In The

Supreme Court of Virginia

RECORD NO. 092163

COMMONWEALTH OF VIRGINIA,

Appellant,

v.

EMMANUEL MORRIS,

Appellee.

BRIEF OF APPELLEE

Jennifer S. Varughese (VSB No. 72289)
LIVESAY & MYERS, P.C.
9843 Business Way
Manassas, Virginia 20110
(703) 361-7735 (Telephone)
(703) 361-2114 (Facsimile)
varughese@lawyers-virginia.com

Counsel for Appellee

THE LEX GROUP ♦ 1108 East Main Street ♦ Suite 1400 ♦ Richmond, VA 23219
(804) 644-4419 ♦ (800) 856-4419 ♦ Fax: (804) 644-3660 ♦www.thelexgroup.com

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

STATEMENT OF THE CASE 1

STATEMENT OF FACTS 2

ARGUMENT 5

I. THE TRIAL COURT HAD AUTHORITY TO GRANT A WRIT OF ERROR CORAM VOBIS UNDER VIRGINIA STATUTE, COMMON LAW, VIRGINIA CASE LAW, AND FEDERAL CASE LAW 5

A. Statutory Authorization 7

B. Common Law 9

C. Virginia Case Law 11

1. Supreme Court of Virginia 11

a. Error of Fact in Light of Recent Case Law 14

2. Virginia Circuit Court 15

D. Federal Case Law 16

E. The Trial Court Did Not Err in Holding That, in the Alternative, It Had the Authority to Grant a Writ of Audita Querela 17

II. THE TRIAL COURT DID NOT ERR IN GRANTING THE WRIT OF ERROR CORAM VOBIS IN APPELLEE'S CASE 18

A. Ineffective Assistance of Counsel Proven 18

1. Impact of Padilla on Ineffective Assistance of Counsel Determination..... 19

B. Discretionary Criteria for Granting of Writ Satisfied..... 21

CONCLUSION 21

CERTIFICATE OF FILING AND SERVICE..... 23

TABLE OF AUTHORITIES

Page(s)

CASES

Asbun v. Commonwealth,
No. 0707-07-04 (Va. Cir. March 14, 2008).....15

Blowe v. Payton,
208 Va. 68, 155 S.E.2d 351 (1967) 9, 11, 12, 13

Commonwealth v. Mubarak,
68 Va. Cir. 422 (Fairfax, 2005).....18

Commonwealth v. Singh,
53 Va. Cir. 88 (Fairfax, 2000).....16

Commonwealth v. Siridavong,
49 Va. Cir. 138 (Fairfax, 1999).....16

Dobie v. Commonwealth,
198 Va. 762, 96 S.E.2d 747 (1957) 9, 10, 12, 14

Fajardo v. Commonwealth,
19 Va. Cir. 162 (1990) 18

Fong Yue Ting v. United States,
149 U.S. 698, 13 S. Ct. 1016 (1893).....14

I.N.S. v. St. Cyr,
533 U.S. 289, 121 S. Ct. 2271 (2001).....15

Neighbors v. Commonwealth,
274 Va. 503, 650 S.E.2d 514 (2007) 9, 10, 13, 21

Padilla v. Kentucky,
559 U.S. ___, 130 S. Ct. 1773 (S. Ct. Mar. 31, 2010) .....passim

Smith v. Commonwealth,
62 Va. Cir. 68 (Fairfax, 2003).....16

United States v. Denedo,
556 U.S. ___ , 129 S. Ct. 2213(2009).....passim

United States v. Morgan,
346 U.S. 502, 74 S. Ct. 247 (1954).....16, 17

CONSTITUTIONAL PROVISION

U.S. CONST. amend. VI 5

STATUTES

INA § 101(a)(43) 19

INA § 101(a)(43)(G) 19, 20

Va. Code Ann. § 8.01-654.....5, 6

Va. Code Ann. § 8.01-677.....7, 8, 11, 17

OTHER

3 Criminal Defense Techniques § 60A.01 (1999) 15

3 Criminal Defense Techniques § 60A.02[2] (1999) 15

Black's Law Dictionary 17

STATEMENT OF THE CASE

Reverend Emmanuel Morris, pursuant to a guilty plea, was convicted of one count of petit larceny in the Circuit Court of Alexandria (hereinafter, "Trial Court") on July 15, 1997 by the Honorable Donald M. Haddock. Joint Appendix, hereinafter "App." at 1-4. For this offense, he was sentenced to 12 months in jail with 11 months suspended. Id. at 3. The remaining 30 days were to be spent in a modified work release program. Id. at 4. Reverend Morris both paid his restitution and completed the work release program earlier than anticipated. Id. at 5. Thus, his probation ended on August 28, 1997. Id.

