1 V I R G I N I A:

2 IN THE CIRCUIT COURT OF THE CITY OF NORFOLK

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5 COMMONWEALTH OF VIRGINIA :

6 VS. : Case No.:

7 WELLYN F. CHAN, : CR05002683-00

8 Defendant. :

COPY

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11 TRANSCRIPT OF PROCEEDINGS

12

13 DATE: October 2, 2009

14 BEFORE: The Honorable John C. Morrison, Jr.

15

16 APPEARANCES:

17 MARGARET A. O'SHEA, ESQUIRE
Assistant Commonwealth's Attorney
18 Appearing on Behalf of the
Commonwealth of Virginia.

19

20 TREY R. KELLETER, ESQUIRE
Attorney for the Defendant.

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25 REPORTED BY: Cathy D. Aiello, RPR

1 P R O C E E D I N G S
2
3 THE COURT: Where is the defendant in this
4 case?
5 MS. O'SHEA: Your Honor, she's in federal
6 custody.
7 THE COURT: She is in federal custody?
8 MS. O'SHEA: Immigration.
9 THE COURT: All right.
10 MR. KELLETER: She's in immigration
11 custody, so we couldn't get her on short notice. Her
12 family is here though, her mother and siblings.
13 THE COURT: Folks, I have not looked at
14 all your submissions, but I know the nature of this
15 case. Apparently this lady was convicted -- what was
16 her conviction for?
17 MS. O'SHEA: She was convicted of assault
18 and battery. She was charged with felony malicious
19 wounding and pled guilty to the lesser-included offense
20 of assault and battery, received a 12-month suspended
21 sentence. That was on September 8th, 2005.
22 THE COURT: And it's my understanding that
23 INS, with a conviction of 12 months, will cause her to
24 be deported.
25 MS. O'SHEA: That's accurate, Judge.

1 THE COURT: That if it is anything less
2 than 12 months, they would not deport her, at least not
3 automatically because of that. Is that correct?
4 MR. KELLETER: That's correct.
5 THE COURT: And your petition at this time
6 is to modify her sentence to prevent the deportation
7 because that was not the intention at the time that the
8 sentence was given?
9 MR. KELLETER: That's correct, Your Honor.
10 And, in fact, as part of my petition, I have a sworn
11 affidavit from the Assistant Commonwealth's Attorney who
12 handled the case at the time, who says that if he had
13 been made aware of the fact that she had deportation
14 consequences, he would have offered a lesser suspended
15 sentence that would have avoided this consequence.
16 THE COURT: So if she received a sentence
17 of 364 days, she would be safe?
18 MR. KELLETER: Yes, Your Honor.
19 THE COURT: All right. What's my
20 jurisdiction to be able to do this at this point?
21 MR. KELLETER: Your Honor, the petition --
22 if I could hand up copies of my -- obviously, Your Honor
23 can't read through it all now, but as part of the
24 record.
25 THE COURT: Do I have your copies here?

1 MR. KELLETER: I don't believe you have my
2 copies, Your Honor.
3 THE COURT: This is the Commonwealth brief
4 in opposition. All right. Hand them to me and you can
5 refer to them.
6 MR. KELLETER: Your Honor, this comes on a
7 petition for a writ of audita querela and a writ of
8 coram nobis.
9 THE COURT: What was the first one? Writ
10 of what?
11 MR. KELLETER: I'm pronouncing it audita
12 querela. It might be audita.
13 THE COURT: That's brand new to me. I see
14 it: Audita querela.
15 MR. KELLETER: That writ has, in fact,
16 been used multiple times by both federal and state
17 courts to do precisely what we're asking here, Your
18 Honor.
19 My reply notes that there are two
20 different -- there were two courts here in Virginia on
21 the circuit court level which have recognized the use
22 audita querela to modify sentence after the --
23 THE COURT: What is it? Tell me what the
24 writ is.
25 MR. KELLETER: It's a common law writ that

1 has not been abrogated in the Commonwealth. It is a
2 writ that is used to address substantial injustices
3 after the fact.
4 The Fairfax Circuit Court has recognized
5 it twice. They have held in a written opinion that it
6 is available in criminal cases to address substantial
7 injustices.
8 There is not a single appellate decision
9 in Virginia to the contrary.
10 In terms of the continued viability of the
11 writ of AQ, essentially, the Code of Virginia makes it
12 clear that the common law of Great Britain continues to
13 apply unless it's been altered by the General Assembly.
14 So every once in a while, you have these situations
15 where somebody finds a writ that's still out there that
16 hasn't been abrogated.
17 My reply sets forth the legal argument,
18 and I think it's a valid one, which when the General
19 Assembly abolishes writs, they do so expressly.
20 I give a couple examples. In previous
21 briefs, I came up with about 30 examples of how the code
22 is littered with sections that say the writ of blank is
23 hereby abolished. In criminal cases, this writ has
24 never been abolished. As I say, two different courts in
25 Virginia on the circuit court level have recognized the

