In The

Supreme Court of Virginia

RECORD NO.: 092346

COMMONWEALTH OF VIRGINIA,

Appellant,

v.

WELLYN FLORES CHAN,

Appellee.

BRIEF OF APPELLEE

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STATEMENT OF THE CASE

Ms. Chan concurs in the Commonwealth's Statement of the Case.

QUESTIONS PRESENTED

I. PURSUANT TO VA. CODE SECTION 1-200, DID THE GENERAL ASSEMBLY CLEARLY MANIFEST ITS INTENT TO ABROGATE THE COMMON LAW WRIT OF AUDITA QUERELA THROUGH THE SUPREME COURT'S ADOPTION OF RULE 1:1, THUS RENDERING THE CIRCUIT COURT'S NUNC PRO TUNC ORDER JURISDICTIONALLY BARRED?

II. WAS THE WRIT OF AUDITA QUERELA AVAILABLE IN THIS POST-TRIAL CRIMINAL CASE, PARTICULARLY WHERE THE CIRCUIT COURT RECOGNIZED THAT THE EQUITIES WEIGHED IN FAVOR OF RELIEF AND THAT MS. CHAN SUFFERED PREJUDICE FROM THE INEFFECTIVE ASSISTANCE OF COUNSEL.

III. DID THE CIRCUIT COURT'S ALTERNATIVE BASIS FOR GRANTING RELIEF, CORAM NOBIS, VIOLATE RULE 1:1 AND OTHER AUTHORITY?

STATEMENT OF THE FACTS

Ms. Chan concurs in the facts stated in the Commonwealth's Statement of the Facts.

PRELIMINARY STATEMENT

The Commonwealth relies on Rule 1:1 to argue that the circuit court did not have jurisdiction to give relief to Ms.

Chan. But a telling, and critical, absence from the Commonwealth's brief is its complete failure to even mention Va. Code Section 1-200, which states that "[t]he common law of England … shall continue in full force within the [Commonwealth] … except as altered by the General Assembly." By ignoring it, the Commonwealth turns matters of proof on its head, making such statements as "[audita querela] has long since become a *historical vestige* of the common law," Commonwealth Brief ("CW Brief") at 11 (emphasis added), and "the Code contains no reference whatever to the writ of audita querela," *Id*., as if to say that the common law is not *the law* unless codified or recently put to good use.

The Commonwealth asks this Court to look only at Rule 1:1 to determine that this ancient and noble writ is no longer available to Ms. Chan. But the correct frame of reference for this case is not Rule 1:1, but Va. Code Sec. 1-200 and its case law that recognizes the full legal authority of the common law until such time as it is altered or

abrogated by the General Assembly in a manner that is unmistakable and plainly manifested. In that respect, the Commonwealth is absolutely correct: the Code indeed contains no reference whatsoever to the writ of audita querela – and that is because the General Assembly has never seen fit to abolish it or restrict it in any way. The writ existed at common law, it was used to prevent substantial injustice, and it exists today, unaltered in its uses.

To the extent the Commonwealth raises legitimate policy concerns about the use of audita querela in the modern world, the concerns are just that: matters of policy. Pursuant to Va. Code Sec. 1-200, the Commonwealth can take its concerns directly to the General Assembly to have the writ of audita querela "altered." Until then, audita querela remains "in full force within the [Commonwealth]" to be used by its circuit courts to provide justice and equity to deserving litigants like Ms. Chan.

ARGUMENT

I. THE CIRCUIT COURT PROPERLY RELIED UPON THE WRIT OF AUDITA QUERELA BECAUSE THE WRIT EXISTS AT COMMON LAW IN CRIMINAL CASES AND HAS NOT BEEN ALTERED OR ABROGATED BY THE GENERAL ASSEMBLY.

