

*App. not included*

IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA, :  
 :  
 Petitioner, :  
 :  
 vs. : Case No. 70,720  
 :  
 WILBERT E. BOLYEA, :  
 :  
 Respondent. :  
 :  
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**FILED**  
SID J. WHITE

AUG 3 1987

CLERK, SUPREME COURT  
By *[Signature]*

DISCRETIONARY REVIEW OF THE DECISION OF  
THE SECOND DISTRICT COURT OF APPEAL  
STATE OF FLORIDA

BRIEF OF RESPONDENT ON THE MERITS

JAMES MARION MOORMAN  
PUBLIC DEFENDER  
TENTH JUDICIAL CIRCUIT

PAUL C. HELM  
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PRELIMINARY STATEMENT

The Respondent, Wilbert E. Bolyea, was the defendant in the trial court and the appellant in the District Court of Appeal, Second District. The Petitioner, the State of Florida, was the plaintiff in the trial court and the appellee in the District Court. References to the record on appeal shall be designated by "R" followed by the page number. References to the Appendix to this brief shall be designated by "A."

STATEMENT OF THE CASE AND FACTS

The Respondent accepts the Petitioner's Statement of the Case and Facts set forth in the Brief of Petitioner on the Merits.

### SUMMARY OF ARGUMENT

The District Court of Appeal, Second District, correctly decided that probationers are in custody for purposes of Florida Rule of Criminal Procedure 3.850. The meaning of "custody" for purposes of Rule 3.850 is the same as that applied to determine the right or standing of a person to petition for a writ of habeas corpus. Probationers are sufficiently restrained in their liberty to have standing in habeas corpus proceedings.

Rule 3.850 was promulgated to facilitate review of prisoners' claims of the denial of counsel and other fundamental rights and was intended to provide relief coextensive with that provided by petitions for writs of habeas corpus. Parolees are also entitled to present their claims in Rule 3.850 motions. Probationers whose fundamental rights have been denied are equally entitled to relief and should be granted review of their claims through the same Rule 3.850 procedure as prisoners and parolees.

Respondent was a prisoner in the county jail when he filed his Rule 3.850 motion claiming ineffective assistance of counsel. He should not be deprived of a hearing because he completed his jail term after the trial court's initial, erroneous denial of his motion. The District Court's decision on Respondent's appeal should be affirmed.

## ARGUMENT

THE SECOND DISTRICT COURT OF APPEAL CORRECTLY DECIDED THAT A PROBATIONER IS IN CUSTODY FOR PURPOSES OF RULE 3.850 AND MAY SEEK POST-CONVICTION RELIEF PURSUANT TO THAT RULE.

On June 29, 1983, Respondent was found guilty of practicing denistry without a license. (R3,4) On November 21, 1983, the Circuit Court for Collier County adjudged Respondent guilty and placed him on five years probation on the condition that he serve 364 days in the county jail. (R4) On September 6, 1984, Respondent filed a motion for post-conviction relief alleging, inter alia, ineffective assistance of counsel. (R5-11) Respondent was in custody when the motion was filed. (R25,26) The Circuit Court summarily denied the motion. (R12) On appeal, the District Court of Appeal, Second District reversed. (R14-16)

Upon remand, Respondent filed a motion to set a hearing date. (R17) Petitioner moved to strike the motion for post-conviction relief on the ground that Respondent was a probationer and no longer in custody. (r24-28) Respondent's counsel argued that Respondent was in custody when the motion was filed. (R26, 27) The Circuit Court granted the motion to strike. (R28) The court entered an order denying Respondent's motion for an evidentiary hearing on the motion for post-conviction relief on the ground that Respondent was no longer in custody. (R22)

On appeal, the District Court again reversed. (A1-6) The court first observed that the trial court should have con-

sidered Respondent's status at the time he initially filed the motion, rather than his status at the time of the hearing after remand. (A2) The court held that "a probationer, whether or not incarcerated as a condition of probation, is 'in custody' for purposes of rule 3.850 and may seek postconviction relief pursuant to that rule." (A5) The court certified that its decision was in conflict with the decisions of other district courts. (A5)