1 jurisdiction to do this. No court - the Virginia
2 Supreme Court, the Court of Appeals - has ever said you
3 can't. There's no adverse rulings. Three different
4 federal district courts have granted it in precisely
5 these situations.
6 Essentially, you look at the law and the
7 equities of the situation. In this case, Ms. Chan has
8 been in this country since she was two years old. Her
9 father served in the U.S. military for 20 years. He's
10 Filipino, and so when he first served in the military,
11 for the first couple years after Wellyn was born, they
12 lived in the Philippines. They then moved to California
13 when she was two. They went back to the Philippines for
14 a couple more years while he was deployed, and since the
15 age of eight, she's been living in Virginia Beach with
16 her family. Her three younger siblings who are here
17 today, they're all U.S. citizens because they were born
18 here. Her father became a U.S. citizen when she was 17
19 through the naturalization process, and but for the lack
20 of filing the proper paperwork, she would have become a
21 citizen at that time, too.
22 Under immigration law, if you are a legal,
23 permanent resident, as she should have been -- when your
24 parents become a citizen, you become a citizen, but the
25 proper paperwork had not been filed, and so Wellyn never

1 became a citizen; and then four years later when she was
2 21, she got this one and only criminal charge against
3 her, she was convicted of the assault and battery, she
4 got 12 months suspended. As I say, the Commonwealth's
5 attorney handling the case has a sworn affidavit
6 indicating that he would have offered less had it been
7 brought to his attention.
8 I also note that in terms of an attorney's
9 responsibility to inquire into deportation/immigration
10 consequences, it's been the practice of this court since
11 at least 2007 to have that very question placed on the
12 guilty plea form that attorneys use to advise their
13 clients. So one of the other bases, which I think is an
14 independent basis, for granting this writ of audita
15 querela has also been used in situations where you can
16 show ineffective assistance of counsel, and again, I
17 think that's an independent basis. It's not required,
18 but I think it strengthens this case in terms of the
19 equities. You have the young woman, who is essentially
20 American. She's been here almost her entire life. Her
21 family is U.S. citizens, her father served this country
22 for 20 years, and that's why she's here, and she had
23 this one conviction. It was an offense which the
24 Commonwealth saw fit didn't even require any jail time.
25 THE COURT: Let me say to you, it's

1 obvious to me that the equities speak in favor of that.
2 Let me ask you two questions. First of
3 all, what does the writ say? You stated what it is in
4 your brief?
5 MR. KELLETER: Yes, Your Honor. It is a
6 writ recognized by courts to address substantial
7 injustices. There's a quote from --
8 THE COURT: What page?
9 MR. KELLETER: Page 5 of my original
10 petition.
11 THE COURT: All right.
12 MR. KELLETER: It is available in criminal
13 cases to prevent substantial injustices. That was the
14 Fairfax Circuit Court recognizing that.
15 And then the first -- that's at the top of
16 the page. And then my first paragraph says, "Multiple
17 Virginia and federal courts have granted this relief in
18 criminal cases." And I say, "See examples." Those are
19 three different federal courts that have recognized an
20 authority to grant.
21 Now, those federal cases are relevant,
22 Your Honor, because, as I again note in my reply brief,
23 that the key law here is recognizing that if it existed
24 at common law and it hasn't been abrogated --
25 THE COURT: I understand that.

1 MR. KELLETER: So the federal cases are
2 cases that look at the common law, and these courts have
3 recognized --
4 THE COURT: The Commonwealth attorney is
5 going to tell me that my authority to amend a sentence,
6 a criminal sentence, does not go beyond 21 days unless
7 the person remains in the local jail.
8 What's your response to that?
9 MR. KELLETER: My response to that is
10 twofold. Again, going back to the basic principle that
11 there can be independent means, independent grants of
12 jurisdiction to the Court, and the writ of audita
13 querela is an independent basis. It existed, again, at
14 common law. It existed in these situations. It was
15 recognized to be an independent cause of action.
16 Technically, it's a civil motion, and as an independent
17 cause of action, the 21-day rule would not apply.
18 THE COURT: All right, sir.
19 MR. KELLETER: Just like the writ of
20 habeas corpus. And as I put in my reply brief, the
21 Virginia Supreme Court has recognized repeatedly that if
22 something exists at common law, the only way it gets
23 abrogated or altered is through the clear intent of the
24 General Assembly, and I quoted somewhere they say
25 flat-out, "This has been abolished." But the other way

