IN THE

SUPREME COURT OF VIRGINIA

RECORD NO. 092346

COMMONWEALTH OF VIRGINIA,

Appellant,

v.

WELLYN FLORES CHAN,

Appellee.

REPLY BRIEF OF THE COMMONWEALTH

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TABLE OF CONTENTS

Page

ARGUMENT 1

I. CONSISTENT WITH VIRGINIA CODE § 1-200, THE CIRCUIT COURT LACKED JURISDICTION UNDER RULE 1:1 TO GRANT THE WRIT OF AUDITA QUERELA FOUR YEARS AFTER ENTERING FINAL JUDGMENT IN THE CRIMINAL CASE. 1

CONCLUSION 11

CERTIFICATE OF TRANSMISSION AND SERVICE 12

TABLE OF AUTHORITIES

Page

CASES

Blowe v. Peyton, 208 Va. 68,
155 S.E.2d 351 (1967) 7

Charles v. Commonwealth, 270 Va. 14,
613 S.E.2d 432 (2005) 6

Dobie v. Commonwealth, 198 Va. 762,
96 S.E.2d 747 (1957) 7, 8

Ex parte Mendenhall, 209 S.W.3d 260
(Tex. Ct. App. 2006) 10

Foster v. Commonwealth, 96 Va. 306,
31 S.E. 503 (1898) 3

Melanson v. Commonwealth, 261 Va. 178,
539 S.E.2d 433 (2001) 2

Miles v. State, 785 A.2d 841
(Md.Ct. Spec. App. 2001) 10

Neighbors v. Commonwealth, 274 Va. 503,
650 S.E.2d 514 (2007) 7

Padilla v. Kentucky, 130 S.Ct. 1473 (2010) 9

Thomas v. Commonwealth, 244 Va. 1,
419 S.E.2d 606 (1992) 9

United States v. Acholonu, 717 F.Supp. 709
(D. Nev. 1989) 10

United States v. Ghebreziabher, 701 F.Supp. 115
(E.D. La. 1988) 10

United States v. Salgado, 692 F.Supp. 1255
(E.D. Wash. 1988) 10

Weishaupt v. Commonwealth, 227 Va. 389,
315 S.E. 847 (1984) 3, 4

Wicks v. Charlottesville, 215 Va. 274,
208 S.E.2d 752 (1974) 2

Yeatts v. Murray, 249 Va. 284,
455 S.E.2d 18 (1995) 5

OTHER AUTHORITIES

Rule 1:1 ..... passim

Section 16.1-132, Code of Virginia 7

Section 1-200, Code of Virginia ..... passim

Section 17.1-503(A) 5

Section 8.01-3, Code of Virginia 5

Section 8.01-3(A), Code of Virginia 5

Section 8.01-654, Code of Virginia 5

Section 8.01-677, Code of Virginia 5, 7, 8

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ARGUMENT

I. CONSISTENT WITH VIRGINIA CODE § 1-200, THE CIRCUIT COURT LACKED JURISDICTION UNDER RULE 1:1 TO GRANT THE WRIT OF AUDITA QUERELA FOUR YEARS AFTER ENTERING FINAL JUDGMENT IN THE CRIMINAL CASE.

Chan's brief conspicuously fails to address numerous arguments advanced by the Commonwealth in its opening brief. Chan's primary

contention is that the writ of audita querela was recognized at common law in criminal cases. Thus, consistent with § 1-200, Chan asserts that the circuit court could properly grant relief in this case, notwithstanding the 21-day limitation in Rule 1:1. For several reasons, Chan's reliance upon § 1-200 is not well-taken.

Section 1-200 states: "The common law of England, insofar as it is not repugnant to the principles of the Bill of Rights and Constitution of this Commonwealth, shall continue in full force within the same, and be the rule of decision, except as altered by the General Assembly." This Court stated in Wicks v. Charlottesville, 215 Va. 274, 208 S.E.2d 752 (1974), that a statute would be presumed to incorporate the common law "unless it clearly appears from express language or by necessary implication that the purpose of the statute was to change the common law." 215 Va. 276, 208 S.E.2d at 755.

