IN THE SUPREME COURT
OF FLORIDA

CASE NO. 91,333

ROBERT EARL WOOD,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

PETITIONER'S INITIAL, BRIEF

On Review of **a Final Judgment**
Denying Post-Conviction Relief, and
Certified Conflict **by the First District** Court **of Appeal**

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STATEMENT OF THE CASE AND FACTS

This case presents the question of whether **a** petition for writ of error corarn nobis is subject to the two-year time limitation of Rule 3.850, Fla.R.Crim.P. **A** threshold issue is whether coram nobis or Rule 3.850 is the proper post-conviction remedy in the circumstances of this case.

Petitioner Robert Earl Wood, **an** inmate at a federal prison, seeks review of a decision of the First District Court of Appeal affirming the summary denial of his ***pro*** **se** petition for writ of error coram nobis on the ground that it was time barred, Appendix **1-4.** In **1996,** Wood sought to set aside his 1988 negotiated *nolo* ***contendere*** plea to **a** charge of possession of cocaine, primarily because he had been misinformed about the possible collateral consequences of a withhold of adjudication. RI-54-63. Wood alleged that he was unlawfully induced or coerced to enter into the plea agreement, and that his counsel willfully failed to explain the penalties that might flow from a withhold of adjudication. RI-56-59. Specifically, Wood alleged that he was not informed that a *nolo* ***contendere*** plea **and** withhold of adjudication is considered a "conviction" under federal law, requiring a sentence enhancement for a subsequent federal drug conviction. Wood wrote in his petition:

> [M]y attorney brought to me the State's offer in the form of a Plea Agreement. He explained that if I accepted the offer and entered a Plea of Nolo Contendere, that I would not have to go to prison, that Adjudication would be withheld, and this charge could and would never be used against me after I satisfied all of the stipulations contained

> within the Judgment. [grammar and punctuation edited].

R1-62 (emphasis supplied). The plea agreement is found in the record at **R1-16-18.** The Order Withholding Adjudication of Guilt and Placing Defendant on Probation provided, ***inter alia***, that "the ends of justice and the welfare of society do not require that you should presently be adjudged guilty and suffer the penalty authorized by law. . . .[I]t is ordered and adjudged that the adjudication of guilt and imposition of sentence are hereby withheld, and that you are hereby placed on probation . . . ." R1-22.

Four years later Petitioner was convicted of a federal drug charge. He received **an** enhanced sentence because his **1988** plea to possession of cocaine and withhold of adjudication was treated by the federal court as a "prior conviction."[1] **R1-77** ¶ 4.

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[1] Clerk's records in the United States District Court, Northern District of Florida, Pensacola Division, Case No. MCR 92-05009-016, indicate that on September 21, **1992,** Petitioner was sentenced to 240 months for conspiracy to import marijuana and for conspiracy with intent to distribute marijuana, and **120** months for possession with intent to distribute marijuana, all to be served concurrently. Title 21 U.S.C. § **841**(b)(1)(B) authorized the enhancement, and provides in relevant part:

> If any person commits such a [drug] violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment which may not be less than 10 years and not more than life imprisonment. . . .No person sentenced under this subparagraph shall be eligible for parole during the term of imprisonment imposed therein.

(Emphasis supplied). Although the term "prior conviction" is not defined in **§ 841,** federal courts have held that federal law, not state law, is to be applied, and that a plea of ***nolo contendere*** and **a** withhold of adjudication is a "conviction" that supports an

Wood alleged that "[h]ad the Defendant, been made aware of this, He [sic] would more than likely have taken this cause to trial." **RI-57.**

The petition was summarily denied by the circuit court as "time barred" **(R1-78),** and rehearing was denied. R1-85 ("summary denial is proper because nothing is alleged that would warrant the relief requested").[2] The First District Court of Appeal affirmed and certified conflict with the Third District Court of Appeal on the issue of whether a petition for writ of error coram nobis is subject to the Rule 3.850 two-year time limitation for filing.

