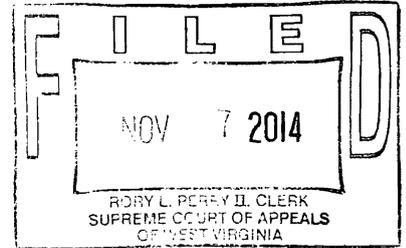


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

DOCKET NO. 14-0603



ORVILLE HUTTON
Petitioner

v.

Appeal from a final order
of the Circuit Court of Harrison
County (13-P-119-3)

STATE OF WEST VIRGINIA
Respondent

Petitioner's Brief

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ASSIGNMENTS OF ERROR

1. THE CIRCUIT COURT ERRED IN HOLDING THAT ORVILLE HUTTON DID NOT HAVE A VIABLE CLAIM FOR INEFFECTIVE ASSISTANCE OF COUNSEL BECAUSE IT FAILED TO CONSIDER HOW THE SUPREME COURT OF THE UNITED STATE'S DECISION IN *PADILLA V. KENTUCKY*, 559 U.S. 356 (2010), APPLIES TO MR. HUTTON'S CASE.
2. THE CIRCUIT COURT ERRED IN CONCLUDING THAT THE WRIT OF ERROR *CORAM NOBIS* IS NOT AVAILABLE AS A POST-CONVICTION REMEDY IN WEST VIRGINIA.
3. THE CIRCUIT COURT ERRED BY DENYING MR. HUTTON'S *CORAM NOBIS* PETITION.

STATEMENT OF THE CASE

The Petitioner, Orville Michael Garth Hutton (who also goes by the name of Mykal G. Rosyth), was born in Jamaica and came to the United States in 1971 at the age of nine. *See* A.R. at 45; Supp. A.R. at 6. He has lived in the United States ever since—approximately 43 years—and has been a lawful permanent resident since October 31, 1972. *See* A.R. at 45; Supp. A.R. at 6.

On May 21, 2010, Hutton entered an *Alford* plea of guilty to the felony offense of Unlawful Assault. *See* Supp. A.R. at 110. On July 6, 2010, he was sentenced to a term of one to five years. *See* Supp. A.R. at 31. Thomas Dyer represented the petitioner in these matters. *See* Supp. A.R. at 110. At no time did anyone advise Hutton that his plea would result in mandatory deportation. *See* A.R. at 45; Supp. A.R. at 251.

Hutton's sentence for his Unlawful Assault conviction was discharged on May 25, 2013. *See* Supp. A.R. at 22. 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, and subject to removal due to his Unlawful Assault conviction. *See* A.R. at 10, 46; Supp. A.R. at 6. Upon discharge, he was ordered into custody of the DHS and ICE. *See* Supp. A.R. at 7–9. He remains in DHS’s custody, first at the York County Prison in York, Pennsylvania now at the Pike County Correctional Facility in Lords Valley, Pennsylvania. *See* Supp. A.R. 1–2.

On September 4, 2013, Hutton filed an Emergency Petition for Writ of Error *Coram Nobis* in the Circuit Court of Harrison County. *See* A.R. at 1. Respondent Harrison County Prosecuting Attorney, Joseph Shaffer, filed his Motion to Dismiss on October 16, 2013, and respondents William J. Ihlenfeld, Eric Holder, DHS, and ICE (collectively, “federal respondents”) filed their Motion to Dismiss or for Summary Judgment on January 29, 2014. *See id.* Hutton filed his response to the respective motions on February 18, 2014. *See id.* On April 9 and 10, 2014, the court held an evidentiary hearing. *See* A.R. at 1, 28, 81. On April 21, 2014, the Circuit Court of Harrison County denied the petitioner’s Writ of Error *Coram Nobis*; the court amended the order on May 28, 2014. *See* A.R. at 2, 4. Hutton filed a Notice of Appeal with this Court on June 10, 2014. *See* A.R. at 176.

SUMMARY OF ARGUMENT

In *Padilla v. Kentucky*, the Supreme Court of the United States held that defense counsel’s failure to advise a client of the immigration consequences of entering a plea constitutes ineffective assistance of counsel. Hutton’s attorney did not inform him that his plea could lead to deportation, denying him effective assistance of counsel.

Padilla requires states to provide a remedy for failure to advise of immigration consequences. *Coram nobis* exists as a post-conviction remedy in West Virginia. Although the legislature abolished the writ in civil cases, it is still available as a post-conviction remedy in criminal cases. Significantly, *coram nobis* is the only remedy available to Hutton.

Therefore, to provide a remedy for denial of Hutton's Sixth Amendment right to effective assistance of counsel, this court must grant him a writ of error *coram nobis*.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Pursuant to Revised Rule of Appellate Procedure 20(a), the Petitioner respectfully requests that this Court hear oral argument because this case involves (1) issues of first impression and (2) issues of fundamental public importance. Oral argument would therefore significantly aid in the decisional process. Pursuant to Revised Rules of Appellate Procedure 20(g), because this case is appropriate for Rule 20 argument and there are no exceptional circumstances, the Court should furthermore decide this case on the merits by issuing an opinion.

