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VIRGINIA: IN THE GENERAL DISTRICT COURT OF LOUDOUN COUNTY

COMMONWEALTH OF VIRGINIA	)	
	)	
v.	)	Criminal No. GC04005749-00
	)	
EDGAR LUIS CABRERA	)	

ORDER

THIS CASE is before the Court on the Defendant's Motion for Writ of Error Coram Vobis. The Defendant was charged with the felony of grand larceny in 2004. On April 5, 2005 he entered into a plea agreement with the Commonwealth whereby the Commonwealth reduced the charge to a misdemeanor of petit larceny, the Defendant pleaded guilty and received a sentence of 12 months in jail with all 12 months suspended.

The Defendant was not advised by his attorney of any immigration consequences as a result of this conviction. On September 27, 2010, the Defendant was ordered to be deported by the United States Department of Justice Executive Office For Immigration Review, which Order is on appeal. The Defendant is not in custody on this charge, and therefore the remedy of a writ of habeas corpus is not available to him. Likewise, the right of the Defendant to file a motion to Reopen under VA. Code Sec. 16.1-133.1 within sixty days of the date of conviction has expired, as has the right of the Defendant to appeal within ten days of the date of conviction under VA. Code Sec. 16.1-132.

The basis for the Writ of Error Coram Vobis is that the Defendant received ineffective assistance of counsel at the time he entered into the plea agreement in this case, a violation of the Sixth Amendment of the U.S. Constitution. Specifically, Defendant alleges that he was not advised by his attorney at the time he entered into the plea agreement that the resulting conviction would in fact affect his legal status in the United States as a legal permanent resident when, in fact, the conviction did cause the Defendant to be subject to removal proceedings to deport him to his native country of Peru.

Rule 7c:6(a) of the Rules of the Supreme Court of Virginia provides:

> "(a) A court shall not accept a plea of guilty... to any misdemeanor charge... without first determining that the plea is made voluntarily with an understanding of the nature of the charge and the consequences of the plea."

In fact, the United States Supreme Court has long held that the trial judge must make an affirmative factual determination before accepting a plea, and found that "[i]t was error... for the trial judge to accept petitioner's guilty plea without an affirmative showing that it was intelligent and voluntary." "Boykin v. Alabama, 395 U.S. 238,242 (1969).

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Moreover, the United States Supreme Court has also stated:

"That a guilty plea is a grave and solemn act to be accepted only with care and discernment has long been recognized... Waivers of constitutional rights not only must be voluntary but must be knowing, intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences." Brady v. United States, 397 U.S. 742,748 (1970).

The Defendant cites Padilla v. Kentucky, 130 S. Ct. 1473 (dec. March 31, 2010), which held:

> "...It is quintessentially the duty of counsel to provide her [sic] client with available advice about an issue like deportation and the failure to do so clearly satisfies the first prong [ineffective assistance of counsel] of the Strickland analysis"... "It is our responsibility under the Constitution to ensure that no criminal defendant – whether a citizen or not – is left to the 'mercies of incompetent counsel'..." To satisfy this responsibility, we now hold that counsel must inform her [sic] client whether his plea carries a risk of deportation. Our longstanding Sixth Amendment precedents, the seriousness of deportation as a consequence of a criminal plea, and the concomitant impact of deportation on families living lawfully in this country demand no less."

Thus, the United States Supreme Court in Padilla specifically found that the failure to advise a criminal defendant of the possible immigration status consequences of a guilty plea is ineffective assistance of counsel and a violation of the defendant's Sixth Amendment right to the assistance of counsel. The question then becomes, what is the appropriate remedy to correct this constitutional violation?

Following the filing of this Motion and this court hearing evidence thereon, the court took the Motion under advisement to await the anticipated ruling of the Virginia Supreme Court in Commonwealth of Virginia v. Morris, Record No. 092163 and Commonwealth of Virginia v. Chan, Record No. 092346, dealing with this very issue. The Supreme Court of Virginia issued its opinion in these cases on January 13, 2011.

In Morris, the Defendant pleaded guilty to petit larceny in 1997 and received 12 months in jail with 11 months suspended. Thus, his right to appeal expired 10 days thereafter by statute, and his right to file a petition for writ of habeas corpus expired as soon as his sentence was served (15 days). In 2008, eleven years later, he was deported and filed a Motion for writ of error coram vobis with the trial court, which was granted.