* * *

When Wood filed his 1996 petition, he had completed the probation imposed by the state court in 1988 **(RI-22,** 53), and thus he styled it as one seeking a writ of error coram nobis, rather than a Rule **3.850** motion which requires the petitioner be "in custody under sentence of a court established by the laws of Florida." **RI-84.** However, the trial court judge found that Wood was "presently considered to be in custody" by virtue of the

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enhanced sentence under section 841(b)(1)(B). United States v. Meiias, **47** F.3d 401 (11th Cir. 1995); United States **v.** Fernandez, **58** F.3d 593,600 n. 21 (11th Cir. 1995) (same) ("every circuit that has considered this issue has reached the same conclusion. [FN21]"); see also United States v. Cisneros, 112 F.3d 1272 (5th Cir. 1997); United States v. Cuevas, 75 F.3d 778 (1st Cir. 1996). Thus, for federal sentencing purposes under § 841, it is irrelevant that Florida law does not consider a withhold of adjudication to be a "conviction." Mejias, ***supra*** citing Garron v. State, **528** ***So.*** 2d **353** [360] (Fla. 1988).

[2] The petition also alleged that the sentencing court's failure to advise Wood of the minimum and maximum penalty rendered the negotiated plea involuntary, that a modification of the term of probation was unconstitutional, and that he was unconstitutionally denied an opportunity to object to the findings of the sentencing court or to offer evidence in mitigation. R1-59-61.

current enhancement of his federal sentence because of the prior state **plea** (citing Howarth v. State, **673 So.** 2d 580 (Fla. 5th **DCA 1996)).** The court therefore construed the unsworn coram nobis petition as a motion for post-conviction relief under Rule 3.850, Fla.R.Crim.P. **RI-78.** Without discussing or analyzing whether the substance of the petition might satisfy the exceptions to the general two-year time limitation of Rule 3.850 contained in subsections (b)(1) and (b)(2) of the rule, the court denied the petition as untimely. **RI-78-82.** Wood appealed.

The district court of appeal did not address the circuit court's Howarth-based "in custody" conclusion, nor the circuit court's decision to treat the petition as one seeking relief under Rule **3.850.** Instead, citing this Court's decision in Richardson v. State, 546 **So. 2d 1037, 1039** (Fla. 1989), holding that Rule 3.850 has supplanted the writ of error coram nobis, and that "the only currently viable **use** for the writ of error coram nobis is where the defendant is no longer in custody, thereby precluding the use of rule 3.850 **as** a remedy," the district court apparently considered the petition as one for writ of error coram nobis, but nonetheless untimely:

> The only apparent continuing application for the writ of error coram nobis is in the situation where the petitioner would have a viable claim under rule 3.850 but for the "in custody" requirement . A petition for a writ of error coram nobis therefore must satisfy the two-year limitation of rule 3.850.

* * * *

> Because the appellant's petition in the present case was filed beyond the two-year time limitation, it was properly denied as untimely. See Vonia v. State, **680** So. 2d 438 (Fla. 2d **DCA** 1996).

Appendix, p. **2** (emphasis supplied).

The district court certified conflict with the Third District's decision in Malcolm v. State, 605 **So.** 2d 945 (Fla. 3d DCA 1992), writing: "We recognize that the court in Malcolm expressly held that a petition for writ of error coram nobis is not subject to the two-year time limitation. We therefore certify conflict with Malcolm." Appendix, **pp.** 1, 3.

That decision was issued on July 11, 1997. Petitioner filed **a** timely motion for rehearing and rehearing en banc on July 28, 1997. See R. 9.420, Fla.R.App.P.[3] Rehearing was denied August 22, 1997. Appendix, p. 4. On September **3,** 1997, Petitioner timely invoked this Court's discretionary jurisdiction based on certified conflict. Article V, section 3(b)(4), Fla. Const. This Court deferred its decision on jurisdiction in **an** order dated September 17, 1997, and appointed undersigned counsel to represent the Petitioner.

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[3] The record in this Court was supplemented to include the motion for rehearing. See Order of October 24, 1997.

SUMMARY OF ARGUMENT

1. Summary Denial on Timing Grounds was Error

The district court erred by summarily dismissing Wood's petition for writ of error coram nobis as untimely. No state statute, rule of procedure, or decision of this Court precludes a defendant from using the ancient common law writ of coram nobis at **any** time.

Historically, the writ has been available without regard to timing, if a defendant seeks relief based upon facts unknown to the court, the defendant, or his counsel at the time of trial, if those facts were of such a nature that would have prevented the entry of the judgment which is challenged, **and** if he could not have learned of them through the exercise **of** due diligence. Hallman v. State, **371** So. 2d 482 (Fla. **1979).** The court below erred by denying the writ without subjecting the petition to that test.

Although Rule 3.850 now provides the mechanism for post-conviction relief in the nature of coram nobis for defendants in custody, that rule specifically provides exceptions to its general two-year limitation on filing, and **the** first of those exceptions incorporates the above-stated standards for coram nobis relief. The rule's two-year time limit is ***not*** applicable if:

> (1) the facts on which the claim is predicated were unknown to the movant or the movant's attorney and could not have been ascertained by the exercise of due diligence, . . .

