarding his immigration status nor the consequences he may face as a[n] immigrant if found guilty.” Supp. App. at 251. The affidavit does not say that Dyer failed to advise Hutton of immigration consequences or even that Dyer would be likely to remember advising Hutton of immigration consequences if he had provided that advice. Supp. App. at 251. By comparison, the affidavit was not as equivocal about other assertions. For

example, Dyer averred that “[t]o the best of [his] recollection, Mr. Hutton was not told by the Judge, Thomas Bedell, presiding over the case, of the consequences of pleading guilty, as an immigrant.” Supp. App. at 251. Moreover, Hutton did not call Dyer to testify in person even though Hutton knew that Dyer’s affidavit did not say that he had failed to advise Hutton about immigration consequences. App. at 45.

Second, the credibility of Hutton’s own testimony that his counsel failed to advise him of immigration consequences was undermined by discrepancies in other parts of his testimony. For example, Hutton had claimed that he did not injure the victim, App. at 38 & 126; App. at 21, and that the victim’s claims were “plainly not supported by the evidence.” App. at 37–38. But Hutton admitted that he had taken the victim by the arm, pulled her across the house and shoved her on the bed, App. at 41–42, and his entry of an *Alford* plea was an admission that “the record supports the conclusion that a jury could convict him.” Syl. Pt. 1, in part, *Kennedy v. Frazier*, 178 W. Va. 10, 10, 357 S.E.2d 43, 43 (1987). Moreover, as the Circuit Court explained, Hutton said that he entered a no contest plea, App. at 33, but he had actually entered a guilty plea under *North Carolina v. Alford*, 400 U.S. 25 (1970), App. at 33; Supp. App. at 110. Witnessing this testimony in person, the Circuit Court clearly believed that Hutton was being affirmatively untruthful. *See* App. at 34 (“I’m going to caution you about possibly committing perjury or false swearing at this point in time.”).

Hutton argues that the discrepancies in his testimony do not support the conclusion that his testimony was not credible because that testimony is unrelated to the advice that he received from counsel. Brief of Petitioner at 19. But that is not a recognized basis for an appellate court to overturn the credibility determination of the trier of fact, here the Circuit Court, “who has had the opportunity to observe, first hand, the demeanor of the witness.” *Miller v. Chenoweth*, 229

W. Va. 114, 121, 727 S.E.2d 658, 665 (2012); *State v. Guthrie*, 194 W. Va. 657, 669 n.9, 461 S.E.2d 163, 175 n.9 (1995) (“An appellate court may not decide the credibility of witnesses or weigh evidence as that is the exclusive function and task of the trier of fact.”). The existence of numerous discrepancies in Hutton’s testimony, even if not directly related to the question at hand, could reasonably have led the Circuit Court to conclude that Hutton was an unreliable narrator of events.

In these circumstances, it was not clearly erroneous for the Circuit Court to conclude that Hutton failed to prove that his counsel did not advise him about immigration consequences. Clearly recognizing as much, Hutton attempts to shift the burden of proof to the State by citation to a number of irrelevant decisions. Brief of Petitioner at 16. Each of the cases cited by Hutton addresses either the standard required to show a knowing waiver of a constitutional right,⁷ or the standard to decide whether a guilty plea was voluntary.⁸ But these claims are legally distinct from Hutton’s Sixth Amendment claim of ineffective assistance of counsel. *See United States v. Akinsade*, 686 F.3d at 255 (“A district court’s duty to ensure a knowing and voluntary plea arises from the Fifth amendment’s guarantee of due process and thus affords defendants a right distinct from the Sixth Amendment right to effective assistance of counsel.”); *Padilla*, 559 U.S. at 391 (Scalia, J., dissenting) (Voluntariness concerns “properly relate[] to the Due Process Clause of

⁷ *State v. Eden*, 163 W. Va. 370, 378, 256 S.E.2d 868, 873 (1979) (“An accused may . . . waive a fundamental right protected by the Constitution, but it must be demonstrated that the waiver was made knowingly and intelligently.”); *Holland v. Boles*, 225 F. Supp. 863, 866 (N.D. W. Va. 1963) (A waiver of the right to counsel can be assumed only when “it is abundantly clear that the accused has not only a full knowledge of all the facts and of his rights, but a full appreciation of the legal effects of his voluntary relinquishment.”).

