IN THE
SUPREME COURT
OF VIRGINIA

Record No. 092163

COMMONWEALTH OF VIRGINIA,
Appellant,

v.

EMMANUEL MORRIS,
Appellee.

BRIEF OF APPELLANT

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The Commonwealth of Virginia, Appellant, respectfully represents that the Appellant is aggrieved by the Order entered by the Circuit Court in Alexandria.

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ASSIGNMENTS OF ERROR

1. The Trial Court erred in its decision finding authority to apply the Writ of Coram Vobis, or alternatively the Writ of Audita Querela, as an appropriate remedy. (Joint Appendix at 83, 149-153, 176)

2. The Trial Court erred in granting Appellee relief under the Writ of Coram Vobis. (Joint Appendix at 177, 469-473)

QUESTIONS PRESENTED

1. Did the Trial Court err in its decision finding authority to apply the Writ of Coram Vobis, or alternatively the Writ of Audita Querela, as an appropriate remedy?

2. Did the Trial Court err in granting Appellee relief under the Writ of Coram Vobis?

STATEMENT OF MATERIAL PROCEEDINGS

On July 15, 1997, Appellee, Mr. Emmanuel Morris, appeared in the Circuit Court for Alexandria City before the Honorable Donald M. Haddock, and entered a plea of guilty to petit larceny, pursuant to a plea agreement to reduce the original charge of grand larceny. (Joint Appendix, hereinafter "App." at 1-4). Per the plea agreement, Mr. Morris was sentenced to jail for a term of twelve months, with all but thirty days suspended.

On May 21, 2009, Mr. Morris filed a petition seeking relief in the form of a Writ of Error Coram Vobis or, in the alternative, Writ of Audita Querela. (App. at 6-37).

On June 18, 2009, Appellant, the Commonwealth of Virginia (hereinafter "the Commonwealth"), and Mr. Morris presented oral argument before Judge Haddock. Judge Haddock ruled that the writ of error coram vobis was an appropriate mechanism to address an application for modification of a sentence in a criminal case. (App. at 149-153).

On July 15, 2009, the Commonwealth and Mr. Morris presented argument as to the applicability of the writ to Mr. Morris' case. (App. at 165-412). On July 28, 2009, Judge Haddock signed an order vacating the sentence imposed on July 15, 1997 and modifying it to reduce its terms to three hundred sixty-four days. (App. at 474).

From this judgment, the Commonwealth respectfully urges this Court to deny the requested relief.

STATEMENT OF THE FACTS

On July 15, 1997, Mr. Morris entered a plea of guilty to petit larceny in a plea agreement to reduce the charge from grand larceny as originally charged. (App. at 222-223). Questions to ascertain whether Mr. Morris was knowingly, intelligently, and voluntarily pleading guilty to the crime charged were embraced in a written plea memorandum which was signed by Mr. Morris and his attorney after

she explained its terms. (App. at 59). The plea agreement, containing all terms including the agreed sentence recommendation, is part of record. (App. at 1-2). Mr. Morris was represented by counsel, J. Amy Dillard with the Office of the Public Defender. (App. at 219).

The Court accepted Mr. Morris' plea to petit larceny. The Court imposed the sentence recommended in the plea agreement, which recommendation was concurred in by Mr. Morris and his counsel. (App. at 225). Mr. Morris was sentenced to twelve months in jail with eleven months suspended. (App. at 225).

Nearly twelve years later, on May 21, 2009, Mr. Morris filed a petition seeking relief, asserting that at the time of his guilty plea, he was unaware of the consequences of the plea and particularly the recommended sentence with regard to his immigration status. (App. at 6-37).

On June 18, 2009, the Commonwealth and Mr. Morris presented oral argument on the authority of the trial court to grant a writ of error coram vobis. Judge Haddock ruled that the writ was an appropriate mechanism by which to address an application for modification of a sentence in a criminal case. (App. at 149-153).

On July 15, 2009, the Commonwealth and Mr. Morris presented argument, heard by Judge Haddock, as to the applicability of the writ to Mr. Morris' case. Mr. Morris testified that in July 1997 he was charged with grand larceny and he was represented by Ms. Dillard. (App. at 218-219). He further testified that at the time of his plea, he was principally interested in avoiding jail time. (App. at 241). Mr. Morris testified that when he met Ms. Dillard, he gave her his license and green card to copy and she said "good." (App. at 220, 287). Mr. Morris testified that he and Ms. Dillard did not discuss anything specific pertaining to his criminal charge and his immigration issues, nor did he ask counsel any questions about his immigration status. (App. at 221, 271). Mr. Morris testified that he and his counsel did not specifically discuss any immigration-related issues while reviewing and signing his plea agreement, but that he assumed that any immigration issues would be fine based on her statement upon viewing his green card. (App. at 223-224, 270).