Based on ineffective assistance of counsel, Reverend Morris filed a "Writ of Error Coram Nobis or, in the Alternative, Writ of Audita Querela" on May 21, 2009. Id. at 6-37. Pursuant to the motion, oral argument was presented to Judge Haddock on June 18, 2009, solely on the issue of whether a trial court has the authority to modify a criminal sentence through the writs of coram vobis or audita querela. Id. at 58-148. Thereafter, the Trial Court issued a five (5) page opinion by letter on June 26, 2009, wherein it ruled that the writ of error coram vobis and writ of audita querela are appropriate vehicles to review and modify a criminal sentence on grounds of ineffective assistance of counsel. Id. at 149-153.

Following the issuance of this opinion, and after an approximately four (4) hour hearing on July 15, 2009, Judge Haddock ruled on July 27, 2009 that Reverend Morris was deserving of a sentence modification of one (1) day which decreased his total sentence to three hundred sixty-four (364) days. Id. at 165-412; 469-473. The Petition for Appeal followed and was granted on March 25, 2010.

STATEMENT OF FACTS

Reverend Morris was represented during his criminal proceedings by a Public Defender, Ms. J. Amy Dillard. App. at 2. During their first and only meeting prior to trial, presumably because of his heavy foreign accent that is present to this day, Ms. Dillard inquired into whether Reverend Morris was a United States (hereinafter, "U.S.") Citizen. Id. at 417. In response, Reverend Morris handed her his green card and indicated that he was not a U.S. Citizen, but a Lawful Permanent Resident. Id. According to Reverend Morris' Affidavit, Ms. Dillard replied: "good, then [I] can pursue the Judge to give [you] a lesser sentence based upon [you] pleading Guilty to the charge instead of prolonging the trial." Id. Having made his immigration status known to Ms. Dillard, Reverend Morris was left with the distinct impression that accepting the proposed sentence of twelve (12) months in jail with eleven (11) suspended would in no way negatively affect

such status within the U.S. Id. In relying on the advice of his counsel and after having made his immigration status known, on July 15, 1997, he pled guilty to petit larceny and received the recommended sentence of twelve (12) months in jail with all but eleven (11) months suspended. Id. at 1-4.

Years later, in 2004, Reverend Morris applied for U.S. Citizenship in Charlotte, N.C. Id. at 418. Though he passed the English, U.S. History, and U.S. Government tests, he was informed that his case could not be immediately approved. Id. An approval was never granted; rather, deportation proceedings commenced because of his 1997 petit larceny conviction. Id. at 423-425. From 2005 through 2008, Reverend Morris tried, in vain, to contest deportation proceedings. Id. at 426-433. It was not until his last immigration hearing, on December 15, 2008, that the immigration judge advised him to seek post-conviction relief because of his status as an "aggravated felon." Id. at 419. Though not initially charged as an aggravated felon by the Department of Homeland Security (hereinafter, "DHS"), the immigration judge agreed with DHS counsel that since the conviction was for a theft offense that carried with it a term of imprisonment of one (1) year, regardless of any sentence suspension, Reverend Morris was, in fact, an aggravated felon. Id. at 423-425. With no immediate

immigration relief available, the immigration judge entered an order of deportation. Id. at 419.

Immediately thereafter, Reverend Morris sought counsel to pursue post-conviction relief and also filed an appeal of the immigration court's decision with the Board of Immigration Appeals. The writs of coram vobis and audita querela were filed in the Circuit Court for the City of Alexandria on May 21, 2009. Id. at 6-37. As a result of a sentence modification being granted by the Trial Court on July 27, 2009, a Motion to Remand was granted by the Board of Immigration Appeals on February 24, 2010.[1] The deportation matter is currently pending at the Charlotte, N.C. immigration court.[2] Reverend Morris, having survived a Liberian civil war and ultimately devoting to religious pursuits with his Lawful Permanent Resident Wife and four (4) U.S. Citizen Children, has now been given the chance to file for relief in immigration court that was previously unavailable to him.