In Chan, the defendant pleaded guilty to misdemeanor assault in 2005 and was sentenced to 12 months in jail, all suspended. Thus, the Defendant's right to appeal expired 10 days thereafter, and the remedy of habeas corpus was not available to him as he was not in custody. In 2009, Chan was deported and he filed a petition for writ of error coram vobis with the trial court, which was granted. Both Morris and Chan alleged

ineffective assistance of counsel for the failure to inform the Court or the Defendant of the immigration consequences of a conviction at the time of entry the plea.

The Commonwealth appealed both Morris and Chan to the Virginia Supreme Court, and the United States Supreme Court entered its holding in Padilla, supra, while Morris and Chan were on appeal.

The Supreme Court of Virginia in Morris and Chan, supra, stated that the common law remedy of a writ of error coram vobis is applicable to errors in fact which, if known by the court, would have prevented rendition of the judgment. However, the Court in its opinion limits this type of error to matters that are jurisdictional and which render the judgment not merely voidable, but void for lack of authority to enter a judgment, citing an 1855 case which cited as examples of the type of error in fact a situation when a party was deceased or a married woman at the time of the judgment, facts unknown to the trial court. Richaradson's Ex'x v. Jones, 12 Gratt. (53VA) 53(1855). While the writ has in fact been applied to claims of lack of jurisdiction, it has never been limited to such claims in the case law or by the legislature.

With this limitation or restriction applied, the Virginia Supreme Court in Morris and Chan held: "... the proper test is whether the alleged error constitutes an error of fact not apparent on the record, not attributable to the applicant's negligence, and which if known by the court would have prevented rendition of the judgment. [citations omitted] ... While ineffective assistance of counsel may render a judgment voidable upon the necessary showing, it does not render the trial court incapable of rendering judgment. [citations omitted]... Accordingly, a claim of ineffective assistance of counsel does not constitute an error of fact for which coram vobis will lie under Code Section 8.01-677..."

Moreover, the Virginia Supreme Court in Morris and Chan, in direct response to the holding of the United States Supreme Court in May, 2010 in Padilla that failure to advise a noncitizen client of immigration consequences, constitutes a violation of a defendant's Sixth Amendment right to effective assistance of counsel, held as follows:

"...Morris and Chan's reliance on Padilla is misplaced. While Morris and Chan may have suffered ineffective assistance of counsel according to Padilla and may have been successful had they timely filed petitions for writs of habeas corpus pursuant to Code Section 8.01-654, neither did so. Ineffective assistance of counsel does not constitute an error of fact for the purposes of coram vobis under Code Section 8.01-677."

Thus, the Virginia Supreme Court in Morris and Chan reversed the trial courts by expressly limiting a motion for writ of error coram vobis to claims that the trial court lacked in personam jurisdiction to enter the judgment that it did, and second, by expressly limiting a claim for ineffective assistance of counsel to filing a petition for writ of habeas corpus rather than a motion for writ of error coram vobis, contrary to its historical application at common law.

The ruling of the Virginia Supreme Court in Morris and Chan is a complete bar to recovery by Mr. Cabrera, the Defendant in this case, because he did not receive any

active jail sentence by this Court and was never in custody, a prerequisite to filing a petition for writ of habeas corpus. Moreover, as his claim is ineffective assistance of counsel, a constitutional violation recognized in Padilla, supra, the decision of the Virginia Supreme Court on January 13, 2011 in Morris and Chan that a claim of ineffective assistance of counsel is not available under a motion for writ of error coram vobis, leaves Mr. Cabrera without any remedy to correct what the United Supreme Court has found to be a constitutional violation in the proceedings. This is contrary to the historical precedent of the common law writ, which has always been held to be applicable when other statutory remedies such as appeal and habeas corpus are not available.

This Court is bound, under the doctrine of stare decisis, to follow a decision of a prior court, especially a higher court, in the interest of maintaining established precedent, fairness to all litigants and predictability in the law.

However, this common law doctrine of stare decisis is not absolute and there are rare exceptions. The Supreme Court of Virginia recognized such an exception in Nelson v. Warden, 262 Va. 276, 284 (2001):

> "Under the doctrine of stare decisis, we are not obliged to uphold a decision that is itself at odds with precedent previously established by this Court "after full deliberation upon the issue," [citations omitted], that fails to give proper effect to "the interposition of legislative power," [citations omitted], and that "has produced confusion."

