IN THE

SUPREME COURT OF VIRGINIA

RECORD NO. 092346

COMMONWEALTH OF VIRGINIA,

Appellant,

v.

WELLYN FLORES CHAN,

Appellee.

BRIEF OF THE COMMONWEALTH

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RECORD NO. 092346

COMMONWEALTH OF VIRGINIA,

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v.

WELLYN FLORES CHAN,

Appellee.

BRIEF OF THE COMMONWEALTH

STATEMENT OF THE CASE

On October 2, 2009, the Circuit Court of the City of Norfolk entered a purported nunc pro tunc order, in which it granted the petition for writ of audita querela or, in the alternative, coram nobis, filed by Wellyn Flores Chan. The circuit court purported to amend Chan's sentence on a prior assault and battery conviction from 12 months in jail, all suspended, to 360 days, all suspended.

The Commonwealth filed a petition for appeal in this Court, which granted the petition on April 14, 2010.

ASSIGNMENT OF ERRORS

I. THE TRIAL COURT ERRED IN HOLDING THAT IT POSSESSED JURISDICTION TO MODIFY A CRIMINAL DEFENDANT'S SENTENCE OVER FOUR YEARS AFTER THE TRIAL COURT'S ENTRY OF THE FINAL SENTENCING ORDER IN THE CASE, WHERE THE 21-DAY PERIOD PROSCRIBED BY RULE 1:1 HAD ELAPSED AND WHERE THERE WERE NO APPLICABLE EXCEPTIONS TO THE RULE.

II. THE TRIAL COURT ERRED IN HOLDING THAT THE TRADITIONAL EQUITABLE WRIT OF ERROR *AUDITA QUERELA* IS AN AVAILABLE REMEDY IN CRIMINAL CASES.

III. EVEN IF THE WRIT OF ERROR *AUDITA QUERELA* IS APPLICABLE TO CRIMINAL PROCEEDINGS, THE TRIAL COURT ERRED IN ISSUING A WRIT OF ERROR *AUDITA QUERELA* UNDER THE CIRCUMSTANCES OF THIS CASE BECAUSE IT HAS PROVIDED THE DEFENDANT WITH A SECONDARY, NON-STATUTORY REMEDY FOR INEFFECTIVE ASSISTANCE OF COUNSEL.

IV. ASSUMING, *ARGUENDO*, THAT THE TRIAL COURT RELIED UPON THE ALTERNATIVE RELIEF REQUESTED, THE TRIAL COURT ERRED IN MODIFYING THE DEFENDANT'S

FINALIZED SENTENCE THROUGH A WRIT OF ERROR *CORAM VOBIS*.

QUESTIONS PRESENTED

I. WAS THE CIRCUIT COURT'S NUNC PRO TUNC ORDER JURISDICTIONALLY BARRED UNDER RULE 1:1?

II. WAS THE WRIT OF *AUDITA QUERELA* AVAILABLE IN THIS POST-TRIAL CRIMINAL CASE, PARTICULARLY WHERE THE DEFENDANT COULD HAVE FILED A HABEAS CORPUS PETITION RAISING THE SAME INEFFECTIVE COUNSEL CLAIMS THAT FORMED THE BASIS OF HER PETITION FOR WRIT OF *AUDITA QUERELA*?

III. ASSUMING ARGUENDO THAT THE CIRCUIT COURT GRANTED RELIEF IN THE FORM OF CORAM NOBIS, DID THAT ORDER VIOLATE SUCH CONTROLLING AUTHORITY AS RULE 1:1 AND NEIGHBORS v. COMMONWEALTH, 274 Va. 503, 650 S.E.2d 514 (2007)?

STATEMENT OF FACTS

In 2005, Chan was indicted in the Circuit Court of the City of Norfolk for malicious wounding, a Class 3 felony, for her actions in injuring another person in a barroom fight, in violation of Virginia Code § 18.2-51, and the trial was scheduled for September 8, 2005. (App. 95). The parties, however, reached a plea agreement, under which the defendant pled guilty to the lesser included misdemeanor offense of assault and battery. (App.

42, 95). By final order entered on September 29, 2005, the circuit court imposed a sentence of 12 months, all suspended for 12 months, conditioned, in part, on the defendant's good behavior while in custody and for 12 months after release.[1] (App. 52-53).

As recited in Chan's pleadings in the lower court, she was 24 years old when she filed her petition for writ of audita querela in the circuit court on September 1, 2009, had lived in the United States since the age of 2, and was a citizen of the Philippines and a legal permanent resident (LPR) in the United States. (App. 43-44). Additionally, Chan's father was an American citizen as were her three younger siblings, and her mother was a legal permanent resident. (App. 42).

According to her pleadings filed in the circuit court, at some point in 2009 Chan contacted the United States Citizenship and Immigration Services (USCIS) to apply for a duplicate LPR card with the intention to become a naturalized American citizen. (App. 44). At that time, USCIS learned of the defendant's conviction and determined that she was subject

[1] The original criminal file was apparently never made a part of the record in the present matter, so that, for example, the indictment, executed plea agreement, and trial transcript are not part of the record. In support of her petition for writ of audita querela, Chan did include as exhibits the trial and sentencing order of September 29, 2005 as well as a blank form entitled "Advice to Defendants Pleading Guilty," which is apparently used in the Norfolk Circuit Court. (App.52-53, 64-66).

to mandatory detention and, thereafter, mandatory deportation under the Federal Immigration and Nationality Act (INA). (App. 44-45).

Consequently, immigration agents detained Chan in April, 2009 and she remained in jail throughout the proceedings in the circuit court. (App. 45). Chan moved to dismiss the basis for her removal in the immigration court, on the ground that assault and battery is not a "crime of violence" under the INA.[2] The immigration court denied the motion to dismiss but then granted counsel for Chan additional time to seek collateral relief in the state courts. (Id.).

On March 21, 2009, Chan filed a petition for writ of coram nobis in the circuit court. (App. 1-15).[3] After the Commonwealth filed a brief in opposition to the petition, Chan filed a motion to non-suit the matter pursuant to Code § 8.01-380, which motion the court granted on June 1, 2009. (App. 38-40).