---

[1] Documentation pertaining to this action is not contained as part of the record because this proceeding took place after the matters before the Trial Court.

[2] Id.

ARGUMENT

I. THE TRIAL COURT HAD AUTHORITY TO GRANT A WRIT OF ERROR CORAM VOBIS UNDER VIRGINIA STATUTE, COMMON LAW, VIRGINIA CASE LAW, AND FEDERAL CASE LAW.

On March 31, 2010, the Supreme Court of the United States issued a landmark decision on the obligation of criminal counsel to properly advise non-citizen defendants whether a particular plea carries with it the risk of deportation. Padilla v. Kentucky, 559 U.S. ___ (S. Ct. Mar. 31, 2010). The Court held that the 6th Amendment of the United States Constitution, which guarantees a right to counsel, extends to non-citizen defendants. As such, misadvice or even a failure to advise a defendant about the implications of accepting a plea offer or entering into a plea agreement that requires an active or suspended sentence amounts to ineffective assistance of counsel in violation of the 6th Amendment. Id. at *9, 13. Notably, the Court's holding was reached without a specific focus on the vehicle used to bring an ineffective assistance of counsel claim or the time in which such a claim is brought after judgment is rendered. Id. at *17. Those aspects of Padilla are instructive in the instant case as the Appellant asserts habeas corpus [pursuant to Section 8.01-654 of the Code of Virginia (1950), as amended] as the only means by which to deal with an ineffective assistance of counsel claim. Brief of Appellant (hereinafter, "Brief") at 8. Additionally,

Padilla clearly delineates what constitutes ineffective assistance of counsel in the situation of a non-citizen in criminal proceedings. Id. at *11-12. In short, under Padilla, the Trial Court acted appropriately in ruling that ineffective assistance of counsel was proven, and the resulting prejudice to Reverend Morris warranted a modification of his sentence.

With the far-reaching backdrop of Padilla in mind, the Appellant is incorrect in its overreaching contention that, in keeping with the finality of judgment basis of Rule 1:1, the judgment in Reverend Morris' case cannot be set aside. As mentioned, the Appellant bases this argument largely on the expiration of time for obtaining a petition for writ of habeas corpus. Brief at 8. The Appellant's discussion of that writ is superfluous since habeas corpus is not applicable to Reverend Morris' case. For habeas to apply, pursuant to Virginia law, Reverend Morris had to have notice, within two (2) years of his conviction, that the conviction needed to be attacked. Va. Code Ann. § 8.01-654 (1950). It was not until years after that time period, at the end of deportation proceedings in 2008, that he obtained such knowledge. App. at 419. Therefore, the Appellant's lengthy discussion of habeas corpus, and its citation of attendant cases, is misguided. The Appellant's argument undermines the true purpose of a writ of error coram vobis and is contrary to Virginia statute, the common

law, Virginia case law, and Federal case law. Furthermore, given the extreme nature of deportation, which is permanent removal from the United States in the case of Reverend Morris, the Appellant's conclusion that Reverend Morris is simply out of luck, for the sake of finality, runs completely counter to the Supreme Court of the United States in its assessment of the common law basis of the writ of error coram vobis. The Supreme Court has held that "…the long-recognized authority of a court to protect the integrity of its earlier judgments impels the conclusion that the finality rule is not so inflexible that it trumps each and every competing consideration." United States v. Denedo, 556 U.S. ___ (2009) at *11, 129 S. Ct. 2213, 2223.

A. Statutory Authorization

There are no Virginia statutes that deal comprehensively with the writ of error coram vobis. Repeatedly in its Brief, the Appellant asserts the superiority of statutory authority on the subject of coram vobis. However, the only Virginia statute that even mentions the writ, Section 8.01-677 of the Code of Virginia (1950), as amended, leaves much room for elaboration in the writ's application:

> "For 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."

Both the statute and even its title, “Errors corrected on motion instead of writ of error coram vobis,” clearly indicate that its focus is “motions” that are separate and distinct from the writ of error coram vobis. Id. The implication of this is that while Section 8.01-677 of the Code of Virginia (1950), as amended, refers to two types of errors that may be redressed by the writ, it does not define the errors and must be interpreted by other relevant sources. Id. Furthermore, the statute is procedural in nature and simply states that motions can serve similar purposes as writs of error coram vobis. Id.