Ms. Dillard could not recall seeing Mr. Morris' green card, nor could she recall her representation of him. (App. at 195). Ms. Dillard testified that it was fair to say that in her responsibility as Mr. Morris' criminal attorney it was extremely unlikely that she would have given

Mr. Morris any immigration advice. (App. at 195). Ms. Dillard further testified only after her representation of Mr. Morris was there immigration training or any discussion about collateral immigration consequences. (App. at 194).

Between January 2005 and December 2008, Mr. Morris had an immigration trial and five short hearings. (App. at 230). Mr. Morris testified that it was during these immigration hearings that he became aware of the fact that the length of his conviction made him deportable. (App. at 244). If his sentence had been less than a year, he would not fall into the deportable category. (App. at 244). This was the state of the law at the time he entered his plea. (App. at 61-62). Mr. Morris stated that had he known he would be deported, by virtue of his conviction and sentence, he would not have pleaded guilty and would have sought immigration advice. (App. at 287). He further testified that despite the fact that the immigration consequences existed at the time of his plea, he did not become aware of them until years later. (App. at 228).

Judge Haddock signed an order vacating the sentence imposed on July 15, 1997 and modifying it to reduce its terms to three hundred sixty-four days. (App. at 474).

ARGUMENT

I. THE TRIAL COURT ERRED IN DETERMINING THE WRIT OF CORAM VOBIS, OR ALTERNATIVELY THE WRIT OF AUDITA QUERELA, IS AN APPLICABLE REMEDY

A. The Authority of the Trial Court to Modify or Vacate its Judgments, Orders, and Decrees is Limited

Rule 1:1 of the Rules of the Supreme Court of Virginia, which applies equally to all proceedings, provides that the trial court retains jurisdiction over its judgments, orders, and decrees for twenty-one days after the date of entry. Certainty in the finality of judgments is the core policy principle upon which Rule 1:1 is predicated. Statutory means to modify or vacate judgments exist, most notably habeas corpus. However, these procedures have strict time limitations.

Accordingly, although there are exceptions to both Rule 1:1 and the various statutory methods used to collaterally attack convictions, a motion based on the extraordinary common law writ of error coram vobis, which seeks to modify the final order of the Court from twelve years ago should be viewed with exacting scrutiny.

The writ of error coram vobis lies for an error in fact not apparent on the record which, if known by the Court, would have prevented rendition of the judgment. Dobie v. Commonwealth, 198 Va. 762, 769, 96 S.E. 2d 747, 752 (1957). In Virginia, "coram vobis

has been substantially limited by the General Assembly through Code §8.01-677." Neighbors v. Commonwealth, 274 Va. 503, 508, 650 S.E.2d 514, 517 (2007); VA Code § 8.01-677 ([f]or any clerical error or error in fact for which a judgment may be reversed or corrected on writ of error *coram vobis*, the same may be reversed or corrected on motion, after reasonable notice, by the court).

B. Coram Vobis is Not a Catchall Means to Achieve a Remedy which is Otherwise Unavailable

Mr. Morris urged the trial court to conclude that the ancillary adverse immigration consequences of his sentence (and by implication his voluntary guilty plea) were facts that, if known, would have caused him to not accept the plea agreement or seek a different sentence. Mr. Morris' reasoning in this regard is both speculative and conclusory. He was charged with a felony and was offered the opportunity to plead guilty to a reduced charge with minimum jail time. Mr. Morris testified that he was primarily interested in limiting his jail time. (App. at 241). There is simply no way to ascertain twelve years later that he would not have accepted the same deal when faced with the possibility of a felony conviction which would also have had immigration consequences. His argument invites the Court to speculate that the outcome would have been different.

Fundamentally, the gravamen of Mr. Morris' petition asserts an ineffective assistance of counsel claim, which is not a defect addressed by the writ of coram vobis. As articulated in Blowe v. Peyton by the Virginia Supreme Court, coram vobis does not supplant the writ of habeas corpus. Blowe v. Peyton, 208 Va. 68, 74, 155 S.E. 2d 351, 356 (1967). The remedy of coram vobis is inapplicable even when the remedy of habeas corpus is no longer available. Id. at 358. A writ of coram vobis may not be used where the error can be corrected by another statutory mechanism. Dobie, 198 Va. at 769, 96 S.E. 2d at 752.

A claim asserting ineffective assistance of counsel should be made in a habeas corpus proceeding. See VA Code § 8.01-654; see also Commonwealth v. Rodriguez, 63 Va. Cir. 137 (Fairfax, 2003) (denying petitioner's coram vobis petition where the claim should have been brought in a habeas corpus proceeding and emphasizing that the expiration of time for filing a habeas corpus petition does not confer upon the Court the authority to hear an ineffective assistance of counsel claim by means of a writ of error coram vobis).

Simply stated, established and binding precedent does not permit the trial court to fashion a remedy via the writ of error coram

vobis which is statutorily provided for by *habeas corpus* and which is not supported by any published appellate decision in Virginia.