ARGUMENT

This appeal is about safeguarding the right of all criminal defendants, including noncitizen defendants, to effective assistance of counsel. Under *Padilla v. Kentucky*, 559 U.S. 356 (2010), attorneys must inform all noncitizen criminal defendants of any potential immigration consequences that may arise from a plea agreement. *Id.* at 373–74. Providing anything less than straightforward advice about the risk of deportation violates the defendant’s Sixth Amendment right to effective assistance of counsel. A Sixth Amendment violation entitles the defendant to post-conviction relief. To ensure that all West Virginia defendants have a remedy for their attorney’s failure to provide advice about deportation risks, West Virginia courts must rely on the writ of error *coram nobis*. In this case, Hutton’s counsel did not advise him that his plea agreement would result in mandatory deportation. The only remedy available to Hutton is a writ of error *coram nobis*. Hutton is entitled to a writ of error *coram nobis* to provide the post-conviction relief *Padilla* requires.

I. THE CIRCUIT COURT ERRED IN FINDING HUTTON RECEIVED EFFECTIVE ASSISTANCE OF COUNSEL

Hutton did not receive effective assistance of counsel because his attorney failed to advise him of the immigration consequences of a conviction, and he would not have entered a plea but for his attorney’s failure. The circuit court erred by not recognizing that Hutton received ineffective representation.

The West Virginia Supreme Court of Appeals (WVSCA) reviews lower courts’ holdings on questions of law de novo. *State v. Black*, 708 S.E.2d 491, 498 (W. Va. 2010). The circuit court’s holding that Hutton’s attorney provided effective assistance should be reviewed de novo and reversed.

A. *Padilla* requires criminal defense attorneys to advise their clients about potential immigration consequences.

Attorneys have the affirmative duty to inform clients of the immigration consequences of convictions. *Padilla v. Kentucky*, 559 U.S. 356, 374 (2010). Contrary to the assertion of the Kentucky Supreme Court in *Padilla* and the Circuit Court of Harrison County in this case, deportation is such a severe consequence of conviction that the right to effective assistance of counsel includes the right to accurate advice about deportation consequences. *Padilla*, 559 U.S. at 365–66. Even if they are not entitled to advice about collateral consequences of conviction, defendants are entitled to advice about deportation, which the Court said is “uniquely difficult to classify as either a direct or a collateral consequence.” *Id.* at 366. Indeed, for many noncitizen defendants, “deportation is . . . the most important part . . . of the penalty.” *Id.* at 354.

Under *Padilla*, when the immigration consequences are “truly clear” attorneys must give their clients specific immigration advice. *Padilla*, 559 U.S. at 368. When the consequences are less clear, attorneys must warn clients generally that convictions may have “adverse immigration consequences.” *Id.* at 369. Not providing any advice about immigration consequences—just like providing “affirmative misadvice”—constitutes ineffective assistance. *Id.* at 370–71.

Strickland v. Washington, 466 U.S. 668 (1984) applies to claims of ineffective assistance of counsel for failure to advise of immigration consequences. *Padilla*, 559 U.S. at 366. *Strickland*’s two-prong test requires defendants to show (1) counsel’s representation was objectively unreasonable and (2) there is a reasonable probability that, but for counsel’s errors, the outcome would have been different. *Strickland*, 466 U.S. at 694. Regarding the first prong, *Padilla* is explicit in concluding that, in cases in which

an attorney fails to advise a client of the deportation consequences of a plea, *Strickland's* first prong is satisfied. *Padilla*, 559 U.S. at 369. Regarding the second prong, "when evaluating the petitioner's claim that ineffective assistance led to the improvident acceptance of a guilty plea, the Court require[s] the petitioner to show that there is a reasonable probability that, but for counsel's errors [the defendant] would not have pleaded guilty and would have insisted on going to trial." *Lafler v. Cooper*, 132 S. Ct. 1376, 1384–85 (2012) (citing *Hill v. Lockhart*, 474 U.S. 52, 59 (1985)).

Hutton's attorney provided objectively unreasonable representation and prejudiced Hutton by failing to advise Hutton about immigration consequences.

Hutton's ineffective assistance claim satisfies *Strickland's* first prong because his attorney failed to meet *Padilla's* requirement that he advise Hutton about immigration consequences. *See Padilla*, 559 U.S. at 369. Hutton testified unequivocally that his attorney, Thomas Dyer, failed to advise him that his plea could result in deportation. A.R. at 45. In his affidavit, Dyer states that he has no memory of informing Hutton of possible immigration consequences, corroborating Hutton's testimony. Supp. A.R. at 251. In conjunction with Hutton's unequivocal testimony that Dyer did not advise him, Dyer's affidavit provides strong evidence that Dyer failed to inform Hutton of his plea's immigration consequences. *Contrast* Cir. Ct. Op. at XX. Therefore, because Hutton's attorney did not advise him of immigration consequences, Hutton satisfies *Strickland's* first prong.