Rule 3.850(b), Fla.R.Crim.P. Thus, even if the time limit of Rule 3.850 were deemed applicable to petitions for writ of error coram nobis, the court below erred by failing to

consider an applicable exception: whether the petition alleged facts unknown at the time of trial, which could not have been ascertained by the exercise of due diligence, and which, if known, would have prevented the entry of judgment. Since coram nobis relief is *only* available in circumstances which would satisfy the Rule 3.850(b)(1) *exception* to the two-year time limitation for filing, the First District's two-year limit on petitions for coram nobis relief is illogical and arbitrary.

Absent circumstances amounting to laches and prejudice to the State, a petitioner's interest in having a means to vacate a truly invalid conviction at any time is consistent with the interests of justice, and outweighs any possible interest in finality of judgments which might be asserted by the State.

The decision below should be reversed and remanded for further consideration under the proper coram nobis standard.

2. The Circuit Court's "In Custody" Determination was Error

Contrary to a finding of the circuit court below, Petitioner should not be deemed to be "in custody" from his completed 1988 state "conviction" (and therefore subject to Rule 3.850's exclusive remedy) simply because his current federal sentence is enhanced as a result of the state plea and withhold of adjudication. Since Rule 3.850 is patterned after federal habeas statutory remedies, Florida law should not depart from federal law on the issue of the meaning of "custody" for state law post-conviction remedies, and this Court should specifically adopt the holding of the Supreme Court of the United States in Maleng v. Cook,

490 U.S. 488, 109 S.Ct. 1923, 104 L.Ed.2d 540 (1989), that one cannot be "in custody" from a sentence which has fully expired. Although the weight of authority in this state is contrary to Maleng v. Cook, Florida's district courts are divided, and this Court should squarely hold that the present enhancement of a subsequent federal sentence by virtue of a prior conviction with a completed sentence does not satisfy the "in custody" requirement of Rule 3.850, with respect to a collateral attack on the earlier conviction. Logically and factually the present "custody" is a result of the subsequent sentence, not the sentence which has expired. Cases which have held to the contrary should be overruled. Since Wood was not in custody, coram nobis was the proper remedy.

3. No Fixed Time Limit Should Apply to Petitioner's Request for Coram Nobis Relief

Since, at the time Wood's petition for coram nobis relief was filed, no time limit for such filings was to be found in Florida law, if this Court should hold that any time limit is appropriate, that new rule should not be applied in this case. To do so would be unduly harsh, particularly given the fact that Petitioner has been incarcerated in a federal facility with limited Florida legal library resources, which has limited his access to court as guaranteed by the Florida Constitution. Under the circumstances of this case, any newly imposed time limit should either not apply, or should be deemed to have been tolled during Petitioner's federal incarceration.

The court below should be instructed to review the petition on its merits.

ARGUMENT

THE DISTRICT COURT ERRED BY IMPOSING A TWO-YEAR LIMITATION ON A PETITION FOR CORAM NOBIS RELIEF, WITHOUT ANALYZING WHETHER THE ALLEGATIONS SATISFIED THE STANDARDS FOR CORAM NOBIS RELIEF

A. CORAM NOBIS AFTER *RICHARDSON V. STATE*

We begin, as did the court below, with Richardson v. State, 546 So. 2d 1037 (Fla. 1989), in which this Court discussed the relationship between Rule 3.850, Fla.R.Crim.P., and the ancient common law writ of error coram nobis, which is used to correct errors of fact, not law. See Hallman v. State, 371 So. 2d 482 (Fla. 1979), abrogated on other grounds, Jones v. State, 591 So. 2d 911 (Fla. 1991). Twenty years after his conviction for first-degree murder, while in custody serving a life sentence for that crime, Richardson sought to vacate the judgment *via* a writ of error coram nobis, on the grounds of newly discovered evidence of knowingly perjured prosecution testimony, the suppression of evidence by the prosecution, and recantation by a prosecution witness. 546 So. 2d at 1037. This Court denied his application to seek coram nobis relief, because "Florida Rule of Criminal Procedure 3.850 has supplanted the writ of error coram nobis, and . . . *all* of Richardson's claims based on newly discovered evidence should be brought under rule 3.850." Id. (emphasis in original). Richardson was advised to "file a motion pursuant to Florida Rule of Criminal Procedure 3.850 in the trial court for all claims which are properly cognizable under that rule." 546 So. 2d at 1039.