Chan's argument nevertheless failed for several related reasons. The paramount rule of statutory construction — to give effect to the intent of the legislature — is no less applicable to a claim such as Chan's. See generally Melanson v. Commonwealth, 261 Va. 178, 183, 539 S.E.2d 433, 435 (2001). Construing a virtually identical predecessor statute to § 1-200, this Court stated in Foster v. Commonwealth, 96 Va. 306, 31 S.E. 503

(1898) that "the common law of England, so far as it is not repugnant to the principles of the Bill of Rights and Constitution of this State, ***or has not been modified by a written law***, is in full force in this State, and constitutes the rule of decision on all subjects, whether of a civil or criminal nature." 96 Va. at 309, 31 S.E. at 504 (emphasis added).

In Weishaupt v. Commonwealth, 227 Va. 389, 315 S.E. 847 (1984), this Court provided important clarification concerning the impact of § 1-200 upon claims such as Chan's. There, in rejecting the defendant's argument that under the common law he could not have been guilty of raping his wife even though they were separated at the time of the act in issue, the Court emphasized that the common law by no means extends unqualifiedly to statutory offenses:

> The actual English common law rule, if applied directly to the facts of this case, would require us to reverse Weishaupt's conviction. But such a direct application is not possible. Before English common law can be applied in Virginia it must be analyzed in light of Code § 1-10 [the predecessor statute to § 1-200] and the cases interpreting that code section. According to the Code, English common law cannot be applied if it is 'repugnant to the principles of the Bill of Rights and the Constitution.' Nor can it be applied if it is 'altered by the General Assembly.' [Moreover,] though the statute, aside from its express limitations, appears to adopt English common law 'generally, and without a qualification,' this is not in fact the case. The true rule is this: 'Such of [English common law] doctrines and

> principles as are repugnant to the nature and character of our political system, or which the different and varied circumstances of our country render inapplicable to us, are either not in force here, or must be so modified in their application as to adapt them to our condition.' Thus, by statute and case law, we are free, in essence to adopt from English common law those principles that fit our way of life and to reject those which do not.

227 Va. at 399-400, 315 S.E.2d at 852 (citation omitted, emphasis in original).

In ruling in Weishaupt that the defendant was legally capable of raping his wife even though they were separated, this Court pointed to recent state decisions "suggest[ing] a break with the ancient rules that cast women in a subservient posture." 227 Va. at 402, 315 S.E.2d at 854. Further, the Court emphasized that the Virginia no-fault divorce statute "embodies a legislative endorsement of a woman's unilateral right to withdraw an implied consent to marital sex….The very scheme of the statute contemplates a voluntary withdrawal, by either spouse, from the marital relationship." 227 Va. at 403, 315 S.E.2d at 854.

Chan asserts that "no statute exists that by its terms is directly and irreconcilably opposed to the writ." (Def. Br. 10). Regarding the Commonwealth's reliance upon Rule 1:1, Chan says that that provision "is not even an act of assembly, but rather a rule of court that is only indirectly

authorized by statute." (Id.). The statutes that Chan herself cites, however, plainly demonstrate that Rule 1:1 is every bit as much a statute, for purposes of § 1-200, as, for example, § 8.01-654 (dealing with habeas corpus) or § 8.01-677 (coram nobis). (Def. Br. 10-11).

Section 8.01-3(A) authorizes this Court to "prepare a system of rules of practice and a system of pleading and the forms of process…to be used in all … courts" of the Commonwealth. Section 17.1-503(A) further states, in relevant part: "Such rules,…which shall be the only rules of practice and procedure in the circuit courts of the Commonwealth, ***shall be included in the Code of Virginia as provided in § 8.01-3, subject to revision by the General Assembly." (Emphasis added).*** Thus, Rule 1:1 is part of the statutory scheme against which Chan's argument under § 1-200 must be assessed.