Hutton's ineffective assistance claim satisfies *Strickland's* second prong because he meets *Lafler's* requirement that he would not have pled guilty had he received accurate

advice.¹ See *Lafler*, 132 Sp. Ct. at 1384–85. Hutton testified, “had I known that there were immigration consequences there’s no way I would have taken the deal.” A.R. at 45. Hutton’s assertion makes sense in light of the fact that he has lived in the United States for nearly his entire life. He explained that deporting him to Jamaica would be like sending him to a foreign country as he has spent his entire life in the United States. A.R. at 37, 45–46. For Hutton, as for many other noncitizen defendants, “deportation is . . . the most important part . . . of the penalty.” *Padilla*, 559 U.S. at 354. Therefore, because he would not have pled guilty but for his attorney’s failure to advise him of the immigration consequences, Hutton satisfies *Strickland*’s second prong.

C. Because Hutton received ineffective assistance, he is entitled to a remedy.

Hutton did not receive such effective assistance of counsel as the Sixth Amendment requires: he received legal representation that fell below an objective standard of reasonableness, and he was prejudiced as a result.

Because he received ineffective assistance, Hutton is entitled to post-conviction review and relief. See *Padilla*, 559 U.S. at 374. State courts are bound to follow the Supreme Court of the United States’ constitutional holding in *Padilla*. See U.S. Const. art. VI, cl. 2; *Cooper v. Aaron*, 358 U.S. 1, 17–18. (1958). The writ of error *coram nobis* is the appropriate post-conviction remedy to address Hutton’s Sixth Amendment right to effective assistance of counsel.

¹ Because the Circuit Court erroneously opined that Hutton did not show that Dyer’s representation fell below an objective standard of reasonableness, it did not address the second prong of *Strickland*.

II. THE CIRCUIT COURT ERRED BY HOLDING THAT *CORAM NOBIS* IS NOT AVAILABLE AS A POST-CONVICTION REMEDY IN WEST VIRGINIA

Coram nobis is available as a post-conviction remedy in West Virginia. The lower court's conclusion to the contrary is a legal holding. This Court reviews legal holdings de novo, and should reverse in this case. *State v. Black*, 708 S.E.2d 491, 498 (W. Va. 2010).

The writ of error *coram nobis* is an ancient common-law writ that has frequently been described as an extraordinary remedy. See e.g., *United States v. Morgan*, 346 U.S. 502, 511 (1954); *Bereano v. United States*, 706 F.3d 568, 577 (4th Cir. 2013); *U.S. v. Akinsade*, 686 F.3d 248, 251, 260 (4th Cir. 2012). The modern application of the writ in state courts was born out of the U.S. Supreme Court's decision in *Mooney v. Holohan*, 294 U.S. 103 (1935). *Mooney* required states to provide post-conviction remedies for defendants to address due process violations. *Mooney*, 294 U.S. at 112–13 (“Reasoning from the premise that the petitioner has failed to show a denial of due process . . . the Attorney General urges that the state was not required to afford any corrective judicial process to remedy the alleged wrong. The argument falls with the premise.”) (citing *Frank v. Magnum*, 237 U.S. 309, 335 (1915)).

This Court has consistently indicated that *coram nobis* may be available to criminal defendants seeking to challenge their convictions when they are no longer in custody, despite its explicit abolishment of the writ in civil cases by the Rules of Civil Procedure. The abolishment of the writ from the Rules of Civil Procedure and the West Virginia Code do not eliminate its availability for post-conviction review of criminal convictions. There is both constitutional and statutory authority for West Virginia courts to issue writs of *coram nobis* as a post-conviction remedy. Furthermore, this writ is the only remedy available to Mr. Hutton and other defendants facing ongoing consequences

of unconstitutional criminal convictions and who are not in state custody and could not seek habeas corpus as a remedy.