Numerous federal cases establish the use of audita querela in criminal cases at common law, and no Virginia appellate decision holds that this facet of law somehow did not survive when the Commonwealth recognized and adopted the body of English common law. The General Assembly has not "altered" audita querela pursuant to Va. Code Section 1-200. As a result, audita querela continues to exist unaltered as a common law writ available to circuit courts in criminal cases.

A. The Writ of Audita Querela Existed at Common Law in Criminal Cases

Audita querela "is an old common-law writ permitting a defendant to obtain 'relief against a judgment or execution because of some defense or discharge arising subsequent to the rendition of the judgment.'" *U.S. v. Johnson*, 962 F.2d 579, 582 (7th Cir. 1992), quoting 11 *Charles A. Wright &*

Arthur R. Miller, Federal Practice and Procedure § 2867, at 235 (1973). At common law, audita querela was used to attack a judgment that was correct when rendered but later was rendered infirm by matters arising after its rendition. *U.S. v. Reyes,* 945 F.2d 862, 863 n. 1 (5th Cir. 1991). It is available in criminal cases to prevent substantial injustice. *Fajardo v. Comm.,* 19 Va. Cir. 162 (1990).

Multiple Virginia and federal courts have granted audita querela relief in criminal cases. *See e.g., Comm. v. Mubarak*, 68 Va. Cir. 422 (2005)(granting audita querela relief to a criminal petitioner to modify his 16 year old criminal sentence to avoid collateral immigration consequences), *U.S. v. Salgado,* 692 F. Supp. 1265 (E.D. Washington 1988)(using *audita querela* to vacate an alien's 24-year-old tax evasion conviction so that the alien could take advantage of amnesty rights), and *U.S. v. Ghebreziabher,* 701 F. Supp. 115, 116-17 (E.D. La. 1988) (using *audita querela* to vacate one of three federal

convictions so that an alien would be eligible for amnesty rights).

The writ was also recognized in *U.S. v. Acholonu*, 717 F. Supp. 709 (D. Nev. 1989). There, the district court declined to issue the writ where it found that the equitable considerations were insufficient. *Id*. at 710. The court suggested that the success of *audita querela* claims turns on whether "justice demands that defendant's conviction be vacated." *Id*.

Other courts that have denied audita querela relief on the merits nonetheless have recognized the writ's common law usage in criminal cases. See e.g., *U.S. v. Johnson*, 962 F.2d 579 (7th Cir. 1992), *Doe v. I.N.S.*, 120 F.3d 200 (9th Cir. 1997), U.S. v. *Holder,* 936 F.2d 1 (1st Cir. 1991); *U.S. v. LaPlante,* 57 F.3d 252, (2d Cir. 1995)(each holding that, at common law, audita querela relief in criminal cases required legal error and not just equitable objection).

The Commonwealth argues that the presence of the All Writs Act in federal law makes federal cases irrelevant. CW

Brief 28. To the contrary, the Act supports the circuit court's use of audita querela. After all, what matters in the first instance is not whether a Virginia appellate case has heretofore had the opportunity to recognize the use of audita querela in criminal causes (unlike multiple circuit courts), but whether the writ existed in criminal cases at common law regardless of the jurisdiction – because the Commonwealth necessarily shared in such law as reflected in Va. Code Section 1-200. And in that regard, the Commonwealth's reliance on the federal All Writs Act to justify the use of audita querela in federal criminal cases bolsters Ms. Chan's claim. After all, the federal All Writs Act does not create new writs; it simply recognizes existing ones.

Lastly, the Commonwealth relies on *Nicolson & Heth v. Hancock*, 14 Va. (1 Munf.) 491, 501 (1810) for the proposition that audita querela "never was introduced into this country." In fact, the quotation is actually a comment from a chancellor in equity in the case at hand made in

response to a statement of counsel discussing a civil motion. It is dicta, and erroneous at that. Looking at the number of Virginia Supreme Court cases that deal with audita querela in the civil context (CW Brief 10), it is safe to say that the Commonwealth's own brief shows that this statement is incorrect.