The Trial Court, in its first issued opinion, also came to the conclusion that Section 8.01-677 of the Code of Virginia (1950), as amended, “does not attempt to limit the common law scope of coram nobis.” App. at 151. Later, in its second issued opinion, the Trial Court modified this conclusion to state that while Virginia case law limits the common law basis of coram vobis to clerical errors or errors in fact, Section 8.01-677 of the Code of Virginia (1950), as amended, nonetheless does not specifically limit the scope. Id. at 469. Accordingly, the Trial Court identified an error in fact in the “misinformation” to Reverend Morris “and failure to inform the Court,” resulting in a null guilty plea. Id. at 251.

The conclusion to be drawn from this analysis is that statutory authority simply does not fully address the writ of error coram vobis in Virginia. The Appellant's contention to the contrary is flawed and misleading. In addition to the existing statutory provision, the Trial Court was correctly aided in its approach to the writ by common law, Virginia case law and Federal case law. The Trial Court did not err in using these collective sources to grant the writ in Reverend Morris' case.

B. Common Law

The Trial Court complied not only with the statutory basis of the writ of error coram vobis, but issued a decision consistent with the common law origins of the ancient writ as well. App. at 469-473. Common law has been the basis and source of this Court's jurisprudence on the writ of error coram vobis. See Dobie v. Commonwealth, 198 Va. 762, 96 S.E.2d 747 (1957), Blowe v. Payton, 208 Va. 68, 155 S.E.2d 351 (1967), and Neighbors v. Commonwealth, 274 Va. 503, 650 S.E.2d 514 (2007). As identified in Dobie, the writ of error coram vobis lies for:

> "an error in 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, or facts adjudicated on the trial. It is not available where advantage could have been taken of the alleged error at the trial, as where the facts complained of were known before or at the trial, or where at the trial the accused or his

> attorney knew of the existence of such facts but failed to present them." Dobie, 198 Va. at 769, 96 S.E.2d at 752.

The above factors were more recently reinforced in Neighbors in 2007. See Neighbors, 274 Va. at 508, 650 S.E.2d at 519. So, too, did the Trial Court carefully address the common law bases of the writ, finding that Reverend Morris' case satisfied each of the aforementioned factors. App. at 472-473. As such, the Trial Court appropriately considered and incorporated this Court's existing stance on the availability of relief from a writ of error coram vobis in determining that Reverend Morris' case satisfied each aspect of its common law origins.

The Supreme Court of the United States provided a common law coram vobis assessment in Denedo. 556 U.S. ___, 129 S.Ct. 2213. The Appellant asserts that Denedo dealt with a military tribunal and, therefore, is not applicable to Reverend Morris' case. Brief at 26-27. Denedo, however, is instructive in Reverend Morris' case for two (2) reasons. First, it highlights the fact that the writ, with its common law origins, has "not been well defined" in the scope of "American jurisprudence." Denedo, 556 U.S. at *5. Given the varied treatment of the writ in circuit courts throughout Virginia, this statement rings true. Nonetheless, this Court is urged to affirm the Trial Court's sentence modification not only because it is

consistent with Virginia statutory and common law authority, but also because the modification ultimately serves the writ's chief aim of preventing manifest injustice.

Second, consistent with the Supreme Court's subsequent opinion in Padilla, Denedo clearly holds that the writ is applicable to redress ineffective assistance of counsel claims when immigration consequences arise. Padilla, 559 U.S. ___; Denedo, 556 U.S. at *13. As a result, this Court is aided in its approach to the common law basis of the writ of error coram vobis by Denedo.

C. Virginia Case Law

1. Supreme Court of Virginia

A theme present in the common law bases of the writ is its focus on errors in fact. Section 8.01-677 of the Code of Virginia (1950), as amended, for what it does say about coram vobis, also includes errors in fact as within the writ's reach. This Court, in Blowe, went a step further and narrowed the focus of the writ to clerical errors and errors in fact. Blowe, 208 Va. at 74, 155 S.E.2d at 356.