A. *Coram nobis* continues to exist as a post-conviction remedy in criminal cases.

The West Virginia Supreme Court of Appeals (“WVSCA”) has consistently noted that the writ may still be available as a post-conviction remedy. *See Cline v. Mirandy*, No. 13-1200 (W. Va. Nov. 3, 2014) (Ketchum, J., concurring); *McCabe v. Seifert*, 640 S.E.2d 142, 148 n.9 (W. Va. 2006); *State ex rel. Richey v. Hill*, 603 S.E.2d 177, 184 n.10 (W. Va. 2004); *Kemp v. State*, 506 S.E.2d 38, 39 n.4 (W. Va. 1997); *State v. Eddie “Tosh” K.*, 460 S.E.2d 489, 498 n.10 (W. Va. 1995); *see also Shrader v. State*, No. 12-0982, 2013 WL 2149846 at *1 n.3 (W. Va. 2013). This Court has indicated that the writ may also be available in cases in which it has denied habeas corpus petitions based on the fact that petitioner is no longer in custody, specifically noting 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.” *Kemp*, 506 S.E.2d at 39 n.4; *see also McCabe*, 640 S.E.2d at 148 n.10; *Richey*, 603 S.E.2d at 184 n.10; *Shrader*, 2013 WL 2149846 at *1 n.3. The Court has also specifically indicated that *coram nobis* would be an appropriate remedy for ineffective assistance of counsel. *Eddie “Tosh” K.*, 460 S.E.2d at 498 n.10; *Kemp*, 506 S.E.2d at 39 n.4; *Shrader*, 2013 WL 2149846 at *1 n.3. The Court has thus acknowledged that the writ might remain available in the post-conviction context despite its abolishment in civil cases.

The authority to grant writs of *coram nobis* is implicit in the West Virginia Constitution. Article VIII, sections 3 and 6 outline the power of West Virginia circuit

courts and the WVSCA. W. Va. Const. art. VIII, §§ 3, 6. These provisions specifically provide both circuit courts and the WVSCA with jurisdiction and authority to grant various common law writs.² Although *coram nobis* is not included in this specific grant of authority, section 6 also grants circuit courts “such other jurisdiction, authority, or power, original or appellate or concurrent, as may be prescribed by law.” W. Va. Const. art VIII, § 6. Section 3 includes a similar grant of appellate jurisdiction to the WVSCA. W. Va. Const. art. VIII, § 3 (“[The Court] shall have such other appellate jurisdiction, in both civil and criminal cases, as may be prescribed by law.”).

Article VIII, section 13 of the West Virginia Constitution and West Virginia Code section 2-1-1 prescribe the authority to grant *coram nobis*. Both adopt the common law in West Virginia to the extent it is not “repugnant” to the constitution or other laws, or until it is “altered or repealed by the legislature.” W. Va. Const. art. VIII, § 16; W. Va. Code § 2-1-1 (2014). Post-conviction *coram nobis* is part of the common law; it is not “repugnant” to any other provisions of the constitution, and has not been altered or repealed by the legislature.

Both the abolishment of *coram nobis* in the Rules of Civil Procedure and the repeal of West Virginia’s *coram nobis* statute only eliminated the writ in civil cases. The West Virginia Rules of Civil Procedure, adopted in 1960, specifically eliminated the writ of *coram nobis* in civil cases. W. Va. R. Civ. P. 60(b). Rule 60 of the West Virginia Rules of Civil Procedure should be interpreted in harmony with its almost identical federal counterpart, Federal Rule 60. Fed. R. Civ. P. 60; W. Va. R. Civ. P. 60. Although both the state and federal rules abolish *coram nobis*, the U.S. Supreme Court has specifically held

² “Circuit Courts shall have original and general jurisdiction of . . . proceedings in habeas corpus, mandamus, quo warranto, prohibition and certiorari” W. Va. Const. art. VIII, § 6.

that the abolition of the writ in the federal rules does not apply to the writ in the post-conviction context. *United States v. Morgan*, 346 U.S. 502, 506 n.4 (1954); see also Franklin D. Cleckley, 2 *Handbook on West Virginia Rules of Criminal Procedure* 508–09 (2d. ed. 1993). Therefore, the abolishment of *coram nobis* in the West Virginia Rules of Civil Procedure should only apply in civil cases, and not to *coram nobis* as a post-conviction remedy.

The repeal of West Virginia’s *coram nobis* statute also did not apply to post-conviction *coram nobis* as a common law remedy. “If the Legislature intends to alter or supersede the common law, it must do so clearly and without equivocation.” *State ex rel. Van Nguyen v. Berger*, 483 S.E.2d 71, 75 (W. Va. 1996). The legislative enactment of West Virginia’s *coram nobis* statute—section 58-2-3—did not clearly and unequivocally eliminate *coram nobis* as a post-conviction remedy in criminal cases. The enactment repealed in total 32 code sections in Chapter 58. Acts 1998, Chapter 110; W. Va. Code § 58-2-3 (1997). The synopsis of the law repealing section 58-2-3 provided to the House of Delegates—House Bill 4060, enacted April 1, 1998—indicated that the law “repeal[ed] provisions of law relating to appellate relief in the supreme court of appeals which are outdated, archaic, or not in conformity with rules of appellate procedure promulgated by the supreme court of appeals.” H.B. 4060, 73rd Leg., 2d Reg. Sess. (W. Va. 1998). It did not indicate that it eliminated a remedy for erroneous criminal convictions. Indeed, the sections of Chapter 58 *not* repealed in 1998 provide procedural rules for appeals from county commissions, appeals from courts of record of limited jurisdiction, and appellate relief in the Supreme Court of Appeals. W. Va. Code §§ 58-3-1 to 58-5-30 (2013). It is likely that section 58-2-3 was only repealed as a housekeeping matter, due to its direct conflict with Rule 60(b) of the West Virginia Rules of Civil Procedure. Only four cases decided by