In sum, federal and state case law establish that audita querela exists at common law as a cause of action available to criminal defendants to attack constitutional infirmities, substantial injustices, and harsh collateral effects.

B. The Writ of Audita Querela Has Not Been Altered or Abolished by the General Assembly.

The "common law of England, insofar as it is not repugnant to the principles of the Bill of Rights and Constitution of this Commonwealth, … continue[s] in full force … except as altered by the General Assembly." Va Code § 1-200. That is, the "full force" of the common law remains in effect until the General Assembly's intent to alter

it is plainly manifested. *Wackwitz v. Roy*, 244 Va. 60, 418 S.E.2d 861 (1992).

In abolishing common law writs or defenses, the General Assembly plainly manifests its intent through express abrogation. *See, e.g.,* Va. Code § 8.01-24 ("The writ of scire facias is hereby abolished."); § 8.01-165 ("No writ of right, writ of entry, or writ of formedon, shall be hereafter brought.").[1] In this case, the Commonwealth concedes that the Code of Virginia is silent regarding audita querela. CW Brief 11.

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[1] See also **§ 8.01-635** ("The common-law writ of quo warranto . . . is hereby abolished . . ."). **§ 8.01-218** ("No action of replevin shall be hereafter brought."); **§ 8.01-220(A)** ("no civil action shall lie or be maintained . . . for alienation of affection, breach of promise to marry, or criminal conversation . . ."); **§ 8.01-220(B)** ("No civil action for seduction shall lie or be maintained ..."); **§ 8.01-220.1** ("the common-law defense of interspousal immunity in tort is abolished…"); **§ 8.01-420.1** ("The common-law proceeding to perpetuate testimony is abolished."); **§ 8.01-467** ("No writ of levari facias, writ of extendi facias, writ of elegit, writ of capias ad satisfaciendum, or writ of distringas shall be issued hereafter."); **§ 8.01-668** ("The writ de homine replegiando is abolished."); **§ 55-14.1** ("The doctrine of worthier title is abolished . . . as a rule of law . . ."); **§ 64.1-19.2** ("The interests of dower and curtesy are abolished.")

In the absence of express language, "only those common law claims falling squarely within the confines of an applicable statute are preempted thereby." *The Country Vintner, Inc. v. Louis Latour*, 272 Va. 402, 412, 634 S.E.2d 745, 751 (2006)(rejecting an argument that statutory civil conspiracy abolished common law conspiracy by implication). That is, "[a] statutory change in the common law is limited to that which is expressly stated or necessarily implied because the presumption is that no change was intended. When an enactment does not encompass the entire subject covered by the common law, it abrogates the common-law rule only to the extent that its terms are directly and irreconcilably opposed to the rule." *Id*.

Just as no statute expressly abrogates audita querela, no statute exists that by its terms is directly and irreconcilably opposed to the writ. The Commonwealth suggests only one: Rule 1:1. But Rule 1:1 is not even an act of assembly, but rather a rule of court that is only indirectly authorized by statute. *See, e.g.*, Va. Code §§

8.01-3, 17.1-503. And even if Rule 1:1 were viewed as the equivalent of an act of the General Assembly, its terms do not come close to abrogating audita querela by implication. Rule 1:1 is not "directly and irreconcilably opposed" to the common law writ of audita querela. It is no more at odds with audita querela than it is with habeas corpus (Va. Code § 8.01-654), coram nobis (Va. Code Section 8.01-677), or any other mechanism that permits a circuit court to consider a matter after 21 days have passed. *See, e.g.*, Va. Code Section 19.2-303, which provides an additional grant of authority to a trial judge to modify a sentence under certain circumstances.

Any implication of abolition by substitution is far less pronounced than it was in *Country Vintner*, *supra*, in which this court rejected an argument that statutory civil conspiracy abolished common law conspiracy by implication. Nor does Rule 1:1 come faintly close to the express abolition of other common law writs and defenses enacted by the General Assembly.