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[2] As stated by Chan, an "aggravated felony" committed by an alien mandates detention and then deportation. In part, it includes a conviction for any "crime of violence" carrying a sentence of at least one year. According to Chan's pleadings in the lower court, the Board of Immigration Appeals (BIA) regards an assault and battery as a crime of violence. (App. 45).

[3] The terms "coram nobis" and "coram vobis" are interchangeable. In this brief, the Commonwealth will employ the term "coram nobis." See Neighbors v. Commonwealth, 274 Va. 503, 507 n.5, 650 S.E.2d 514, 517 n.5 (2007).

Next, on September 1, 2009 Chan filed a petition for writ of audita querela or, in the alternative, writ of coram nobis. (App. 41-93). The Commonwealth again filed a brief opposing the petition. (App. 94-124).

The circuit court conducted argument on the petition on October 2, 2009. At the conclusion of the proceeding, the circuit court judge granted the petition, stating:

> This may be an equitable remedy, but, you know, we are not in equity, but every judge, when he sentences in a criminal case, considers the equities, if you will, in the situation, or should.
>
> I think that this is a brilliant discovery by counsel for Ms. Chan, and I think that it's appropriate in this case to apply it. I think it's an independent situation. I don't think the Court's barred from considering it.

(App. 140).

As recited in the transcript, the circuit court then stated that it was "going to amend the sentence to 360 days as opposed to 12 months…." (Id.). This appears to have been an inadvertent misstatement, considering that Chan herself sought a reduction of her sentence of only one day, i.e., to 364 days (which was sufficient to remove her from the mandatory detention and deportation provisions). The only order contained in the record is one amending the trial and sentencing order of September 29,

2005, by a nunc pro tunc order dated October 2, 2009. (App. 142). That order recites that Chan was sentenced to 364 days in jail, with all of it suspended. As per a handwritten notation, that sentence was reduced to 360 days, all of which likewise was suspended.[4] (Id.).

Preliminary Statement

At the outset, it is useful to offer an overview regarding this Court's assessment of the validity of the lower court's nunc pro tunc order. A Lexis search of the term "audita querela" discloses that in the entire history of the Commonwealth this Court has mentioned this phrase in 22 cases, the most recent of which was 100 years ago.[5] This Court has never considered the applicability of a writ of audita querela to a criminal case, much less held that this writ lies in such a case.

If this Court were to sustain what the lower court did in this case, it would create a gaping hole in Rule 1:1 of the Rules of this Court and the

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[4] Exhibit A of Chan's petition for writ of audita querela is the original trial and sentencing order of September 29, 2005, which unambiguously recites that Chan received a sentence of 12 months in jail, all suspended. (App. 52-53). Although the record is silent as to the entry of any order imposing a sentence of 364 days, it ultimately does not matter, for purposes of the present appeal. That is, the Commonwealth's position is that the initial sentence of 12 months could not be reduced at all. Thus, regardless of any uncertainties in the record about the manner in which Chan's sentence was reduced from the initial term of 12 months to the ultimate term of 360 days in jail, the jurisdictional issues raised in the present appeal are unaffected.

[5] No decision of the Court of Appeals of Virginia apparently has ever referred to, much less considered, this writ.

interests of finality that inform it. This Court has consistently invoked Rule 1:1 to a host of circumstances, notwithstanding the claimed "equities" supposedly warranting a deviation from the plain terms of Rule 1:1. The Commonwealth submits that the applicability of Rule 1:1 is no less evident here and mandates the vacating of the circuit court's order as a jurisdictional nullity. Otherwise, a floodgate of petitions and motions filed long after a criminal case ended will likely ensue.

ARGUMENT

I. RULE 1:1 RENDERED THE CIRCUIT COURT'S ACTION IN REDUCING THE DEFENDANT'S SENTENCE FOUR YEARS AFTER ITS ENTRY A JURISDICTIONAL NULLITY. THE WRIT OF AUDITA QUERELA, EVEN ASSUMING ITS CURRENT EFFICACY IN VIRGINIA, IS INAPPLICABLE TO THIS CASE AND CANNOT OVERRIDE THE CLEAR DICTATES OF RULE 1:1.

It appears that the circuit court entered its nunc pro tunc order primarily or exclusively based upon Chan's petition for writ of audita querela.[6] For a host of reasons, the circuit court did not have the authority to modify Chan's sentence based on the writ of audita querela.

[6] Chan's petition primarily argued that her sentence should be reduced by way of a writ of audita querela, but she did seek, as an alternative ground, her sentence reduction by a writ of coram nobis. (App. 43, 49). In granting

Audita querela was "an equitable action to be relieved from some oppression or injustice in the proceedings, where the party has had no day in court, nor can have a writ of error." May v. State Bank, 41 Va. (2 Rob.) 60, 80-81 (1843). See also 11 A.M.J., *Judgments and Decrees*, §130 at 177 n.7. It was "primarily a remedy of judgment debtors" where the debtor did not find out about a judgment rendered against him until it was too late to file an appeal. See United States v. Kimberlin, 675 F.2d 866, 869 (7th Cir. 1982). See also United States v. Holt, 417 F.3d 1172, 1174 (11th Cir. 2005); Black's Law Dictionary at 150 (9th ed. 2009) (writ of error audita querela was "introduced during the time of Edward III" and was "available to a judgment debtor to seek the rehearing of a matter on grounds of newly discovered evidence or newly existing legal defenses").

No appellate court in Virginia has ever applied audita querela to a criminal proceeding in Virginia. Even where audita querela used to lie, that writ has long since "been entirely superseded in practice by the motion to quash the execution" of the civil judgment. See 11 A.M.J., *Judgments and Decrees*, §130 at 117 n.7, citing Smock v. Dade, 26 Va. (5 Rand.) 639,

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the defendant's petition, the circuit court said that this was "a brilliant discovery by counsel for Ms. Chan…." (App. 140). The circuit court would have had no reason to characterize a petition for coram nobis relief in such a manner, considering that it, unlike a writ of audita querela, plainly is a writ currently recognized in Virginia.