⁸ Syl. Pt. 1, *Riley v. Ziegler*, 161 W. Va. 290, 290, 241 S.E.2d 813, 814 (1978) (“When a conviction rests upon a plea of guilty, the record must affirmatively show that the plea was intelligently and voluntarily mad with an awareness of the charge to which the plea is offered and the consequences of the plea.”); *State ex rel. Gill v. Irons*, 207 W. Va. 199, 202, 530 S.E.2d 460, 463 (2000) (same).

the Fifth and Fourteenth Amendments, not to the Sixth Amendment,” and such claims should not [be] smuggle[d] into the Sixth Amendment.”); *cf. Brady v. United States*, 397 U.S. 742, 748 (1970) (recognizing that the requirement that a plea be voluntary is rooted in the Fifth Amendment). Hutton has not challenged his conviction and sentence on either of these bases in this appeal, even though Hutton raised the voluntariness of his plea as a separate claim in the Circuit Court. App. at 166–67. Instead, he has argued only that his right to effective assistance of counsel was violated when his counsel failed to inform him that a guilty plea could result in deportation.

B. Any Failure To Advise Hutton About Immigration Consequences Was Not Deficient Performance.

Even if Hutton had proven that his counsel had failed to advise him of the immigration consequences of his conviction, this failure would not constitute ineffective assistance of counsel under the Sixth Amendment in the circumstances in this case. Counsel has not performed deficiently so long as his investigation and advice is reasonable in the circumstances. *See Strickland v. Washington*, 466 U.S. 668, 688 (1984) (“[T]he defendant must show that counsel’s representation fell below an objective standard of reasonableness.”); *id.* at 691 (“[C]ounsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary.”). “More specific guidelines are not appropriate.” *Id.* at 688. This Court “‘must indulge [a] strong presumption’ that counsel ‘made all significant decisions in the exercise of reasonable professional judgment.’” *Cullen v. Pinholster*, 131 S. Ct. 1388, 1407 (2011) (quotations omitted).

Hutton relies on *Padilla* to argue that his counsel was obligated to inform him of potential immigration consequences. But *Padilla* does not speak to situations where, as here, a

client does not inform counsel that he is a noncitizen and reasonable counsel would not under the factual circumstances inquire about immigration status. In *Padilla*, the Supreme Court of the United States announced that the Sixth Amendment required that counsel provide advice about immigration consequences of a guilty plea to a noncitizen client during the plea bargain process. *Id.* at 373–74

Padilla addressed only the investigation of the law and legal advice required to provide competent counsel once an attorney knows that his client is not a citizen. The criminal defendant in *Padilla* claimed that his counsel knew about his immigration status and provided incorrect advice about the immigration consequences of a guilty plea, *id.* at 359—allegations that the Supreme Court “[a]ccept[ed] . . . as true,” *id.* at 369. The Court did not address or set forth a rule regarding whether factual investigation of immigration status in other circumstances is required. And wisely so, as the alternative would require absurd results. For example, counsel for the recently convicted former Governor of Virginia would have been required to ask his client about his immigration status for his client to enter a guilty plea, even though his client’s personal and professional history is well-known. Further, a rule that required counsel to investigate immigration status in every case would violate the Supreme Court’s instruction that “[n]o particular set of detailed rules for counsel’s conduct can satisfactorily take account of the variety of circumstances faced by defense counsel or the range of limited decisions,” and rejection of “the notion that the same investigation will be required in every case.” *Pinholster*, 131 S. Ct. at 1406–07 (quoting *Strickland*, 466 U.S. at 688–89 & 691); *see also Chaidez*, 133 S. Ct. at 1108 (recognizing that *Padilla* is an application of the *Strickland* test).

In the absence of a specific rule that requires investigation of immigration status, counsel’s failure to investigate Hutton’s immigration status and advise Hutton about immigration

consequences is not constitutionally deficient unless Hutton can show circumstances that rebut the strong presumption that his counsel acted reasonably. *See Pinholster*, 131 S. Ct. at 1407; *see also Premo v. Moore*, 131 S. Ct. 733, 742 (2011) (“[W]hen the Sixth Amendment applies, the formulation of the standard is the same: reasonable competence in representing the accused.”); *Strickland*, 466 U.S. at 691 (“In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel’s judgments.”). Hutton has failed to meet this burden. Instead, the evidence suggests that Hutton’s counsel acted reasonably under the particular circumstances of this case.