For the reasons which follow, this Court finds that the Virginia Supreme Court's opinion in Morris and Chan, supra, is at odds with longstanding precedent and jurisprudence, is an infringement on the legislative power to amend, restrict or limit the common law, and creates confusion.

First, on the question of longstanding precedent and jurisprudence, the right to file a petition for wirt of error coram vobis has never been limited to cases where the trial court lacked jurisdiction to enter a judgment, and the Virginia Supreme Court's opinion in Morris and Chan does not cite any precedent for that holding, except for an 1855 case that cited the death of a party prior to entry of a judgment or the fact that a female litigant was married at the time judgment was entered as examples of cases where the writ was applied. Moreover, another case relied upon by the Court in Morris and Chan, supra, cites other examples that are not jurisdictional, such as to inquire into the voluntariness of a guilty plea in a criminal case. Dobie v. Commonwealth, 198 Va. 762, 770 (1957).

The Writ of Error Coram Vobis is an ancient remedy from the Common Law of England meaning "before you," and was a writ of error directed to the trial court which tried the case to correct an error in fact. (See: Students Law Lexicon, A Dictionary of Legal Words and Phrases, by William C. Cochran and Howard L. Bevis, W. . Anderson Co. publisher, 1988)

"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, appeal or other existing statutory proceeding...It lies for an error of fact not apparent 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 is 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..." Dobie v. Commonwealth, 198 VA. 762 (1957).

"...This writ lies where some defect is alleged in the process or the execution thereof, or some misprison of the clerk, or some error in the proceedings arising from a fact not appearing upon their face, as where judgment is rendered against a party after his death, or who is an infant or feme covert [married woman]...But it does not lie to correct any error in the judgment of the court, nor to contradict or put in issue a fact directly passed upon and affirmed in the judgment itself..." Richardson's Ex'x v. Jones, 12 Gratt. (53 VA) 53 (1855). [emphasis added]

It is, therefore, far more expansive than correcting a clerical error. The writ also has been used to inquire into a defect or error in the proceedings. Dobie, supra at p. 770. For example, in Dobie, the defendant pleaded guilty to the crime of rape and was sentence to death in the electric chair. The defendant filed a motion for writ of error coram vobis pursuant to the statutory predecessor to Sec. 8.01-677 which contained the same language as the current statute, asking the court to set aside and annul the conviction on the ground that his plea of guilty was not a voluntary plea. The defendant did not allege a clerical error or error in fact under the statute. The trial court granted a hearing, at which the defendant testified that he pleaded guilty because his attorneys told him he could "get the chair" if he went to trial and he was scared and was told by his lawyers that the judge would have mercy on him if he pleaded guilty. The lawyers denied this claim. The trial court denied the motion and the defendant appealed. The Supreme Court of Virginia affirmed, stating, at p. 770:

> "In the present case, it was very clearly shown by the evidence heard by the trial court that no error in fact existed in its judgment of conviction... for which a writ of error coram vobis should issue and for which the defendant's motion under the statute should be granted...In the order...appointing counsel for the defendant nearly a month before his trial, the court certified that the counsel so appointed were "able and competent attorneys at law." In... oral argument his present counsel stated that he was ably represented.
>
> The evidence leaves no doubt that his plea of guilty was the result of his own choice, made after full disclosure to him by counsel of its nature and its possible result...the court found and stated in its order that the defendant fully understood the nature and effect of his plea. It did not turn out as the defendant hoped, but whether the result would have been more favorable had he chosen to be tried by a jury no one can say. The fact remains that the plea he entered was

not the result of coercion by fraud, fear of violence or other means. If a mistake was made, it was a mistake on the part of the defendant and his counsel on a question of procedure, not a mistake in fact correctible by writ of error coram vobis or on the defendant's motion under the statute [emphasis added]."

Thus, the defendant was not allowed to withdraw his plea of guilty on his motion under the statute because there was no clerical error or mistake of fact shown, only a mistake in judgment in assessing the advantages of pleading guilty or being tried by a judge. Thus the Court considered the remedy, but found it not applicable under the facts of the case.