the WVSCA cite section 58-2-3, and every one of them was a civil matter. *See State Road Comm'n v. Hereforde*, 153 S.E.2d 501, 506 (W. Va. 1967); *Davis v. Fire Creek Fuel Co.*, 109 S.E.2d 144, 153 (W. Va. 1959) (overruled in part by *Yates v. Macari*, 168 S.E.2d 746 (W. Va. 1969)); *Reed v. Schwarz*, 81 S.E.2d 725, 726 (W. Va. 1954); *Chaney v. State Compensation Comm'r*, 33 S.E.2d 284, 287 (W. Va. 1945). Therefore, the repeal of West Virginia's *coram nobis* statute also applies only to civil cases and not to *coram nobis* as a post-conviction remedy.

When the legislature repealed section 58-2-3 it did not intend to repeal common-law remedies. The legislature rather intended to modernize the State Code. It intended to vacate the field of procedural law. And, the legislature intended to allow the WVSCA to continue to exercise its constitutional authority to “promulgate rules for all cases and proceedings, . . . for all of the courts of the state relating to writs, warrants, process, practice, and procedure” W. Va. Const. art. VIII, § 3. Therefore, the repeal of section 58-2-3 did not abolish the writ of *coram nobis* in its entirety. The writ is still available as a post-conviction remedy.

B. *Coram nobis* is the only remedy available to Hutton, who is entitled to a remedy.

Hutton asks the Court to explicitly recognize *coram nobis*, not only because it is an available remedy in West Virginia, but also because it is the *only* remedy available to him. Hutton faces grave ongoing consequences as a result of his unconstitutional conviction. Hutton and defendants like him must have a means to vindicate their constitutional rights in these extraordinary cases, and *coram nobis* provides those means. The following analysis outlines how this Court should apply *coram nobis* in Mr. Hutton's case.

III. THE CIRCUIT COURT ERRED BY FAILING TO GRANT HUTTON A WRIT OF ERROR *CORAM NOBIS* BECAUSE *CORAM NOBIS* IS AVAILABLE AS A POST-CONVICTION REMEDY IN WEST VIRGINIA AND IS AN APPROPRIATE REMEDY FOR THE DENIAL OF EFFECTIVE ASSISTANCE OF COUNSEL

West Virginia is required to provide a remedy to defendants whose counsel failed to advise them about immigration consequences. *Padilla*, 559 U.S. at 385. Like the petitioners in *Eddie “Tosh” K. and Kemp*, Hutton suffered from ineffective assistance of counsel but is no longer in state custody and, consequently, cannot petition for a writ of habeas corpus.³ In *Eddie “Tosh” K. and Kemp*, this Court indicated that *coram nobis* relief would be appropriate, and it is appropriate here. Because ineffective assistance of counsel led to a flawed conviction premised on a constitutionally deficient process and, further, because Hutton has no other available remedy and has not forfeited the remedy that remains available to him, this Court should grant his petition for a writ of error *coram nobis*.

The circuit court suggested that writs of error *coram nobis* should be limited to correcting factual errors. Cir. Ct. Op. at 16. This suggestion would leave defendants whose convictions rest on fundamental legal errors without a remedy,⁴ and it contravenes this

³ See *Eddie “Tosh” K.*, 460 S.E.2d at 498 n.10; *Kemp*, 506 S.E.2d at 39 n.4; see also *United States v. Denedo*, 556 U.S. 904, 91213, 917 (2009) (explaining that *coram nobis* can issue to correct fundamental legal and factual errors); *United States v. Morgan*, 346 U.S. 502, 508 (1954) (explaining that *coram nobis* applies to deprivation of counsel); *United States v. Akinsade*, 686 F.3d 248, 252 (4th Cir. 2012) (holding that *coram nobis* relief is proper relief for ineffective assistance of counsel); *United States v. Castro*, 26 F.3d 557, 559 (5th Cir. 1994) (same).

⁴ Moreover, Hutton’s allegation of ineffective assistance of counsel is properly considered a factual issue. Ineffective assistance of counsel claims present mixed questions of law and fact. *State ex rel. Vernatter v. Warden*, 528 S.E.2d 207, 212 (W. Va. 1999). In this case, factual issues predominate. It is a matter of *fact* that Hutton’s attorney did not inform him of the *fact* that his plea could lead to deportation. The legal issue—that Hutton’s counsel was required to advise him about immigration consequences—is settled. *Padilla*, 559 U.S. at 366. Consequently, Hutton would be entitled to *coram nobis* relief even if it were limited to correcting factual errors.