644-45 (1826); Lowenbach v. Kelley, 111 Va. 439, 442-43, 69 S.E. 352, 354 (1910); Fawkes v. Davison, 35 Va. (8 Leigh) 554, 558 (1837); Steele v. Boyd, 33 Va. (6 Leigh) 547, 552-54 (1835); Windrum v. Parker, 29 Va. (2 Leigh) 361, 396 (1830). Indeed, the esteemed Virginia Justice Brockenbrough remarked more than 150 years ago, "I question whether the oldest practitioner in our courts has ever known of an instance of a resort to the audita querela, or whether the writ can be found in any of our records." Steele, 33 Va. at 553.

The only Virginia appellate decisions to mention the writ are civil in nature. See, e.g., Lowenback's Adm'r, 111 Va. at 443, 69 S.E. at 354; May, 41 Va. (2 Rob.) at 76; Steele, 33 Va. (6 Leigh) at 552-555; Noyes v. Cooper, 32 Va. (5 Leigh) 186, 187-188 (1834); Cathrae v. Clarke, 32 Va. (5 Leigh) 268, 271-274 (1834); Windrum, 29 Va. (2 Leigh) at 367; Smock, 26 Va. (5 Rand.) at 644-645; Nicolson & Heth v. Hancock, 14 Va. (1 Munf.) 491, 501 (1810). And, even in the civil context, this Court has clearly held that the ancient writ of error audita querela has been supplanted by the modern motion to quash the judgment. See Lowenback's Adm'r, 111 Va. at 443, 69 S.E.2d at 354; see also Steele, 33 Va. (6 Leigh) at 552-555; Windrum, 29 Va. (2 Leigh) at 367; Smock, 26 Va. (5 Rand.) at 644-645.

Indeed, as William Blackstone commented in the eighteenth century, the writ of error audita querela had, by that time, been "driven [] quite out of practice" in England. Blackstone, supra, at *405-406. And, in 1810 – almost two hundred years ago – this Court opined that the writ of error audita querela was not only obsolete, but "never was introduced into this country." Nicolson & Heth, 14 Va. (1 Munf.) at 501 (1810).

Consistent with the above authorities, the lower court had no basis for granting relief in the case at bar based on the writ of audita querela. There is little basis for concluding that it has any current efficacy in Virginia, but there is substantial reason for holding that it has long since become a historical vestige of the common law. Unlike, for example, a writ of coram vobis, which Code § 8.01-677 explicitly authorizes, the Code contains no reference whatever to the writ of audita querela. Also, the sheer paucity of cases in Virginia even mentioning, much less applying, writs of audita querela is strongly suggestive of the conclusion that it does not now exist in the Commonwealth.

Further, the United States Supreme Court has held that "audita querela is a regular suit in which the parties may plead and take issue on the merits, and cannot, therefore, be sued against the United States, as in England it could not against the Crown." Avery v. United States, 79 U.S. (12 Wall.) 304,

307 (1871). It follows that a writ of error audita querela is inappropriate in a criminal action, for the Commonwealth of Virginia, the sovereign entity, is necessarily a party to that action.

Considering the origins and historical applications of the writ, it is clear that a writ of error audita querela, which was intended to be brought as a separate action in a court of chancery to relieve a civil judgment debt, is not an available or appropriate post-conviction remedy in a criminal proceeding. See United States v. Padilla, 478 F.Supp.2d 865, 868 n.4 (E.D. Va. 2004) ("[T]he ancient writ of audita querela . . . has no apparent relevance to criminal sentences." (omission in original) (quoting Melton v. United States, 359 F.3d 855, 856 (7th Cir. 2004))). The writ was a debtor's remedy, intended to provide an individual who "has had no day in court," May, 41 Va. (2 Rob.) at 76, with the ability to bring suit to quash a monetary judgment entered in a previous civil suit.

Axiomatically, no criminal case can proceed without the presence of a defendant. It follows that Chan, who has had her "day in court," and thus has been provided with an opportunity to present a defense, cannot collaterally attack her sentence with a writ of error audita querela. See generally Avery, 79 U.S. at 304 ("[T]his writ does not lie, where the party complaining has had a legal opportunity of defense and has neglected it.").

Even if the writ of audita querela were not a dead letter of the law in Virginia, and even if it potentially were applicable in a criminal case, for several fundamental reasons the circuit court erred in employing it here. First, insofar as the lower court's order modification of Chan's sentence constituted an order in a criminal case, it plainly violated Rule 1:1. This Rule, of course, provides that a trial court loses jurisdiction 21 days after entry of final judgment in a criminal (or any other) case. The provisions of Rule 1:1 are "mandatory" and intended to ensure "the certainty and stability that the finality of judgments brings." Super Fresh Foods Mkts of Va., Inc. v. Ruffin, 263 Va. 555, 563, 561 S.E.2d 734, 739 (2002). Thus, "[o]nce a final judgment has been entered and the twenty-one day time period of Rule 1:1 has expired, the trial court is thereafter without jurisdiction in the case." Id.

Unquestionably, there are limited exceptions to Rule 1:1. See, e.g., Code § 8.01-428; Code § 8.01-677; Code § 19.2-303. Statutes that "create exceptions to the finality of judgments," however, run counter to the "strong policy reasons favoring certainty of results in judicial proceedings." McEwen Lumber Co. v. Lipscomb Bros. Lumber Co., 234 Va. 243, 247, 360 S.E.2d 845, 848 (1987). Accordingly, these legislative exceptions must be narrowly construed against the party seeking post-judgment modification of the sentence. Id.

Chan's only real argument against the jurisdictional bar of Rule 1:1 has been that the equities of this case are such that the circuit court could properly reduce the sentence. (App. 48-50). This Court, though, has invoked the plain terms of Rule 1:1 despite other parties' equitable arguments. For example, in School Bd. Of Lynchburg v. Caudill Rowlett Scott, 237 Va. 550, 379 S.E.2d 319 (1989), the trial court on July 25, 1986 entered final judgment in favor of the defendant. On August 15, 1986, counsel for the plaintiff School Board called the circuit court clerk's office to ask if the final order had been entered and was erroneously told that it had not been. One week later, the clerk's office repeated the same misinformation to the plaintiff's counsel. 237 Va. at 552-553, 379 S.E.2d at 320-321. Counsel for the School Board finally learned on September 3, 1986, that the order indeed had been entered on July 25, which led to the filing of a motion for relief under § 8.01-428(B) to correct the alleged "clerical mistake." On September 9, 1986, the circuit court purported to vacate its original final judgment order and then entered a new order reiterating its earlier rulings and again dismissing the case.

