

IN THE CIRCUIT COURT OF HARRISON COUNTY, WEST VIRGINIA

ORVILLE M. HUTTON,

Petitioner,

vs.

Civil Action No. 13-P-119-3

James A. Matish, Chief Judge

State of West Virginia – Attorney General
Patrick Morrissey,

Harrison County Prosecuting Attorney
Joseph Shaffer,

United States Attorney General
William J. Ihlenfeld, II – United States
Attorney for the Northern District of
West Virginia,

United States Attorney General,

Department of Homeland Security,

ICE, York County, Pennsylvania,

Respondents.

AMENDED ORDER DENYING WRIT OF ERROR CORAM NOBIS¹

Pending before the Court is petitioner Orville M. Hutton’s “Emergency Petition for Writ of Error *Coram Nobis*” filed on September 4, 2013. On October 16, 2013 respondent Harrison County Prosecuting Attorney, Joseph Shaffer, filed his Motion to Dismiss. On January 29, 2014 respondents William J. Ihlenfeld, II, United States Attorney General Eric Holder, Department of Homeland Security, and the United States Immigration and Customs Enforcement (ICE), York

¹ Upon review of the final order entered on April 21, 2014, the Court amends its order to reflect additions that are incorporated herein. All additions appear in bold.

County, Pennsylvania (collectively "Federal Respondents"), filed their Motion to Dismiss or for Summary Judgment. No response was filed by West Virginia Attorney General Patrick Morrissey.² The Petitioner filed his response to the respective motions on February 18, 2014.

By Order entered December 16, 2013 the Court scheduled a Pretrial/Scheduling Conference for February 6, 2014. By facsimile received February 5, 2014 the Petitioner requested a continuance of the Pretrial/Scheduling Conference to allow time to respond to a pending federal petition requesting the same relief he seeks with this Court.³ The Court granted the Petitioner's motion and held the Pretrial/Scheduling Conference on March 20, 2014. At the hearing, respondents Joseph Shaffer and Patrick Morrissey appeared by counsel Andrea Roberts and the Federal Respondents appeared by counsel Helen Campbell Altmeyer. The Petitioner was not made available to appear by the ICE officials detaining him.

On April 9, 2014 the Court held an evidentiary hearing on the Petitioner's ineffective assistance of counsel claim as to Thomas Dyer, his court appointed counsel at the time of his plea and sentencing. **At the outset of the hearing, the Court inquired into whether the Petitioner wanted to withdraw his request for appointed counsel, which was incorporated into a responsive pleading. The Petitioner responded that he did not withdraw his request and wished to have counsel appointed for him, if it could be done immediately that day. The Court acknowledged that counsel could be appointed, but advised the Petitioner that counsel would not be able to immediately represent him at the hearing. The Petitioner stated to the Court that a deportation order was pending and he did not know when the**

² Respondent Morrissey has not appeared in this matter. However, the assistant prosecuting attorney at the March 20, 2014 Pretrial/Scheduling Conference stated that she was appearing on Respondent Morrissey's behalf in this matter.

³ Orville M. Hutton v. State of West Virginia, Civil Action No. 1:13cv186 (N.D.W.Va. 2013).

Court could reschedule the hearing. The Court further advised the Petitioner that if counsel was appointed, such counsel would need time to prepare and adequately represent the Petitioner. The Court next advised the Petitioner that it was his choice on whether or not counsel would be appointed, but that the hearing would have to be rescheduled if counsel was appointed. The Petitioner decided to orally withdraw his request and move forward with the hearing without the benefit of counsel. The Petitioner participated by telephone and called his sister Mykhel Yisrael, whom is his current immigration attorney, and his wife, Qeturah Rasyth, as witnesses to testify telephonically. After the Petitioner's post-sentencing subsequent counsel, Courtenay Craig, was not available, the Court allowed for the evidentiary hearing to continue on April 10, 2014. At the April 10, 2014 hearing the Petitioner again participated by telephone. Mr. Craig was also available telephonically and testified as a witness on the Petitioner's behalf. Neither party called as a witness Mr. Dyer, the Petitioner's attorney upon whom the ineffective assistance of counsel claim is based.

After reviewing the court file and memoranda filed by the parties, hearing argument at the hearings, and considering pertinent legal authorities, the Court denies the Petitioner's Writ of Error *Coram Nobis* for the reasons that follow.

Factual and Procedural History

The Petitioner, born Orville Michael Garth Hutton on November 13, 1962, is a Jamaican national who came to the United States in or around 1971 at the age of nine. He has lived in the United States for approximately 43 years and attended grade school, high school and three years

of college. He is a permanent resident, presently in the custody of ICE at the York County Prison in York, Pennsylvania.

During the January 2010 Term of the Harrison County, West Virginia Grand Jury, the Petitioner was indicted in case number 10-F-34-2 for Malicious Assault, in violation of W. Va. Code § 61-2-9(a) (Count One) and three counts of Sexual Assault in the Second Degree, in violation of W. Va. Code § 61-8B-4 (Counts Two, Three and Four) for events that occurred on or about January 12, 2009. The victim in the offenses was Tamara Knox, the Petitioner's live-in girlfriend and the mother of their then-four-year-old son.