Court's statements in *Eddie "Tosh" K. and Kemp*. See *Eddie "Tosh" K.*, 460 S.E.2d at 498 n.10; *Kemp*, 506 S.E.2d at 39 n.4. The circuit court's denial of a writ of error *coram nobis* was based on both legal and factual determinations, which this Court reviews de novo and under the clearly erroneous standard, respectively. *State v. Black*, 708 S.E.2d 491, 497-98 (W. Va. 2010).

United States v. Akinsade, 686 F.3d 248 (4th Cir. 2012), a case factually similar to this one, provides a useful model for determining when *coram nobis* relief appropriate. It sets out eminently reasonable requirements in light of the writ's status as an extraordinary but important "remedy of last resort." *Id.* at 252; see also *Kemp*, 506 S.E.2d at 39 n.4. Under *Akinsade*, a petitioner must satisfy four requirements to obtain *coram nobis* relief: a more usual remedy must not be available; valid reasons must exist for not attacking the conviction earlier; there must be adverse consequences from the conviction; and the error must be of the most fundamental character. *Akinsade*, 686 F.3d. at 252 (quoting *Hirabayashi v. United States*, 828 F.2d 591 (9th Cir. 1986)).

A. Because Hutton was no longer in the custody of the sentencing court when he petitioned, *coram nobis* is the only remedy available.

Coram nobis is the only remedy available to Hutton. The Circuit Court of Harrison County found that "West Virginia's post-conviction habeas corpus scheme would not apply" because Hutton "was not incarcerated under sentence of imprisonment on the challenged conviction at the time he filed his petition." Cir. Ct. Op. at 16. This is a legal determination that this court reviews de novo. *State v. Black*, 708 S.E.2d 491, 498 (W. Va. 2010). This Court should uphold the circuit court's holding because there is no room for dispute that Hutton was not in state custody.

The West Virginia Division of Corrections officially released Hutton from their custody, and DHS took him into their custody. A.R. at 9, 22. Like the circuit court, the United States District Court for the Northern District of West Virginia also held that Hutton was not in state custody (and that it could not review his federal habeas petition as a result). *See Hutton v. West Virginia*, 1:13CV186, 2014 WL 856489, at *2 (N. D. W. Va. Mar. 5, 2014). Therefore, habeas corpus is not an available remedy because Hutton has been released from state custody, and a writ of error *coram nobis* is the only remedy available.

B. The circuit court’s finding that Hutton could have objected to deportation earlier was clearly erroneous because Hutton had valid reasons for not objecting earlier.

The circuit court found that Hutton had earlier “opportunities” to contest his deportation, and forfeited his objection to deportation by failing to contest it earlier. Cir. Ct. Op. at 18. The circuit court also found that Hutton, not his attorney, was responsible for inquiring about deportation. *Id.* at 17–19. These findings of fact are clearly erroneous, and should be reversed. *State v. Black*, 708 S.E.2d 491, 49798 (W. Va. 2010). First, Hutton did not know about his plea’s immigration consequences in time to take advantage of earlier opportunities for legal action. Second, the finding that Hutton was responsible for inquiring about immigration consequences misstates attorneys’ obligations to their clients.

1. Hutton was unaware that his plea could lead to deportation in time to contest deportation through an appeal or habeas petition.

When he entered his plea, Hutton did not know the plea could lead to deportation. A.R. at 45. He specifically said that Dyer did not advise him of immigration consequences. *Id.* Similarly, Dyer’s affidavit says, “I likewise have no memory of speaking with Mr. Hutton regarding his immigration status nor the consequences he may face as a

immigrant if found guilty.” Supp. A.R. at 251. Dyer’s affidavit indicates that he did not inform Hutton that he could be deported. At the very least, it corroborates Hutton’s testimony.

a. Hutton’s testimony that his trial attorney never informed him of potential immigration consequences is credible.

Contrary to the circuit court’s finding, questions as to Hutton’s credibility do not undermine his corroborated statement that he did not know the immigration consequences of his plea. *See* Cir. Ct. Op. at 18. First and foremost, by using misgivings about Hutton’s credibility as justification for denying his petition, the circuit court discounted this Court’s clear rule that pleas are only acceptable “in situations in which it is clear that the accused has not only a full knowledge of all facts and of his rights, but a full appreciation of the effects of his voluntary relinquishment.” *State v. Eden*, 256 S.E.2d 868, 873 (W.Va. 1979). “[T]he record must affirmatively show” that a plea was made “with an awareness of ... the consequences of the plea.” *Riley v. Ziegler*, 241 S.E.2d 813, 815 (W. Va. 1978); *see also State ex rel. Gill v. Irons*, 530 S.E.2d 460, 463 (W. Va. 2000); *Holland v. Boles*, 225 F. Supp. 863, 866 (N.D. W. Va. 1963) (“If such waiver is to be assumed at all, it can only be in situations in which it is abundantly clear that the accused has not only a full knowledge of all the facts and of his rights, but a full appreciation of the legal effects of his voluntary relinquishment.”). Following this Court’s rule, Hutton’s plea is only valid if the record “affirmatively show[s]” that he understood the plea’s consequences. *Riley*, 241 S.E.2d at 815. Even if there is some question as to Hutton’s credibility, that uncertainty provides nothing like affirmative evidence that Hutton understood his plea’s consequences—namely, the fact that it could lead to his deportation.

