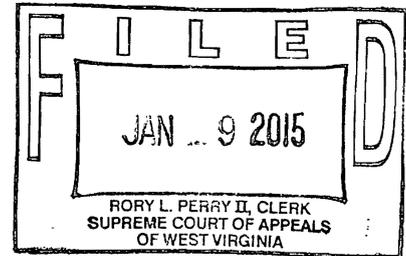


**IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA**

DOCKET NO. 14-0603



**ORVILLE HUTTON**  
Petitioner

v.

Appeal from a final order  
of the Circuit Court of Harrison  
County (13-P-199-3)

**STATE OF WEST VIRGINIA**  
Respondent

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**Petitioner's Reply Brief**

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## **I. THE WRIT OF ERROR CORAM NOBIS IS AVAILABLE IN WEST VIRGINIA**

### **A. The Constitution of West Virginia provides authority for state courts to issue *coram nobis* by virtue of the Supreme Court of Appeal's authority to issue writs of error, and the general grant of authority to the courts under the common law.**

The West Virginia Constitution authorizes West Virginia courts to issue writs of error *coram nobis*. Article VIII, Section four of the West Virginia Constitution provides pointed authority for the West Virginia Supreme Court of Appeals (“WVSCA”) to issue writs of error, a category of writs that includes *coram nobis*. W. Va. Const. art. VIII, §§ 3, 4, 6; *Black’s Law Dictionary*, Writ of Error (9th Ed. 2009). Although *coram nobis* is not mentioned in the list of extraordinary writs in Sections Three and Six of Article VIII, this is not determinative. The Court’s general authority to issue writs of error appears in Section Four.<sup>1</sup> Sections Three and Six do not limit the authority granted in Section Four. The listed writs contained in Sections three and six are not an exhaustive list of all “writs” available for state courts to issue. *See* W. Va. Const. art. VIII, §§ 3, 4, 6.

Additionally, the State’s interpretation of the Constitution fails to give proper consideration to the residual clauses contained in grants of authority to state courts. *See* W. Va. Const. art. VIII, § 3 and 6. The Constitution grants broad authority to state courts under the common law, including the use of the writ of error *coram nobis*. *See* W. Va. Const. art. VIII, § 3, 4. The legislature has clearly failed to alter or amend the common law authority to grant writs of error *coram nobis*.<sup>2</sup> Therefore, West Virginia courts have the authority to issue writs of error *coram nobis*.

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<sup>1</sup> W. Va. Const. art. VIII, §§ 4.

<sup>2</sup> The State cites three cases to support its conclusion that there is no constitutional or statutory authority for state courts to issue writs of error *coram nobis*. Resp. Br. at 11 n.4. The first case dealt with an appeal by an attorney seeking to overturn a ruling disbarring him. *State v. Shumate*, 37 S.E. 618 (W. Va. 1900). The Court distinguished a case intended to disbar an attorney from both civil and criminal cases to reach the conclusion that a writ of error would not lie in such a case. *Id.* Further, the *Shumate* court clearly states that writs of error do lie in both civil and

**B. The *coram nobis* statute adopted from Virginia was intended to define common-law *coram nobis* and the procedure for it rather than abolish or replace it.**

The State contends that Virginia’s *coram nobis* statute replaced the common law writ, and, therefore, that the common law adopted by West Virginia did not include *coram nobis*. Resp. Br. at 8–9. This contention ignores the rule that the legislature cannot alter the common law without clear intent.

The WVSCA has clearly stated that “[t]he common law is not construed to be altered or changed by statute, unless legislative intent to do so be plainly manifested.” *State ex rel. Van Nguyen v. Berger*, 483 S.E.2d 71 (W. Va. 1996). This comports with the long-held principles established by the United States Supreme Court to that effect. *See Meister v. Moore*, 96 U.S. 76 (1877) (holding that a Michigan marriage statute did not abolish common-law marriage).

Neither Virginia nor West Virginia’s *coram nobis* statutes purported to abolish or even replace the common law writ; nothing in the language of the statutes plainly manifest intent to do so. *See* W. Va. Code § 58-2-3 (1997). They simply define its procedure and scope. Without “plainly manifest[ed]” intent, the *coram nobis* statute cannot be interpreted to alter the common law. *Berger* 483 S.E.2d at 72.