In reviewing Reverend Morris' case, the Trial Court properly held that Reverend Morris' grievance constituted an error in fact. In its first letter opinion, as previously mentioned, the Trial Court stated that "the error

alleged is one of fact – the fact of misinformation to the petitioner and failure to inform the Court would, if proven, render petitioner's guilty plea not knowingly, intelligently and voluntarily made and accordingly a nullity." App. at 151. Though not explicitly stated, this Court also treated ineffective assistance of counsel as an error in fact in Dobie and Blowe. Dobie, 198 Va. 762, 96 S.E.2d 747; Blowe, 208 Va. 68, 155 S.E.2d 351. According to the Trial Court, this is the logical conclusion because, if ineffective assistance of counsel were not an error of fact, this Court would have simply made that assertion and not proceeded to discuss whether counsel was, in fact, ineffective or discuss other vehicles for post-conviction relief. App. at 151.

In Dobie, the defendant alleged ineffective assistance of counsel on the basis that he was coerced, by his attorneys, to plead guilty to a rape charge even though he was innocent. Dobie, 198 Va. at 766, 96 S.E.2d at 750. Instead of denying the writ on the basis that, even if ineffective assistance was proven it could not be an error in fact, the Court denied the writ because it found that there was no ineffective assistance and, thus, the plea was voluntarily made. Dobie, 198 Va. at 771, 96 S.E.2d at 753.

The defendant in Blowe failed to prove that there was ineffective assistance of counsel stemming from a changed plea of not guilty of

robbery to guilty of grand larceny. 208 Va. at 75, 155 S.E.2d at 358. Both the defendant and his counsel were given notice of the punishment that would be imposed upon conviction of either offense. Id. Again, the Court did not address the alleged ineffective assistance of counsel as not constituting an error in fact, even if proven. Id. Rather, the Court made a determination that the defendant failed to prove ineffective assistance of counsel. Id.

Neighbors v. Commonwealth, marked this Court's last foray into the writ of error coram vobis. Neighbors, 274 Va. 503, 650 S.E.2d 514. The defendant's alleged "lack of capacity due to medication at the time of his guilty plea" was deemed neither a clerical error nor error in fact since the defendant knew of his medical condition when he entered into the Alford plea. Neighbors, 274 Va. at 512, 650 S.E.2d at 523. This scenario easily contrasts with Reverend Morris' case as Reverend Morris was not aware of any misrepresentation by his counsel until several years after his conviction. App. at 419. Furthermore, Reverend Morris did not have any reason to question the sentence as his counsel was fully aware of his immigration status.

a. Error of Fact in Light of Recent Case Law

This Court has previously identified examples of errors of fact which may prevent rendition of judgment: mental incompetence, death, and infancy. **Dobie, 198 Va. at 762, 96 S.E.2d at 747.** The Appellant suggests that failure to include ineffective assistance of counsel resulting in immigration consequences is indicative of this Court's refusal to acknowledge such failure as an error in fact. Brief at 13. In reality, however, this Court has not had the opportunity to broaden the examples of errors in fact that may prevent rendition of judgment. Certainly, when Dobie was decided in 1957, immigration consequences were not at the forefront of criminal legal jurisprudence in Virginia or elsewhere in the United States as it is today. The 1997 introduction of "aggravated felonies" into the Immigration and Nationality Act (hereinafter "INA") raised the stakes for non-citizen defendants such that even misdemeanor convictions carry the risk of permanent banishment from the United States. Jurisprudence from the Supreme Court of the United States has evolved over time to reflect the severity of various, increasingly more stringent, immigration laws. As early as 1893, the Supreme Court held that deportation is a particularly severe "penalty". Fong Yue Ting v. United States, 149 U.S. 698, 740 (1893). In 2001, the Supreme Court

acknowledged that " '[p]reserving the client's right to remain in the United States may be more important to the client than any potential jail sentence.'" I.N.S. v. St. Cyr, 533 U.S. 289, 323 (2001) (quoting 3 Criminal Defense Techniques §§ 60A.01, 60A.02[2] (1999)). Most recently, on March 31, 2010, the Supreme Court held that "[t]he severity of deportation…only underscores how critical it is for counsel to inform her noncitizen client that he faces a risk of deportation." Padilla, 559 U.S. ___.

In sum, this Court is urged to follow the lead of the Supreme Court of the United States and hold that, just as mental incompetence, death and insanity constitute errors in fact that may prevent rendition of a judgment, so, too, should ineffective assistance of counsel resulting in dire immigration consequences be deemed an error in fact. Otherwise, given the severity of deportation, a substantial injustice will result.