In sum, the writ of audita querela exists at common law in criminal cases and has not been altered under § 1-200 or abolished by the General Assembly. The circuit court had jurisdiction to modify Ms. Chan's sentence by writ of audita querela to allow for a fair and just disposition under the extraordinary circumstances of this case.

II. THE CIRCUIT COURT PROPERLY USED THE WRIT OF AUDITA QUERELA IN THIS CASE, REGARDLESS OF WHETHER SIMILAR RELIEF MIGHT BE AVAILABLE THROUGH OTHER GROUNDS, WHERE THE COURT FOUND THE EQUITIES STRONGLY FAVORED RELIEF AND, IN THE ALTERNATIVE, THAT MS. CHAN SUFFERED PREJUDICE FROM INEFFECTIVE ASSISTANCE OF COUNSEL.

The Commonwealth sidesteps Ms. Chan's legal and equitable bases for relief by largely devoting its brief to the red herring of habeas corpus, a writ that played absolutely no role in the circuit court's decision. In doing so, the Commonwealth cites no case law or statute whatsoever for its key proposition – upon which its entire habeas discussion is based – that habeas corpus is a "fundamental procedural bar" to relief by writ of audita querela. CW Brief 19.

In fact, audita querela as a cause of action has remained unaltered by the General Assembly from its common law roots. Whether habeas corpus provides an independent basis for relief or not is immaterial; the circuit court relied upon audita querela and coram nobis, in the alternative, and a possible third basis for relief has no bearing.[2]

In Ms. Chan's case, the circuit court relied on equitable and legal grounds to provide relief through audita querela.

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[2] The Commonwealth makes the unsubstantiated claim that the existence of the writ of habeas corpus acts as a "fundamental procedural bar" to audita querela by analogy to coram nobis, stating that "[i]f that is true of a writ of coram nobis, which is expressely 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."

The Commonwealth again stands matters on their head. The lack of a statute relating to audita querela is evidence that the analogy to coram nobis is misplaced and that habeas corpus thus is **not** a procedural bar to audita querela, precisely because no statute exists that abrogates or alters the writ of audita querela as it existed at common law in criminal cases. Sec. 8.01-677 did not "establish" coram nobis, as the Commonwealth asserts; if anything, it may have altered it, thus limiting its scope. No such statute exists limiting the scope of audita querela. Thus, the Commonweatlh's whole argument about habeas corpus – by analogy to coram nobis – is immaterial.

Equitably, the circuit court recognized Ms. Chan's case to be compelling compared to other cases in which defendants have sought post-sentence relief. Ms. Chan, a resident of the U.S. since the age of two and of Virginia since the age of eight, had been jailed by immigration authorities for six months awaiting deportation. Joint Appendix ("App.") 130. The circuit court received evidence from her father, a U.S. citizen and 20 year veteran of the U.S. Navy; her three younger siblings, all U.S. citizens by birth; and her mother, a legal permanent resident. App. 130. The court considered her age, 25, and her lack of any other criminal record. App. 131.

Legally, the circuit court recognized that Ms. Chan suffered ineffective assistance of counsel when she was advised to accept a plea offer to assault and battery in 2005 and received a twelve month suspended sentence. App. 131. Trial counsel never advised Ms. Chan of the immigration consequences of her plea given her immigration status (that twelve months of suspended time would lead to

mandatory deportation but that 364 days would have no immigration consequence) and ignored the eyewitness accounts of two people prepared to testify at trial who corroborated Ms. Chan's pleas of self defense. App. 46. The circuit court received evidence from the prosecutor in the case that the Commonwealth would have offered a lesser sentence had it been made aware of the fact of Ms. Chan's non-citizenship. App. 131. In the totality of the circumstances, the circuit court properly held that trial counsel's performance amounted to ineffective assistance of counsel in violation of Ms. Chan's Sixth Amendment rights. *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052 (1984).[3]

The recent U.S. Supreme Court opinion in *Padilla v. Kentucky* significantly strengthens the circuit court basis for relief. 559 U.S. ___, 130 S. Ct. 1473 (2010). Padilla was a legal permanent resident who had resided in the United

[3] Under *Strickland*, a defendant has to show (1) that her counsel's performance was deficient and (2) that the deficient performance prejudiced her. 466 U.S. at 687.