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criminal cases. *Id* at 618 (“This is not a civil case to warrant a writ of error, under Chapter 135 because it is not a proceeding inter parties . . . . Not being a criminal proceeding, a writ of error does not lie under the clause of section 1, c. 160, Code 1899, giving ‘a party in a criminal case’ a writ of error.”). The second case dealt with an appeal by an employer of a decision by the state compensation commissioner to award the widow of a deceased employee compensation under the worker’s compensation act. *Deitz v. Colliery Co. v. Ott*, 129 S.E.2d 708 (1925). The Court in *Deitz* dismissed case because the appeal properly lied in circuit court, which has “supervision and control over proceedings before justices and other inferior tribunals . . . .” *Id.* at 709. The third case dealt with a motorist’s petition for review of a decision made by the Commissioner of the Division of Motor Vehicles to revoke his driver’s license for second offense D.U.I. *State ex rel. Dale v. Stucky*, 752 S.E.2d 330 (2013). The Court held that the Wood County Circuit Court did not have subject-matter jurisdiction over the petition when it transferred the matter to the Kanawha County Circuit Court, and thus, the transfer order was void. All of these cases are clearly distinguishable from Mr. Hutton’s.

**C. The legislature did not intend to abolish *coram nobis* when it repealed West Virginia’s *coram nobis* statute; it intended, rather, to modernize the state code and bring it into conformity with the procedural rules promulgated by the WVSCA.**

The State also contends that the repeal of West Virginia’s *coram nobis* statute was intended to abolish the writ entirely, and that, otherwise, the act is meaningless. *See* Resp. Br. at 11. This assertion is not tenable given the clear intent outlined in the act. 1998 W. Va. Acts 110; H.B. 4060, 73rd Legislature, 2nd Reg. Sess. (W. Va. 1998). Instead, the clear purpose of the Act was to update the code.

The legislature repealed West Virginia’s *coram nobis* statute—along with 31 other code sections—with clear and explicit intent: to “repeal provisions of law relating to appellate relief in the [S]upreme [C]ourt of [A]ppeals which are outdated, archaic, or not in conformity with the rules of appellate procedure promulgated by the [S]upreme [C]ourt of [A]ppeals[.]” *Id.*

The terms “abolish” and “common law” are not contained in the Act, because this Act was not intended to affirmatively abolish any part of the common law. *Id.* Rather, it was intended to bring the code into conformity with the procedural rules promulgated by the WVSCA under its constitutional authority. W. Va. Const. art. VIII, § 3; 1998 W. Va. Acts 110. By means of this Act, the legislature recognized the authority of the WVSCA to craft and promulgate procedural rules for West Virginia courts.

**D. Allowing Mr. Hutton and similarly situated defendants to obtain relief via *coram nobis* does not violate any public policy interest articulated or implied by the legislature.**

The State also contends that the public's interest in the finality of criminal judgments forecloses Mr. Hutton from obtaining relief in this case.<sup>3</sup> See Resp. Br. at 14. The State further contends that the legislature's repeal of the *coram nobis* statutes demonstrated "policy choices about finality when a sentence has been served." Resp. Br. at 14. These contentions fail to recognize the serious consequence Mr. Hutton continues to face as a result of his plea, and do not reflect the expressed intent in the legislative act repealing West Virginia's *coram nobis* statute.

*Coram nobis* is an extraordinary remedy for extraordinary circumstances. Providing a narrow avenue of relief for Mr. Hutton and defendants in similar situations vindicates the right of criminal defendants to procedural and substantive justice that is inherent in both the United States' and West Virginia's Constitutions. It ensures that a deprivation of their rights will not be left unaddressed.

**II. THIS COURT SHOULD EXPAND THE COMMON LAW APPLICATION OF *CORAM NOBIS* TO THIS CASE BECAUSE VIOLATIONS OF CONSTITUTIONAL RIGHTS MUST BE REMEDIED, AND THIS COURT HAS THE POWER TO ALTER OR AMEND THE COMMON LAW**

**A. The Court has the power to alter or amend the common law when it becomes outdated, and should amend the common law to vindicate Mr. Hutton's constitutional rights.**

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<sup>3</sup> In support of this argument the State alleges *Padilla v. Kentucky* does not apply retroactively. This argument is irrelevant for Mr. Hutton, as he entered his plea on May 21, 2010, more than a month after the Supreme Court rendered its decision in *Padilla*. See A.R. at 110; *Padilla v. Kentucky*, 559 U.S. 356 (2010) (decided March 31, 2010).