2. Virginia Circuit Court

Virginia Circuit Court case law is varied on the subject of coram vobis. In the cases cited in the Appellant's Brief alone, denial of the writ can be summarized as a result of failure to establish ineffective assistance of counsel or failure to obtain relief through some other mechanism. See generally, Asbun v. Commonwealth, No. 0707-07-04 (Va. Cir. March 14, 2008) (gubernatorial pardon viewed as remedy for ineffective assistance of

counsel); Commonwealth v. Siridavong, 49 Va. Cir. 138 (Fairfax, 1999) (unanticipated immigration consequences constitute newly-discovered evidence for which coram vobis does not lie); Commonwealth v. Singh, 53 Va. Cir. 88 (Fairfax, 2000) (failure to understand the terms of a guilty plea not a basis for coram vobis relief); Smith v. Commonwealth, 62 Va. Cir. 68 (Fairfax, 2003) (ineffective assistance of counsel claim known of during statutory period for habeas precluded granting of coram vobis relief).

These diverse holdings are not binding on Reverend Morris' case. If anything, however, similar to the cited Supreme Court of Virginia cases, they are instructive in that the deciding courts do not categorically refuse to consider ineffective assistance of counsel claims as errors in fact. Id. If that were the case, not one of those courts would go so far as to analyze the actual ineffectiveness claim and/or specify what, in the court's opinion, was a more appropriate remedy than coram vobis relief. To that end and, again, in keeping with statutory authorization, the Trial Court in Reverend Morris' case did not err in holding that ineffective assistance of counsel can be remedied through the writ of error coram vobis.

D. Federal Case Law

In United States v. Morgan, 346 U.S. 502, 74 S. Ct. 247 (1954), the Supreme Court of the United States granted the common law writ of error

coram vobis, where no federal statute existed, in the context of denial of counsel. In its Brief, the Appellant used the holding in Morgan as support for its position that granting of the writ is tied to statutory authorization. The holding of the Trial Court does not conflict with this position. As mentioned, ineffective assistance of counsel constitutes an error in fact within the parameters of Section 8.01-677 of the Code of Virginia (1950), as amended.

E. The Trial Court Did Not Err in Holding That, in the Alternative, It Had the Authority to Grant a Writ of Audita Querela

The Trial Court correctly stated that the writ of audita querela is also a proper vehicle by which to attack a conviction, however, that specific writ was not granted. App. at 152. Citing the Black's Law Dictionary definition of audita querela, the Appellant disagrees with that conclusion, stating that Reverend Morris presented no defense or discharge arising since the rendition of the judgment. Brief at 28-30. The Appellant is incorrect for two (2) reasons. First, ineffective assistance of counsel in the form of a misrepresentation regarding immigration consequences constitutes a defense. Second, Reverend Morris' realization of the misrepresentation approximately 12 years after his conviction shows that his defense arose since the rendition of the judgment. Reverend Morris was not aware of,

contrary to the Appellant's assertion, the consequences of his plea and sentence at the time of judgment. He did not know, and had no reason to suspect, that he was the victim of ineffective assistance of counsel. As stated by the Trial Court, unknown ineffective assistance of counsel is never waived by a plea of guilty. App. at 151.

The writ of audita querela remains a viable common law form of relief in Virginia criminal cases. See Commonwealth v. Mubarak, 68 Va. Cir. 422 (Fairfax, 2005), Fajardo v. Commonwealth, 19 Va. Cir. 162 (1990). The General Assembly has taken no action to eliminate this particular writ.

II. THE TRIAL COURT DID NOT ERR IN GRANTING THE WRIT OF ERROR CORAM VOBIS IN APPELLEE'S CASE.

A. Ineffective Assistance of Counsel Proven

The Trial Court held that there was "an affirmative misrepresentation" made to Reverend Morris, constituting ineffective assistance of counsel. App. at 472. Upon learning that he was not a U.S. Citizen, Reverend Morris recalled his counsel saying: "good, then she can pursue the Judge to give me a lesser sentence based upon me pleading guilty to the charge instead of prolonging the trial." Id. at 417. The words spoken and Reverend Morris' resulting reliance thereupon form the basis of this affirmative misrepresentation. The Trial Court's conclusion to that end was not arrived at in haste, but after careful consideration of Reverend Morris'

Affidavit and his comprehensive testimony on July 15, 2009. Id. at 416-420, 201-290. It is also to be noted that, though Reverend Morris came to know that Ms. Dillard did not recall any facts surrounding his case, he did not embellish his recollections in a manner that placed them more squarely within the realm of misadvice. The Trial Court, therefore, deemed his testimony "most believable." Id. at 472. The Trial Court acknowledged that though Reverend Morris' case "is the closest of cases," the ineffective assistance of counsel "conclusion is inescapable in the context of the situation. Id.