In a footnote, this Court observed that its decision did not necessarily lead Richardson to a procedural bar on untimeliness grounds, as he had alleged "the discovery of facts unknown to the court, the defendant, or counsel at trial" (id. at **1037):**

> [FN 1] We note that Richardson is not procedurally barred from filing a motion pursuant to rule 3.850 for claims which satisfy the exception from the time limitation for claims based on alleged facts which "were unknown to the movant or his attorney and could not have been ascertained by the exercise of due diligence." Fla.R.Crim.P. **3.850.**

546 So. 2d at 039 n. 1.

After discussing that Rule 3.850 has "absorbed" many common law post-conviction remedies, including claims of newly discovered evidence in the nature of coram nobis, this Court recognized a continuing use for the common law writ of coram nobis:

> We believe the only currently viable use for the writ **of** error coram nobis is where the defendant is no longer in custody, thereby precluding the use of rule 3.850 as a remedy. . . . [W]e hold that all newly discovered evidence claims must be brought in a motion pursuant to Florida Rule of Criminal Procedure 3.850, and will not be cognizable in an application for a writ of error coram nobis unless the defendant is not in custody.

546 *So.* 2d at **1039** (emphasis supplied). Richardson confirmed that coram nobis is a remedy still available in Florida in criminal cases, but did not present or decide the question of whether the two-year time limitation of Rule 3.850 applies to a coram nobis petition filed by

a defendant no longer in custody.

B. THE THRESHOLD "IN CUSTODY" ISSUE

Under Richardson, Wood's entitlement to seek coram nobis relief requires an initial determination of whether he is "in custody under sentence of a court established by the laws of Florida." R. 3.850(a). If so, coram nobis is not available, and the petition must satisfy the procedural and substantive requirements of Rule 3.850. If Wood is not "in custody" under Rule 3.850, coram nobis is an available remedy and the question giving rise to certified conflict must then be resolved: does a coram nobis petition have to be filed within the two-year time limitation of Rule 3.850?

The First District Court of Appeal ignored the predicate "custody" issue. However, the circuit court concluded, based on Howarth v. State, 673 So. 2d 580 (Fla. 5th DCA 1996), that "the Defendant is presently considered to be in custody." (RI-78-82).

Howarth states:

> [I]f a defendant's prior conviction is used to enhance a current sentence, the defendant is considered to be in custody for purposes of post-conviction relief. & Bannister v. State, 606 So. 2d 1247 (Fla. 5th DCA 1992). See also Duenas v. State, 636 So. 2d 549 (Fla. 2d DCA 1994); McArthur v. State, 597 So. 2d 406 (Fla. 1st DCA 1992). Since Mr. Howarth is challenging the validity of his 1987 convictions in an effort to avoid enhancement of his current sentence, he is in custody for purposes of post-conviction review.

> Thus, his petition was properly considered under rule 3.850.

673 So. 2d at **581**. Although that conclusion has support in Florida law, the cases are not uniform, and this Court has never decided whether the current enhancement of a federal sentence by a fully served state conviction (or withhold of adjudication disposition) constitutes "custody" for purposes of Rule 3.850. That question should be resolved in this case. It is best resolved by analogy to federal law regarding "custody."

Federal law does not stretch the definition of "custody" for habeas corpus purposes. See Maleng **v. Cook, 490 U.S. 488, 109** S.Ct. **1923,** 104 L.Ed.2d **540** (1989):

> In this case, the Court of Appeals held that a habeas petitioner may be "in custody" under a conviction whose sentence has fully expired at the time his petition is filed, simply because that conviction has been used to enhance the length of a current or future sentence imposed for a subsequent conviction. We think that this interpretation stretches the language "in custody" too **far.**

Id. at 491, 109 S.Ct. at 1925. This Court should follow the Supreme Court of the United States' analysis, and reject the Howarth reasoning.