On appeal, this Court held that the erroneous information provided to plaintiff's counsel by the clerk's office was not a "clerical mistake" within the meaning of § 8.01-428(B). 237 Va. at 555, 379 S.E.2d at 322.

Accordingly, "the order of September 9 was a nullity because the trial court had lost jurisdiction after 21 days had elapsed following entry of the final order of July 25." 237 Va. at 556, 379 S.E.2d at 323. And, for much the same reasons, this Court held that it lacked jurisdiction to consider the School Board's appeal, inasmuch as a notice of appeal had not been filed within 30 days after entry of the final judgment on July 25. Id.

Similarly, in at least two death penalty cases this Court strictly applied applicable time limits, even though its rulings had, literally, life and death repercussions. For example, in Coleman v. Thompson, 501 U.S. 722 (1991), a Virginia death row prisoner, by counsel, filed his notice of appeal from the state habeas circuit court's dismissal of his habeas petition 33 days after entry of final judgment, or three days after the 30-day limit established in Rule 5:9(a). The Commonwealth moved this Court to dismiss the habeas appeal on the ground that the notice of appeal was untimely. This Court then granted the motion to dismiss and dismissed the petition for appeal. 501 U.S. at 727-728.

Thereafter, the United States Supreme Court enforced this Court's procedural default ruling, holding, in part, that the petitioner was not constitutionally entitled to the assistance, or effective assistance, of counsel in a state collateral proceeding, and thus any error by his habeas counsel

was not "cause" for his default. Id. at 752-757. Significantly, the United States Supreme Court concluded that this Court's procedural dismissal of Coleman's habeas appeal was an independent and adequate state ground barring federal habeas review notwithstanding Coleman's contention that in prior cases this Court had not always applied the 30-day limit in Rule 5:9(a). Id. at 740-744.

By any measure, Rule 1:1 is at least as unequivocal in its establishment of a time limit as Rule 5:9(a), which, in conjunction with Rule 5:5(a), potentially authorizes the filing of a notice of appeal beyond a deadline based on "the intervention of some extraordinary occurrence or catastrophobic circumstance which was unpredictable and unavoidable." The petitioner in Coleman certainly was not personally responsible for any errors by his habeas counsel, and the procedural dismissal of his state habeas corpus appeal undoubtedly had a substantial impact on Coleman's subsequent federal habeas actions (particularly as to any ineffective counsel claims, which would have been procedurally defaulted on federal habeas for failure to properly perfect them on state habeas appeal). Yet, the death row prisoner in Coleman remained subject to the time limits of Rule 5:9(a); Chan has no greater equitable claim under Rule 1:1. See also Wise v. Williams, 982 F.2d 142 (4th Cir. 1992) (this Court's dismissal of state habeas corpus

appeal filed by Virginia death row prisoner, on ground that notice of appeal was untimely, was adequate and independent state law ruling barring federal habeas review of state habeas claims).

Additionally, this Court's ruling in Asbun v. Commonwealth, Record No. 080519, is instructive as to Chan's equitable argument. There, the petitioner sought relief almost identical to that granted in this case. Pursuant to a plea agreement Asbun pled guilty in 1997 to grand larceny at an Alexandria department store and received a sentence of 12 months in jail, with all but 45 days suspended. In 2007, Asbun (who by then was 53 years old) filed a motion to modify her sentence by one day, i.e., to reduce the penalty from 12 months incarceration to 364 days in jail (with the suspended time remaining unchanged). Asbun alleged that her trial attorney had affirmatively misinformed her about the immigration consequences of her guilty plea. The circuit court denied Ashbun's motion to modify her sentence, on the ground that the writ of coram nobis did not lie as to her claim.

The Court of Appeals initially granted Asbun's petition for appeal. Record No. 0707-07-4. The Court of Appeals subsequently transferred the case to this Court pursuant to Code § 8.01-677.1, concluding that that court lacked jurisdiction to consider the circuit court's ruling on the writ of coram

nobis. Thereafter, this Court refused Asbun's petition for appeal on the coram nobis appeal as well as a petition for rehearing.

By any measure, the equities in Asbun were at least as compelling as those in the case at bar. The appellant there was a much older individual than Chan, had three children (one of whom was a United States citizen) and had a much longer record of otherwise unblemished conduct while in the United States. Irrespective of the precedential significance, if any, of this Court's denial of Asbun's petition for appeal, see Sheets v. Castle, 263 Va. 407, 411-412, 559 S.E.2d 616, 618-619 (2002); but see Stillwell v. Commonwealth, 219 Va. 214, 226 and n.4, 247 S.E.2d 360, 368 and n.4 (1978), the fact that this Court denied relief there on an almost identical claim surely suggests the inadequacy of Chan's equitable contentions, as a basis for not invoking Rule 1:1. To state it differently, Chan is not entitled to some exemption from the otherwise clear mandate of Rule 1:1 when the appellant in Asbun was not. Indeed, any evaluation of the competing equities of the defendants here and in Asbun, and any attempt to justify different outcomes in the two cases, simply underscore the fact that Rule 1:1 was intended to bring certainty and finality into the law by doing away with such subjective exercises.

Moreover, this Court has pointed out that, "[u]nless otherwise provided by statute, Rule 1:1 prohibits modification of a final order more than 21 days after the date of entry" of the final order. Charles v. Commonwealth, 270 Va. 14, 17 n.*, 613 S.E.2d 432, 433 n.* (2005) (emphasis added) (citation omitted). This language implies that, even if the writ of error audita querela had been recognized at common law as an exception to the finality of criminal convictions, the legislature's failure to enact a statute recognizing the writ as an exception to Rule 1:1 is fatal to its continuing viability as a post-conviction remedy.