Hutton did not call his immigration status to the attention of his counsel. The Supreme Court has acknowledged that under *Strickland* “[t]he reasonableness of counsel’s actions may be determined or substantially influenced by the defendant’s own statements or actions.” *Strickland v. Washington*, 466 U.S. 668, 691 (1984). “Counsel’s actions are usually based, quite properly . . . on information supplied by the defendant. In particular, what investigation decisions are reasonable depends critically on such information.” *Id.* Thus, “the reasonableness of an attorney’s decision not to conduct an investigation is directly related to the information the defendant has supplied.” *Coleman v. Brown*, 802 F.2d 1227, 1233 (10th Cir. 1986); *see also Mitchell v. Kemp*, 762 F.2d 886, 888–89 (11th Cir. 1985) (“The reasonableness of a decision on the scope of investigation will often depend upon what information the defendant communicates with the attorney.”). Although Hutton has admitted that his attorney answered all of his questions and that he spoke or communicated with his attorney around twenty-seven times, Supp. App. at 22–23, 50, Hutton never suggested to his counsel that he was a noncitizen or that immigration consequences of a conviction might be a concern, App. at 39.

Nor has Hutton introduced other evidence that suggests that counsel reasonably should have inquired about his immigration status. Hutton had immigrated to the United States as a child in 1971. App. at 45; Supp. App. at 6. At the time of his arrest and conviction, Hutton had been in the United States for around 40 years. App. at 157–58. He had started his own business in the United States and had a son who was a citizen of the United States. App. at 157–58. His mother, siblings, son, and nieces and nephews all live in the United States. App. at 165. Hutton has admitted that he “know[s] nothing about” his native Jamaica. App. at 46, 165. Under these circumstances, it was reasonable for Hutton’s counsel not to inquiry about his immigration status.

C. Hutton Was Not Prejudiced by Any Failure of His Counsel to Advise Him About Immigration Consequences.

Finally, Hutton has failed to establish that he was prejudiced by his counsel’s failure to inform him of immigration consequences. To establish that he was prejudiced by his guilty plea, Hutton “must show that there is a reasonable probability that, but for counsel’s errors, he would not have pleaded guilty and would have insisted on going to trial.” *Hill v. Lockhart*, 474 U.S. 52, 59 (1985). This showing requires that Hutton “convince the court that a decision to reject the plea bargain would have been rational under the circumstances.” *Padilla*, 559 U.S. at 372. Hutton’s “subjective preferences, therefore, are not dispositive; what matters is whether proceeding to trial would have been objectively reasonable in light of all the facts.” *United States v. Fugit*, 703 F.3d 248, 260 (4th Cir. 2012). Proceeding to trial is not objectively reasonable in the face of overwhelming evidence of guilt. *Id.*; *see also Pilla v. United States*, 668 F.3d 368, 373 (6th Cir. 2012) (concluding that a petitioner could not establish prejudice from

a plea entered without the immigration advice required by *Padilla* because the petitioner “faced overwhelming evidence of her guilt”).

Hutton cannot establish prejudice because he faced overwhelming evidence of guilt had he gone to trial. The victim, Tamara Knotts, was prepared to testify that Hutton had hit her with his fists, choked her until she almost passed out, threw her into a wall, and continued to beat her with his fists and hands. Supp. App. at 66. Physical evidence supported this testimony. The State had evidence that, nine days after the battery, Knotts needed assistance to get out of the house and could not walk on her own. Supp. App. at 66–67. Hospital records from nine days after the battery showed multiple bruising to the back, chest, abdomen, shoulders, and sides, and deep bruising inside her ribs. Supp. App. at 67. If he had proceeded to trial, Hutton likely would have been found guilty and “would have been just as removable as [h]e [i]s after h[is] guilty plea.” *Pilla*, 668 F.3d at 373.

CONCLUSION

For the foregoing reasons, the decision of the Circuit Court of Harrison County should be affirmed.

Respectfully submitted,

STATE OF WEST VIRGINIA

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**IN THE WEST VIRGINIA SUPREME COURT OF APPEALS
NO. 14-0603**

Orville Hutton,

Petitioners

v.

State of West Virginia,

Respondents.

CERTIFICATE OF SERVICE

I, Elbert Lin, Solicitor General and counsel for Respondent, verify that on December 22, 2014, I served a copy of *State of West Virginia's Respondent's Brief* upon all parties as indicated below by U.S. Mail:

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