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PRELIMINARY STATEMENT

Petitioner/Defendant, GREGORY D. ROLLE, seeks review of the denial by the appellate court below of his Petition For Leave to File Petition For Writ of Error Coram Nobis in the trial court below.

Throughout this Brief, the parties will be referred to by their respective designations in these appellate proceedings and by their proper names. Sometimes the Petitioner will be referred to as the Defendant and the Respondent as the "State".

References to the record on appeal will be indicated by proper name of a pleading filed below followed by the appropriate page number. References to an Appendix attached to a pleading will be indicated by proper name of the pleading followed by the symbol "A" and the appropriate page number.

References to the Appendix to this Brief will be indicated by the symbol "A" followed by the appropriate page number.

STATEMENT OF CASE AND FACTS

The Petitioner/Defendant, GREGORY D. ROLLE, was tried by a jury and convicted of Murder in the First Degree and Armed Robbery on July 30, 1981. On August 4, 1981, advisory sentence proceedings were conducted which resulted in a jury recommendation of life imprisonment without possibility of parole for twenty-five years. On January 5, 1982 the trial court sentenced the Petitioner/Defendant to a term of life imprisonment subject to a minimum sentence of twenty-five years for the conviction of Murder in the First Degree, and as to the Armed Robbery conviction the Defendant was also sentenced to a term of life imprisonment, said terms of imprisonment to run concurrently. Subsequently, Petitioner/Defendant filed his Notice of Appeal with the Fourth District Court of Appeal seeking reversal of the Final Judgment adjudicating the Petitioner guilty of the crimes of Murder in the First Degree and Armed Robbery. Oral Argument in these proceedings was heard by the appellate court on July 5, 1983.

After oral argument and pending decision on the merits of the appeal by the appellate court, Petitioner filed his Petition For Leave to File Petition For Writ of Error Coram Nobis with the Fourth District Court of Appeal on September 16, 1983. The basis of these coram nobis proceedings was the discovery of newly discovered evidence in the form of the testimony of one Lawrence Craig Turner who stated in deposition under oath that the State's key witness, Charlie Lee Wright, who had testified against the

Defendant/Petitioner admitted to Turner that he had committed the crimes for which the Petitioner/Defendant was convicted. At trial, the essence of the testimony of Charlie Lee Wright was an alleged confession made to him, containing numerous admissions against penal interests by the Petitioner.

On September 30, 1983, the Fourth District Court of Appeal entered an Order in which the Court directed the Respondent, the State of Florida, to file with the appellate court and show cause, if any there be, on or before October 20, 1983, why the Petition For Leave to File Petition For Writ of Error Coram Nobis should not be granted. On November 7, 1983, the State of Florida served its Response to Petition For Leave to File Petition for Writ of Error Coram Nobis. On November 15, 1983, Petitioner/Defendant served his Reply To Response To Petition For Leave To File Petition For Writ of Error Coram Nobis and on November 16, 1983, the State of Florida served its Response to Reply. On April 25, 1984 the Fourth District Court of Appeal in its Opinion denied the Petitioner/Defendant's plenary appeal and affirmed the trial court in Case No. 82-288. On the same date the Fourth District Court of Appeal in a separate opinion denied the Petition For Leave to File A Petition For Writ of Error Coram Nobis. On May 3, 1984, Petitioner/Defendant timely served his Motion for Rehearing in which he suggested certification of the following question to the Supreme Court of Florida as a question of great public importance:

"WHETHER THE RULE OF LAW GOVERNING CORAM NOBIS PROCEEDING IN CASES OF NEWLY DISCOVERED EVIDENCE IS THAT SUCH EVIDENCE MUST DIRECTLY INVALIDATE AN ESSENTIAL ELEMENT OF THE STATE'S CASE." (Motion for Rehearing, 1)

On June 27, 1984 the appellate court denied the Motion for Rehearing; however, the court certified the following question of one of great public importance:

"In order to be entitled to an evidentiary hearing upon a Petition For Writ of Error Coram Nobis predicated upon the recent discovery of additional evidence, must a showing be made that the Defendant would have been entitled to a Dismissal or a Directed Verdict of Acquittal had the new evidence been considered at the original trial?" (A 6).