1 is in which if the General Assembly legislates in such a
2 manner that it essentially crowds out the field, but one
3 of the key cases I cite is the example of conspiracy.
4 As we know, there is the -- in terms of civil
5 conspiracy, there is common law conspiracy and there's
6 statutory conspiracy, and they overlap a great deal.
7 Quite frankly, it gets confusing sometimes, but the
8 Supreme Court in the Vintner case, that I cite in my
9 reply, expressly held in that case that the statutory
10 conspiracy did not abrogate the common law conspiracy,
11 that it wasn't express, and that there seemed to be
12 different purposes; and, therefore, you can't assume
13 that they were abrogating one but not the other.
14 In this case, there's nothing to point at
15 to say that they've abrogated the writ of audita
16 querela.
17 THE COURT: Let me hear from Ms. O'Shea.
18 What's your position?
19 MS. O'SHEA: Your Honor, the
20 Commonwealth's position is that the writ of audita
21 querela, however it's pronounced, arose in equity, which
22 is actually slightly different from common law.
23 Equitable defenses, equitable remedies are
24 not the same thing as common law defenses or common law
25 remedies, Judge.

1 It arose, historically speaking, at the
2 time of Edward, III. That's the 14th century is when it
3 popped up in England, and it is defined and has been
4 discussed as available to a judgment debtor, someone
5 against whom a civil judgment has been entered.
6 To go back after a judgment is entered and
7 effect or vacate or otherwise alter that ruling based on
8 something that arose subsequent to entry of a civil
9 judgment, that's the definition of common law.
10 It's a debtor's remedy, Judge, and it's in
11 a court of equity, courts of equity, not in a criminal
12 common law court. As such, it was never a part of the
13 common law for the legislature to need to abolish.
14 I would note, Judge, Blackstone, who wrote
15 in the 18th century, a commonly accepted author
16 regarding English common law, described it as being
17 driven quite out of practice. In 1810, the Virginia
18 Supreme Court expressed doubt as to whether the writ had
19 ever been accepted in this country.
20 The last time the Virginia appellate
21 courts mentioned the writ in passing, it was in 1910, to
22 say -- a hundred years ago the Virginia Supreme Court
23 mentioned the writ, and it was to say that it had been
24 superseded in practice, that it was gone, that it was
25 not a part of Virginia law, period. That's what the

1 Virginia appellate courts had to say on the writ of
2 audita querela. Basically, nothing.
3 Every single Virginia Supreme Court to
4 even mention the writ has done so in a civil context,
5 not a criminal context. Civil because this was a civil
6 equitable remedy designed to apply to civil debtors, not
7 criminal defendants. Completely different ballpark.
8 It's taking a square peg and trying to force it through
9 a round hole.
10 So my point, Judge, is basically the writ
11 was not designed to apply in criminal cases. It was
12 designed to apply in civil cases.
13 I would note that the Federal District
14 Court for the Eastern District of Virginia has held that
15 the writ is inapplicable in a criminal context. There,
16 the defendant filed a writ of audita querela basically
17 seeking to have his conviction overturned for
18 ineffective assistance, habeas. The Eastern District
19 transmuted that into a habeas petition and said -- their
20 language was, "The ancient writ of audita querela has no
21 apparent relevance to criminal sentences," period.
22 So, Judge, the Commonwealth's position is
23 that this writ doesn't exist in criminal cases. Even if
24 it did, it wouldn't apply because the defendant has a
25 remedy for ineffective assistance of counsel, and that's

1 a habeas petition, which he has actually filed, and the
2 Virginia Supreme Court has made clear time and time and
3 time again ineffective assistance of counsel claims have
4 to be raised in habeas petitions. You can't file them
5 under a guise of any other type of writ.
6 The writ of error coram nobis, for
7 example, which is the other ground that we haven't
8 talked about, the Virginia Supreme Court has expressly
9 held that that does not supplant the writ of habeas
10 corpus. Ineffective counsel claim has to be raised
11 through that writ, which is statutory in Virginia and an
12 exception to Rule 1:1.
13 With regard to the two circuit court cases
14 out of Fairfax County that were cited by the petitioner,
15 those cases rely on the three federal district court
16 cases also mentioned by counsel.
17 I would note that those three federal
18 district court cases have all been disavowed in the
19 federal context. The courts have said, basically, that
20 they attempted to resurrect an equitable writ in a
21 criminal context, and they did so erroneously, and now
22 we're talking about federal Court of Appeals cases here,
23 Your Honor, such as the 9th Circuit and -- I cited for
24 Your Honor in my brief, there is an opinion in Maryland
25 that declined to adopt the writ of audita querela under