In Virginia, writs of *habeas corpus* are governed by VA Code § 8.01-654, which states in pertinent part:

> A. 2. A petition for writ of *habeas corpus ad subjiciendum*, other than a petition challenging a criminal conviction or sentence, shall be brought *within one year* after the cause of action accrues. A habeas corpus petition attacking a criminal conviction or sentence, except as provided in § 8.01-654.1 for cases in which a death sentence has been imposed, shall be filed *within two years* from the date of final judgment in the trial court or within one year from either final disposition of the direct appeal in state court or the time for filing such appeal has expired, whichever is later.
>
> B. 1. With respect to any such petition filed by a *petitioner held under criminal process*, and subject to the provisions of subsection C of this section and of § 17.1-310, only the circuit court which entered the original judgment order of conviction or convictions complained of in the petition shall have authority to issue writs of habeas corpus. (emphasis added).

The statute contains no exception allowing for petition to be filed outside of these limitations periods. See Hines v. Kuplinski, 267 Va. 1, 591 S.E.2d 692 (2004). The petitioner's guilty plea was accepted in 1997. The state of the immigration law at the time made him deportable, just as it does now. Accordingly, assuming the trial court even had the jurisdiction to consider the substantive merits of the defendant's *habeas* petition, the petition is untimely and the trial

court has no procedural authority to consider his claims. The fact that Mr. Morris was allegedly unaware of the immigration consequences within the statute of limitations does not extend the statutory period for filing a habeas corpus claim.

However, apart from being time-barred, which alone should result in the denial of the defendant's motion, the trial court also lacks the subject matter jurisdiction to consider the defendant's arguments because the defendant is not currently under the criminal process of this Court.

> *Habeas corpus* is a writ of inquiry granted to determine whether a person 'is detained without lawful authority.' It is available only where the release of the prisoner from his immediate detention will follow as a result of an order in his favor. It is not available to secure a judicial determination of any question which, even if determined in the prisoner's favor, could not affect the lawfulness of his immediate custody and detention. *It cannot be used to modify or revise a judgment of conviction.*

McClenny v. Murray, 246 Va. 132, 134, 431 S.E.2d 330, 331 (1993) (emphasis added). The plain language of VA Code § 8.01-654 requires that the defendant must demonstrate that he is being detained without lawful authority. Id.

Mr. Morris is not under the criminal process of the trial court. "Under the common law, the purpose and scope of the writ of *habeas corpus* is to test the legality of a convict's detention. The writ is

available only when the release of the convict from detention will follow as a result of an order in the convict's favor. Dorsey v. Angelone, 261 Va. 601, 544 S.E. 2d 350 (2001) (citing Virginia Parole Bd. v. Wilkins, 255 Va. 419, 420-421, 498 S.E.2d 696 (1998).

i. The Writ of Error Coram Vobis is Not a Means to Retroactively Modify or Vacate Sentence or Conviction

The legislature and the Courts of Virginia have defined the applicability of the writ of error coram vobis and the statute and cases control here. Section 8.01-677 of the Virginia Code defines the writ: "for any clerical error or error in fact for which a judgment may be reveresed or corrected on writ of error coram vobis, the same may be reversed or corrected on motion, after reasonable notice, by the court." The Courts have limited the applicability of the writ, noting that "coram vobis has been substantially limited by the General Assembly through Code 8.01-677." Neighbors v. Commonwealth, 274 Va. at 508, 650 S.E.2d at 517 (2000).

The Virginia Supreme Court considered the applicability of the writ of error coram vobis in Dobie v. Commonwealth, 198 Va. at 769, 96 S.E. 2d at 752 (1957). In Dobie, the defendant, who had been convicted of robbery and rape, assigned error on two grounds, alleging (1) that his conviction was invalid because his plea of guilty

was involuntary and (2) that there was a conflict in the evidence which raised a reasonable doubt as to his guilt. Dobie, 198 Va. at 768, 96 S.E. 2d at 751.

The defendant argued ineffective assistance of counsel coupled with actual innocence. He asserted that his attorneys coerced him into pleading guilty to the charge of rape, a charge to which, in spite of his guilty plea, he claimed innocence. In affirming the trial court's denial of the motion, the Court offered guidance on the applicability of the writ.

According to the Court, the principal function of coram vobis is to afford a court an opportunity to correct its record with reference to a vital fact not known when judgment was rendered, and which could not have been presented by a motion for a new trial, appeal, or other existing statutory proceeding. Dobie, 198 Va. at 769, 96 S.E. 2d at 752. "It lies for an error of fact not apparent on the record, not attributable to the applicant's negligence, and which if known by the court would have prevented rendition of the judgment. It does not lie for newly discovered evidence or newly-arising facts. . . ." Dobie, 198 Va. at 769, 96 S.E. 2d at 752.