Two early decisions concluded that federal incarceration enhanced by a previously served Florida conviction does *not* satisfy Rule **3.850's** custody requirement, although the First District Court of Appeal decisions were not uniform. **Parks v.** State, **301 So.** 2d **482** (Fla. 1st **DCA 1974);** Chapman v. State, 300 **So. 2d 749** (Fla. 1st **DCA** 1974);

contra, Wilcox v. State, 267 So. 2d 15 (Fla. 1st DCA 1972). Parks and Chapman were later criticized in Bryan v. State, 345 So. 2d 1095 (Fla. 2d DCA 1977), which found, as did Wilcox, *supra,* that a federal prisoner who alleged his federal sentence was enhanced by a fully served prior Florida conviction *was* "in custody" and entitled to seek post-conviction remedies in Florida. Accord, Rose v. State, 235 So. 2d 353, 354 (Fla. 3d DCA 1970) ("a prisoner is 'in custody' for the purpose of applying for post-conviction relief from a judgment, the sentence for which has been satisfied, if the motion shows some relationship between the current confinement and the judgment to which the motion for relief is addressed such as would result in the prisoner's receiving credit in some degree on the current confinement"). The Bryan court reasoned that Parks and Chapman were in conflict with this Court's earlier decision in State v. Reynolds, 238 So. 2d 598 (Fla. 1970), which had found that a petitioner who was in the custody of a *state* other than Florida is also "in custody" for purposes of Florida post-conviction remedies. Cf. Shell v. State, 501 *So.* 2d 1332, 1333 (Fla. 2d DCA 1987) (enhancement of subsequent Florida sentence constituted "custody" for Rule 3.850 even though sentence for challenged earlier probation violation had been served); Simmons v. State, 485 So. 2d 475 (Fla. 2d DCA 1986) (same); compare, Wall v. State, 525 So. 2d 486 (Fla. 1st DCA 1988) (no allegation that New Mexico sentence was enhanced by fully served Florida sentence, therefore no Rule 3.850 "custody").

Reynolds was motivated by compelling facts: the desire to provide a state remedy for a defendant convicted in violation of Gideon v. Wainwright, 372 U.S. 335, 83

S.Ct. 792, 9 L.Ed.2d 799 (1963). &Reynolds, 224 So. 2d 769. In addition, Florida had an outstanding detainer filed against Reynolds in the Texas courts, and arguably asserted present custody over him even while in another state. Id. at 770. Thus, in Reynolds this Court did not squarely address the "custody" question presented in this case - whether the present enhancement of a *federal* inmate's sentence because of a prior Florida conviction on which the sentence has expired constitutes "custody" for Rule 3.850 purposes. This is a question on which the district courts are divided, on which this Court has never spoken, and on which the Supreme Court of the United States' contemporary post-Reynolds guidance counsels against an "in custody" finding.[4] Since federal habeas was acknowledged as the pattern for Rule 3.850 in Richardson v. State, 546 So. 2d at 1038, the Maleng v. Cook custody analysis should be incorporated into Florida law, and the Howarth / Bryan / Wilcox analysis should be rejected.

Wood's probation terminated March 3, 1992. R1-53. He is serving a *federal* sentence imposed September 21, 1992. See p. 2, *supra*, n. 1. Thus, if words have meaning, Wood is not "in custody *under sentence of a court established by the laws of Florida.*" Rule 3.850 (emphasis supplied). Indeed, he was never "sentenced" by a Florida court, since he was never adjudicated guilty, and "[p]robation is not a 'sentence' but a 'final disposition'

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[4] This conflict among the district courts on the understanding of "custody" in the circumstances of this case was not the subject on which the court below certified conflict. But if this Court accepts jurisdiction, it may, at its discretion, consider any issue affecting the case. Cantor v. Davis, 489 So. 2d 18, 20 (Fla. 1986).

under rule 3.700(b)." Waite v. City of Fort Lauderdale, 681 *So.* 2d 901,903 n. 3 (Fla. 4th DCA 1996). Thus, he should not be relegated to seeking relief under the rule.[5]

The Supreme Court of the United States has logically found that, in circumstances such as these, the "custody" stems from the current conviction and sentence, not from that which was fully served:

> [O]nce the sentence imposed for a conviction has completely expired, the collateral consequences of that conviction are not themselves sufficient to render an individual "in custody" for the purposes of a habeas attack on it.
>
> * * *
>
> When the second sentence is imposed, it is pursuant to the second conviction that the petitioner is incarcerated and is therefore "in custody."

Maleng v. Cook, 490 U.S. at 492-493, 109 S.Ct. at 1926.[6]

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[5] We acknowledge here that if Rule 3.850 applies Wood's claims may be barred under this Court's decision in Adams v. State, 543 So. 2d 1244 (Fla. 1989), which adopted an interpretation of the rule requiring that contentions based on new facts or a significant change in the law be brought within two years of the time such *facts* become known or such change was announced. Id. at 1247. Adams has never been applied to a coram nobis petition, however, and any new decision doing so should not be applied to affect Wood adversely. See Id. (Court unwilling to penalize Adams).

