IN THE SUPREME COURT OF FLORIDA.

CASE NO: 65,570

FOURTH DISTRICT COURT OF APPEAL
CASE NO: 83-2990

GREGORY D. ROLLE,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

REPLY BRIEF OF PETITIONER, GREGORY D. ROLLE

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CITATION OF AUTHORITIES

PRELIMINARY STATEMENT

Petitioner 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.

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 Petitioner's Initial Brief will be indicated by the symbol "IB" followed by the appropriate page number.

References to Respondent's Answer Brief will be indicated by the Symbol "AB" followed by the appropriate page number.

Reference to the Record on Appeal will be indicated by the Symbol "R" followed by the appropriate volume and page number.

STATEMENT OF THE CASE AND FACTS

Petitioner restates his Statement of the Case and Facts to reflect citations to the Record on Appeal in these proceedings as supplemented by the eight (8) volume record of trial court proceedings included herein by Order of this Court entered after service of Petitioner's Initial Brief.

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. (R VIII; 1091). 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. (R VIII; 1122). 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. (R VIII; 1151-1153) 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 (Wright) 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. (R II; 193-311).

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 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 PROCEEDINGS 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 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 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 Rehearing 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 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

(QUESTIONS CERTIFIED)

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, 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 ORIGINAL TRIAL.

The State argues that the Riley standard of "conclusiveness" in coram nobis proceedings requires this Court to answer the question certified in the affirmative and that newly discovered evidence must be such as to entitle the Defendant to a dismissal or a directed verdict of acquittal had the evidence been considered at trial. (AB; 15-16).

Petitioner replies that the Riley requirement that the facts not only prevent entry of judgment but that the facts "conclusively" do so merely emphasizes the Court's insistence on the finality of judgments.

Petitioner submits that the "conclusiveness" test adds nothing but confusion to the critical issue of determining what facts, if any exist, warrant a hearing in the trial court below upon an application for coram nobis relief. The trial court must first grant the Writ before an evidentiary hearing may be conducted. Lamb v. State, 107 So. 535, 540 (Fla. 1926).

If Petitioner must demonstrate before this Court such facts as would conclusively have prevented entry of judgment, Petitioner wonders what facts, if such facts exist, must one adduce to prove conclusively that judgment should not have been

entered. For if the test is truly one of "conclusiveness", Petitioner submits that no "new evidence" could ever be adduced to prove the non-existence of any basis for entry of judgment by the trial court absent a lack of jurisdiction.

The State argues that Petitioner's reliance upon the case of Ex Parte Welles, 53 So.2d 708 (Fla. 1951) is misplaced because the prosecuting attorney confessed error and believed the Defendant innocent. (AB; 20-21). Petitioner replies that the State's argument undermines its own assertion that newly discovered evidence must be such as to have conclusively prevented entry of judgment. Petitioner submits that merely because the State confessed error does not "conclusively" demonstrate the lack of any basis on the part of the trial court to have entered judgment.

The issue of guilt or innocence of an accused when determined by a trial court rests upon facts adduced at trial. What new facts ever exist that might conclusively have prevented entry of judgment had they been known at time of trial? Petitioner submits that none exists; and, if the standard for coram nobis relief is as the State argues, then such a requirement is meaningless and a defendant must demonstrate an impossibility. To require the Petitioner to conclusively show that new facts would have prevented entry of judgment is as patently ludicrous as to require a defendant to prove the non-existence of any issues of fact as to guilt and to show that the defendant would have been entitled to judgment of acquittal as a

matter of law.

Such a requirement is analogous to the requirement of civil procedure that a defendant in a "slip and fall" case prove the non-existence of any issue of fact conclusively in order to obtain summary judgment. Holl v. Talcott, 191 So.2d 40 (Fla. 1966).

In short, it is logically impossible to conclusively prove a negative, i.e., the non-existence of any factual basis for judgment. It is tantamount to a homeowner attempting to conclusively show to a prospective purchaser that no termites exist when the purchaser says they do exist.

The State also argues that the teaching of the cases it cites is that"...if sufficient evidence to support the judgment remains after the newly-discovered evidence is considered, coram nobis relief cannot be granted". (AB; 19).

Petitioner submits that again the State contradicts itself. For if, as the State argues, the "conclusiveness" test applies, then what difference does it make whether "sufficient" evidence exists to support the judgment? Why must the appellate court make a "sufficiency" determination when the burden upon the defendant is that he must "conclusively" demonstrate that new evidence would have prevented judgment against him?

Petitioner submits that strong public policy supports the argument that it is the province of the trial court to evaluate the sufficiency of newly-discovered evidence once the

requirements for the issuance of the Writ have been established to the satisfaction of the trial court, not the appellate courts. The trial court, not the appellate court, issues the Writ before an evidentiary hearing is even conducted. Lamb, at 540.

Lastly, the distinction made by the State on the question of newly-discovered evidence as it relates to coram nobis relief versus a motion for new trial (AB; 16-17) misses the importance of the record on appeal in this cause.

The Petitioner, in fact, raised exactly the same kind of evidence in his Amended Motion for New Trial wherein the Defendant specifically alleged by supporting affidavit that the State's key witness, Charlie Lee Wright, made similar confessions to one Stuart Cameron and such allegation was the subject of an extensive post-trial hearing. (R VIII; 1130), (R V; 769-809).

Petitioner respectfully submits that the Record on Appeal, which includes the testimony of Stuart Cameron and the deposition of Lawrence Craig Turner attached to the Petition seeking coram nobis relief, establishes more than a sufficient predicate for leave to file a Petition for Writ of Error Coram Nobis in the trial court below.

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 questions 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.

WILLIAM G. CRAWFORD, JR.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Reply Brief of Petitioner, Gregory D. Rolle, was furnished to RUSSELL S. BOHN, ESQUIRE, Assistant Attorney General, 111 Georgia Avenue, Suite 204, West Palm Beach, Florida 33401, by mail this 12th day of October, 1984.

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