This Court has asserted its power to alter the common law. *See Mallet v. Pickens*, 522 S.E.2d 436, 438 (1999).<sup>4</sup> Specifically, it can alter the common law if and when it decides that the common law no longer comports with societal notions of fairness. *Id.*

The State concludes that the common law narrowly limits the application of *coram nobis* to correct only certain errors of fact. Resp. Br. at 16. The State also concludes that *coram nobis* cannot be applied to ineffective assistance of counsel claims. *Id.* at 17. However, in the cases cited above, this Court specifically held that W. Va. Code, 2-1-1—upon which the State relies—does not bar this Court from amending or altering the common law. The State therefore underestimated the power of this Court, which can amend the common law to promote fairness and justice.

Mr. Hutton’s case raises an issue of fairness that requires this Court, if necessary, to update the common law to vindicate Mr. Hutton’s constitutional rights. As a constitutional matter, counsel must advise his client of the immigration consequences of a plea. *Padilla v. Kentucky*, 559 U.S. 356, 385 (2010). When a defendant does not receive effective assistance of counsel because his attorney did not advise him of immigration consequences, a remedy must be available.

Indeed, the Fourth Circuit Court of Appeals held that *coram nobis* applies specifically to cases where counsel has failed to provide proper advice regarding immigration consequences. *See generally United States v. Akinsade*, 686 F.3d 248 (4th

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<sup>4</sup> The Court explained:

This Court’s right to respond to changes in the law is also manifest: Though some have argued ... that our Constitution prohibits such amendments, we have held that, “Article VIII, Section 13 of the West Virginia Constitution and W. Va. Code, 2-1-1, were *not* intended to operate as a bar to this Court’s evolution of common law principles, including its historic power to alter or amend the common law.”

*Mallet v. Pickens*, 522 S.E.2d 436, 438 (1999) (emphasis added) (quoting *Morningstar v. Black and Decker Mfg. Co.*, 253 S.E.2d 666 (1979)).

Cir. 2012). The State of Maryland also held that *coram nobis* applies in such situations. *Skok v. State*, 760 A.2d 647, 657 (2000); *see also Moguel v. State*, 966 A.2d 963, 965 (2009). Explaining the importance of vindicating constitutional rights through writs of error *coram nobis*, the Maryland court explained that, often “a defendant is willing to forego an appeal even if errors of a constitutional or fundamental nature may have occurred. Then, when the defendant later learns of a substantial collateral consequence ... if the defendant is not [in custody] he or she will not be able to challenge the conviction.” *Skok*, 760 A.2d at 660. Because of the injustice inherent in such situations, the Maryland court recognized the need for remedies like *coram nobis*. *Id.*

Therefore, even if the State’s interpretation of the common law is correct, this Court still has the power and the duty to alter or amend West Virginia common law to promote fairness. *See Mallet*, 522 S.E.2d at 441. Fairness requires vindicating Mr. Hutton’s right to effective assistance of counsel. *See Padilla*, 559 U.S. at 385.

**B. The *dicta* regarding *coram nobis* in recent West Virginia cases is persuasive.**

Finally, it is significant that recent West Virginia cases suggest that *coram nobis* is a valid remedy for ineffective assistance of counsel. The State dismisses the discussions of *coram nobis* in West Virginia cases *Kemp v. State*, 506 S.E. 2d 38 (1997) and *State v. Eddie “Tosh” K.*, 460 S.E.2d 489 (1995) as *dicta*, stating that such *dicta* are not binding. *See* Resp. Br. at 18. However, this Court has held that, “[t]he mere fact that a correct statement of law is set out in an opinion of this Court as obiter *dicta* does not impugn its integrity as a valid proposition of

law.” *W. Va. Dep’t of Transp., Div. of Highways v. Parkersburg Inn, Inc.*, 671 S.E.2d 693, 700 (2008) (internal quotation marks and citations omitted). This Court’s *dicta* regarding *coram nobis* is persuasive, and should not be cast aside.<sup>5</sup>

### **III. MR. HUTTON IS ENTITLED TO *CORAM NOBIS* RELIEF BECAUSE VALID REASONS EXIST FOR NOT CHALLENGING HIS CONVICTION SOONER**

Mr. Hutton was unable to effectively challenge his conviction through an ineffective assistance of counsel claim because he was unaware of the immigration consequences of his plea until ICE contacted him only ten days before he had completed his sentence. Ten days is not sufficient time to file a habeas petition, especially *pro se*.