Petitioner/Defendant, GREGORY D. ROLLE, now seeks before this Court review of the Decisions of the Fourth District Court of Appeal denying both his Petition For Leave To File Petition For Writ of Error Coram Nobis and his subsequent Motion for Re-hearing in which the appellate court certified its question as one of great public importance. Petitioner seeks here only an evidentiary hearing in the trial court below as to the merits of the Petition For Writ of Error Coram Nobis. The Petitioner does not seek here a new trial, only the opportunity to present newly discovered evidence as alleged in the Petition in light of the stringent requirements for coram nobis relief.

ARGUMENT

(QUESTION CERTIFIED)

IN ORDER TO BE ENTITLED TO AN EVIDENTIARY HEARING UPON A PETITION FOR WRIT OR ERROR CORAM NOBIS PREDICATED UPON THE RECENT DISCOVERY OF ADDITIONAL EVIDENCE, A SHOWING NEED NOT BE MADE THAT THE DEFENDANT WOULD HAVE BEEN ENTITLED TO A DISMISSAL OR DIRECTED VERDICT OF ACQUITTAL HAD THE NEW EVIDENCE BEEN CONSIDERED AT THE TRIAL.

Petitioner respectfully submits that the question certified by the appellate court below should be answered in the negative as stated above. Petitioner further submits that he is entitled to an evidentiary hearing in the trial court below on the merits of his Petition For Writ of Error Coram Nobis.

In its opinion in these appellate proceedings, the Fourth District Court of Appeal, in denying coram nobis relief stated:

"We must confess, however, to being somewhat disturbed by this result, especially in the face of the rather liberal standards for relief from procedural error authorized by the criminal rules of procedure through a motion for post-conviction relief. The matter alleged herein, i.e., a newly discovered incriminating statement by the chief witness for the prosecution, clearly goes to the merits of the issue of petitioner's guilt or innocence." (A 4)

The appellate court concluded its opinion with the following comment on the current status of Florida Law on coram nobis relief:

"The net result is that the judiciary may grant relief to a Defendant who is not required to make any showing as to his innocence, but can demonstrate that his lawyer failed to perform up-to-snuff, although we are powerless to act in the face of allegations which, if proven were directly effect the issue of the Defendants guilt or innocence." (A 4-5).

On page three (3) of its Opinion, the appellate court

misapprehended the law governing coram nobis relief when it stated:

"The rule that can be deduced from this line of cases is that newly discovered evidence, if true must directly invalidate an essential element of the state's case." (A 3).

And, as authority, the court cites the case of Riley v. State, 433 So.2d 976, 980 (1983). No where in the Riley case or in any other case has the Supreme Court of Florida required newly discovered evidence to invalidate an essential element of the state's case. In fact, in the Riley case the Court specifically considers the sufficiency of the evidence apart from the new evidence and states such evidence would alone would have been sufficient to convict Riley. Riley 433 So.2d at 980. In Hallman v. State, 371 So.2d 482 (Fla 1979), this Court set out the specific requirements for a Petition For Leave To File A Writ of Error Coram Nobis:

"A petition for this writ addressed to the appellate court must disclose fully the alleged facts relied on; mere conclusory statements are insufficient. The appellate court must be afforded a full opportunity to evaluate the alleged facts for itself and to determine whether they establish prima facie grounds. (Citations omitted) Furthermore, the petition should assert the evidence upon which the alleged facts can be proved and the source of such evidence. (Citation omitted) The function of a writ of error coram nobis is to correct errors of fact, not errors of law. (Citation omitted) The facts upon which the petition is based must have been unknown by the trial court, by the party, or by counsel at the time of trial, and it must appear that defendant or his counsel could not have known them by the use of diligence. (Citation omitted) Hallman, 371 So2d. at 484-85.