This Court has made clear the primacy of the original criminal proceedings and the secondary, disfavored nature of post-trial writs. For example, in Yeatts v. Murray, 249 Va. 284, 455 S.E.2d 18 (1995), in upholding the circuit court's dismissal of a death row prisoner's habeas corpus petition, in lieu of an evidentiary hearing, and its reliance, in part, upon the respondent's affidavits, this Court pointed out that the circuit court's action was

> consistent with the collateral nature of a habeas corpus proceeding. The primary avenue for review of a conviction is a direct appeal. "When the process of direct review…comes to an end, a presumption of finality and legality attaches to the conviction and sentence." The state's dual interests of insuring the criminal defendant of his right to a fair trial…and the sovereign's need to punish offenders and achieve finality in judgments permit a habeas court 'to minimize the burdens to all concerned through the use of affidavits or other simplifying procedures."

249 Va. at 288-289, 455 S.E.2d at 20-21.

Consistent with the primacy of the criminal trial and direct appeal, Rule 1:1, with few exceptions, extinguishes a circuit court's ability to act in a criminal case 21 days after entry of final judgment. In this regard, this Court stated in Charles v. Commonwealth, 270 Va. 14, 17 n.*, 613 S.E.2d 432, 433 n.* (2005) 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. Chan does not, and cannot, identify any statute authorizing the circuit court's action in this case at bar. Indeed, Chan relies upon the complete absence of Virginia appellate decisions recognizing the applicability of a writ of audita querela to criminal cases and the utter absence of any mention of this writ in the Code of Virginia as proof of its continuing vitality.

In this regard, Chan's distinguishing between a writ of coram nobis, which is expressly referred to in § 8.01-677, and a writ of audita querela, which is nowhere mentioned in the Code of Virginia, and which, according to Chan, is therefore wholly unlimited by the Code, is not well-taken. Chan correctly states that § 8.01-677 does not "establish" coram nobis. (Def. Br. 13 n.2).[1] Indeed, this statute merely states that a clerical error or error in fact cognizable on coram nobis may be disposed of upon reasonable notice by the court.

Yet, such cases as Neighbors v. Commonwealth, 274 Va. 503, 650 S.E.2d 514 (2007), Blowe v. Peyton, 208 Va. 68, 155 S.E.2d 351 (1967), and Dobie v. Commonwealth, 198 Va. 762, 96 S.E.2d 747 (1957), have imposed substantial limitations on writs of coram nobis not expressly contained in § 8.01-677 or any other Code provision. See Brief of Commonwealth at 30-38. Neighbors, for example, made clear that coram nobis did not lie where the defendant could have filed a timely appeal under § 16.1-132 or a timely habeas corpus petition.

If Chan's arguments pursuant to § 1-200 were correct, however, there would have been no basis for this Court's holdings in Neighbors, Blowe,

[1] In its opening brief, the Commonwealth said that § 8.01-677 authorizes, not establishes, coram nobis. (Comm. Br. 11). Obviously, the Commonwealth meant by this reference only that § 8.01-677 makes clear the current efficacy of coram nobis in Virginia.

and Dobie, on the ground that the common law writ of coram nobis, other than to the extent it has been procedurally modified in § 8.01-677, remains fully intact in Virginia. This Court's consistent restrictions on the availability of the writ of coram nobis, which show otherwise, therefore apply with equal force to a writ of audita querela.

Moreover, even allowing for the possibility that, pursuant to § 1-200, the writ of audita querela has some current efficacy in Virginia, the circuit court still lacked jurisdiction in Chan's criminal case to modify her sentence four years after entry of final judgment. Significantly, on brief Chan does not identify one appellate decision in Virginia even assuming the applicability of audita querela to criminal cases. As discussed in the Commonwealth's brief at pages 9-10, Virginia appellate decisions have mentioned this writ only in civil cases and, even as to them, have made clear that audita querela has been supplanted by the modern motion to quash the judgment.

