IN THE

SUPREME COURT OF VIRGINIA

RECORD NO. 092346

COMMONWEALTH OF VIRGINIA,

Appellant,

v.

WELLYN FLORES CHAN,

Appellee.

BRIEF OF AMICUS CURIAE
THE VIRGINIA ASSOCIATION OF CRIMINAL DEFENSE LAWYERS
IN SUPPORT OF APPELLEE

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STATEMENT OF THE NATURE OF THE CASE

The Virginia Association of Criminal Defense Lawyers ("VACDL"), as *amicus curiae*, adopt the Statement of the Case of Appellant, the Commonwealth of Virginia, filed in her Opening Brief.

ASSIGNMENTS OF ERROR

I. Did the trial court err in holding that the traditional equitable writ of *audita querela* is an available remedy in a criminal case.

II. Did the trial court err in holding that it possessed jurisdiction to modify a criminal defendant's sentence after the trial court's entry of the final sentencing order in a case when the 21-day period prescribed by Rule 1:1 of the Rules of the Supreme Court of Virginia had elapsed.

QUESTIONS PRESENTED

1. Is the writ of *audita querela* available post-trial in criminal cases?
2. Does Rule 1:1 of the Rules for the Supreme Court of Virginia override the writ of *audita querela*?

STATEMENT OF FACTS

The Virginia Association of Criminal Defense Lawyers ("VACDL"), as *amicus curiae*, adopts the Statement of Facts of Appellee, Wellyn Flores Chan, filed in her Opening Brief.

ARGUMENT

I. THE WRIT OF AUDITA QUERELA IS IN EFFECT IN THE COMMONWEALTH.

The writ of *audita querela* is a common law writ that was created in 1329 in the Third Year of Edward III. It still existed when the General Assembly first adopted the British writs, and it remained part of the law of England until it was abolished in England in 1925. When our Colony declared its separation from England by the Convention of May 1776, that Convention framed the first Constitution of Virginia.

That Convention also ordained that the common law of England, all statutes or acts of Parliament made in aid of the common law prior to the Fourth Year of the Reign of King James the First, which were of a general nature, not local to the Kingdom, along with the several acts of the General Assembly of the Colony then in force insofar as the same were consistent with the several ordinances, declarations, and resolutions of the General Convention, were found to be the rule of decision and shall be considered as in full force until the same should be halted by the legislative power of the Colony. 9 Hen. Stat. 127 sec. 6; *see also Foster v. Commonwealth*, 96 Va. 306, 308-09, 31 S.E. 503, __ (1898).

Several years later, in 1792, the Ordinance of 1776, which adopted

the Acts of Parliament that were of a general nature and that had been made in aid of the common law prior to the Fourth Year of James the First, was repealed by the legislature. Importantly, the part of the Ordinance of 1776 that adopted the common law then in force until it should be altered by legislative power, was not repealed. *Id.*

Today, Va. Code § 1-200 states as follows:

> The common law of England, insofar as it is not repugnant to the principle 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.

The next succeeding section, Va. Code § 1-201, reads as follows:

> The right and benefit of all writs, remedial and judicial, given by any statute or act of Parliament, made in aid of the common law prior to the Fourth Year of the Reign of James the First, of a general nature, not local to England, shall still be saved, insofar as the same are consistent with Bill of Rights and Constitution of this Commonwealth and the Act of the Assembly.

It follows, therefore, that the writ of a*udita querela*, as part of the common law prior to the Fourth Year of the Reign of King James the First was encompassed by the Ordinance of 1776. It was not abrogated in 1792, and continues in force today under Va. Code §§ 1-200 and 1-201.

The American Law Reports recently has defined the writ as:

> [A] remedy granted in favor of one against whom execution has been issued or is about to issue on a judgment, the enforcement would be contrary to justice, either because of: (1) matters arising subsequent to its rendition; or (2) prior existing defenses that were unavailable to the losing party in the original action due to the prevailing parties' fraudulent conduct or to circumstances over which the losing party lacked control.

A.L.R. Fed. 2d 493 (2006). In addition, Black's Law Dictionary 120 (5th ed. 1979) defines it as a common law writ to obtain relief against the consequences of a judgment on account of a matter arising since its rendition and which could not be otherwise addressed.

The presumption is that there may be no change in the common law unless a statute, intending to affect such change, is explicit in that regard. *See* Sutherland's Rules of Statutory Construction, § 6101 (4th ed. 1986); *see also Hannabass v. Ryan,* 164 Va. 519, 180 S.E. 416 (1935) (holding that statutes involving the common law are not to be construed as altering or changing the common law unless legislative intent is clear and manifest).

Such clear and manifest legislative intent does not exist in any statute in the Commonwealth regarding the writ of *audita querela.* An example of the specificity required to affect a common law writ that is available under Va. Code §§ 1-200 and 1-201 is found in Va. Code § 8.01-668. That provision abolished the writ *de homine*, which, unlike the writ of *audita*

querela, is no longer in force in the Commonwealth as a consequence of the clear statement legislative intent in Va. Code § 8.01-668.