Of note, the Court speaks of "a vital fact not known when

judgment was rendered," in contrast to a "question of procedure," Dobie, 198 Va. at 771, 96 S.E. 2d at 753. While the former may provide a basis for coram vobis relief, the latter, which, in Dobie, was as a procedural (i.e., tactical) decision to plead guilty, does not. Furthermore, the fact or facts upon which the coram vobis petition is based must be of such a character that the Court, had it been aware of the facts alleged, could not render judgment. The Court provides examples of error of facts which would have prevented rendition of judgment such as mental incompetence, death, and infancy, not immigration consequences or ineffective assistance of counsel.

Notwithstanding the broader import of this distinction, Dobie is likewise instructive because of its practical import. The defendant's petition for coram vobis relief alleged ineffective assistance of counsel. In affirming the trial court's decision, the Court reasoned that if a mistake was made by the defendant's attorneys, it was not correctible by the writ of coram vobis. Other means are available to seek redress of ineffective assistance of counsel.

Ten years passed before the Virginia Supreme Court's next significant discussion of coram vobis relief. In Blowe v. Peyton the Court affirmed the trial court's denial of the petitioner's writ of error

coram vobis, which alleged various infirmities, principal among them being ineffective assistance counsel. In Blowe, the foremost issue confronting the Court was whether a writ of error coram vobis may serve as a substitute for a writ of *habeas corpus*. Blowe, 208 Va. at 74, 155 S.E. 2d at 356.

On appeal, the petitioner asserted that the trial court erred in denying his petition for a writ of error coram vobis or, alternatively, a writ of a *habeas corpus*. Consequently, a focal point of the Supreme Court's opinion centered upon the distinction between the two writs. With respect to *habeas corpus*, the Court stated:

> Habeas corpus is a writ of inquiry granted to determine whether a person 'is detained without lawful authority' . . . . It is available only where the release of the prisoner from his immediate detention will follow as a result of an order in his favor. *It is not available to secure a judicial determination of any question which, even if determined in the prisoner's favor, could not affect the lawfulness of his immediate custody and detention. It cannot be used to modify or revise a judgment of conviction.*'

Blowe, 208 Va. at 73, 155 S.E. 2d at 356. (citing Peyton v. Williams, 206 Va. 595, 601, 145 S.E.2d 147, 151 (1965); McDorman v. Smyth, 187 Va. 522, 47 S.E.2d 441 (1948); Smyth v. Holland, 199 Va. 92, 96, 97 S.E.2d 745, 748 (1957); Smyth v. Midgett, 199 Va. 727, 730, 101 S.E.2d 575, 578 (1957) (emphasis added).

In regard to coram vobis, the Court discussed its availability as

a common law remedy in the context of its statutory authorization.[1] Moreover, the Court framed the issue of the writ's applicability aptly, where it stated: "[t]he courts are now frequently called upon to deal with petitions or motions for writs of error coram vobis on the basis of the lack of availability of *habeas corpus* under the facts and circumstances of the particular case." Blowe, 208 Va. at 74, 155 S.E. 2d at 356.

In holding that coram vobis was inapplicable, the court stated:

> Our statute is in simple, clear, and unambiguous language, and we read it to mean what it says. It does not provide that it may be used to obtain a writ of error, or an appeal, or *for any purpose other than to correct a 'clerical error or error in fact.' It does not supplant the writ of habeas corpus.* If its provisions should be widened, the enlargement should be effected by the legislature.

Blowe, 208 Va. at 74, 155 S.E. 2d at 356. (emphasis added). In doing so, the Court clarified and restricted the purposes for which the writ may be employed. It likewise emphasized that, absent legislative modification, the writ should not be used to effectuate remedies provided for by other writs.

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[1] The writ of error *coram vobis* is codified in VA Code § 8.01-677, which states: "[f]or any clerical error or error in fact for which a judgment may be reversed or corrected on writ of error *coram vobis*, the same may be reversed or corrected on motion, after reasonable notice, by the court."

The remaining Virginia cases interpreting the remedy of coram vobis follow and hold that the writ is an inappropriate remedy by which to challenge a guilty plea when the challenge is not to a clerical error or error in fact. The defendant in Neighbors claimed he was incapacitated by drugs at the time of his plea and consistent with settled law, the Neighbors court held that this was not "an error of fact" that would have prevented rendition of judgment.

Section 8.01-677 and applicable Virginia case law outline the parameters of the applicability of any common law writ to the case at hand. If ineffective assistance of counsel is the basis for requesting a remedy, the writ of coram vobis is not, according to the plain language of Neighbors and Blowe, a substitute for the writ of habeas corpus. Neighbors, 274 Va. at 508, 650 S.E.2d at 517 and Blowe, 208 Va. at 74, 155 S.E.2d at 356. Since there has been no clerical error or error in fact alleged, as defined by Virginia law, neither § 8.01-677 nor the common law authorize the use of the writs in this case.