On May 21, 2010 the Petitioner appeared before the Honorable Thomas A. Bedell, Judge of the Circuit Court of Harrison County, West Virginia and entered an *Alford*⁴ plea of guilty to the felony offense of Unlawful Assault, a lesser included offense of Malicious Assault, in violation of W. Va. Code § 61-2-9(a). Counts Two, Three and Four of the Indictment were dismissed. On July 6, 2010 the Petitioner was sentenced to a penitentiary for a term of one to five years. On August 9, 2010 Mr. Craig filed a "Notice of Intent to Appeal" on behalf of the Petitioner alleging a claim of ineffective assistance of counsel. On August 27, 2010 Mr. Craig filed a "Motion for Post-Conviction Bond or in the Alternative Home Confinement" on behalf of the Petitioner, which was denied by the plea/sentencing court without a hearing on September 21, 2010. In paragraph 6 of the motion, the Petitioner asserted that he may waive his right to appeal to prosecute a writ of habeas corpus for ineffective assistance of counsel against Mr. Dyer. Mr. Craig also filed a "Motion to Reconsider Sentence" and a "Motion for a New Trial Based on

⁴ *North Carolina v. Alford*, 400 U.S. 25, 91 S.Ct. 160 (1970); see also *Kennedy v. Frazier*, 178 W. Va. 10, 357 S.E.2d 43 (1987).

Newly Discovered Evidence” on the Petitioner’s behalf on September 16, 2010. The plea/sentencing judge denied both motions by orders entered on December 15, 2010. The Court has referenced, relied upon and taken judicial notice of the court file and orders for case number 10-F-34-2 in this matter.

The Petitioner was paroled on or about August 15, 2011. On or about February 15, 2012, the Petitioner was again arrested and charged with domestic abuse against his then and current wife, Qeturah Rasyth. The Petitioner was subsequently released on April 24, 2012 after Mrs. Rasyth failed to appear for a hearing on the charges.⁵ The domestic abuse charges were dropped and the Petitioner’s parole was not revoked. On or about August 9, 2012, he was again arrested and this time his parole was revoked for contacting his wife, traveling to the state of Ohio without his parole officer’s written permission, traveling to Upshur County, West Virginia without his parole officer’s written permission and writing a worthless check. The Petitioner’s sentence for his conviction of Unlawful Assault was effectively discharged on May 25, 2013, without making parole.

On May 15, 2013, ten days before his discharge date, the Petitioner was notified by the Department of Homeland Security (“DHS”) that he was subject to a United States Immigration and Customs Enforcement (ICE) detainer. The Petitioner avers that he did not know his plea agreement could subject him to mandatory removal. In support, the Petitioner supplied an affidavit executed by his attorney, Thomas Dyer. Mr. Dyer provided that he has “no memory of speaking with Mr. Hutton regarding his immigration status nor the consequences he may face as a[n] immigrant if found guilty.” The Petitioner also provided a transcript from his plea hearing.

⁵ The Court references magistrate case number 12M-496 for the domestic abuse charges.

While the plea/sentencing judge discussed many rights the Petitioner would lose by virtue of being convicted of a felony, no mention was made of deportation consequences. The Petitioner requests this Court to vacate his conviction on the grounds of ineffective assistance of counsel, a Sixth Amendment violation, and a due process violation.

Analysis and Conclusions of Law

The Petitioner brought this matter before the Court on a writ of error *coram nobis*. As a result, the Court must determine whether the writ of *coram nobis* exists in West Virginia. In making this determination, the Court must address the sources of authority to recognize the writ and the proper scope of the writ. The Court will begin with a brief examination of the history of the writ.

History of a writ of error coram nobis

The writ of error *coram nobis* has its roots in sixteenth century England. *See Trujillo v. State*, 310 P.3d 594, 597 (Nev. 2013). The writ is a nonstatutory, common law remedy whose origins trace back to an era in England in which appeals and new trial motions were unknown. *See People v. Hyung Joon Kim*, 202 P.3d 436, 445 (Cal. 2009). The writ of *coram nobis* was devised as a means of reviewing errors of fact outside the record that affected the validity and regularity of the decision itself and would have precluded the judgment from being rendered had they been known. *Trujillo*, 310 P.3d at 597 (citation omitted). The writ was sought before the same court that had entered the judgment and could only be used to address an error of fact not known to the court and not negligently concealed by the defendant. *Id.* (citing Richard B.

Amandes, Coram nobis – Panacea or Carcinoma, 7 Hastings L.J. 48, 49 (1955-56)). The same court entertained the writ because “error in fact [was] not the error of the judges and reversing it [was] not reversing their own judgment.” *United States v. Morgan*, 346 U.S. 502, 507 n.9, 74 S.Ct. 247, 250 n.9 (1954). Some examples of the kinds of errors of fact that were reviewed through a writ of *coram nobis* include clerical errors, the infancy of the defendant and nonrepresentation by a guardian, the death of a party before the verdict, the insanity of the defendant at the time of trial, a guilty plea procured by extrinsic fraud, and a valid defense that was not made because of fraud, duress, or excusable neglect. *Trujillo*, 310 P.3d at 597.