In Blowe v. Peyton, 208 VA 68 (1967), the defendant was indicted for robbery and pleaded guilty to grand larceny and was convicted and sentenced to two years in the state penitentiary. Nine years and eight months later, Blowe filed a motion in the trial court for a writ of error coram vobis pursuant to the same statute, the predecessor to Sec. 8.01-677. In it, he alleged that his conviction was void because (1) he could not be convicted of grand larceny under an indictment for robbery, (2) ineffective assistance of counsel in that counsel was appointed the day of trial, (3) that he was denied a fair and impartial trial, and (4) that he was denied a preliminary hearing. He did not allege a clerical error or error in fact. The trial court heard evidence on the motion and denied it, finding that the claims raised by Blowe are "...matters which should be determinded by habeas corpus...", and that writ of error coram vobis is not the proper method by which the petitioner should proceed because he did not allege an error in fact in the proceedings.

The Virginia Supreme Court affirmed the trial court's denial of Blowe's motion, noting that Blowe presented no evidence whatsoever of any clerical errors or errors of fact. Noted the court at page 72: "...Told the second time to go ahead with the presentation of evidence, if any, showing that the judgment was invalid, and asked what clerical error if any, was alleged in the petition, counsel merely replied that there were "clerical errors and factual errors that also occurred, and that is all I have Your Honor." Asked if he would rest at that stage, counsel replied "Yes, Your Honor." The Court went on to say:

> "In Virginia, we have by statute provided for a proceeding by motion to correct, "any clerical crror or error in fact for which a judgment or decree may be reversed or corrected," as a substitute for the common law writ of error coram vobis..."
>
> "Our statute is 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..."

In addressing Blowe's motion under the statute, upon which Blowe presented no evidence or argument, the Court simply held: "The change of a plea of not guilty of robbery to a plea of guilty of grand larceny was a matter of judgment, and not a "clerical

error or error of fact. We agree with the trial court that neither habeas corpus nor coram vobis is available under the facts and circumstances of this case. According to the record, Blowe has had a fair and impartial trial, and, as a result of following advice of counsel, received a lighter sentence than that which otherwise might have been imposed upon him. No "clerical error or error in fact" has been pointed out in the pleadings or in the evidence."

The most recent case of the use of coram vobis to set aside a guilty plea is Neighbors v. Commonwealth, 274 Va.503 (2007). Neighbors pleaded guilty in Orange County General District Court to the charge of resisting arrest and was fined $50.00. After his statutory right of appeal had expired, he filed with the trial court a pleading titled "Petition for Writ of Error Coram Nobis and Motion to Revoke/Vacate Plea." The Court's opinion in Neighbors does not state whether the petition was filed under the common law or as a motion under Sec. 8.01-677. However, the Court's opinion treats it as a motion under the statute. The basis for the motion was that Neighbors alleged that he was under heavy doses of medication at the time he entered his plea, and therefore lacked the capacity to enter a plea. The General District Court denied the Motion stating that a petition for a Writ Coram Nobis and a Motion to Revoke/Vacate a plea does not lie within "the jurisdiction" of the district court.

Neighbors appealed to the Circuit Court of Orange County. The Circuit Court denied the appeal because (1) the Circuit Court does not have appellate jurisdiction because the defendant did not appeal the case timely under Sec. 16.1-132 of the Code of Virginia, (2) Neighbors cannot appeal a civil matter under Sec. 16.1-106 if the amount in controversy is not greater than $50.00, and (3) coram nobis is not the proper vehicle to challenge the insanity/capacity of the defendant to enter a plea of guilty. Neighbors appealed to the Supreme Court of Virginia.

The Supreme Court of Virginia reversed, holding that the Circuit Court did have jurisdiction to hear the appeal of the judgment of the General District Court. On the issue of whether Neighbor's challenge to his capacity to enter a guilty plea could be raised by a motion under Sec. 8.01-677, the Court found that under the facts of the case, Neighbors did not plead a clerical error or error in fact in the General District Court and therefore he did not prove error under the statute.

> "Neighbors' general allegations that he suffered from some undefined lack of capacity due to medication at the time of his guilty plea is not a clerical error. Neither is it a claim of an error in fact. Accordingly, under the record in this case [emphasis added], a writ of coram vobis would not lie as a means by which Neighbors could collaterally challenge his guilty plea. The circuit court did not err in that portion of its judgment which determined the writ of coram vobis was thus not available to Neighbors." Neighbors, id., at p.512.