Only the Dobie court defines an error in fact, giving the examples of death of a party prior to judgment, or infancy, as errors that would have *prevented* rendition of judgment. Dobie, 198 Va. at

769, 96 S.E. 2d at 752. Clearly, immigration consequences of a guilty plea are not such an error in fact.

While not controlling, the decision and opinion of the Supreme Court of California in People v. Hyung Joon Kim are instructive. There, the defendant pleaded guilty to one charge and in exchange the court dismissed other charges pursuant to a plea agreement. People v. Hyung Joon Kim, 45 Cal.4th 1078, 202 P.3d 436 (2009). The defendant then faced deportation as a result of his convictions and filed a writ of coram nobis, alleging ineffective assistance of counsel in providing immigration advice. Id. at 1089, 202 P.3d at 444. The California Supreme Court, as the Virginia Supreme Court did in Dobie, found that the type of error in fact that would prevent rendition of judgment includes for example infancy, death of a party pending suit, or insanity. Id. at 1092, 202 P.3d at 445-446. The court further held that the remedy of coram nobis does not lie to correct errors of law, directing the courts to look at the "fact" in the "error of fact" and not to its legal effect. Id. at 1093, 202 P.3d at 447. To qualify as the basis for relief under coram nobis, the newly discovered facts must establish a basic flaw that would have prevented rendition of judgment, such as infancy or death. Id. at 1103, 202 P.3d at 453.

New facts that speak to the legal effect of a guilty plea are not the "error in fact" which permits coram vobis relief. Id. at 1104, 202 P.3d at 454. As in the Virginia decisions, the California Supreme Court directed that ineffective assistance claims must be pursued in habeas corpus proceedings or other statutory means and not through coram vobis.

It is clear from Virginia law that ineffective assistance claims should not be remedied by coram vobis relief. If Mr. Morris' claim in that his counsel was ineffective in failing to advise him of immigration consequences, and therefore he has an error of fact which must be remedied by coram vobis relief, his claim under law must fail. If his claim is that immigration consequences or deportability themselves are the error in fact that must remedied by coram vobis relief, this claim too must fail. This was a circumstance existing at the time of the plea which makes the remedy unavailable. It is by no definition an error of fact which would have prevented rendition of judgment on a charge of petit larceny.

ii. The Writ of Coram Vobis has Been Applied Rarely in Virginia Courts to Address Adverse Immigration Consequences

Since Blowe, no Virginia appellate court has considered the

considerably more narrow issue of whether coram vobis may be used to modify or vacate a sentence or conviction where adverse immigration consequences have arisen and *habeas* relief is no longer available. The scant authority interpreting coram vobis in this specific context instead emanates from the circuit courts – in particular, the Circuit Courts of Alexandria, Fairfax County and Arlington County.

However, it must be emphasized that notwithstanding the absence of appellate authority considering coram vobis arguments, both Dobie and Blowe remain established precedent. The rules of law articulated must be accorded their proper controlling weight.

Nevertheless, a comprehensive treatment of the topic requires discussion of the more recent decisions from the circuit courts. In Alexandria, the Honorable John E. Kloch ruled in the case of Asbun v. Commonwealth, that the writ of coram vobis is both the wrong remedy to address the immigration consequences of a plea and/or sentence and to cure any claim of alleged ineffective assistance of counsel. Asbun v. Commonwealth, No. 0707-07-4 (Va. Cir. March 14, 2008). Despite a full evidentiary hearing in which evidence was taken, Judge Kloch ruled that the writ was not the correct remedy. The matter was appealed to the Virginia Supreme Court and the court

declined to review Judge Kloch's decision.

In Commonwealth v. Siridavong, the Honorable David T. Stitt denied a petition for a writ of error coram vobis. Commonwealth v. Siridavong, 49 Va. Cir. 138 (Fairfax, 1999). The factual context upon which the petition was based again concerned adverse immigration consequences brought about by a felony conviction.

In reaching his decision, Judge Stitt did not address the merits of the petitioner's claim – i.e., ineffective assistance of counsel. Instead, he focused on the *antecedent* question of whether coram vobis could be used to modify the petitioner's conviction simply because unanticipated immigration consequences subsequently developed.

Judge Stitt concluded that coram vobis would not lie for such a purpose. In particular, he stated:

> Defendant asks the Court to modify the Final order as a matter of equity based on extraordinary and unanticipated consequences. However, a writ of error *coram vobis* must relate to facts not before the Court but in existence at the time the judgment was rendered. Here, Defendant alleges facts that were not in existence at the time of trial. A writ of error *coram vobis* does not lie for newly-discovered evidence or newly-arising facts, such as an unanticipated consequence which arose after the judgment was rendered.

Siridavong, 49 Va. Cir. at 138.