[6] In his federal case, Wood had a statutory right to challenge the enhancement of his sentence, 21 U.S.C. § 851 (R1-77 ¶ 4), although federal law would preclude a successful challenge. See p. 2, n. 1. He also had the right to challenge the validity of the state "conviction" resulting in the enhancement of his present federal sentence through federal habeas corpus, see Van Zant v. Florida Parole Comm'n, 104 F.3d 325,327 (11th Cir. 1997), although that claim may be procedurally barred. 28

The circuit court's "in custody" determination in this case should be rejected. This Court should find that the enhancement of a present federal sentence by a prior state conviction or a completed term of state probation does not satisfy the "in custody" requirement of Rule 3.850, and that Petitioner's petition for writ of error coram nobis should not be analyzed under that rule.

We now move to the question giving rise to certified conflict: whether a coram nobis petition by a petitioner not in custody is subject to the same two-year limitation for filing contained in Rule 3.850.

C. NO FILING DEADLINE SHOULD BE IMPOSED ON PETITIONER'S CORAM NOBIS PETITION

The Third District was correct when it observed in Malcolm v. State, 605 So. 2d 945 (Fla. 3d DCA 1992), that "there is no express time limitation for filing a petition for writ of error coram nobis. . . ." Id. at 949. No court has held to the contrary, prior to this case. No statute or rule imposes a time limit. The First District's rejection of the Third District's view and creation of a two-year time limitation for coram nobis petitions may have been a linguistic misapplication of this Court's decision in Richardson v. State. Richardson

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U.S.C. §§ 2244(d), 2254 (Antiterrorism and Effective Death Penalty Act (AEDPA), effective April 24, 1996). In any event, we submit that because concerns for federalism and comity may restrict the federal court's willingness at this stage to inquire into the voluntariness of Woods' state court plea (after the probation has expired), state post-conviction remedies are the better forum for the resolution of his claims.

stated that "the only currently viable use for the writ of error coram nobis is where the defendant is no longer in custody, thereby precluding the use of rule 3.850 as a remedy." 546 So. 2d at **1039** (emphasis supplied). That statement in no way restricts a petitioner's ability to seek coram nobis relief at any time. If the **use** of Rule 3.850 is "precluded," one cannot be subject to its time limitations.

The First District transformed the words "viable use" [for coram nobis] into "viable claim" [under Rule 3.850], writing, "[t]he only apparent continuing application **for** the writ of error coram nobis is in the situation where the petitioner would have a viable claim under rule 3.850 but for the 'in custody' requirement." Appendix p. **2** (emphasis supplied). Richardson did not contain the "viable claim" language, or the notion that "but for" the absence of custody all the procedural aspects **of** Rule 3.850 must **be** met by a **coram** nobis petitioner. But the First District's two-year time limit conclusion seems to flow - erroneously - from that Rule **3.850** "viable claim" concept.

Most Rule **3.850** claims are no longer "viable" unless brought within two years after a conviction becomes final, but the First District's reasoning that the need for viability compels a two-year time limit collapses, because a claim under Rule **3.850** may first arise and be quite viable well beyond the two-year period if it satisfies either of the timing exceptions found in 3.850(b). See, e.g., Ouslev v. State, **679** ***So.*** 2d 1280 (Fla. 1st DCA **1996)** (change in law applied retroactively); Lowe v. State, **673** ***So.*** 2d 927,928 n. 1 (Fla. **5th DCA** 1996) (newly discovered evidence); Porter v. State, **670 So.** 2d 1126 (Fla. 2d DCA

1996) (new facts not discoverable previously).

The exception to the two-year time limit, found in Rule 3.850(b)(1), actually embodies the elements for a claim in the nature of coram nobis, as shown by the following comparison:

The Coram Nobis Standard	**The Rule 3.850 Timing Exception**
	(b) . . . No other motion shall be filed or considered pursuant to this rule if filed more than **2** years after the judgment **and** sentence become final in **a** noncapital case . . . unless it alleges that
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 the defendant or his counsel could not have known them by the use of diligence.	(1) the facts on which the claim is predicated were unknown to the movant **or** the movant's attorney **and** could not have been ascertained by the exercise of due diligence. . . .
* * *	* * *
Richardson, **546 So.** 2d at **1038,** quoting Hallman v. State, 371 ***So.*** 2d 482,484-85 (Fla. 1979) (citations omitted; second emphasis in original).	(Emphasis supplied).