The Riley case also reiterated the fundamental rule that:

"(t)he Petition must allege facts of such a vital

nature that had they been known to the trial court, they conclusively would have prevented entry of judgment." Riley, 433 So.2d at 980.

However, Justice Boyd in his dissenting opinion stated:

"The allegations of the petition, setting forth evidence of Ferguson's admissions against his penal interest, are such that if they are true and had been known at the time of petitioner's trial, they conclusively would have changed the outcome of that litigation and would have prevented entry of the judgment from which petitioner ultimately seeks relief." Riley, 433 So.2d at 982-983.

Applying the principles set forth in the dissenting opinion of Justice Boyd to the facts in the case at bar, the newly discovered testimony of Lawrence Craig Turner which contains numerous admissions against penal interest allegedly made by the state's key witness Charlie Lee Wright who allegedly stated that he had committed the crime for which the Petitioner/Defendant had been convicted. In the Riley case, Riley's Petition For Coram Nobis relief was based in principle part on the affidavit of one Anthony Saia who stated that he had personally heard a fellow prisoner Ferguson admit that he and his cousin had committed the crime for which Riley stood convicted.

In the case of Ex parte Welles, 53 So2d. 708 (Fla 1951), a petition to apply to the Criminal Court of Records of Dade County for a new trial was treated as an application to apply for Writ of Error Coram Nobis addressed to the judgment of conviction affirmed by the Supreme Court of Florida. The Court granted the Writ on the basis that it had been conclusively shown that another person committed the robbery in which the Defendant had been convicted and that the proof as to his identity was clearly erroneous.

Justice Terrell writing for the majority addressed the argument that desired release could be secured on application to the Pardon Board as has been suggested by the appellate court below in this cause. Justice Terrell wrote:

"Even if the Pardon Board saw fit to consider the case it could do no more than remit the sentence and restore civil rights. The mark of a criminal and the fact that Petitioner had been convicted of a heinous crime would remain to smite him. If the re-examination results in an acquittal, an exoneration and removal of the charge from the record will necessarily follow and this will go far to remove the stains on his character. If rules of procedure have become so rigid and inflexible that an error like this cannot be corrected for fear of establishing a precedent that will plague us, then we have lost this creative facility that we have always thought to be residents in the judiciary. If we admit that it cannot be done to cope with new situations as they arise, then we must conclude that the law has matured and that it no longer expands to meet human needs." Ex parte Welles, 53 So.2d at 710.

Although the appellate court below denied the Petitioner's Motion For Rehearing, the appellate court did however certify the following question as one of great public importance:

"In order to be entitled to an evidentiary hearing upon a Petition For Writ of Error Coram Nobis predicated upon the recent discovery of additional evidence, must a showing be made that the Defendant would have been entitled to a dismissal or directed verdict of acquittal had the new evidence been considered at the original trial?"

None of the cases cited by the appellate court in its opinion provide guidance on this question. These cases generally state that a Petition For Leave to File a Writ of Error Coram Nobis should be granted only if the allegations of newly discovered matters, if taken as true, would have prevented entry of judgment against the Defendant if known before judgment was entered. Riley

v. State 433 So.2d 976 (Fla 1983). The appellate court also cited the case of Lamb v. State, 107 So.535 (Fla. 1926). This Court in Lamb granted an application for leave to file a Writ of Error Coram Nobis in a case where the Defendant was convicted of Murder in the First Degree with a recommendation of mercy. The Lamb court however did not specify the facts or circumstances upon which it granted the application for a Writ of Error Coram Nobis. The Petition there simply alleged generally that certain facts and evidence in existence at the time of trial and conviction were not known to the Petitioner nor his attorneys and that if the facts were known at the time of conviction would have caused the court to have entered a different judgment, that is, a judgment in favor of the Defendant, and that none of these matters could have been known by his attorneys by the exercise of due diligence. Lamb 107 So. at 537. The Court, however, in discussing the writ of error coram nobis generally states:

"The writ supplements, but does not supersede, the remedy provided in the Statutes by the granting of new trial or the correction of error. It is not available where the facts complained of are known before the trial, and where advantage could have been taken of the alleged error at the trial; nor does it lie to correct an adjudicated issue of fact." Lamb, 107 So. at 538.