In Smith v. Commonwealth, Judge Dennis J. Smith denied a petition for a writ of error coram vobis squarely on jurisdictional grounds. Smith v. Commonwealth, 62 Va. Cir. 68 (Fairfax, 2003). The petitioner asserted ineffective assistance of counsel, specifically alleging misadvice concerning the length of the sentence he could receive upon conviction. According to the petitioner, his attorney's representations, which later turned out to be erroneous, induced him to plea guilty.

Judge Smith stated:

> [a] writ of *coram vobis* may not be used where the error could be corrected by [an]other statutory proceeding. Claims of ineffective assistance of counsel should be asserted in a *habeas corpus* proceeding. Petitioner, in fact, did file a petition for [a] writ of *habeas corpus* based upon ineffective assistance of counsel and, according to Petitioner, the Virginia Supreme Court denied the habeas petition as time barred. As previously articulated, a writ of *coram vobis* may not be used where the error at issue could be raised through another statutory proceeding.

Smith, 62 Va. Cir. at 68 (citing Dobie, 198 Va. at 769, 96 S.E. 2d at 752.) (internal citations omitted). Notably, the petitioner alleged that his attorney affirmatively misadvised him on the potential ramifications of his guilty plea.

Citing established Virginia precedent, the Court noted that ineffective assistance of counsel, in any form, should be asserted in a

habeas proceeding. Furthermore, although observing that "a writ of coram vobis is used to further the interest of justice in cases where there is no other remedy," the Court distinguished between the nonexistence of a remedy from circumstances where a remedy exists, but is time barred. Smith, 62 Va. Cir. at 68. Even though a *habeas* petition is time barred, that circumstance does not spontaneously bestow jurisdiction for the Court to grant a coram vobis petition.

The Circuit Court for Fairfax County considered the issue once again in Commonwealth v. Singh, where, in a letter opinion by Judge Leslie M. Alden, the Court denied an additional coram vobis petition. Commonwealth v. Singh, 53 Va. Cir. 88 (Fairfax, 2000). In doing so, the Court focused on the quantum of evidence necessary to effectively challenge the proceeding which the petitioner alleges to be infirm. The context of the petition yet again involved adverse immigration consequences produced by a criminal conviction (which was based upon plea agreement).

Emphasizing that the proceeding challenged is presumed to be correct and that the burden of showing otherwise rests on the petitioner, the Court stated:

> [t]he petition and any other supporting affidavits must be tested within the context of the record of the case for their reasonableness, the probability of their truth, the effectiveness of the attack they make on the original judgment and their relationship to the general enforcement of law with justice to all.

Singh, 53 Va. Cir. at 88 (citing Taylor v. State of Alabama, 335 U.S. 252, 68 S.Ct. 1415 (1948) (internal quotation marks omitted). After consideration of the evidence provided in support of the petition, the Court concluded that the petitioner failed to provide sufficient evidence.[2]

Following the Court's reasoning in Smith, in Commonwealth v. Rodriguez, Judge Randy I. Bellows likewise denied a coram vobis petition alleging ineffective assistance of counsel. Commonwealth v. Rodriguez, 63 Va. Cir. 137 (Fairfax, 2003). Judge Bellows echoed the reasoning of his colleagues and stressed that claims of ineffective assistance of counsel should be asserted in *habeas corpus* petitions. Rodriguez, 63 Va. Cir. at 137. Furthermore, in a footnote, Judge Bellows fittingly stated:

> It may well be that the time for filing a habeas corpus petition has long expired and, indeed, had expired at the time the instant petition was filed. Even if that is the case, however, it does not confer upon this Court the authority to hear an ineffective assistance of counsel claim in the context of a

[2] The Court also highlighted that the petitioner signed a two-page documents setting out his plea agreement with the Commonwealth.

petition for a writ of error *coram nobis*.

Rodriguez, 63 Va. Cir. at 137 n.1.

Accordingly, then, many of the few published decisions emanating from the courts of the Commonwealth properly adhere to the established precedents of Dobie and Blowe. The significance of this trend is dual. First, Dobie and Blowe are settled authority and their dictates, particularly concerning the *inapplicability* of coram vobis for redress of ineffective assistance of counsel claims, are controlling.

Moreover, as emphasized in Blowe, the Virginia coram vobis statute is precise and does not allow for it to be used for any purpose other than to correct a clerical error or error in fact. Blowe, 208 Va. at 74, 155 S.E. 2d at 356. To interpret the statute otherwise stretches its construction to the breaking point; as the Supreme Court stated, "if its provisions should be widened, the enlargement should be effected by the legislature." Id.

One exception to the trend of Virginia's Circuit Courts to follow the law of established precedent applicable to coram vobis appears to be the opinion of Judge William Newman, Jr, issued in the case of Commonwealth v. Wael Mohamed, 71 Va. Cir. 383, (Arlington, 2006).