In America, the writ developed slowly and was rarely used. In 1954, however, the Supreme Court of the United States resurrected the doctrine in *United States v. Morgan*, 346 U.S. 502, 74 S.Ct. 247 (1954). In *Morgan*, the defendant was serving an enhanced sentence based on a prior conviction. The defendant argued that the prior conviction was invalid because it was based on a guilty plea that he entered without the benefit of counsel. 346 U.S. at 503-04, 74 S.Ct. 247. The Court determined that a motion in the nature of *coram nobis* could be sought in a criminal case based on the all-writs language in 28 U.S.C. § 1651.⁶ *Id.* at 505-11, 74 S.Ct. 247. While the Court acknowledged that at common law the writ was limited to errors of fact, the Court explained that, to achieve justice, the writ of *coram nobis* would be available to correct errors of the most fundamental character under circumstances where no other remedy was available and sound reasons existed for failure to seek relief earlier. *Id.* at 511-12, 74 S.Ct. 247. The Court then indicated that a motion in the nature of *coram nobis* was of the same general character as one

⁶ 28 U.S.C. § 1651(a) provides that the federal courts “may issue writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.”

under 28 U.S.C. § 2255, meaning it would be available to correct violations of the Constitution and laws of the United States. *Id.* at 505 n.4, 74 S.Ct. 247.

Because the federal law in *Morgan* is procedural, states are not bound by it. *See, e.g., State v. Sinclair*, 49 A.3d 152, 155 (Vt. 2012). As the Supreme Court of Vermont pointed out, state courts have adopted different approaches to the questions of whether *coram nobis* is available, and, if so, whether it can be used to address both matters of fact and law. *Id.* In describing the uncertainty surrounding *coram nobis*, the Vermont court stated:

Our decisions are in such confusion on the writ of *coram nobis* that no one can tell where we stand. In writing on the subject we have wobbled and bobbed like a lost raft at sea. But we are not alone, as other courts likewise seem to be without mast and compass when sailing this sea. Reference to the texts and reported decisions of foreign jurisdictions will show that other courts are in the same state of confusion. The writ of *coram nobis* appears to be the wild ass of the law which the courts cannot control. It was hoary with age and even obsolete in England before the time of Blackstone, and courts who attempt to deal with it become lost in the mist and fog of the ancient common law.

Id. (quoting *Anderson v. Buchanan*, 292 Ky. 810, 168 S.W.2d 48, 55 (1943)).

Coram nobis in recent West Virginia opinions

In West Virginia, a long line of decisions recognize that *coram nobis* has been purely abolished in civil cases by Rule 60(b) of the West Virginia Rules of Civil Procedure.⁷ *See, e.g., Isenhart v. Vasiliou*, 187 W. Va. 357, 360 n.8, 419 S.E.2d 297, 300 n.8 (1992). Four recent opinions, however, question whether the ancient writ has been abolished in criminal proceedings.

The earliest of the four cases, *State v. Eddie Tosh K*, involved an adjudicated delinquent child as a result of having committed assault during a fist fight. 194 W. Va. 354, 460 S.E.2d 489,

⁷ W. Va. R. Civ. P. 60(b) provides that “[w]rits of *coram nobis*, *coram vobis*, petitions for rehearing, bills of review and bills in the nature of a bill of review, are abolished, and the procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action.”

(1995) (per curiam). The juvenile raised many trial and post-trial errors, none of which constituted reversible error. However, the Court in a footnote suggested the use of *coram nobis* based upon whether the juvenile received the effective assistance of counsel during the delinquency hearing. *Id.* at 363 n.10, 460 S.E.2d at 498 n.10. Habeas corpus relief was unavailable since the juvenile was not incarcerated at that time. *Id.* The Court stated that “in spite of the language in Rule 60(b), which abolishes the writ of *coram nobis*, in criminal cases ‘the writ of *coram nobis* ... remains available whenever resort to a more usual remedy would be inappropriate.’” *Id.* (quoting *James v. United States*, 459 U.S. 1044, 1046-47, 103 S.Ct. 465, 466-67 (1982)).

Two years later, in *Kemp v. State*, 203 W. Va. 1, 506 S.E.2d 38 (1997) (per curiam), the Court considered Kemp’s writ of habeas corpus based upon his trial counsel’s ineffective assistance at his trial. One week prior to oral arguments, Kemp was released from the penitentiary. *Id.* at 2, 506 S.E.2d at 39. Because he had already been released, the Court denied the writ of habeas corpus as moot. *Id.* However, the Court added in a footnote that “[a]lthough we hold that the appellant cannot, at this time, petition for a writ of habeas corpus, he may be able to protect himself through a writ of error known as *coram nobis*. This particular writ has been used for post-conviction issues where the defendant is not incarcerated.” *Id.* at 2 n.4, 506 S.E.2d at 39 n.4.

In *State ex rel. Richey v. Hill*, 216 W. Va. 155, 603 S.E.2d 177 (2004), the Court further questioned the availability of a writ of *coram nobis*. In *Hill*, the petitioner sought a writ of mandamus directing a superintendent of the state police and a prosecuting attorney to either conduct DNA tests on certain evidence used in the petitioner’s trial or to release such evidence so

that he could arrange his own testing. *Id.* at 159, 603 S.E.2d at 181. After his writ of habeas corpus was denied by the circuit court and refused by the Supreme Court of Appeals of West Virginia, the petitioner filed a *coram nobis* petition. *Id.* The circuit court judge denied the petition as barred by the doctrine of *res judicata*, and the petitioner did not appeal. *Id.* at 162, 603 S.E.2d at 184. The Court again suggested in a footnote that the writ may still be available in a post-conviction context where the petitioner is not incarcerated. *Id.* at n.10, 603 S.E.2d at 184 n.10. The Court stated that “[c]oram nobis, however, is of ‘limited scope’ since it does not reach ‘prejudicial misconduct in the course of the trial, the misbehavior or partiality of jurors, and newly discovered evidence.’” *Id.* (quoting *United States v. Mayer*, 235 U.S. 55, 69, 35 S.Ct. 16, 20 (1914)).