1 analogous circumstances, and it went through all of the
2 federal case law and did an excellent job of it, which
3 is why I didn't bother to list every single federal
4 Court of Appeals opinion discussing it.
5 So my point is, Judge, that those Virginia
6 circuit court cases rely on federal precedent. The
7 federal precedent is faulty.
8 Those two Virginia circuit court opinions
9 have been implicitly overruled in their own jurisdiction
10 by a subsequent decision, and that decision was issued
11 in 2002 also in Fairfax County, and I'm referring to
12 Commonwealth v. Sharma, S-h-a-r-m-a, where the Court
13 said, basically, once the sentence has been carried out,
14 as has been in this case, the Court no longer has the
15 authority to modify the sentence, the writ of audita
16 querela is not appropriate, and that the petitioner's
17 only relief is with the governor of the Commonwealth of
18 Virginia. And that is the Commonwealth's position here
19 as well.
20 Going back very briefly to the issue of
21 whether or not this even existed at common law in a
22 criminal context, I researched U.S. Supreme Court
23 decisions, Your Honor, discussing it. I did find one
24 from 1870. Avery v. United States. The cite is 79 U.S.
25 304, and it said the writ does not lie where the party

1 complaining has had a legal opportunity of a defense and
2 neglected it, one, and that's just -- and on equity
3 grounds regardless. But, second, they say that it's a
4 regular suit in which the parties may plead and take
5 issue on the merits and cannot, therefore, be sued
6 against the United States. As in England, it could not
7 against the crown.
8 So my point, Judge, is the U.S. Supreme
9 Court held in 1870, the --
10 THE COURT: 1870, that was even before
11 Mr. Jenkins was born.
12 MS. O'SHEA: Just barely, Judge.
13 So, Your Honor, you can't take a writ that
14 arose equitably, for equitable grounds, to provide a
15 judgment debtor relief from a judgment that was later
16 determined to be inequitable and bring it over and give
17 it to criminal defendants as a ground for collaterally
18 attacking their criminal convictions years and years
19 down the road.
20 There are narrow limited exceptions to 1:1
21 that do apply in criminal context, such as a petition
22 for a writ of actual innocence, such as the petition for
23 a writ of habeas corpus, such as the statute that
24 enables the Court to modify the sentence as long as the
25 defendant hasn't been transferred to the Department of

1 Corrections. That's basically all there is in terms of
2 criminal cases, Judge. The writ of audita querela was
3 not used as a vehicle at common law for attacking
4 criminal convictions, and as such, it doesn't exist
5 here. The definition doesn't fit here.
6 So that's the Commonwealth's point with
7 regard to that writ. It simply doesn't exist.
8 THE COURT: I don't need to hear you
9 further, sir.
10 Counsel, this is very interesting. You
11 know, it's refreshing to see that there can be this kind
12 of interest in a criminal case. Very interesting and
13 you both have educated me greatly. I congratulate you
14 both on the research that you've done. This may be an
15 equitable remedy, but, you know, we're not in equity,
16 but every judge, when he sentences in a criminal case,
17 considers the equities, if you will, in the situation,
18 or should.
19 I think that this is a brilliant discovery
20 by counsel for Ms. Chan, and I think that it's
21 appropriate in this case to apply it. I think it's an
22 independent situation. I don't think the Court's barred
23 from considering it. I'm going to make that ruling.
24 I'm going to amend the sentence to 360 days as opposed
25 to 12 months, and I'll note your exception to my ruling.

1 MS. O'SHEA: Thank you, Judge. Just for
2 the record, I'd state another basis for my objection is
3 that the statute of limitations on misdemeanors has long
4 since run, which I think would impact somewhat the
5 Court's ability to modify the sentence thereafter.
6 THE COURT: All right. Very well.
7 MR. KELLETER: Your Honor, I have a
8 proposed order. I may need to modify it. I can
9 certainly get it down to Your Honor to sign today. I
10 need it to take to Immigration Court.
11 THE COURT: That's fine. If you'll share
12 that with counsel before she's got to get to her other
13 court. You can just scratch through this order if you
14 wish.
15
16 (The hearing was concluded.)
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