On its face, the reasoning in this decision is clearly erroneous. In arguing that the writ is applicable, Newman fails to distinguish between the unavailability of other remedies (*habeas corpus*) and the fact that such remedy is time barred. He further fails to recognize the fundamental point of the Morgan decision, cited in his opinion, that the applicability of the writ is a function of specific statutory authorization, not some equitable whimsy of the Court in search of a remedy where none exists.

When compared with the United States Supreme Court's interpretation of coram vobis in United States v. Morgan, which limited the reach of the writ to its underlying statutory authorization, it necessarily follows that coram vobis relief in Virginia can extend no further than the plain language of its authorizing statute. See Morgan, 346 U.S. at 506-07, 74 S.Ct. at 250; See VA Code § 8.01-677. In finding otherwise and in construing coram vobis otherwise, Newman violates both the statute and standing precedent construing the same.

C. The Federal Cases do not Control and are Inapposite

The state of law in Virginia is not governed by United States v. Denedo, 129 S. Ct. 2213 (2009), and United States v. Morgan, 346

U.S. 502 (1954). To the extent the Court relies on language from these cases, the writ was found to be applicable ONLY to correct a "fundamental [legal or factual] error." Furthermore, Morgan dealt with the *denial* of counsel in a Federal Court case, based on federal statutory authorization, and held that the denial of counsel deprived the Defendant of a basic constitutional right. The Morgan Court further found that a proceeding challenged by a writ of error coram vobis is presume to be correct and the burden of showing otherwise rests on the petitioner. Morgan at 512.

Additionally, the holding in Denedo was very narrow and explicitly did not address when the writ was applicable and under what circumstances. The Denedo holding applied only to United States military courts and found that military courts had jurisdiction to entertain the writ of coram nobis, saying specifically and without reservation, "we hold *only* that the military appellate courts had jurisdiction to hear respondent's request for a writ of coram nobis" (emphasis added). Denedo, 129 S. Ct. at 2224. This holding in no way supercedes the decisions of Virginia Rule 1:1, § 8.01-677, and the Virginia Courts. As the concurring opinion in Denedo points out, military courts are markedly different from any other courts in that

their jurisdiction is precisely limited at every turn and further that those limits cannot be overridden by judicial extension of statutory jurisdiction. Id. The Supreme Court's finding that military courts have jurisdiction to entertain coram vobis writs applies only to military courts. The holding in Denedo is essentially that these courts of very limited statutory jurisdiction have jurisdiction to entertain writs of coram vobis. There is simply no logical applicability of this holding respecting to military court jurisdictions to Virginia Courts that are also of limited jurisdiction by virtue of Rule 1:1, § 8.01-677, as well as Virginia case law which has consistently held that the remedy is not applicable under Virginia law and statutes. See Dobie, 198 Va. 762, 96 S.E.2d 747; Blowe, 208 Va. 68, 155 S.E.3d 351; Neighbors, 274 Va. 503, 650 S.E.2d 514.

Morgan considered the common law writ of coram vobis in the context of the federal code, and the Court's emphasis on statutory procedure is significant. Specifically, the Court predicated the power to grant coram vobis relief on statutory authorization. Moreover, by way of context, as a starting point for any judgment challenged or sought to be modified, the Court also explained that a proceeding challenged by a writ of error coram vobis is presumed to be correct

and the burden of showing otherwise rests on the petitioner. Morgan at 512.

Accordingly, at minimum, Morgan stands for the proposition that availability of the writ of coram vobis as a remedy is tied to statutory authorization and the burden to affirmatively demonstrate the factual infirmities of the challenged proceedings falls upon the petitioner.

D. Remedy of the Writ of Audita Querela has No Application in This Matter

The writ of audita querela is a common law writ brought by a defendant to obtain relief against the consequences of the judgment on account of some matter of defense or discharge, arising since its rendition and which could not be taken advantage of otherwise. Black's Law Dictionary (8th ed. 2004).

Counsel has pointed to no defense to the charge or any fact that would discharge him from the crime to which he pleaded guilty and was sentenced accordingly. There is no published authority in Virginia granting relief under this writ, so the Court must look only to other Circuit Court opinions as well as Federal law. In Commonwealth v. Sharma, the Fairfax Circuit Court declined to grant a writ of audita querela in which a reduction of the sentence was

requested for immigration reasons. Commonwealth v. Sharma, 58 Va. Cir. 460 (Fairfax, 2003). The Court cited § 19.2-303 of the Virginia Code, which deprived the Court of jurisdiction to modify a sentence once it has been fully served. Id. at *2. In United States v. Ayala the U.S. Court of Appeals for the District of Columbia declined to apply the common law writ to allay immigration consequences, emphasizing the need for petitioner to show a post-judgment contingency supplying a matter of "discharge" or "defense". United States v. Ayala, 894 F.2d 425 (D.C. Cir. 1990). The Court was clear that the writ does not furnish an equitable basis for relief independent of any legal defect in the underlying judgment. Ayala, 894 F.2d at 429. The Court went on to hold "...we do not believe that the "gap filling" allowed by Morgan permits a court to redefine a common law writ in order to create relief not otherwise available in the federal postconviction remedial scheme." Id. See United States v. Morgan, 346 U.S. 502, 74 S.Ct. 247 (1954).