The most recent significant discussion on *coram nobis* came in *State ex rel. McCabe v. Seifert*, 220 W. Va. 79, 640 S.E.2d 142 (2006) (per curiam). McCabe sought habeas corpus relief primarily upon an alleged discrepancy between the sentencing order and his underlying plea agreement concerning the date his concurrent sentences were to commence. *Id.* at 81, 640 S.E.2d at 144. The circuit court denied the petition, and McCabe appealed to the Supreme Court of Appeals of West Virginia. *Id.* After McCabe filed his appeal, he was released upon parole. *Id.* Therefore, the Court concluded that McCabe’s appeal was moot. *Id.* McCabe asked the Court, as an alternative to reversing the denial of habeas relief, to convert his appeal into a *coram nobis* proceeding. *Id.* at 84 n.9, 640 S.E.2d at 147 n.9. The Court concluded, again in a footnote, that McCabe was only entitled to leave to file a motion in the circuit court to correct the sentencing order and that a resolution of whether McCabe could convert his appeal into a *coram nobis* proceeding was unnecessary. *Id.* Justice Albright, in his dissent, questioned the majority’s refusal

to settle the recurring question of whether the writ of *coram nobis* is available in the criminal context. *Id.* at 89, 640 S.E.2d at 152.

While instructive, these recent opinions discuss the possibility of the writ of *coram nobis* in footnotes.⁸ Language in a footnote, however, should be used with caution. The Supreme Court of Appeals of West Virginia has held that “new points of law ... will be articulated through syllabus points as required by our state constitution.” Syl. Pt. 2, in part, *Walker v. Doe*, 210 W. Va. 490, 558 S.E.2d 290 (2001). Furthermore, “language in a footnote should be considered obiter dicta which, by definition, is language ‘unnecessary to the decision in the case and therefore not precedential.’ ” *State ex rel. Medical Assurance v. Recht*, 213 W. Va. 457, 471, 583 S.E.2d 80, 94 (2003) (quoting *Black’s Law Dictionary* 1100 (7th ed. 1999)).

Coram nobis is not available in civil or criminal proceedings in West Virginia

This Court must now determine what West Virginia law, if any, authorizes granting the writ or *coram nobis* in a criminal context. In *State v. Eddie Tosh K*, *supra*, the Supreme Court of Appeals of West Virginia noted that “in spite of the language in Rule 60(b), which abolishes the writ of *coram nobis*, in criminal cases the writ of *coram nobis* remains available whenever resort to a more usual remedy would be inappropriate.” 194 W. Va. at 363 n.10, 460 S.E.2d at 498 n.10 (internal quotations and citation omitted). Additionally, the United States District Court for the Northern District of West Virginia opined that “the abolition of these writs in civil cases probably does not apply to their use in criminal cases.” *Miller v. Boles*, 248 F.Supp. 49, 58 n.46

⁸ The Court also notes that in *Cottrill v. Mirandy*, No. 11-1528 (W. Va. Supreme Court, January 25, 2013) (memorandum decision), the Supreme Court of Appeals of West Virginia was asked to definitively hold that the writ of *coram nobis* is completely abolished in the State of West Virginia. The Court found it unnecessary to decide the issue because the petitioner’s substantive claims were frivolous.

(N.D.W.Va. 1965), *overruled on other grounds*, *Sheftic v. Boles*, 377 F.2d 423 (4th Cir. 1967).

As a basis for this assumption, the *Miller* court stated that petitions for writs of *coram nobis* do not become separate and collateral civil cases such as habeas corpus. Instead, they attach to the former case and become a continuing part thereof. *See id.*; *see also Morgan*, 346 U.S. at 505 n.4, 74 S. Ct. 247 (rejecting the argument that Rule 60(b) of the Federal Rules of Civil Procedure expressly abolishing the writ of *coram nobis* in civil cases also ended the writ in criminal cases because the writ of *coram nobis* served as a step in a criminal case). This Court is persuaded that Rule 60(b) of the West Virginia Rules of Civil Procedure did not abolish the writ of *coram nobis* in criminal proceedings.

In West Virginia, our state constitution and code recognize the applicability of the common law. Article VIII, § 13 of the West Virginia Constitution provides:

“Except as otherwise provided in this article, such parts of the common law, and of the laws of this state as are in force on the effective date of this article and are not repugnant thereto, shall be and continue the law of this state until altered or repealed by the Legislature.”

Additionally, West Virginia Code chapter two states that:

“The common law of England, so far as it is not repugnant to the principles of the constitution of this state, shall continue in force within the same, *except in those respects wherein it was altered by the general assembly of Virginia before the twentieth day of June, eighteen hundred and sixty-three*, or has been, or shall be, altered by the Legislature of this state.”

W. Va. Code § 2-1-1 (emphasis added). “The common law, if not repugnant of the Constitution of this State, continues as the law of this State unless it is altered or changed by the Legislature. Article VIII, Section 21 of the Constitution of West Virginia; Chapter 2, Article 1, Section 1, of the Code of West Virginia.” Syl. Pt. 3, *Seagraves v. Legg*, 147 W. Va. 331, 127 S.E.2d 605

(1962). Therefore, the Court must determine whether the General Assembly of Virginia altered the common law writ of *coram nobis* before June 20, 1863 or whether the West Virginia Legislature altered the common law writ.