Therefore, Neighbors , Dobie and Blowe, all allowed a criminal defendant to file a motion under the statute alleging a clerical error or error in fact and which would enable the defendant to withdraw his guilty plea. Dobie and Blowe both found merely that the

appellants' claims did not show any clerical errors or errors in fact, only errors in judgment as to whether a more lenient sentence might result by pleading guilty rather than going to trial. Moreover, Neighbors provided merely that coram vobis was not available to Neighbors because "[t]he purpose of the writ does not involve correcting errors of fact "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 and failed to present them. "Neighbors, supra, at p. 512.

In addition to the foregoing three Virginia cases in which the Supreme Court of Virginia heard petitions for writ of error coram vobis to set aside a plea of guilty due to an alleged mistake of fact in the proceedings (i.e. not a knowing and intelligent entry of a guilty plea), other cases in common law jurisprudence have recognized the availability of the remedy in cases not alleging a jurisdictional defect.

In U.S. v. Morgan, 346 U.S. 502 (1954), the United States Supreme Court upheld the availability of the remedy of coram vobis to a criminal defendant who had not been afforded assistance of counsel as guaranteed by the Sixth Amendment to the constitution, and who had already served his sentence, and thus the remedy of appeal or writ of habeas corpus was not available to him.

In Morgan, supra, the defendant pleaded guilty to a criminal charge in federal court in 1939 and received a sentence of 4 years, which he served. Thus, the remedy of habeas corpus was not available to him after he was released from custody. In 1950, Morgan was convicted in a state court and received an enhanced sentence in state court as a result of his 1939 federal conviction. Morgan filed a petition for writ of error coram vobis in the U. S. District Court where he was convicted in 1939 seeking to vacate the conviction because he was denied his Sixth Amendment right to counsel. The U.S. District Court (the trial court) dismissed the petition, instead treating it as a habeas corpus petition which was not available to Morgan because he was no longer in custody on the 1939 conviction.

The U.S. Supreme Court in Morgan reversed, holding that coram vobis is an available remedy under the common law to correct errors of fact in the process or in the proceedings to allow the trial court to correct its error. The U.S. Supreme Court cited Johnson v. Zerbst, 304 U.S. 458, which held that a federal trial without a competent and intelligent waiver of counsel bars the conviction of the accused, and remanded the case to the U.S. District Court (the trial court) for a hearing on the claim of denial of assistance of counsel, or a competent and intelligent waiver thereof.

In Morgan, the U.S. Supreme Court noted with approval that the remedy of writ of error coram vobis has been allowed without limitations of time for facts that affect the "validity and regularity" of the judgment, and was used in both criminal and civil cases. The Court cited a variety of cases which have found appropriate the use of the writ of error coram vobis. The Court noted that it has been used to inquire into the failure to swear witnesses, as to the insanity of the defendant, pleading guilty to a crime through

the coercion of fear of mob violence (involuntary plea), and failure to advise the defendant of his right to counsel. See Morgan, supra.

Moreover, the U.S. Supreme Court expressly found that the remedy of coram vobis is available even though the defendant's appeal rights had expired and he had already served his sentence and thus no longer had the remedy of habeas corpus. Coram vobis was available for "[o]therwise a wrong may stand uncorrected which the available remedy would right." Morgan, supra.

In conclusion, on this first prong of the exception to the doctrine of stare decisis, this Court finds that the decision of the Virginia Supreme Court in Morris and Chan, finding that coram vobis is limited to errors in fact which render the court without authority or jurisdiction to enter a judgment, and holding that denial of effective assistance of counsel is not an error for which coram vobis will lie, is contrary to the longstanding precedent and body of jurisprudence in the common law in the application of coram vobis.

In regard to the second prong of the exception to the doctrine of stare decisis, namely that the decision infringes on the interposition of legislative power, I find that the decision of the Virginia Supreme Court in Morris and Chan is a substantial limitation on the common law of Virginia, which area is expressly reserved to the legislature.

In May, 1776, when the colony of Virginia was declaring its independence from England, the Virginia convention adopted the following law: "The common law of England, and all statutes or acts of parliament made in aid thereof, prior to the fourth year of James the First, which are of a general nature and not local to that kingdom, together with the several acts of the colony then in force, so far as the same may consist with the several ordinances, declarations and resolutions of the general convention, shall be considered as in full force until the same shall be altered by the legislative power of the commonwealth." See: Michie's Jurisprudence, Vol. 3C, Common Law, Sec. 5. This statute was amended several times by the General Assembly since then, and the current version reads:

> "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 with the same, and be the rule of decision, except as altered by the General Assembly." Sec. 1-10, Code of Virginia.