The paucity of authority on the writ of audita querela likely is a result of the limiting language of the definition. The plain, simple, and limiting language that requires a matter of "discharge" or "defense" to the charge is not present here. The immigration consequences of a a

sentence are in no manner or definition a "defense" or "discharge" to the charge, and further the matter at issue did not arise "since" the rendition of judgment. By Mr. Morris' own words, the consequences of his plea and sentence were manifest at the time of his plea and not a matter that arose since that time.

II. THE TRIAL COURT ERRED IN DETERMINING THE WRIT OF CORAM VOBIS, OR ALTERNATIVELY THE WRIT OF AUDITA QUERELA, IS AN APPLICABLE REMEDY IN APPELLEE'S CASE

Ms. Dillard testified that she has no recollection of the case and that she would not have advised Mr. Morris of any immigration matters, as she did not receive any immigration training until after her representation of Mr. Morris. (App. at 194, 195). Mr. Morris, however, testified that he interpreted Ms. Dillards's actions as the equivalent of immigration advice. (App. at 270). There is no evidence that Ms. Dillard gave Mr. Morris misinformation.

The decision of the United States Supreme Court in Padilla v. Kentucky held, on a petition for habeas corpus, that counsel for defendant must advise their client that they may face immigration consequences as a result of their criminal convictions. Padilla v. Kentucky, No. 08-651, 2010 WL 1222274 (S. Ct. Mar. 31, 2010). In Padilla's case the Court considered whether counsel's representation

"fell below an objective standard of reasonableness" when his counsel told him that he "did not have to worry about immigration status since he has been in the country so long." Id. at *3, 7. The Court held that constitutionally competent counsel would have advised him that his conviction for drug distribution made him subject to automatic deportation. Id. at *3. The Court noted that the relevant immigration statute regarding Padilla's charges is succinct, clear, and explicit in defining the removal consequences if convicted. Id. at *8. Padilla's counsel could have easily determined that his plea would make him eligible for deportation simply by reading the text of the statute. Id. Instead, Padilla's counsel provided him false assurance that his conviction would not result in his removal from the country. Id. The Court went on further to say that where the consequences are complicated, counsel need only advise that there may be immigration consequences and need not give specific advice. Id.

In the instant case, the term that makes Mr. Morris deportable is the length of his sentence on a certain type of crime, a matter sufficiently esoteric and complex that trial counsel would have a need only to advise her client that he might have consequences. Unlike counsel in Padilla, Ms. Dillard did not give Mr. Morris false

assurances regarding his immigration status. Mr. Morris testified that when he met Ms. Dillard, he gave her his license and green card to copy and she said "good." (App. at 220, 287). Counsel in Padilla fell below an objective standard of reasonableness when a false assurance was provided that he "did not have to worry about immigration status since he has been in the country so long," which is markedly different than Ms. Dillard saying "good" when she was able to copy his documents. Mr. Morris, who was obviously aware that there might be immigration ramifications, testified he assumed that any immigration issues would be fine based on her statement upon viewing his green card. (App. at 270). Mr. Morris testified that Ms. Dillard gave him the equivalent of immigration advice and there is no evidence this was wrong advice, so arguably Ms. Dillard fulfilled her obligations under Padilla and there is no effective assistance claim, as she acted as constitutionally competent counsel.

However, should the Court find that trial counsel was arguably ineffective, a claim of ineffective assistance of counsel should be brought on a habeas corpus claim. The Supreme Court's decision in Padilla does nothing to change the fact that, as the Virginia courts have consistently held, coram vobis remains the wrong remedy to

address Mr. Morris' immigration problems.

CONCLUSION

WHEREFORE, based on the preceding points and authorities, the Commonwealth respectfully urges this Court to deny the requested relief.

Respectfully submitted by,

Krista Boucher
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Alexandria, Virginia 22314

CERTIFICATE

Pursuant to Rule 5:17(e) of the Rules of this Court, Appellant states the following:

1. The Appellant is:

   Krista Boucher, Deputy Commonwealth's Attorney
   Commonwealth's Attorney's Office
   520 King St. #301
   Alexandria, Virginia 22314
   (703) 746.4100

2. The Appellee is Emmanuel Morris, who is represented by counsel:

   Jennifer Varughese, Esq.,
   9843 Business Way
   Manassas, Virginia 20110
   (703) 499.9005

3. Three copies of this Brief of Appellant and three copies of the Joint Appendix were mailed on the 30th day of April, 2010 to opposing counsel.

4. Counsel for Appellee was privately retained.

5. Appellant desires to state orally to a panel of this Court the reasons why the Court should deny the requested relief.

Krista Boucher
Deputy Commonwealth's Attorney