1. Impact of Padilla on Ineffective Assistance of Counsel Determination

The Commonwealth fails in its attempt to distinguish Reverend Morris' case from the facts set forth in Padilla. First, the deportable statute in question is not "esoteric and complex" to the point that Ms. Dillard only had to inform Reverend Morris that immigration consequences may ensue. Brief at 31. Section 101(a)(43) of the INA provides twenty-one subsections, A-U, of crimes that are aggravated felonies, convictions of which result in virtually mandatory, permanent deportation. Subsection G refers to "a theft offense (including receipt of stolen property) or burglary offense for which the term of imprisonment [is] at least one year" regardless of any sentence suspension. INA § 101(a)(43)(G). There is nothing

complicated about that portion of the statute. Reverend Morris was presented with a plea deal in which he would plead guilty to petit larceny and receive a twelve (12) month jail sentence, eleven (11) months of which was suspended. He clearly pled guilty to an aggravated felony as petit larceny is a theft offense and the twelve (12) month sentence constitutes a "term of imprisonment [of] at least one year." Id.

Second, the Supreme Court did not identify a specific means by which claims of ineffective assistance must be brought before a court, generally referring to Mr. Padilla's case as a "postconviction" rather than a "habeas" proceeding. Padilla, 559 U.S. at *1. Therefore, the Commonwealth's insistence that such claims, according to Padilla, can only be brought in a habeas corpus proceeding is incorrect.

The Court builds upon its Denedo discussion of ineffective assistance of counsel in the immigration context to hold that counsel must, in every criminal case, inform a non-citizen client whether a plea carries a risk of deportation. Id. at *17. Furthermore, the Supreme Court specifically rejected the contention that ineffective assistance of counsel claims only lie for affirmative misadvice. Id. at *13. If this Court were to hold that there was no affirmative misadvice, the fact that Ms. Dillard failed to inform

Reverend Morris of the possibility of deportation is still sufficient for ineffective assistance of counsel purposes.

B. Discretionary Criteria for Granting of Writ Satisfied

Contrary to the Appellant's assertion, neither the Appellee nor the Trial Court put forth the position that the state of existing law on Virginia coram vobis is governed chiefly by Denedo or other federal cases. Denedo, however, sheds light on the common law basis of the writ of error coram vobis and mentioned the discretionary factors that may be considered by a court in judging the merits of a coram vobis case. Such factors are not addressed in Virginia appellate jurisprudence and, therefore, the Denedo factors (including strength of ineffective assistance of counsel claim and the delay in filing coram vobis writ) are all the more instructive. Id. at *13. By and large, however, the Trial Court did not err in granting the writ of error coram vobis because its decision stayed within the statutory and common law parameters of the most recent Supreme Court of Virginia case on the matter, Neighbors. 274 Va. 503, 650 S.E.2d 514.

CONCLUSION

Wherefore, and for the foregoing reasons, Appellee respectfully requests that the decision of the Trial Court granting the Appellee relief in the form of a sentence modification be upheld.

Respectfully submitted,

EMMANUEL MORRIS

BY COUNSEL:

Jennifer S. Varughese, Esq.
VA Bar Number: 72289
Livesay & Myers, P.C.
9843 Business Way
Manassas, VA 20110
(703) 361-7735 (Telephone)
(703) 361-2114 (Facsimile)
varughese@lawyers-virginia.com

CERTIFICATE OF FILING AND SERVICE

Pursuant to Rule 5:26(d), I hereby certify that:

Fifteen bound copies and one electronic copy on CD of the foregoing Brief of Appellee were hand-filed with the Clerk of the Supreme Court of Virginia, this 28th day of May, 2010, and three bound copies of the same have been served, via U.S. Mail, postage prepaid, upon:

S. Randolph Sengel
Commonwealth's Attorney for the City of Alexandria
Krista Boucher
Deputy Commonwealth's Attorney
Courthouse, 520 King Street, Suite 301
Alexandria, Virginia 22314
(703) 746-4100 (Telephone)
(703) 746-4466 (Facimile)

Counsel for Appellant

Jennifer S. Varughese, Esq.