Moreover, the circuit court's finding that Hutton was not credible was in error. The court focused on two statements as evidence of Hutton's lack of credibility. Cir. Ct. Op. at 18. Neither of these statements undermines his credibility.

i. Hutton's confusion about the distinction between an *Alford* plea and a no contest plea does not undermine his credibility; instead, it emphasizes his need for legal advice with respect to the plea process.

The Circuit Court points out that Hutton refers to his *Alford* plea as a plea of no contest, taking this reference as evidence of his lack of credibility. Cir. Ct. Op. at 18. However, Hutton's confusion about the subtle difference between *Alford* and no contest pleas actually illustrates that Hutton does not understand the complex plea bargaining process.

Addressing Hutton's credibility, the Circuit Court says, "the Petitioner...insists that he did not know his plea of 'no contest' would result in his removal from the United States. However...Petitioner entered an *Alford* plea. In an *Alford* plea, a criminal defendant pleads guilty." Cir. Ct. Op. at 18. The Circuit Court's inference seems to be that Hutton was not forthcoming about the details of his plea, and that his evasiveness called his credibility into question.

An examination of the hearing transcript, however, makes clear that Hutton was not being evasive. He simply did not understand the difference between an *Alford* plea and a no contest plea. During the hearing, the following exchange occurred:

THE PETITIONER: I know that my acceptance of no contest plea resulted in mandatory—

THE COURT: Well, let me stop you right there, sir, because this was not a no contest plea. This was a guilty plea.

THE PETITIONER: It was an *Alford* plea, Your Honor.

THE COURT: Sir, it was a guilty plea.

THE PETITIONER: Well, it was my understanding at that time that an *Alford* plea was a no contest—

THE COURT: That's not correct, sir. Judge Bedell has already ruled on that issue with respect to post-trial motions that were filed.

THE PETITIONER: Yes, Your Honor.

THE COURT: So I'm going to caution you about possibly committing perjury or false swearing at this point in time.

THE PETITIONER: Okay, so it's a guilty plea.

THE COURT: You may continue.

THE PETITIONER: Had I known that my acceptance of a guilty plea would result in mandatory removal from this country I absolutely would not have accepted it.

A.R. at 33–34.

Hutton's belief that his *Alford* plea was a plea of no contest is understandable because the two are similar and their distinctions subtle. *See, e.g.*, 11A Cyc. Fed. Proc. § 43:12 (3rd. ed. 2014) (“[I]t has also been said that when a defendant offers an *Alford* plea, the proper procedure is to treat the plea as a plea of *nolo contendere*.”). Hutton's confusion is also understandable because, when accepting his plea, Judge Bedell stated on the record that “the defendant...offered his guilty plea today...even though he's unable or unwilling to admit participation in the offense.” Supp. A.R. at 72–73. This accurate explanation of an *Alford* plea could easily make a defendant think his plea was essentially a plea of no contest.

Hutton also had no motivation for trying to convince the court that he entered a plea of no contest rather than an *Alford* plea. A plea of no contest, like an *Alford* plea,

“authorizes the court for purposes of the case to treat [the defendant] as if he were guilty.” *North Carolina v. Alford*, 400 U.S. 25, 36 (1970). Pleading no contest to a deportable offense, like pleading guilty or entering an *Alford* plea, can result in deportation. See *Wisconsin v. Bedolla*, 720 N.W.2d 158, 161 (Wis. 2006); *In re T.E.F.*, 614 S.E.2d 296 (N.C. 2005). Hutton’s confusion does not undermine his credibility; it simply underscores his urgent need for an attorney to explain the consequences of entering any plea.

ii. Hutton’s assertions of innocence do not undermine his credibility.

Second, the Circuit Court points out discrepancies between Hutton’s testimony to the effect that he did not injure the victim and testimony wherein he apparently admits to the crime, suggesting that these discrepancies render his testimony that Dyer did not advise him about deportation not credible. See Cir. Ct. Op. at 18. Statements about the underlying crime are irrelevant to the uncontroverted statement that Dyer did not advise Hutton of his plea’s immigration consequences. Any inconsistencies in Hutton’s statements about the underlying crime are insufficient to undermine the credibility of Hutton’s corroborated statements about the circumstances of his plea.

b. Hutton was not responsible for inquiring about the immigration consequences of his plea because it is an attorney’s duty to advise his client about a plea’s immigration consequences, not a defendant’s duty to inquire about immigration consequences.