Thus, consistent with the above-authorities, the circuit court simply lacked jurisdiction to enter its order modifying Chan's sentence four years after it had lost jurisdiction under Rule 1:1. See also Wagner v. Shird, 257 Va. 584, 514 S.E.2d 613 (1999); Davis v. Mullins, 251 Va. 141, 466 S.E.2d 90 (1996); Dixon v. Pugh, 244 Va. 539, 423 S.E.2d 169 (1992).

Even assuming that the lower court had jurisdiction to entertain Chan's motion to modify her sentence based on the writ of audita querela, another fundamental procedural bar confirms that the court erred in modifying her sentence. As discussed below, this Court has made clear that a writ of coram nobis does not lie if a petitioner may seek relief by way of an appeal or habeas corpus petition. If that is true of a writ of coram nobis, which is

expressly established in § 8.01-677, then the same conclusion surely obtains as to a writ of audita querela, which is nowhere to be found in the Code of Virginia.

Chan unquestionably could have filed a timely habeas corpus petition in this matter. As stated above, two ineffective counsel claims underlie her petition for writ of audita querela. One is a garden-variety ineffective counsel claim – that Chan's attorney was ineffective for not defending on the basis of certain claimed exculpatory eyewitness accounts of the barroom incident. Under § 8.01-654(A)(2), Virginia's habeas corpus statute of limitations, Chan (who did not file a direct appeal) thus could have filed a habeas corpus petition raising this claim at any time within two years after entry of final judgment on September 29, 2005. See generally School Board v. Giannoutsos, 238 Va. 144, 146, 380 S.E.2d 647, 649 (1985) ("where a statute creates a right and provides a remedy for the vindication of that right, then that remedy is exclusive unless the statute says otherwise"). Cf. Orbe v. Johnson, 267 Va. 560, 563, 601 S.E.2d 547, 549-550 (2004) (declaratory judgment not substitute for post-conviction remedies).

This is equally true with respect to Chan's other ineffective counsel contention – that her defense attorney was ineffective because he did not ask her "about [her] immigration status and properly inform her about the

consequences of a conviction, or direct [her] to an immigration practitioner." (App. 47). Upon the exercise of due diligence, Chan unquestionably could have filed a timely habeas corpus petition raising the present ineffective counsel claim.

Plainly, during the two years after entry of final judgment in the criminal case, when Chan could have filed a habeas corpus petition raising ineffective counsel claims, she had the tools to argue that defense counsel's representation with respect to her potential deportation was deficient under the Sixth Amendment. The United States Supreme Court's recent decision in Padilla v. Kentucky, 130 S.Ct. 1473 (2010), shows as much.

There, the Court held the petitioner had pleaded facts sufficiently establishing that his defense counsel had been constitutionally deficient under the "performance" prong of the two-part test in Strickland v. Washington, 466 U.S. 668 (1984), for not properly advising Padilla that he might be subject to automatic deportation if he pled guilty to the charged criminal offense. Significantly, the Supreme Court cited numerous prior federal and state decisions considering ineffective counsel claims relating to the potential deportation of petitioners who had previously entered guilty

pleas.[7] 130 S.Ct. at 1481 and n.9, 1484. Indeed, at least as far back as Zigta v. Commonwealth, 38 Va. App. 149, 562 S.E.2d 347 (2002), a Virginia defendant challenged his guilty plea based upon his unawareness at the time of trial of the potential deportation consequences of any conviction.

It is true that Padilla rejected many prior decisions establishing, for example, a distinction between a trial attorney's failure to advise a client of the potential deportation consequences of a guilty plea and counsel's affirmative misadvice on the subject. 130 S.Ct. at 1484. It is also true that in Zigta, the Court of Appeals held that the trial court had rightly denied the defendant's pre-sentence motion to withdraw his guilty plea, on the ground that the deportation impact of the plea was a collateral consequence that the trial court did not have to discuss during the plea colloquy. Padilla rejected any such distinction between direct and collateral consequences of a plea, at least in this context of deportation. 130 S.Ct. at 1481-41482.

The fact, however, that case law may have been adverse to Chan during the time in which she could have filed any state habeas corpus petition is not controlling; rather, the relevant inquiry is whether she had the tools to make such an argument, which she plainly did. In this regard, it is

[7] The Supreme Court remanded Padilla for a determination of whether defense counsel's representation failed under the "prejudice" prong of that test. 130 S.Ct. at 1483-1484.

fundamental that the perceived futility of a claim is not "cause" for failure to raise it. See Engle v. Isaac, 456 U.S. 107, 130-131 (1982); Epperly v. Booker, 235 Va. 35, 44, 366 S.E.2d 62, 67 (1988). For all this Court knows, if Chan had filed a timely habeas petition, the United States Supreme Court would have sustained her ineffective counsel claim before it ever decided Padilla. See Epperly, 235 Va. at 44, 366 S.E.2d at 67 quoting Engle, 456 U.S. at 130 ("Even a state court that has previously rejected a constitutional argument may decide, upon reflection, that the contention is valid").

On a related point, nothing in Padilla indicates that it would be retroactively applicable here. The Supreme Court certainly did not purport to hold in Padilla that its decision was one reasonable jurists could not decide differently. To the contrary, the Supreme Court recognized the many prior decisions of federal and state courts rejecting petitioners' arguments on such basic issues as whether the Sixth Amendment right to counsel extends to such a "collateral" consequence as deportation and whether the failure to advise a client, as distinct from affirmatively misadvising him, is a basis for a Strickland violation. 130 S.Ct. at 1481, 1484.

That being the case, then under the "new rule" doctrine articulated in Teague v. Lane, 489 U.S. 288 (1989), and its progeny, Padilla is inapplicable to the present case. See Mueller v. Murray, 252 Va. 356, 360-366, 478

S.E.2d 542, 545-549 (1996) (on death row prisoner's state habeas corpus appeal, Simmons v. South Carolina, 512 U.S. 154 (1994) constituted Teague new rule not applicable retroactively to appeal). And, the Supreme Court certainly did not hold in Padilla that it is applicable to a case, irrespective of a party's prior failure to file a timely habeas corpus action.