The origins of *coram nobis* in Virginia traces back to Section 1, Chapter 181 of the Code of Virginia of 1849:⁹

“For any clerical error, or error in fact for which a judgment or decree may be reversed or corrected on writ of error *coram nobis*, the same may be reversed or corrected, on motion after reasonable notice, by the court, or if the judgment or decree be in a circuit court, by the judge thereof in vacation.”

The writ of error *coram nobis* has survived in Virginia and currently reads as follows:

“For any clerical error or error in fact for which a judgment may be reversed or corrected on writ of error *coram vobis*,¹⁰ the same may be reversed or corrected on motion, after reasonable notice, by the court.”

Va. Code Ann. § 8.01-677 (2013) (footnote added). As a common law writ, *coram nobis* has been substantially limited by the General Assembly of Virginia through Va. Code Ann. § 8.01-677. *See Neighbors v. Com*, 274 Va. 503, 508, 650 S.E.2d 514, 517 (2007). The Supreme Court of Virginia has made clear that the writ is restricted to only clerical errors and certain errors in fact:

⁹ The statutory language in Section 1, Chapter 181 of the Code of Virginia of 1849 is identical to Section 1, Chapter 181 of the Code of Virginia of 1860. The *coram nobis* statute made its first appearance in the West Virginia Code in Section 1, Chapter 134 of the West Virginia Code of 1868 with substantially the same language. The exact language of Section 1, Chapter 134 of the West Virginia Code of 1868 appears in Section 1, Chapter 134 of the West Virginia Code of 1923. The exact language of Section 1, Chapter 134 of the West Virginia Code of 1923 also appeared in West Virginia Code § 58-2-3, which was repealed by Acts 1998, Chapter 110, effective 90 days after March 14, 1998.

¹⁰ While the Virginia statute uses the term “*coram vobis*,” there is no distinction today between “*coram vobis*” and “*coram nobis*.” The ancient writ “was called *coram nobis* (before us) in King’s bench because the king was supposed to preside in person in that court. It was called *coram vobis* (before you – the king’s justices) in Common Pleas, where the king was not supposed to reside. The difference related only to the form appropriate to each court and the distinction disappeared in this county when the need for it ended.” *Neighbors v. Com*, 274 Va. 503, 508, 650 S.E.2d 514, 516 (2007) (citation omitted). “*Coram vobis* shall be deemed to include the term *coram nobis* and both shall be considered to be the same proceeding in modern pleading and practice.” *Id.* at 507 n.5, 650 S.E.2d at 516 n.5.

“Our statute is in 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. If its provisions should be widened, the enlargement should be effected by the legislature.”

Blowe v. Peyton, 208 Va. 68, 74, 155 S.E.2d 351, 356 (1967). “This limited application has not been extended to serve as a writ of error to bring the original judgment under review or to permit a change of a defendant’s plea after trial.” *Neighbors*, 274 Va. at 511-12, 650 S.E.2d at 519. “The 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 but failed to present them.” *Id.* at 512, 650 S.E.2d at 519 (internal quotations and citation omitted).

Based on Virginia’s code and accompanying case law, the General Assembly of Virginia altered the common law writ of *coram nobis* in 1849 by substantially limiting the writ. West Virginia incorporated Virginia’s alteration of the writ into its own code. The most recent version of the statute incorporated from Virginia’s code can be found in W. Va. Code § 58-2-3 (1997) (Repl. Vol. 1997), which provided:

“For any clerical error or error in fact for which a judgment or decree may be reversed or corrected on writ of error coram nobis, the same may be reversed or corrected, on motion after reasonable notice, by the court, or by the judge thereof in vacation.”

W. Va. Code § 58-2-3 would not have permitted a change of a defendant’s plea after trial, could not have corrected errors of fact where the facts complained of were known before or at the trial, and could not have been used where at the trial the accused or his attorney knew of the existence of such facts but failed to present them. *See Neighbors v. Com*, 274 Va. at 511-12, 650 S.E.2d at 519. This alteration of the common law continued in West Virginia until W. Va. Code § 58-2-3

was repealed in 1998.¹¹ Thus, the common law of England did not continue in force in West Virginia. Subsequently, with the repeal of W. Va. Code § 58-2-3, the legislature saw it fit to entirely abolish the writ of error *coram nobis*. Pursuant to W. Va. Code § 2-2-9, “[w]hen a law which has repealed another is itself repealed, the former law shall not be revived without express words for the purpose.” Therefore, the writ is now unavailable in West Virginia in either civil or criminal proceedings.

The outcome the Court reaches is reinforced with the important interest of finality of judgments. “The interest in finality of judgments is a weighty one that may not be casually disregarded. Where sentences have been served, the finality concept is of an overriding nature, more so than in other forms of collateral review such as habeas corpus, where a continuance of confinement could be manifestly unjust.” *State ex rel. Richey v. Hill*, 216 W. Va. at 163 n.12, 603 S.E.2d at 185 n.12 (citation and internal quotations omitted).

Even if the common law writ of error *coram nobis* was available in criminal proceedings in West Virginia, the error alleged by the Petitioner could not be corrected by the writ. As discussed above, the Supreme Court of the United States expanded the common law writ with the all-writs language of 28 U.S.C. § 1651 in *United States v. Morgan*, *supra*.