Skirting the crucial point that Hutton was entirely unaware of his plea’s immigration consequences in time to raise the issue, the State attempts to show that Hutton is bound by his post-conviction counsel’s failure to address immigration consequences. In support of its argument that the strategic decision of Hutton’s post-conviction counsel should be imputed to Hutton, the State cites case that are beside the point. First, it cites *Jennings v. Wiles*, 96 S.E. 1009 (1918). This case applies to negligence of counsel, not strategic decisions. *See id.* at 1010. It is also about a default judgment in a civil case, not the constitutional right to effective assistance of counsel. *Id.* at 1009. *Jennings* does not support the proposition that negligence is imputed to the client in situations other than

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<sup>5</sup> Moreover, the State relies on cases from other jurisdictions. These cases are no more binding than this Court’s *dicta*, and they are less persuasive. Out-of-state cases should not carry more weight than this Court’s well-reasoned *dicta*.

default judgment. *See, e.g., Rollins v. N. River Ins. Co.*, 149 S.E. 838, 839 (1929); *Ellis v. Gore*, 132 S.E. 741, 741 (1926).

Second, the State cites *Edwards v. United States*, 265 F.2d 909 (6th Cir. 1959). *Edwards*, however, simply makes clear that the defense’s truly strategic decisions cannot later be characterized as errors. *See id.* at 910. *Edwards* is inapplicable because Mr. Hutton did not have enough information to make strategic decisions. Unaware of his plea’s immigration consequences or previous counsel’s errors, he could not make a fully informed decision about how to address the possibility of deportation.

Therefore, Mr. Hutton did not delay in challenging his conviction. He did not know about the immigration consequences of his plea in time to raise this issue, and is entitled to relief through a writ of error coram nobis.

#### **IV. MR. HUTTON IS ENTITLED TO RELIEF BECAUSE HIS COUNSEL WAS CONSTITUTIONALLY INEFFECTIVE**

Mr. Hutton is entitled to relief because his Sixth Amendment right to effective assistance of counsel was violated, and this violation must be remedied. The United States Supreme Court clearly held that “counsel must inform her client whether his plea carries a risk of deportation.” *Padilla*, 559 U.S. at 375.<sup>6</sup> Failure to do so satisfies the first prong of *Strickland v. Washington*, 466 U.S. 668 (1984). *See Padilla*, 559 U.S. at 371.<sup>7</sup> Uninformed of the immigration consequences of the plea, he now faces mandatory deportation from his home of over forty years. Thus, Hutton has satisfied both prongs of

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<sup>6</sup> “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 client whether his plea carries a risk of deportation.” *Padilla*, 559 U.S. at 375.

<sup>7</sup> “It is quintessentially the duty of counsel to provide her client with available advice about an issue like deportation and the failure to do so clearly satisfies the first prong of the *Strickland* analysis.” *Padilla*, 559 U.S. at 371 (internal quotation marks and citations omitted).

*Strickland*<sup>8</sup> and established that he did not receive the reasonably effective assistance guaranteed by the Sixth Amendment.

**A. The circuit court clearly erred in finding that Mr. Hutton failed to prove that his counsel failed to advise him of immigration consequences.**

The State argues that the Circuit Court’s finding that Mr. Hutton did not prove his counsel failed to advise him of immigration consequences was not clearly erroneous. Resp. Br. at 21. However, when “viewing the evidence in its entirety,” the Circuit Court’s findings are simply not “plausible.” *Bd. of Educ. of Cnty. Of Mercer v. Wirt*, 453 S.E.2d 402 (W. Va. 1994).

The State highlights Dyer’s affidavit, which stated that Dyer “ha[d] no memory of speaking with Mr. Hutton regarding his immigration status nor the consequences he may face as a[n] immigrant if found guilty.” Resp. Br. at 21. A statement indicating “no memory” of a mandatory component of competent representation of a noncitizen strongly suggests that it did not occur.

As for the failure of Mr. Dyer to testify at the hearing on Mr. Hutton’s Petition for a Writ of *Coram Nobis*, given the affidavit’s clear implications of ineffective assistance of counsel under *Padilla*, it was eminently reasonable for Hutton to not call Dyer to testify (And, notably, attorneys for the State also failed to secure Mr. Dyer’s appearance. See A.R. at 60.)

The State also notes that the Circuit Court’s finding was based on “determinations regarding the credibility of witnesses,” and so deserves greater deference. Resp. Br. at 21. However, Mr. Hutton’s testimony that that Dyer failed to

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<sup>8</sup> To prevail on a claim of ineffective assistance of counsel, the defendant must show that his counsel’s performance was deficient and that the deficient performance prejudiced the defense. *Strickland*, 466 U.S. at 687.

advise him that his plea could result in deportation was both unequivocal and uncontroverted so there was little cause to question Mr. Hutton's credibility. *See* Pet. Br. at 15–16.