Nothing would be unfair in any conclusion that Padilla cannot be invoked retroactively to this case, and in fact there are substantial policy reasons counseling against any such conclusion. Nothing in Chan's pleadings in the lower court suggests that the relevant federal statutes were different when she pled guilty in 2005 than at the present time. Likewise, the Supreme Court's discussion of relevant statutes in Padilla reflects that the statutory landscape has not significantly changed since Chan entered her guilty plea. 130 S.Ct. at 1478-1480, 1483. Thus, any inquiries to her attorney or the trial court by Chan, who was certainly aware in 2005 that she was not an American citizen and had been charged with a serious felony punishable by up to 20 years in prison, could well have led to her being apprised of the federal statutes that might mandate her detention and deportation.

Yet, Chan made no such inquiry at trial, and she likewise apparently never delved into the matter during the two years in which she could have

filed a habeas corpus petition. In Zigta, for example, the defendant learned the true impact of his guilty plea upon his immigration status in the period between his plea and his sentencing. 38 Va. App. at 152, 562 S.E.2d at 348. Given the unchanging nature of relevant federal statutes in the period since Chan entered her guilty plea, her failure to make the slightest inquiry about the impact of any criminal conviction on her status as a permanent legal resident cannot be regarded as an exercise of due diligence under § 8.01-654(A)(2) and § 801-654(B)(2), Virginia's abuse of the writ statute. Any other conclusion would provide a petitioner with an incentive not to make reasonable inquires when a timely appeal or habeas corpus petition still could be filed.

Further, even if Padilla were otherwise applicable to this case, Chan's own pleadings in the lower court show that she suffered no violation of her Sixth Amendment right to effective counsel. The defendant never argued in the circuit court that the matter of her immigration status had ever arisen during her consultations with defense counsel. Instead, Chan complained only that she and her attorney had never discussed the matter and that he had not properly warned of her of the impact of a criminal conviction or directed her to a lawyer conversant with immigration laws. (App. 42, 46-

48). Thus, Chan's pleadings establish that she never informed her attorney of her immigrant status and that the attorney never otherwise learned it.

In sharp contrast, the petitioner's own pleadings in Padilla made clear that at the time of trial his attorney had been aware of his status as an immigrant. 130 S.Ct. at 1478. Although Padilla articulates an attorney's obligations under the Sixth Amendment in the event he is aware of his client's status, at no point in that decision did the Supreme Court ever hold or imply that, in the first instance, a defense attorney must raise the matter with a defendant of his possible immigrant status. To the contrary, Padilla presupposed that an attorney has such knowledge about his client. For example, in rejecting the distinction numerous courts had previously made between an attorney's silence on a defendant's possible deportation and his affirmative misadvice on the matter, the Supreme Court stated: "***When attorneys know*** that their clients face possible exile from this Country and separation from their families, they should not be encouraged to say nothing at all." 130 S.Ct. at 1484 (emphasis added).

Certainly, Chan was far better situated to know her status as a non-citizen of the United States than her attorney. It would hardly have placed some onerous burden on her to require her to so inform her attorney of the fact that she was a Filipino citizen. Indeed, she had lived in the United

States since she was two years old and spoke only English. (App. 43, 56). Further, requiring Chan to inform her attorney of her immigrant status accords with prior decisions of this Court. See, e.g., Thomas v. Commonwealth, 244 Va. 1, 16-19, 419 S.E.2d 606, 614-615 (1992) (where defendant "himself knew more than anyone else about the role the marijuana played in the murder scenario," claim rejected that Commonwealth had intentionally destroyed marijuana supposedly supporting contention that he had smoked marijuana laced with PCP on night of murders; defendant was "as much to blame for [defense counsel's] ignorance [of marijuana] as anyone connected with the case"); Epperly, supra, 235 Va. at 44-45, 366 S.E.2d at 67 (claim that trial prosecutor wrongly directed prosecution witnesses not to speak with defense counsel prior to trial rejected, in part, for lack of prejudice; only evidence presented at trial that surprised defense counsel were three inculpatory statements by Epperly, and "he will not be heard to contend that he was surprised by the testimony at trial when he could have disclosed his own statements to his own attorneys as they were preparing his defense").[8]

[8] Any other conclusion would mean either that a trial attorney has an absolute duty under the Sixth Amendment to ask his client whether he is an American citizen or, no better, query him based on such circumstances as his last name, facial appearance, and manner of speaking.

Finally, numerous holdings in the federal court reinforce the conclusion that Chan's failure to file a timely habeas corpus petition is enough to establish the unavailability of audita querela in this case. To the extent audita querela is available in federal courts as a means to challenge a criminal conviction, the "courts' authority to grant writs of *coram nobis* and *audita querela* flows from a common source, the All Writs Act…." Hanan v. United States, 402 F. Supp. 2d 679, 683 (2005). The All Writs Act, 28 U.S.C. § 1651(a), grants federal courts the power to issue "all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." Virginia does not have a statutory provision comparable to the federal All Writs Act.

Further, even when audita querela was available through an All Writs Act, federal courts have found it is not applicable when a petitioner had another remedy. In Holt, for example, the petitioner sought to vacate the sentence in his criminal case by filing a writ of audita querela, arguing that the court should either apply Blakely v. Washington, 542 U.S. 296 (2004), retroactively, or else apply the reasoning of Blakely. Holt at 1173. The court denied his petition, noting that federal courts may recognize common law writs in a criminal context only when "necessary to plug a gap in the system of federal post-conviction remedies." Holt, 417 F.3d at 1175

(internal quotation omitted). The court recognized that a writ of audita querela could not be granted when relief could have been granted under 28 U.S.C. § 2255 (habeas corpus). The proper avenue was for the prisoner to have filed a § 2255 motion. The court determined that because a proper avenue was available in the federal system, the writ of audita querela did not lie. See Holt, 417 F.3d at 1175. See also United States v. Valdez Pacheo, 237 F.3d 1077, 1079-80 (9th Cir. 2001); Corral v. United States, 436 F.Supp.2d 1045, 1046 (D. N.D. 2006).