States for nearly 40 years, and served in the U.S. Armed Forces during Vietnam. 559 U.S. at *1. In 2001, he pled guilty to various drug offenses. *Id*. Before agreeing to the plea, Padilla received erroneous advice from his counsel regarding the immigration consequences of his plea. *Id*. Padilla then sought post-conviction relief to set aside the plea on the ground that he had received ineffective assistance of counsel. *Id*. at *1-2. The Court held that the lawyer for an alien charged with a crime has a constitutional obligation to tell the client that a guilty plea carries a risk that he will be deported. *Id*. at *17.

In light of *Padilla*, Ms. Chan unquestionably suffered ineffective assistance of counsel and prejudice. Her attorney never made her aware that her plea might subject her to the risk of deportation. She was prejudiced because the record in the circuit court showed that she would have avoided a twelve month sentence – and the risk of deportation – had

the prosecutor and court been made aware of her immigration status.[4]

The Commonwealth argues that *Padilla* does not aid Ms. Chan because it only applies when the client has notified a lawyer of her immigration status. CW Brief 25. That is not an accurate reading of *Padilla*. In fact, the court in *Padilla* states without limitation that "we now hold that counsel must inform her client whether his plea carries a risk of deportation." 559 U.S. at *17. It plainly states a rule that applies in all criminal cases. The court does not suggest that its holding is limited to a subset of cases in which the client first raises the issue. To the contrary, the court notes that "[f]or at least the past 15 years, professional norms have generally imposed an obligation on counsel to provide advice on the deportation consequences of a client's plea." 559 U.S. at *15. This norm is reflected

[4] *See* Affidavit of Assistant Commonwealth's Attorney. App. 67.

in Virginia circuit court practice in which *the lawyer* is expected to raise the issue.[5]

But the Commonwealth suggests that such a plain reading of the holding is untenable and invites racial profiling. CW Brief 27, fn 8. Not so. At most, a plain reading of the holding adds eight words to the duty of a lawyer, who merely needs to advise the client that, "*If you are not a United States citizen*, then you need to be aware that the proposed plea carries a risk of deportation."[6]

In sum, the circuit court properly found that counsel's performance violated Ms. Chan's right to the effective assistance of counsel, and that, as an independent basis for relief under audita querela, that substantial equities strongly favored relief. Ms. Chan successfully completed her

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[5] *See* Norfolk Circuit Court form: *Advice to Defendants Pleading Guilty*. App. 64-66, Question No. 24.

[6] If the Commonwealth is concerned that *Padilla* is asking lawyers to insult a client by 'suggesting' that she might not be a citizen, the practical import of the holding simply adds one more clause to the lawyer's duty: "Mr/Mrs _____, *I am obligated to tell all my clients that*, *if you are not a U.S. citizen*, you need to be aware that the proposed plea carries a risk of deportation."

probation and all of the requirements of the sentence imposed by the circuit court and had been a model citizen since that time. App. 5. The court recognized that she plays a central role within her family, caring for her younger siblings and assisting her ailing mother while her father is away at sea. App. 48. For these and other reasons, the circuit court correctly granted relief by writ of error audita querela.