It should also be noted that after 1 October 2005, what had been Va. Code § 1-11 regarding Acts of Parliament was readopted in Va. Code § 1-201. Likewise, the right and benefit of all writs under the common law, which had been Va. Code § 1-10 became Va. Code § 1-200 on that date. These provisions previously were codified as §§ 2 and 3, respectively, of the Code of 1919.

Had the General Assembly wanted to abolish, curtail, or limit the writ of *audita querela*, it would have done so over the years, but it has not. As a general principle, under the separation of powers doctrine, use of the writ, due to its incorporation in the common law under the Code of Virginia, may only be curtailed by the General Assembly; with all due respect, that may not be accomplished by the courts.

The prosecution's argument, in their brief, that practitioners' use of motions to quash judgments or the execution of judgments has superseded the writ misses the mark. The fact that lawyers may not use an available remedy cannot and does not have the impact, or effect, of repeal. Only the General Assembly is authorized to do that. In *Lowenbach v. Kelley*, 11 Va.

439, 69 S.E. 352 (1910), cited by the prosecution in their brief at page 10, this Court did not hold, as the prosecution argued, that the writ of *audita querela* had been "supplanted." No case from this Court has held that the writ has been abolished or repealed, just as no statute has abolished or repealed it. Infrequency of use does not operate to extinguish the law.

The common law and its writs remain a part of the Virginia law. In *Stewart v. Bailey*, 7 F.3d 384 (4th Cir 1993), the Court addressed judicial writs preserved from Westminster Hall by Va. Code § 1-11 (now § 1-201). The question addressed in that case was whether the writ of habeas corpus *ad prosequendum* was supplanted by the Interstate Agreement on Detainers, which had been adopted in the Commonwealth. The Court held that that writ continued in force and was not the same as the Interstate Agreement on Detainers.

In *Campbell v. Commonwealth,* 216 Va. 174, 431 S.E.2d 648 (1993), this Court, interpreting then in force Va. Code §§ 1-10 and 1-11 (now §§ 1-200 and 1-201), applied the common law to the elements of the crime of forgery of a public record. This Court determined that over the preceding 100 years, the revisions of the statutory scheme regarding forgery had only applied the requirement of prejudice to forgeries of private writings and not

public records. Revisions of the Code of Virginia, over the years, have not diminished or altered the writ of *audita querela*.

In *Oehl v. Oehl*, 221 Va. 618, 624, 272 S.E.2d 441, 444 (1980), a case involving child custody and parental rights of visitation, this Court observed that "...the prevailing English rules of procedure comport favorably with the concept of the procedure of due process, as that concept has involved in this State and nation." The writ of *audita querela* has been used in this Country in various cases, including criminal cases, in the 19th and early 20th centuries. *See* Ira P. Robins, *Revitalization of the Common-Law Civil Writ of Audita Querela as a Postconviction Remedy in Criminal Cases*, 6 Geo. Immigr. L. J. 643, 646-50 (Dec. 1992).

Various federal courts have applied the writ in a criminal context. In *United States v. Elene Lopez*, 1990 W.L. 10023717 (D. Ariz. 1990), a federal district court granted a writ of *audita querela* to adjust a sentence that had previously been entered and over which the court, otherwise, had no continuing jurisdiction. *See also United States v. Espinoza-Soto*, 1994 W.L. 16013615 (D. Ariz. 1994) (granting the writ for equitable reasons); *accord United States v. Salgado*, 692 F. Supp. 1265 (E.D. Wash. 1988).

Some of the federal courts that have recognized the applicability of

the writ in criminal cases have required a legal objection not cognizable under existing federal post-conviction remedies. For example, in *United States v. Ayala*, 894 F.2d 425 (D.C. 1990), the court held that:

> The Supreme Court's decision in *United States v. Morgan*, 346 U.S. 502, 98 L.Ed. 248, 74 S.Ct. 247 (1954), makes clear that a federal court can vacate a criminal conviction pursuant to the common law writ if *audita querela* only if the writ permits a defendant to raise a legal objection not cognizable under existing federal post-conviction remedies.

Id. at 430.

Because the defendant in that case had a debatable post-conviction remedy under the then-existing provisions of 28 U.S.C. § 2255, his request for relief under *audita querela* was denied and the case was remanded to allow him to pursue whatever relief might be available under § 2255.

In *United States v. Holder*, 936 F.2d 1 (1st Cir. 1991), the court found that the writ of *audita querela* in civil proceedings had been abolished by Rule 60(b) of the Federal Rules of Civil Procedure, but assumed, without deciding, that the writ may be available in criminal proceedings to obtain relief on a matter of defense arising since the rendition of judgment when advantage of that circumstance could not otherwise be taken. In *United States v. Ghebreziabher*, 701 F. Supp. 115 (E.D. La. 1998), the court

granted a writ of *audita querela* to allow relief from a past judgment owing to a matter or defense of discharge arising since the rendition of the judgment that could not have been taken advantage of otherwise. In *United States v. Khalif,* 116 F. Supp. 2d 210 (D. Mass. 1999), the court granted a writ of *audita querela* because the accused had received ineffective assistance of counsel.