Because of the similarity between the requirements for the two remedies it would be illogical to allow Rule 3.850 petitioners to file ***more*** **than** two years from the date the conviction becomes final when they allege facts previously unknown which could not have been ascertained by the exercise **of** due diligence and which vitiate the underlying

judgment (as limited by Adams, ***supra*** at p. **15,** n. 5), while imposing an absolute two-year time ***limit*** on coram nobis petitioners who **allege** the same sort of previously unknown facts. But that is what the court below did (although the decision below is silent about when the two-year period began to run - when the "conviction" became final, or after petitioner learned of the facts underlying his petition).

Rather than first looking to a time limit, and then deciding whether to reach the merits of a petition for writ of error coram nobis, since coram nobis falls within a recognized exception to the two-year time limit of Rule 3.850, the better approach is to focus first on the merits - does the petition satisfy the standards for coram nobis relief? - and if so, then look at whether **or** not the timing is reasonable. That determination will necessarily be fact based. See Malcolm, ***supra,*** 605 **So.** 2d at 945, overlooking certain deficiencies in the petition and granting coram nobis relief:

> "The strength of our jurisprudence is due to the fact that it readily accommodates itself to all classes **of** controversies. Justice is its dominating **purpose** and we are led to that by rules of procedure. They are not sacrosanct, in fact, when they fail to lead to justice, the time for change has arrived."

Id., quoting **Ex** parte Welles, 53 So. 2d 708, 711-12 (Fla. 1951). But see State v. Caudle, 504 ***So.*** 2d **419** (Fla. **5th DCA 1987)** (laches barred coram nobis relief where petition filed nine years after conviction and court files had been destroyed in the interim); compare McCray v. State, **22** Fla. L. Weekly S627 (Fla. Oct. 9, 1997) (denying habeas petition brought fifteen

years after conviction because laches prejudiced the State and barred relief), That order of analysis – first the merits, then the timing – protects a coram nobis petitioner's substantial interest in having an invalid conviction or sentence set aside, while respecting the State's need for finality in judgments. It is also consistent with the facts that the legislature has never limited the right to seek coram nobis relief by imposing a statutory time limit, nor has this Court ever enacted a rule or issued a decision doing so.

If such a rule were to emerge from this case, applying the Adams rule to coram nobis petitions (requiring that they be brought within two years of the discovery of new facts) (see p. 14, *supra,* n. 5), it should not be applied in this case, since Petitioner had no prior notice of such a rule. Additionally, because he has been incarcerated in a federal facility without meaningful access to Florida legal library materials since he learned of the collateral consequences of his Florida plea (R1-83-84), any time limit should be deemed tolled during that period. Compare Demps v. State, 696 *So.* 2d 1296 (Fla. 3d DCA 1997) (tolling the two-year time limit under Rule 3.850 during the time prisoner was out of state and denied access to Florida legal materials):

> [I]t would be a violation of Demps' right of access to court under the Florida and federal constitutions to hold that his motion for postconviction relief is time-barred given that he did not have access to Florida legal materials, or a reasonable alternative, for the entire period within which he had to file the motion. [FN5]. We hold that the two-year time period provided for in rule 3.850 within which Demps had to file

his motion was tolled for that period of time that he was deprived of access to Florida courts.

[FN5]. In reaching this conclusion we are reminded of the supreme court's comments regarding the two-year limit placed on motions filed under rule 3.850:

> [N]othing in our law suggests that the two-year limitation must be applied harshly or contrary to fundamental principles of fairness.
>
> * * *
>
> The fundamental guarantees enumerated in Florida's Declaration of Rights should be available to all through simple and direct means, without needless complication or impediment, and should be fairly administered in favor of justice and not bound by technicality. Art. I, Fla. Const.

Haag v. State, 591 So. 2d 614,616 (Fla. 1992).

The access to courts constitutional concerns voiced by the Demps court are *apropos* here as well, and should preclude any newly articulated rule imposing a time limit on coram nobis petitions from being applied to Wood in this case.

* * *

Coram nobis is an ancient extraordinary writ, reserved for extraordinary circumstances. See generally United States v. Morgan, 346 U.S. 502, 74 S.Ct. 247, 98 L.Ed. 248 (1954) (at common law the writ "was allowed without limitation of time for facts that affect the 'validity and regularity' of the judgment"); Ex parte Welles, 53 So. 2d 708 (Fla. 1951); Lamb v. State, 107 So. 535 (Fla. 1926); Nickels v. State, 98 So. 502 (Fla. 1923). Our

state laws should not foreclose relief to those who can satisfy the substantial prerequisites for coram nobis relief, through the imposition of a bright-line time limit such as that fashioned by the court below. Whether or not any filing restrictions for coram nobis petitions are fashioned for the future, this Court should reject the bright-line approach in this case, reverse the decision below, and remand for a consideration of the merits of Wood's petition.