The common law of England is in force in Virginia in conformity to the terms of this section. Wiseman v. Commonwealth, 143 VA. 631 (1925).

In accordance with the statute, the common law may be altered by the General Assembly (not by judicial decision). "[A] decision to abrogate a longstanding common law principle is the proper function of the legislature, not of the courts." Collins v. Commonwealth, 57 Va. App. 355 (2010). But there are limitations on this legislative alteration. Thus, statutes in derogation of the common law are to be strictly construed

and not to be enlarged in their operation by construction beyond their express terms." Jan Paul Fruiterman, M.D. and Assoc. v. Waziri, 259 VA. 540 (2000) (emphasis added). Moreover, "...The common law will not be considered as altered or changed by statute unless the legislative intent is plainly manifested...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..." Boyd v. Commonwealth, 263 VA. 346 (1988) (emphasis added). Also, it has been held that, although the General Assembly can abrogate the common law, its intent to do so must be "plainly manifested" Wackwitz v. Roy, 244 VA. 60 (1992).

The General Assembly has enacted a statute which makes reference to the writ of error coram vobis. Section 8.01-677 of the Code of Virginia, provides as follows:

> "For any clerical error or error of 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."

It has been held that a judgment of conviction that is more than 21 days old can be set aside under this section. Comm. V. Pryor, 2000 VA Cir Lexis 645 (Amherst County), Feb. 16, 2000. This statute, found in Chapter 26.2 of the Code of Virginia dealing with "Appeals Generally" to the Court of Appeals and Virginia Supreme Court, clearly states that, in addition to filing a petition for writ of coram vobis, an appellant may file a motion to the trial court to correct a clerical error a error of fact in the trial court during the pendency of the appeal. It's language is permissive, not restrictive.

This statute by its express terms, does not limit or restrict the common law writ of error coram vobis to clerical errors or errors in fact depriving the court of jurisdiction. To the contrary, it merely provides in express language, that an appellant may also file a motion in the trial court to correct a clerical error or error in fact, the same as such error could be corrected by common law petition for writ of error coram vobis.

While the black-face typed headline of the statute provides: "Errors corrected on motion instead of writ of error coram vobis," the body of the statute does not restrict the right to file a petition for writ of error coram vobis. Rather, it expressly provides that a motion may be filed before the trial court upon reasonable notice, to correct a clerical error or error in fact. Moreover, the headlines of a statute are not a part of the statute. Section 1-217 of the Code of Virginia reads:

> "The headlines of the sections printed in black-face type are intended as mere catchwords to indicate the contents of the sections and do not constitute parts of the act of the General Assembly."

Had the General Assembly intended to alter, restrict, limit or abolish the common law right to file a petition for writ of error coram vobis, it could have plainly manifested

that intention in the statute, as it has on many other occasions (See, for example, Sec 8.01-635 ("The common law writ of quo warranto…is hereby abolished."); Sec. 8.01-668 ("the writ de homine replegiando is abolished")' Sec 8.01-165 ("No writ of right, writ of entry, or writ of formedon, shall be hereafter brought"); Sec 8.01-218 ("No action of replevin shall be hereafter brought"); Sec. 8.01-219 ("A judgment for the plaintiff in an action of trover shall not operate to transfer title…"); Sec 8.01-220 ("…no civil action shall lie or be maintained in this Commonwealth for alienation of affection, breach of promise to marry, or criminal conversation…after June 28, 1968…No civil action for seduction shall lie or be maintained where the cause of action arose…after July 1, 1974."); Sec. 8.01-220.1 ("The common law defense of interspousal immunity in tort is abolished…after July 1, 1981."); Sec 8.01-24 ("The writ of scire facias is hereby abolished…"); and Sec. 54.1-2144 ("The common law of agency relative to brokerage relationships in real estate transactions to the extent inconsistent with this article shall be expressly abrogated.").

Nor does it limit in any way the time to file a motion for writ of error coram vobis, nor does it restrict the right to file for ineffective assistance of counsel to habeas corpus only.

In conclusion, it simply cannot be stated that, in enacting this statute originally in 1849, (Dobie, supra, p. 770), the General Assembly expressly manifested an intention to restrict or limit the common law right of a writ of error coram vobis to errors of fact that deprived the Court of jurisdiction to enter the judgment. The 160 years of case law precedent cited above is proof sufficient.