Not only did Hutton not know his plea could lead to deportation, but he was also not responsible for inquiring about his plea’s immigration consequences, contrary to the circuit court’s indication. See Cir. Ct. Op. at 18–19. The circuit court suggests that Hutton should have asked whether his plea could result in immigration consequences. This suggestion fundamentally misstates the obligations of criminal defense attorneys to their clients.

The Supreme Court of the United States has rejected the position that attorneys may remain silent about a plea's immigration consequences. *Padilla*, 559 U.S. at 370. The Court explained, "[s]ilence under these circumstances would be fundamentally at odds with the critical obligation of counsel to advise the client of the advantages and disadvantages of a plea agreement" because "[o]ur longstanding Sixth Amendment precedents, the seriousness of deportation as a consequences of a criminal plea, and the concomitant impact of deportation on families living lawfully in the country demand no less" than straightforward advice. *Id.* at 370, 374.

Accordingly, Hutton was not responsible for asking his attorney (or the judge) about the immigration consequences of his plea. His attorney had an unequivocal obligation to inform him that his plea might carry deportation consequences. Therefore, the circuit court erred in finding that Hutton needed to ask about immigration consequences.

2. Because Hutton did not know, and could not have known, about the possibility of deportation earlier, he could not have raised this issue prior to his petition for a writ of error *coram nobis*.

As Hutton did not find out that he was subject to deportation until May 2013, he could not have raised this issue in a direct appeal. Supp. A.R. at 6. It is axiomatic that Hutton could not appeal an issue of which he was completely unaware. In addition, ineffective assistance of counsel is not normally raised on direct appeal in West Virginia. *See, e.g., West Virginia v. Triplett*, 421 S.E.2d 511, 522 (W. Va. 1992). Therefore, because Hutton could not have contested deportation in a direct appeal, his failure to do so does not constitute forfeiture.

Hutton found out that he was subject to deportation only ten days before his release from state custody. A.R. at 8, 160; Supp. A.R. at 6. Ten days is not enough time to

prepare a habeas petition contesting deportation, and sufficient time for preparation is essential in habeas proceedings. *See Morrow v. Harwell*, 768 F.2d 619, 624 (5th Cir. 1985) (noting that brevity of confinement may give someone insufficient time to petition the courts); *Swann v. City of Huntsville*, 471 So.2d 1268, 1270 (Ala. Crim. App. 1985) (noting the importance of giving counsel sufficient time to prepare for habeas proceedings). Therefore, because Hutton did not know about the possibility of deportation with sufficient time to address the issue in a petition for a writ of habeas corpus, his failure to do so does not constitute forfeiture of the issue.

C. Because Hutton faces deportation, he suffers adverse consequences as a result of his conviction.

Hutton faces deportation, an irrefutably adverse consequence. The circuit court does not dispute that deportation is an adverse consequence, and the Supreme Court of the United States makes clear that it is. *Padilla*, 559 U.S. at 365, 386 (explaining that “deportation is a particularly severe “penalty”). The consequence is particularly severe in this case because Hutton, an adult, has lived in the United States since childhood and has familial ties to the United States. A.R. at 37–38, 42, 47. On its face, deporting Hutton to a country that is foreign to him and separating him from his family is a severely adverse consequence.

D. Ineffective assistance of counsel is an error of the most fundamental character.

Finally, it bears emphasizing that denying Hutton effective assistance of counsel was a fundamental error warranting the extraordinary remedy of *coram nobis*. “[I]ncompetent advice distorts the defendant's decision-making process and seems to call the fairness and integrity of the criminal proceeding itself into question.” *Padilla*, 559 U.S. at 385 (Alito, J., concurring). Ineffective assistance is no less than a “constitutional

deficiency.” *Padilla*, 559 U.S. at 369; *see also Akinsade*, 686 F.3d at 256 (explaining that counsel’s failure to properly advise a client of the immigration consequences of a plea is “a fundamental error necessitating *coram nobis* relief”). Not having received the benefit of accurate advice about the plea he entered, Hutton entered a plea that was clearly unconstitutional. There can be no more fundamental error than a constitutionally deficient criminal conviction. West Virginia courts have the obligation to remedy this fundamental error.

CONCLUSION

The circuit court’s order should be reversed. This Court should grant Petitioner a writ of error *coram nobis* or, at the very least, remand this case for further proceedings not inconsistent with *Padilla v. Kentucky* and West Virginia courts’ authority to grant writs of error *coram nobis*.

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CERTIFICATE OF SERVICE

I hereby certify that on this 6th day of November, 2014, true and accurate copies of the foregoing **Petitioner's Brief** were sent by mail to counsel for all other parties to this appeal as follows:

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