In West Virginia, however, there is no constitutional or statutory basis to expand the writ. Article VIII, § 6 of the West Virginia Constitution grants circuit courts with “original and general jurisdiction ... of proceedings in habeas corpus, mandamus, quo warranto, prohibition and certiorari[.]” Notably absent is the “all writs necessary” language relied upon in *Morgan* or any

¹¹ See note 6, *supra*.

mention of the writ of error *coram nobis*. Additionally, West Virginia does not have a statute with language expanding the writ.

Assuming *arguendo* that the writ is available in West Virginia, with no authority to expand the writ its common law use would apply. “Consistent with the common law, the writ of *coram nobis* may be used to address errors of fact outside the record that affect the validity and regularity of the decision itself and would have precluded the judgment from being rendered.” *Trujillo v. State*, 310 P.3d at 601. The realm of factual errors that may give rise to the writ “is limited to errors involving facts that were not known to the court, were not withheld by the defendant, and would have prevented entry of the judgment.” *Id.* Legal errors fall entirely outside the scope of the writ. *See id.*; *see also Hyung Joon Kim*, 202 P.3d at 446. “A writ of *coram nobis* is the forum to correct only the most egregious factual errors that would have precluded entry of the judgment of conviction had the error been known to the court at the time.” *Id.*

Applying the common-law writ, in most states the remedy of *coram nobis* would be available to a petitioner if no other remedy is available. While some state appellate courts have ruled that modern post-conviction review mechanisms such as habeas corpus statutes create single, unified systems of post-conviction relief, *see, e.g., State v. Blakesley*, 989 A.2d 746, 751 (Me. 2010), West Virginia’s post-conviction habeas corpus scheme would not apply and would not preclude a writ of error *coram nobis* because the Petitioner was not incarcerated under sentence of imprisonment on the challenged conviction at the time he filed his petition.

In his petition, the Petitioner claimed that he received ineffective assistance of counsel because his trial counsel failed to inform him about the immigration consequences of his conviction. “An ineffective assistance of counsel claim presents a mixed question of law and

fact.” Syl. Pt. 1, in part, *State ex rel. Vernatter v. Warden*, 207 W. Va. 11, 528 S.E.2d 207 (1999) (citation omitted). The ultimate issue to a claim of ineffective assistance of counsel is the legal question of whether the representation was constitutionally adequate under the test laid down in *Strickland v. Washington*, 466 U.S. 688, 104 S.Ct. 2052 (1984). See *State v. Miller*, 194 W. Va. 3, 15, 459 S.E.2d 114, 126 (1995) (explicitly adopting the two-pronged test established in *Strickland*). Because the issue raised by the Petitioner is a question of law, his claim is not cognizable under a writ of error *coram nobis*. See *State v. Diaz*, 808 N.W.2d 891 (Neb. 2012) (determining that claims of ineffective assistance of counsel are not appropriate for *coram nobis* relief); see also *Hyung Joon Kim*, 202 P.3d at 454 (“That a claim of ineffective assistance of counsel, which relates more to a mistake of law than of fact, is an inappropriate ground for relief on *coram nobis* has long been the rule.”).

Even if a claim of ineffective assistance of counsel was cognizable under a writ of error *coram nobis*, the Petitioner has not demonstrated that the representation he received fell below an objective standard of reasonableness. See *Miller*, 194 W. Va. at 6, 459 S.E.2d at 117, at Syl. Pt. 5. While the Petitioner did proffer an affidavit from Tom Dyer, his attorney during the entry of the plea and at sentencing, the affidavit merely states that he has “no memory of speaking with [the Petitioner] regarding his immigration status nor the consequences he may face as [an] immigrant if found guilty.” The affidavit does not state that Mr. Dyer failed to advise him of the deportation consequences, or that he did not actually advise him, or that he did not know about possible deportation consequences; instead, it states that Mr. Dyer did not remember if such a conversation occurred. The Petitioner failed to call Mr. Dyer as a witness at either of his evidentiary hearings on his ineffective assistance of counsel claim.

Additionally, the Court finds that the Petitioner's testimony that he was not advised of deportation consequences is not credible. To illustrate, the Petitioner at his evidentiary hearing and in his petition insists that he did not know his plea of "no contest" would result in his removal from the United States. However, the record is clear that the Petitioner entered an *Alford* plea. In an *Alford* plea, a criminal defendant pleads guilty. A court's acceptance of such a plea does not violate the defendant's due process rights so long as the court is satisfied that there is a factual basis for the plea independent of the defendant's statements. *See State v. Lilly*, 194 W. Va. 595, 605 n.2, 461 S.E.2d 101, 111 n.2 (1995) (Cleckley, J. concurring) (citations omitted). A plea of no contest, on the other hand, "is a formal declaration by the accused that he will not contest the charge against him." *University of West Virginia Board of Trustees ex rel. West Virginia University v. Fox*, 197 W. Va. 91, 95 475 S.E.2d 91, 95 (1996) (citations and internal quotations omitted).

The Petitioner also claims that he did not injure the victim and that his admission to that effect in a recorded statement is inaccurate because it is qualified by stating that he is facing the charges because of the victim's lies. In reading the statement in its entirety, the Petitioner unequivocally admitted that he grabbed the victim by her wrist, pulled her to the other side of the house, and pushed her down on the bed. Because of these discrepancies, the Court finds that the Petitioner's testimony concerning Mr. Dyer's failure to advise lacks credibility.