Finally, in regard to the third prong to the exception to the doctrine of stare decisis, namely that the decision creates confusion, the Supreme Court of Virginia in Morris and Chan did not expressly overrule Dobie, Blowe or Neighbors, all of which heard the defendant's claims of error in entering his plea knowingly, intelligently and voluntarily, finding only that the errors alleged were not errors in fact to which coram vobis would apply. In none of the cases did the Supreme Court of Virginia hold that errors in fact are limited to jurisdictional claims or that a claim for ineffective assistance of counsel can only be raised in a petition for writ of habeas corpus. In fact, in all of the cases, the remedy of habeas corpus was no longer available to the defendant, and the Supreme Court still decided the claims on the merits. Moreover, the Court in Morris and Chan quoted with approval the principal function of the writ in Dobie, supra, where it says it is available to correct a vital fact not known when the judgment was rendered which could not have been corrected by a motion for a new trial, appeal, or other existing statutory proceeding (i.e. writ of habeas corpus), and then proceeds to hold that a claim of denial of the constitutional right to counsel can only be raised in a habeas corpus, proceeding, not in a coram vobis petition.

This holding, therefore, creates confusion, and this Court cannot in good conscience apply it in this case under the doctrine of stare decisis.

The law required this court, as a prerequisite to accepting a plea of guilty, to make a factual finding that the Defendant's plea of guilty was voluntarily and intelligently entered. This Court made such a finding, as indicated on the back of the warrant. The Supreme Court of the United States in the 2010 case of Padilla has held that the failure of counsel to advise a noncitizen defendant of the ramifications of his plea of guilty on his immigration status is ineffective assistance of counsel and a violation of the defendant's Sixth Amendment rights under the constitution.

If this Court were to abide by the ruling in Morris and Chan, a constitutional violation will stand uncorrected, as the remedy of habeas corpus is not available to the Defendant in this case. For the reasons stated above, the Court will not allow this to happen.

The Court in this case finds that this Court accepted the Defendant's plea of guilty in this case on the factual premise that it was made knowingly and intelligently with the effective assistance of counsel. The Defendant in this case has established that his counsel's failure to advise him of the legal consequences of a guilty plea constituted ineffective assistance of counsel under Padilla v. Kentucky, 130 S. Ct. 1473 (2010), a fact not known to the Defendant or to the Court when the plea was made, and a fact not apparent on the record, not due to the Defendant's own negligence nor concealed by the Defendant, and a fact not remediable by appeal, habeas corpus or other statutory remedy.

Had the Defendant been properly advised, he would not have entered into the plea agreement and this Court would have been prevented from entering this conviction. This meets the elements necessary for relief under the general common law petition for Writ of Error Coram Vobis recognized in the Commonwealth of Virginia since its creation.

WHEREFORE, the Court doth hereby ORDER that the Petition for Writ of Error Coram Vobis is granted, and the Defendant's conviction on April 5, 2005 of the misdemeanor of petit larceny is hereby VACATED, and the Defendant's plea of guilty to said charge is hereby WITHDRAWN. This case shall be reinstated on the Court's docket as a felony charge of grand larceny and scheduled for a preliminary hearing on March 31, 2011 at 1:00 P.M. in this Court. This Court does not have the authority to modify the sentence as was requested, but agrees with the statement of the U.S. Supreme Court in Padilla, supra; "the nature of relief secured by a successful collateral challenge to a guilty plea-an opportunity to withdraw the plea and proceed to trial-imposes its own significant limiting principle: those who collaterally attack their guilty pleas lose the benefit of the bargain obtained as a result of the plea." Padilla, supra, at p. 1488.

Therefore, the Defendant is hereby reinstated on an unsecured bond in the amount of $1,000.00.

THIS CASE is continued to ___March 31, 2011 at 1:00 P. M.___ for a preliminary hearing.

The clerk of this court shall mail a copy of this Order to:

(1) Angela H. Vernail, Esq.
Assistant Commonwealth's Attorney
20 E. Market St
Leesburg, VA 20176

(2) Alfred L. Robertson, Jr.
11350 Randon Hill Rd, Suite 800
Fairfax, VA 22030

ENTER this 31st day of January, 2011

This is a civil proceeding to which the Commonwealth may note its appeal within 10 days.

JUDGE