Petitioner argues that Respondent lacked standing to seek relief under Florida Rule of Criminal Procedure 3.850 because he was on proation and not in custody at the time the trial court ruled on the motion. Petitioner is incorrect. The meaning of "custody" as used in Rule 3.850 is the same as that applied to determine the right or standing of a person to petition for a writ of habeas corpus. State v. Barber, 301 So.2d 7,10 (Fla. 1974); Rita v. State, 470 So.2d 80,82 (Fla. 1st DCA 1985). A probationer is sufficiently restrained in his liberty to have standing to seek review of the validity of his conviction in a habeas corpus proceeding. Ex Parte Bosso, 41 So.2d 322,323 (Fla. 1949). Since a Rule 3.850 motion has the same scope as a common law writ of habeas corpus, Gideon v. Wainwright, 153 So.2d 299,300 (Fla.1963), a probationer must have standing to seek review of the validity of his conviction in a Rule 3.850 proceeding.

This Court has never receded from Barber, Bosso, or Gideon. The district courts of appeal are bound by this Court's decisions. Hoffman v. Jones, 280 So.2d 431 (Fla.1973). To the extent that Decker v. State, 476 So.2d 330 (Fla.4th DCA 1985;



Ferguson v. State, 415 So.2d 98 (Fla.4th DCA 1982); and Bellcase v. State, 406 So.2d 116 (Fla.5th DCA 1981), conflict with Barber, Bosso, and Gideon by ruling that probationers are not in custody for purposes of a Rule 3.850 motion, those cases were wrongly decided and cannot serve as valid precedent in support of the Petitioner's argument.

No useful purpose would be served by denying the availability of Rule 3.850 motions to probationers. The rule was originally promulgated to facilitate judicial review of prisoners' claims of denial of counsel and other fundamental rights in response to Gideon v. Wainwright, 372 U.S. 335 (1963), and was intended to provide relief coextensive with that available by petitions for writs of habeas corpus. Gideon v. Wainwright, 153 So.2d at 300. This Court extended the availability of the Rule 3.850 procedure to review the claims of those on parole. State v. Barber, 301 So.2d at 10. Surely Respondent and other probationers are equally entitled to seek relief from judgments of guilt upon a claim of ineffective assistance of counsel or a denial of some other fundamental right as prisoners and parolees. If Rule 3.850 motions are not available to probationers, then they must be permitted to seek relief by petition for writ of habeas corpus of some other procedure. If Rule 3.850 motions are the most expeditious procedure for judicial review of the claims of prisoners and parolees, surely they are also the most expeditious procedure for review of the claims of probationers. Petitioner has presented no good reason for treating the claims of probationers differently than the claims

of prisoners.

Even if this Court were to decide that the claims of probationers should be subject to a different procedure than the claims of prisoners and parolees, Respondent should still be afforded a hearing on his motion for post-conviction relief because he was a prisoner in the county jail when he filed his motion. See Laytner v. State, 239 So.2d 857 (Fla.3d DCA 1970). Respondent should not be deprived of a hearing on his claim of ineffective assistance of counsel just because he has successfully completed his jail term since the trial court's initial, erroneous denial of his motion for post-conviction relief. Respondent remains subject to the judgment of guilt and its attendant consequences, including the possibility of the revocation of probation and imposition of a prison sentence if Respondent violates the terms and conditions of probation.

This Court should affirm the decision of the District Court on Respondent's appeal.

CONCLUSION

Respondent respectfully requests this Honorable Court to affirm the District Court's decision on his appeal.

Respectfully submitted,

JAMES MARION MOORMAN  
PUBLIC DEFENDER  
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APPENDIX

1. Decision of the District Court of Appeal, Second District on Respondent's appeal.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished to the Attorney General's Office, Park Trammell Building, 1313 Tampa Street, 8th Floor, Tampa, Florida 33602, by mail this 30th day of July, 1987.

  
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PAUL C. HELM

PCH:jss