Importantly, whether the § 2255 motion would prove successful was not relevant to Holt's determination that it was a "proper avenue." To the contrary, in fact, the court "further construed his *pro se* filing as a § 2255 petition and held that, since he had already filed a § 2255 petition and had not sought this court's permission to file another, the district court had correctly denied it." United States v. Davis, 352 Fed. Appx. 314, 315 (11th Cir. 2009) (discussing application of audita querela in Holt). In finding that a petition warrants audita querela relief, a federal court "may not use the statutory limits imposed by Congress upon habeas relief as the basis for finding that the petitioner has no other means of redress." Hazard v. Samuels, 206 Fed. Appx. 234, 236 (3d Cir. 2006) (unreported); United

States v. Paster, 190 Fed. Appx. 138, 139 (3d Cir.), cert. denied, 549 U.S. 1013 (2006).

II. INSOFAR AS THE CIRCUIT COURT MAY HAVE GRANTED RELIEF BASED ON THE WRIT OF CORAM NOBIS, THAT WRIT DOES NOT LIE, CONSIDERING THAT THE DEFENDANT COULD HAVE FILED A TIMELY HABEAS CORPUS PETITION RAISING THE SAME INEFFECTIVE COUNSEL CLAIMS.

Assuming arguendo that the lower court, at least in part, premised its amendment of the sentencing order on Chan's alternative petition for writ of coram nobis, the court erred under numerous decisions of this Court. This Court described the function of a writ of error coram nobis (or coram vobis) in Dobie v. Commonwealth, 198 Va. 762, 96 S.E.2d 747 (1957):

> The principal function of the writ is to afford to the court in which an action was tried an opportunity to correct its own record with reference to a vital fact not known when the judgment was rendered, and which could not have been presented by a motion for a new trial, or appeal or other existing statutory proceeding. It lies for an error of fact not appearing 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 lies for an error 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.

198 Va. at 769, 96 S.E.2d at 752.

This Court has also emphasized the substantial limitations governing a writ of error coram nobis. In Dobie, the Court noted that the writ "cannot serve to gain a new trial for a defendant after a conviction on a plea of guilty merely because he might have fared better on a plea of not guilty." 198 Va. at 771, 96 S.E.2d at 753. Further, the writ does not lie to review a sufficiency of the evidence claim and "does not have the function of a writ of error to the original judgment so as to bring that judgment under review." Id.

In Blowe v. Peyton, 208 Va. 68, 155 S.E.2d 351 (1967), this Court again emphasized the specific, limited functions of a writ of coram nobis. There, in discussing the substantially identical predecessor statute to § 8.01-677, 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.

208 Va. at 74, 155 S.E.2d at 356. The Supreme Court went on to hold in Blowe that the petitioner's claims of trial court error and ineffective assistance of counsel did not entitle him to coram nobis relief. 208 Va. at 76, 155 S.E.2d at 358.

Recently, in Neighbors v. Commonwealth, 274 Va. 503, 650 S.E.2d 514 (2007), this Court quoted this very language from Blowe v. Peyton in upholding a circuit court's ruling that coram nobis "would not lie as a means by which [the petitioner/appellant] could collaterally challenge his guilty plea." 274 Va. at 509, 650 S.E.2d at 517. There, Neighbors entered an Alford guilty plea in the general district court to the charge of resisting arrest. In lieu of timely noting an appeal under Virginia Code § 16.1-132 for a trial de novo in the circuit court or filing a habeas corpus petition, Neighbors later filed a petition for writ of coram nobis in the general district court challenging his guilty plea. The petitioner asserted that various medically prescribed medications he was taking at the time of his plea rendered him incompetent and unable to enter a knowing and voluntary guilty plea. Id. at 509, 650 S.E.2d at 517.

In upholding the circuit court's ruling "on the merits of Neighbors' claim" that coram nobis did not lie as to his guilty plea allegation, id. at 511,

650 S.E.2d at 518, this Court noted that the common law writ of coram nobis

> has been substantially limited by the General Assembly through Code § 8.01-677, which provides that "[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." We recognized the restriction of a writ of error coram vobis only to clerical errors and certain errors in fact in Blowe….

Id. at 508, 650 S.E.2d at 517. Noting the Commonwealth's argument in Neighbors that the defendant had other remedies such as a timely appeal under § 16.1-132 or a habeas corpus petition, this Court referred to its prior conclusion in Blowe that coram nobis "should not be used for any purpose other than to correct a clerical error or error in fact [and that t]his limited application has not been extended to serve as a writ of error to bring the original judgment under review or to permit a change of a defendant's plea after trial." Id. at 511-512, 650 S.E.2d at 519 (citations and internal quotations omitted). This Court went on to uphold the circuit court's ruling that coram nobis did not lie as to Neighbors' claim, because his asserted lack of capacity at the time of the guilty plea was neither a clerical error nor an error in fact. Id. at 512, 650 S.E.2d at 519.

Neighbors, Dobie, and Blowe plainly establish that coram nobis does not lie where the petitioner has some other available remedy. In particular, coram nobis does not lie as a substitute for an appeal or habeas corpus petition. Cf. Brooks v. Peyton, 210 Va. 318, 171 S.E.2d 243 (1969) (habeas corpus not substitute for direct appeal).

In the case at bar, no less than in Neighbors, the defendant had other available remedies that, upon the exercise of due diligence, she could have pursued. In particular, Chan could have sought habeas corpus relief and challenged her guilty plea as well as the related issue of trial counsel's ineffectiveness. See pages 21-27 of this brief.

Any contention by Chan that she could not have filed a habeas corpus petition or that she was entitled to seek coram nobis relief after the statute of limitations had run on her habeas remedies is baseless. In both Neighbors and this case the defendant contested the validity of his or her guilty plea. If the petitioner's claim in Neighbors that his physical and mental condition was such as to preclude the entry of a valid guilty plea, then no principled distinction exists between that allegation and Chan's claim that her plea was unintelligent based on her trial attorney's ineffectiveness. Likewise, no principled basis exists for requiring the petitioner in Neighbors to use other available remedies in lieu of seeking

coram vobis relief, but dispensing with any such requirement as to Chan. And, the availability of coram nobis relief in the present case cannot be based on the absence of any other current remedy; the petitioner in Neighbors filed his coram nobis petition after his appellate remedies had expired. See also Matus-Leva v. United States, 287 F.3d 758, 761 (9th Cir. 2002) (coram nobis unavailable despite fact that petitioner could no longer file timely federal habeas petition).