**B. Mr. Hutton's counsel performed deficiently by failing to advise him of immigration consequences.**

The State next claims that Hutton did not demonstrate that it was objectively unreasonable for counsel not to investigate his immigration status, so counsel's failure to advise him of immigration consequences was not deficient. *See* Resp. Br. at 24.

*Padilla* does not directly address the requirement that an attorney know his client's immigration status because it is uniformly understood that proper representation requires understanding a client's individual circumstances and objectives, including his immigration status.

Counsel must, at a minimum, “conduct a reasonable investigation enabling him or her to make informed decisions about how to best represent clients.” *Daniel v. Legursky*, 465 S.E.2d 416 (W. Va. 1995). It is axiomatic that an attorney cannot make informed decisions for a noncitizen if the attorney does not determine the client's citizenship status. Additionally, the ABA's Pleas of Guilty Standards explicitly urge counsel to “interview the client to determine what collateral consequences are likely to be important to a client given the client's particular personal circumstances.” ABA Pleas of Guilty, Commentary to Standard 14-3.2(f).<sup>9</sup> The commentary further notes that “it may well be that many clients' greatest potential difficulty, and greatest priority, will be the immigration consequences of a conviction.” ABA Pleas of Guilty, Commentary to

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<sup>9</sup> Recall that *Padilla* refused to label immigration consequences as merely collateral. *Padilla*, 559 U.S. at 357. Determining immigration consequences, then, is arguably even more urgent than determining collateral consequences. .

Standard 14-3.2(f). Similarly, the National Legal Aid and Defender Association's Performance Guidelines for Criminal Defense Representation specifically require counsel to ask every client about his immigration status at the initial interview. NLADA Guideline 2.2(b)(2)(A).

The Padilla decision built on counsel's already well-established obligation to inquire about his client's immigration status, a minimum mandatory requirement of adequate representation. *Padilla* added to this obligation the rule that, if the client indicates that he is not a U.S. citizen, counsel must advise about immigration consequences (or, in complex cases, consult an authority on immigration law). *Padilla*, 559 U.S. at 369.

Moreover, the State cites to cases in support of its assertion that counsel's investigations depend on what the client tells the attorney. The information provided by the client and the "investigations" in each of these cases<sup>10</sup> are fundamentally different from the inquiry into a client's immigration status. Inquiring about immigration status is a fundamental requirement for adequate representation. The obligation is not and cannot be on the client to speak up about such crucial matters.

Therefore, Mr. Hutton's counsel failed to provide competent representation by failing to advise Mr. Hutton of the immigration consequences of his plea; if Mr. Hutton's counsel did not know Mr. Hutton was a noncitizen who potentially faced immigration consequences, he had a clear and unequivocal duty to find out.

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<sup>10</sup> In *Strickland* and *Coleman*, the information not supplied by the client related to lines of defense. *Strickland*, 466 U.S. at 681; *Coleman v. Brown*, 802 F.2d 1227, 1233 (10th Cir. 1986). Here, immigration status does not pertain to a line of defense. In *Mitchell*, the information was intended for mitigation purposes, with the subsequent investigation to establish mitigating factors. *Mitchell v. Kemp*, 762 F.2d 886, 888 (11th Cir. 1985). Here, immigration status does not serve to mitigate.

**C. Mr. Hutton was prejudiced by his counsel's failure to advise him of immigration consequences.**

Finally, the State claims that Hutton has not shown any prejudice from counsel's failure to advise him of immigration consequences. Resp. Br. at 27. The State claims that, to establish prejudice, Hutton must have shown a reasonable probability that he would have rejected the plea and insisted on going to trial.

Mr. Hutton easily meets this burden. Mr. Hutton explicitly stated that, had he been aware of the deportation consequences of his plea, he would have rejected it. A.R. at 45. The United States Supreme Court noted that "preserving a client's right to remain in the United States may be more important than any potential jail sentence"; this was the case for Mr. Hutton. *Padilla*, 559 U.S. at 368. Faced with exile from his longtime home, Mr. Hutton could have rationally rejected the offered plea in favor of, for example, bargaining for a different plea not exposing him to deportation consequences.

Therefore, Mr. Hutton is entitled to relief because his counsel was constitutionally ineffective under *Padilla*. In the interests of justice and as a corollary of its clear power to do so, this Court should remedy the violation of Mr. Hutton's Sixth Amendment right. It has the authority to do so by issuing a writ of error *coram nobis*.

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## Certificate of Service

I hereby certify that on this 8th day of January, 2015, true and accurate copies of the foregoing **Petitioner's Reply Brief** were sent by mail to counsel for all other parties to this appeal as follows:

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