Further, by Chan's own characterization of audita querela, it has no applicability here. Chan states that this writ lies to obtain relief against a judgment or execution "'because of some defense or discharge arising subsequent to the rendition of the judgment.'" (Def. Br. 4). Similarly, Chan states that this writ "was used to attack a judgment that was correct when

rendered but later was rendered infirm by matters arising after its rendition." (Def. Br. 5).

The relevant federal laws governing Chan's deportation, however, are unchanged since Chan's criminal trial in 2005. (Comm. Br. 24-25). Thus, if Chan at the time of her trial had notified her attorney or the court of one fact she had known all of her life — namely, that she was born in the Philippines and is not an American citizen — her "defense" to her possible deportation under the immigration statutes would have been fully available at that time. Only because Chan did not inform her attorney or the court of her status as a Filipino citizen did this "defense" not emerge.

The only thing that occurred after this trial was the Supreme Court's decision in Padilla v. Kentucky, 130 S.Ct. 1473 (2010). Chan has made no showing on brief that she could not have filed a timely state habeas corpus petition challenging her plea and/or the effectiveness of her attorney, based on her claimed ignorance of the relevant immigration statutes. Chan says that "the Commonwealth places an unreasonable standard of care on the actions of a 21 year old non-lawyer," but she cites no case law to show that this constituted cause for her inaction. (Def. Br. 20).

Indeed, in Thomas v. Commonwealth, 244 Va. 1, 16-19, 419 S.E.2d 606, 614-615 (1992), in affirming the 17-year-old defendant's capital

murder conviction and death sentence, this Court charged the defendant with failure to apprise defense counsel of the (asserted) fact that he smoked marijuana laced with PCP on the night of the murders. Thus, this Court rejected Thomas's claim that the Commonwealth had intentionally destroyed marijuana that would have supported his contention that he had used marijuana laced with PCP at the time of the murders.

Further, the defendant's argument that federal case law demonstrates the applicability of audita querela in Virginia is unpersuasive. Chan cites three federal district court decisions granting audita querela relief in criminal matters. United States v. Acholonu, 717 F.Supp. 709 (D. Nev. 1989); United States v. Ghebreziabher, 701 F.Supp. 115 (E.D. La. 1988); United States v. Salgado, 692 F.Supp. 1255 (E.D. Wash. 1988).

As discussed in Miles v. State, 785 A.2d 841 (Md.Ct. Spec. App. 2001), these decisions have been widely rejected in subsequent federal decisions. Indeed, as the court stated in ex parte Mendenhall, 209 S.W.3d 260 n.1 (Tex. Ct. App. 2006), audita querela "has its origin in civil proceedings. The availability of this writ as a post-conviction remedy has been viewed with deep skepticism in both federal and state courts."

Thus, the circuit court wrongly invoked the ancient, abandoned writ of audita querela to disturb Chan's sentence four years after it became final.

Even if this writ still lies in civil cases in Virginia, the strict 21-day limitation in Rule 1:1, which has been invoked in numerous appellate decisions to hold actions jurisdictionally barred, is a strong legislative expression of the importance of finality in criminal cases, one that the circuit court's order here, if not corrected, would negate.

CONCLUSION

For these reasons, as well as those stated in the Opening Brief of the Commonwealth, the order of the Circuit Court of the City of Norfolk amending the defendant's sentence should be vacated.

Respectfully submitted,

COMMONWEALTH OF VIRGINIA

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CERTIFICATE OF TRANSMISSION AND SERVICE

On July 2, 2010, the required copies of this reply brief, paper and electronic, 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 and a copy of this brief was also e-mailed to Trey R. Kelleter at TKelleter@vanblk.com. The undersigned certifies that the brief, excluding the cover page, table of contents, table of authorities and certificate, contains 2,195 words.

The Commonwealth desires to present oral argument in this case.

_____
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