The remedy cannot be invoked on the ground that an important witness testified falsely about a material issue in the case; nor can newly discovered evidence, going to the merits of the issue tried, be used as a basis for the Writ. Lamb, 107 So. at 539. Based upon the foregoing, it appears that the newly discovered evidence must go to the merits of the issue tried in order to form

the basis for the denial of a Petition for Writ of Error Coram Nobis.

Petitioner submits that had the newly discovered testimony and evidence of Turner, which implicated the state's key witness Charlie Lee Wright, then known to the trial court at the time of trial, such evidence would have conclusively prevented entry of the judgment by the trial court below. None of the cases cited by the appellate court even remotely suggests that in the case of recent discovery of additional evidence a showing must be made that the Defendant would have been entitled to a dismissal or directed verdict of acquittal had the new evidence been considered at the original trial. Petitioner suggests respectfully that the purpose of a Petition For Leave To Apply For A Writ of Error Coram Nobis is simply to provide a vehicle by which a Petitioner may seek to have an evidentiary hearing in order to determine the truth of allegations, which if proven to be true, might conclusively have prevented judgment against the Defendant in the trial court below.

Petitioner contends that it is both impossible and impractical for an appellate court to determine whether the allegations of a Petition Seeking Leave To File a Petition of Error Coram Nobis in the trial court below predicated upon the recent discovery of additional evidence demonstrate that the Defendant would have been entitled to a Dismissal or a Directed Verdict of Acquittal had the new evidence been considered at the time of trial without a complete and exhaustive review of the


original trial court proceedings. Petitioner respectfully submits that it is the province of the trial court to conduct an evidentiary hearing to determine the truth of the allegations set forth in a Petition seeking Coram Nobis relief, assuming the Petition meets the prima facia requirements established for such relief in Hallman v. State. Petitioner does not seek here a new trial. Petitioner only seeks permission to authorize the trial court to consider an application for a Writ of Error Coram Nobis and to grant the Writ if in the Judgment of the trial court a sufficient showing is made for granting the Writ. If the Writ is granted a trial is had on the issue as to the existance of the particular facts alleged in the Petition and, if found for the Plaintiff in the Writ, the trial court then must determine whether such facts are sufficient to cause the judgment of conviction to be vacated; but the judgment of conviction is not set aside or affected unless and until a valid judgment for the Petitioner is rendered in due course of legal procedure. Lamb v. State, 107 So. at 540.

CONCLUSION

Based upon the foregoing argument and the case law cited, Petitioner submits that a showing need not be made that the Defendant would have been entitled to a dismissal or a directed verdict of acquittal had the new evidence been considered at the original trial in order to be entitled to an evidentiary hearing upon a Petition for Writ of Error Coram Nobis predicated upon the recent discovery of additional evidence.

Petitioner, therefore, submits that on the basis of the law, the question certified by the appellate court below should be answered in the negative; and further, that this Court reverse the denial by the appellate court below of the Petition for Leave to File Petition for Writ of Error Coram Nobis in the trial court.

Respectfully submitted,


WILLIAM G. CRAWFORD JR.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Initial Brief of Petitioner was furnished to RUSSELL BOHN, ESQUIRE, OFFICE OF THE ATTORNEY GENERAL, STATE OF FLORIDA, 111 Georgia Avenue, West Palm Beach, Florida, by mail this 27th day of August, 1984.

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