Also noteworthy are the opportunities the Petitioner had to address the consequences of a plea and his ineffective assistance of counsel claim. At the Petitioner's plea hearing, the plea/sentencing judge advised him that he could lose many civil rights, some of which the Petitioner never enjoyed as a lawful permanent resident. This line of questioning should have

caused the Petitioner to ask about immigration consequences. Also, the Petitioner's post-sentencing counsel, Mr. Craig, filed a notice of appeal listing ineffective assistance of counsel as a ground for appeal approximately a month after the Petitioner was sentenced. Mr. Craig also filed a motion for post-conviction bond or in the alternative home confinement that mentioned the possibility of prosecuting a writ of habeas corpus for ineffective assistance of counsel against Mr. Dyer. During the representation, the Petitioner actually informed Mr. Craig of his status as a Jamaican national. Additionally, the Petitioner never raised the issue through a writ of habeas corpus after his motions were denied. The Petitioner also failed to file a writ of habeas corpus while he was still in custody serving his sentence or within a reasonable time after he learned of the detainer, which was ten days before his sentence was discharged. By waiving all of these remedies, the Petitioner cannot now stand silent and ask this Court for relief after his conviction is final and his sentence is discharged.

The plea/sentencing judge was not required to advise the Petitioner of deportation consequences

The Petitioner also claims that his guilty plea was not entered knowingly and voluntarily because the plea/sentencing judge did not advise the Petitioner of the deportation consequences of his guilty plea.

“Guilty pleas are governed by Rule 11 of the West Virginia Rules of Criminal Procedure, which is patterned after Rule 11 of the Federal Rules of Criminal Procedure.” *State ex rel. Appleby v. Recht*, 213 W. Va. 503, 510-11, 583 S.E.2d 800, 807-8 (2002) (per curiam) (citation omitted). In *Recht*, the Supreme Court of Appeals of West Virginia relied on the advisory

committee note to the 1974 amendment to Federal Rule of Criminal Procedure 11, which provides, in pertinent part:

It has been suggested that it is desirable to inform a defendant of additional consequences which might follow from his plea of guilty.... The ABA Standards Relating to Pleas of Guilty § 1.4(c)(iii) (Approved Draft, 1968) recommend that the defendant be informed that he may be subject to additional punishment if the offense charged is one for which a different or additional punishment is authorized by reason of the defendant's previous conviction.

Under the rule the judge is not required to inform a defendant about these matters, though a judge is free to do so if he feels a consequence of a plea of guilty in a particular case is likely to be of real significance to the defendant.

Id. (emphasis added in *Recht*). The *Recht* Court continued by recognizing that:

“The law is clear that a valid plea of guilty requires that the defendant be made aware of all ‘the direct consequences’ of his plea. By the same token, it is equally well settled that, before pleading, the defendant need not be advised of all collateral consequences of his plea, or, as one Court has phrased it, of all ‘possible ancillary or consequential results which are peculiar to the individual and which may flow from a conviction of a plea of guilty,’ ”

Id. (quoting *Cuthrell v. Director, Patuxent Institution*, 475 F.2d 1364, 1365–66 (4th Cir. 1973)).

“The distinction between direct and collateral consequences of a plea, while sometimes shaded in the relevant decisions, turns on whether the result represents a definite, immediate and largely automatic effect on the range of the defendant’s punishment.” *Id.* (citation and internal quotations omitted). “For a guilty plea to be constitutionally valid, a defendant must be made aware of all the direct, but not the collateral, consequences of his plea.” *U.S. v. Nicholson*, 676 F.3d 376, 381 (4th Cir. 2012) (citation omitted). “Direct consequences have a definite, immediate and largely automatic effect on the range of the defendant’s punishment. A consequence is collateral when it is uncertain or beyond the direct control of the court.” *Id.* (citation omitted) (emphasis in original). “What renders a plea’s effects collateral is not that they arise virtually by

operation of law, but the fact that deportation is not the sentence of the court which accepts the plea but of another agency over which the trial judge has no control and for which he has no responsibility.” *U.S. v. Delgado-Ramos*, 635 F.3d 1237, 1239 (9th Cir. 2011) (citation and internal quotations omitted).

Applying the foregoing principles, the Court determines that the deportation consequences was a collateral consequence of the Petitioner’s guilty plea, and that therefore the plea/sentencing court was not required to advise him of it pursuant to Rule 11 of the West Virginia Rules of Criminal Procedure. An individual or entity other than the plea/sentencing court was responsible for the deportation proceedings, and the plea/sentencing court had neither control nor responsibility over that decision. Furthermore, the facts of this case demonstrate that deportation is not necessarily a direct consequence of a plea. After the Petitioner was incarcerated for approximately a year, he was released on parole. However, the Petitioner was not served with a detainer while incarcerated before his parole was granted or while he was not incarcerated and serving on parole. It was only after his violation of his parole conditions and after he nearly discharged his sentence that he was served with the detainer.

Orders

Therefore, the Petitioner’s request for counsel to represent him at the April 9, 2014 evidentiary hearing was withdrawn and the Petitioner elected to proceed *pro se* without the benefit of counsel. The Court hereby ORDERS that the Petitioner effectively waived any right to counsel at the evidentiary hearing before this Court.