Moreover, it is fundamental that a habeas corpus petitioner must exercise due diligence. See Hines v. Kuplinski, 267 Va. 1, 591 S.E.2d 692 (2004) (record established that petitioner could have discovered basis for ineffective counsel claims within allowable period under § 8.01-654(A)(2), thus rendering moot his constitutional challenge to that statute). See also McCleskey v. Zant, 499 U.S. 467, 497-502 (1991) (death row prisoner's failure to include claim in first federal habeas petition that he could have discovered upon reasonable investigation barred its review in second federal habeas petition as abuse of writ); Stockton v. Murray, 41 F.3d 920, 924 (4th Cir. 1994) (federal habeas court dismissed as procedurally defaulted claims raised by Virginia death row prisoner; Supreme Court of Virginia previously had dismissed them as ones that he knew of, or could reasonably have discovered factual bases for, prior to filing state habeas

petition). The record in the case at bar makes clear that Chan could easily have discovered the basis for a habeas claim raising the present issue well before the statute of limitations ran.

Chan's entire argument is premised upon her assertion that relevant federal immigration laws establish — based upon her sentence of one year or more — that she is an "aggravated felon" who is therefore is subject to mandatory deportation. (App. 44-45). Padilla reflects that those laws were in effect when Chan pled guilty. 130 S.Ct. at 1480. Thus, this is hardly a case akin, for example, to one involving the claimed suppression of evidence; from the very moment of her indictment to the entire period in which she was "in custody" on the assault and battery sentence Chan could have determined the impact of the federal statutes on her status as a permanent resident.

Given Chan's failure to pursue her habeas corpus remedies, the only remaining issue is whether the trial court's ignorance of her status as a non-citizen and her trial attorney's claimed misrepresentation were clerical errors or errors in fact. See Neighbors, 274 Va. at 511-512, 650 S.E.2d at 519. The defendant does not argue that there was any clerical error in this matter. Her contention in her brief in opposition that her attorney's alleged ineffective assistance and the court's unawareness of her status were

errors in fact proves too much and should be rejected by this Court. (Br. Opp. 10).

If petitioner's assertion were accepted, then the fundamental distinction between habeas corpus and coram nobis would be blurred beyond distinction. To state it differently, the principle, as established in such cases as Neighbors and Blowe, that coram nobis does not lie as a substitute for habeas corpus and that a petitioner must pursue other available remedies in lieu of seeking coram nobis relief, would be lost.

Under Chan's view, virtually any claimed mistake by an attorney could be characterized as an "error in fact." For example, a defendant could seek coram nobis relief based on her attorney's allegedly deficient investigation and failure to put on certain witnesses, on the ground that her representations at the outset of the trial that she was ready to proceed and had all witnesses present were errors in fact arising out of her attorney's errors.

Moreover, claimed mistakes by attorneys of the sort alleged here cannot fairly be characterized as errors in fact. An error in fact has been defined thusly: "Error in fact occurs when, by reason of some fact which is unknown to the court and not apparent on the record (e.g., infancy, or death of one of the parties), it renders a judgment void or voidable."

Black's Law Dictionary 543 (6th ed. 1990). Similarly, in Dobie the Supreme Court gave as examples of errors in fact a judgment rendered against a party after his death or who is an infant. 198 Va. at 770, 96 S.E.2d at 752-753. The claimed misrepresentation of Chan's attorney cannot fairly be deemed the equivalent of these errors.

While this Court may well regard trial counsel's claimed failure to discuss Chan's potential deportation with her as bringing about a severe or even inequitable result, that simply cannot warrant extension of the writ of coram vobis to circumstances that cases decided by this Court unmistakably disallow. If, for example, a prisoner failed to meet a filing deadline established by a statute of limitations by one day, the dismissal of his petition, no matter how harsh the consequences, would clearly be required (assuming he could not satisfy some putative, highly restrictive equitable tolling limitation). See Bowles v. Russell, 127 S.Ct. 2360 (2007) (Supreme Court applied "rigorous rule" requiring filing of appeal in federal habeas case in time mandated by statute, despite assertion by dissent that lower court had engaged in "bait and switch"). See also pages 14-19 of this brief.

Finally, petitioner's argument, which relies so heavily upon the claimed equities favoring the lower court's amendment of her sentence four

years later, ignores one important circumstance. The state Constitution, in broad, unqualified language, affords the Governor the authority to grant reprieves and pardons. Va. Const., Art. V, § 12. Likewise, § 53.1-229 simply states that the authority "to grant pardons or reprieves is vested in the Governor." If the equities here are as one-sided in favor of Chan as she claims, there is all the more reason to conclude that executive clemency could be granted in this case. Cf. Evans v. Muncy, 916 F.2d 163 (4th Cir. 1990) (death row prisoner's contention that his post-trial behavior as inmate at death row facility refuted jury's finding of "future dangerousness" was more properly deemed claim for executive clemency and thus not properly resolvable by judiciary.)[9]

[9] Indeed, it is the Commonwealth's understanding from the Office of the Secretary of the Commonwealth that on December 2, 2009, Chan filed a request for a sentence commutation in the Governor's Office.

CONCLUSION

For these reasons the order of the Circuit Court of the City of Norfolk amending the defendant's sentence should be vacated.

Respectfully submitted,

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CERTIFICATE OF TRANSMISSION AND SERVICE

On May 24, 2010, the required copies of this brief were hand-delivered to the Clerk's Office of this Court for filing and three copies of this brief were mailed to Trey R. Kelleter, Esquire, VANDEVENTER BLACK LLP, 101 W. Main Street, Suite 500, Norfolk, Virginia 23510, counsel for the appellant.

The Commonwealth desires to present oral argument in this case.

_____
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