III. THE CIRCUIT COURT PROPERLY USED THE WRIT OF CORAM NOBIS IN THE ALTERNATIVE TO GRANT RELIEF.

The writ of coram nobis lies if four prerequisites are met: (1) at the time of judgment, the court was operating under an error of fact; (2) the error is not attributable to the petitioner's negligence; (3) the error was of a type that, if known, would have prevented the court from proceeding to judgment; and (4) the error is not correctable by other existing statutory mechanisms. *Dobie v. Commonwealth*, 198 Va. 762, 769, 96 S.E.2d 747 (1957). The record in this

case supports the circuit court's grant of relief pursuant to the writ of coram nobis.[7]

First, counsel for Ms. Chan never made the trial court aware of the facts that Ms. Chan was not born in the United States and that she was not a citizen of the United States.[8]

Second, Ms. Chan was not negligent in failing to bring these facts to the court's attention. In arguing that she was, the Commonwealth places an unreasonable standard of care on the actions of a 21 year old non-lawyer. Mistakes and oversights are not per se negligent, and the Commonwealth

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[7] To the extent the Commonwealth questions the basis for the circuit court's grant of relief, the record is to be viewed in a light most favorable to the prevailing party, Ms. Chan, on appeal, granting her all reasonable inferences from the record. The circuit court received into evidence Ms. Chan's brief and supporting documents that contained factual proffers and witness exhibits to which the Commonwealth made no objection. The court is presumed to have reviewed the entire record and granted relief accordingly.

[8] These facts, when applicable law is applied to them, rendered Ms. Chan deportable, much as the fact of someone's time of birth, when applicable law is applied, renders someone an infant under the law. See, e.g., *Dobie*, 198 Va. at 762, 96 S.E.2d at 747 (holding that infancy is an error of fact which may prevent rendition of judgment).

introduced no evidence into the record in the circuit court to suggest that Ms. Chan's failure to act rose to such a level.

Third, knowledge by the circuit court of the error unquestionably would have prevented the court from proceeding to judgment. The assistant commonwealth's attorney's affidavit confirms that a different plea agreement would have been offered to Ms. Chan, and accepted by the court, had the Commonwealth and court been aware of the relevant facts. Affidavit of Assistant Commonwealth's Attorney. App. 67. Also, the circuit court itself granted the writ, indicating that it was satisfied that it would not have proceeded to the original judgment had it known of Ms. Chan's place of birth and non-citizen status.

Fourth, at the time the circuit court granted relief by way of the writ of coram nobis, there was no other legal mechanism available for relief (except for audita querela, for which relief was granted in the alternative.).[9]

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[9] The Commonwealth argues that the existence of habeas corpus makes coram nobis unavailable. However, at the time the circuit court granted coram nobis relief, the two

In sum, the circuit court properly relied upon coram nobis to grant relief to Ms. Chan for an error of fact.

CONCLUSION

For these reasons the order of the circuit court granting relief to Ms. Chan should be upheld.

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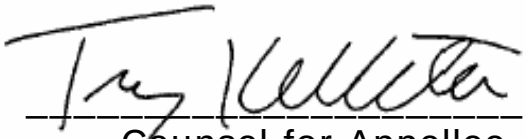
year statute of limitations on habeas corpus had run, so the mechanism was not available to Ms. Chan. The Commonwealth would seem to suggest that the mere existence of habeas for two years rendered coram nobis unavailable after that period. By that logic, the existence of any mechanism for post trial relief for some period of time – such as a motion for new trial, Va. Code Section 19.2-303, or appeal – would render coram nobis moot in all instances.

CERTIFICATE

The undersigned, counsel for the Appellee, Wellyn Flores Chan, hereby certifies the following in compliance with the provisions of Rule 5:26(d): that fifteen (15) copies of this Brief of Appellee were filed with the Supreme Court of Virginia via hand delivery; one (1) copy was filed electronically via e-mail at scvbriefs@courts.state.va.us and, that three (3) copies of the said Brief were mailed via U.S. First Class Mail to, Robert H. Anderson, III, Senior Assistant Attorney General, Office of the Attorney General 900 East Main Street Richmond, Virginia 23219



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Counsel for Appellee