The writ also has been used and granted in this Commonwealth. Some cases in which it has been applied include:

1. *Commonwealth v. Mubarak*, 68 Va. Cir. 442 (Ffx. Cty. Cir. Ct. 2005);

2. *Commonwealth v. Caballero*, Case No. C9802379 (Pr. Wm. Cty. Cir. Ct. 2005);

3. *Commonwealth v. Gupta*, Case No. GT04-000537 (Culpeper Gen. Dist. Ct. 2007);

4. *Commonwealth v. Hussain*, Case No. A-15904-02 (Stafford Cty. Juv. Dom. Rel. Ct. 2007);

5. *Commonwealth v. Carnahan,* Case No. CR05069174-00 (Pr. Wm. Cty. Cir. Ct. 2008);

6. *Commonwealth v. Momen*, Case No. FE-2005-149 (Ffx. Cty. Cir. Ct. 2009); and

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

To say that the writ is not accepted in the Commonwealth is not accurate.

In each of the above cases, it was accepted by the court.

II. RULE 1:1 OF THE RULES OF THE SUPREME COURT OF VIRGINIA DOES NOT OVERRIDE APPLICATION OF THE WRIT OF AUDITA QUERELA.

The prosecution's reliance on Rule 1:1 of the Rules of the Supreme Court of Virginia as a bar to a court's application of the writ of *audita querela* is misplaced. Rule 1:1 determines when a judgment order becomes final. That is not, however, a basis to divest the courts of the exercise of their authority under extraordinary writs, which go back in our legal history to Runnymede. While the General Assembly has enacted legislation prescribing the application of extraordinary writs in Va. Code § 8.01-654, they is not barred in a trial court as the opposition invokes of finality under Rule 1:1.

Trial courts have authority, according to this Court's decision in *Powell v. Commonwealth*, 182 Va. 327, 28 S.E.2d 687 (1944), to correct an illegal sentence, Rule 1:1 notwithstanding, because a void sentence does not terminate the jurisdiction of the court. Clerical errors, or errors of fact, for which a judgment may be reversed or corrected by a writ of *coram vobis*, may be reversed or corrected on motion, under Va. Code § 8.01-677. The availability of that extraordinary writ is not overridden by the time

constraints of Rule 1:1.

Other provisions of the laws of the Commonwealth that are not constrained or limited by Rule 1:1 include Va. Code § 19.2-303 regarding the modification of uncompleted sentences, Rule 5:7B of the Rules of the Supreme Court of Virginia regarding petitions for a writ of actual innocence, and the writ of *audita querela.*

The writ of *audita querela* is, by legislation of the General Assembly in Va. Code §§ 1-200 and 1-201, part of the law of the Commonwealth the same as if it had been legislated by a specific statute. It traditionally has not had any time limits. Under the common law of England, it was a post-final judgment remedy without a time limit. The General Assembly, the only government body in the Commonwealth with the authority to do so, has not seen fit to place a time limit on the writ.

The relationship of Rule 1:1 of the Supreme Court of Virginia to the writ of *audita querela* is that the Rule defines the beginning time at which recourse to the writ becomes available because the writ only applies to "final judgments." Thus, if a judgment were not final under Rule 1:1, the writ would not apply.

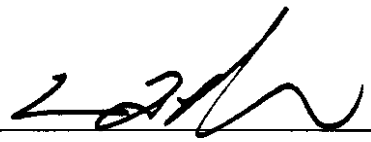
CONCLUSION

The legal issue addressed in the brief of amicus curiae is significant. It is not the place of the VACDL to address the merits of this particular case. The common law is the law of the Commonwealth. The writ of audita querela is part of the common law and is, thereby, the law of the Commonwealth.

REQUEST FOR ORAL ARGUMENT

Counsel for the VACDL on this brief of *amicus curiae* filed on behalf of Wellyn Flores Chan, Appellee, respectfully requests oral argument in person.

Respectfully submitted,
VIRGINIA ASSOCIATION OF CRIMINAL DEFENSE LAWYERS



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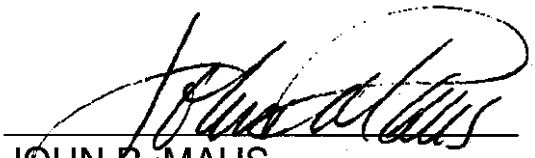

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CERTIFICATE

I hereby certify pursuant to Rule 5:17 that a true copy of the foregoing Brief of Amicus Curiae was mailed, first class, postage prepaid this 18th day of June 2010, to Kenneth T. Cuccinelli, II, Attorney General of Virginia, and Robert H. Anderson, III, Senior Assistant Attorney General, 900 E. Main Street, Richmond, VA 23219, and Trey R. Kelleter, Esq., Vandeventer Black, LLP, 101 West Main Street, Suite 500, Norfolk, VA 23510.

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