The Court FURTHER ORDERS, after careful consideration of the arguments presented, that the Petitioner's writ of error *coram nobis* be DENIED for the reasons discussed above.

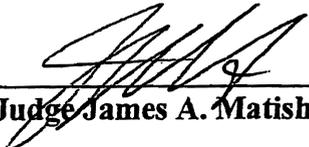
The Court FURTHER ORDERS the Circuit Clerk to remove this matter from the docket.

This is a final order from which any party may appeal by filing a notice of appeal and the attachments required under Rule 5(b) of the West Virginia Rules of Appellate Procedure with the Office of the Clerk of the Supreme Court of Appeals of West Virginia at its address of State Capitol Complex, Building One, Room E-317, 1900 Kanawha Blvd. East, Charleston, WV 25305 within thirty (30) days of the entry of this order and by serving a copy on all parties who have appeared in this action, including the Clerk of the Circuit Court of Harrison County and the court reporter. The Clerk of the Circuit Court of Harrison County and the court reporter's address is 301 West Main Street, Clarksburg, WV 26301. In addition, within four months of the entry of this judgment, any person wishing to appeal must file a petitioner's brief together with the appendix record as required under Rules 5(f) and 5(g) of the West Virginia Rules of Appellate Procedure with Rory Perry, Clerk of the Supreme Court of Appeals of West Virginia, at his address of State Capitol Complex, Building One, Room E-317, 1900 Kanawha Blvd. East, Charleston, WV 25305 and by serving a copy upon all the aforesaid parties.

The Circuit Clerk is DIRECTED to send certified copies of this Order to Orville M. Hutton, Petitioner, pro se, at his address of **175 Pike County Road, Lords Valley, PA, 18428**; unto Andrea Roberts, Counsel for respondents Joseph Shaffer and Patrick Morrisey, at her address of 301 West Main Street, Clarksburg, WV, 26301; unto Helen Campbell Altmeyer, counsel for Federal Respondents, at her address of P.O. Box 591, Wheeling, WV, 26003; unto William J. Ihlenfeld, II, Respondent, at his address of 320 West Pike Street, Clarksburg, WV,

26301; unto Patrick Morrissey, Respondent, at his address of WV State Capitol Building 1, Room 26E, Charleston, WV, 25305; unto ICE, Respondent, 3400 Concord Road, York, Pennsylvania, 17402; and a courtesy copy unto Mykhel T. Yisrael, immigration attorney for Orville M. Hutton, at her address of 92 Wellbrook Avenue, Staten Island, New York, 10314.

Enter: 04/28/2014



Chief Judge James A. Matish

STATE OF WEST VIRGINIA
COUNTY OF HARRISON, TO-WIT

I, Donald L. Kopp II, Clerk of the Fifteenth Judicial Circuit and the 18th
Family Court Circuit of Harrison County, West Virginia, hereby certify the
foregoing to be a true copy of the ORDER entered in the above styled action
on the 28 day of April, 2014.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix
the Seal of the Court this 29 day of April, 20 14.

Donald L. Kopp II
Fifteenth Judicial Circuit & 18th Family Court
Circuit Clerk
Harrison County, West Virginia

**IN THE SUPREME COURT OF APPEALS
OF WEST VIRGINIA**

ORVILLE M. HUTTON,)	Case No.
PETITIONER)	13-P-119-3
VS.)	(James A. Matish, Chief Judge)
)	
STATE OF WEST VIRGINIA -)	
PATRICK MORRISEY, WEST VIRGINIA)	
STATE ATTORNEY GENERAL;)	
HARRISON COUNTY PROSECUTING)	
ATTORNEY - JOSEPH F. SHAFFER;)	
RESPONDENT(S))	

CERTIFICATE OF SERVICE

I, ORVILLE M. HUTTON, hereby certify that I personally caused to be served a copy of the attached Notice of Appeal by Express Mail and USPS First Class Mail on the 24 day of June, 2014, to the following individuals and addresses:

Clerk of Court
West Virginia Supreme Court of Appeals
State Capitol Complex, Bldg 1
Room E-317
1900 Kanawha Blvd East
Charleston, WV 25305

Donald L. Kopp, II, Circuit Clerk
Fifteenth Judicial Circuit, Harrison County West Virginia
Harrison County Courthouse
301 W. Main Street
Clarksburg, WV 26301-2967

The Honorable Judge James Matish
Fifteenth Judicial Circuit, Harrison County West Virginia
Harrison County Courthouse
301 W. Main Street
Clarksburg, WV 26301-2967

Andrea L. Roberts, Esq.
Assistant Prosecuting Attorney
Harrison County Prosecuting Attorney's Office
Harrison County Courthouse
301 W. Main Street
Clarksburg, WV 26301-2967

Christopher Scott Dodrill, Esq.
West Virginia Office of Attorney General
812 Quarrier Street 6th floor
Charleston, WV 25305

Helen Campbell Altmeyer, Esq.
Assistant United States Attorney
Northern District of West Virginia
United States Attorney's Office
P.O. Box 591
Wheeling, WV 26003

Ms. Renee Eades
Court Stenographer
Fifteenth Judicial Circuit, Harrison County West Virginia
Harrison County Courthouse
301 W. Main Street
Clarksburg, WV 26301-2967

A handwritten signature in black ink, appearing to read 'M. Hutton', is written over a solid horizontal line.

Orville M. Hutton
Pikes County Correctional Facility
175 Pikes County Blvd
Lords Valley, PA 18428