CONCLUSION

For the foregoing reasons, this Court should hold that a federal prisoner whose sentence is enhanced by a prior fully served state conviction (or plea and withhold of adjudication) is not "in custody" for purposes of Rule 3.850, and therefore a writ of error coram nobis is the proper remedy to seek to vacate that conviction or plea. The decision of the First District Court of Appeal holding that a petition for a writ of error coram nobis must satisfy the two-year limitation of Rule 3.850 should be reversed, in favor of the traditional practice of examining the merits of a petition, constrained only by notions of laches and prejudice to the State where the delay in filing is great. The Third District's Malcolm decision should be approved, inasmuch as it held that "there is no express time limitation for filing a petition for writ of error coram nobis. . . ." The substantive requirements for coram nobis relief incorporate a reasonable limitation on the successful presentation of such claims. If a time limitation on coram nobis petitions is newly imposed by this Court, it should not be

applied to this case. Because the court below did not consider the merits of the petition, or whether the timing exceptions in Rule 3.850(b) are applicable, the summary denial of Wood's petition should be reversed and remanded for further consideration.

Respectfully submitted,

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By: _____
BEVERLY A. POHL

By: _____
BRUCE ROGOW

Appointed by the Court as
Counsel for Petitioner

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to (1) TRISHA E. MEGGS, Assistant Attorney General, Department of Legal Affairs, The Capitol, Tallahassee, FL 32399-1050, and (2) ROBERT EARL WOOD, #02869-107, FPC Pensacola, 110 Raby Avenue, Dorm 3, Pensacola, FL 32509-5127, by U.S. Mail (to Mr. Wood) / Fed Ex (to Ms. Meggs) this 4th day of November, 1997.

BEVERLY A. POHL

Appendix

IN THE DISTRICT COURT OF APPEAL

FIRST DISTRICT, STATE OF FLORIDA

NOT FINAL UNTIL TIME EXPIRES TO FILE MOTION FOR REHEARING AND DISPOSITION THEREOF IF FILED

ROBERT EARL WOOD,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

CASE NO. 96-4336

Opinion filed July 11, 1997.

An appeal from Circuit Court for Bay County.
Dedee Costello, Judge.

Robert Earl Wood, Marianna, Pro Se.

Robert Butterworth, Attorney General, and Trisha E. Meggs, Assistant Attorney General, Tallahasaee, for Appellee.

ALLEN, J.

The appellant challenges an order by which the trial court denied his petition for a writ of error coram nobis because it was filed beyond the two-year time period specified in Florida Rule of Criminal Procedure 3.850. We affirm the order, bgt we certify conflict with Malcolm V. State, 605 So. 2d 945 (Fla. 3d DCA 1992).

In 1996, the appellant filed a petition for a writ of error coram nobis in which he challenged two 1988 convictions. The

appe lant apparently sought a writ of error coram nobis rather than relief under rule 3.850 because he had completed his sentence for the 1988 convictions and was no longer "in custody" as required for relief under the rule. Because the petition was filed more than two years after the 1988 convictions became final, the trial court denied the petition as untimely.

In light of the supreme court's decision in Richardson v. State, 546 So. 2d 1037 (Fla. 1989), virtually all claims formally cognizable by petition for writ of error coram nobis may now be presented only under rule 3,850 which contains a requirement that the motion be filed within two years after the judgment and sentence become final. The only apparent continuing application for the writ of error coram nobia is in the situation where the petitioner would have a viable claim under rule 3.850 but for the "in custody" requirement. A petition for a writ of error coram nobis therefore must satisfy the two-year limitation of rule 3.850. If the two-year limitation were not applied to petitions for writs of error corm nobis, they could be used to circumvent the rule. By analogy, the case law precludes resort to a petition for writ of habeas corpus to pursue the time-barred claims of persona who are in custody. See, e.g., Patterson v. State, 664 So. 2d 31 (Fla. 4th DCA 1995); Robbins v. State, 564 So. 2d 256 (Fla. 1st DCA 1990).

Because the appellant's petition in the present case was filed beyond the two-year time limitation, it was properly denied as untimely. Vonia V. State, *680* So. 2d 438 (Fla. 2d DCA 1996).

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We recognize that the court in Malcolm expressly held that a petition for writ of error coram nobis is not subject to the two-year time limitation, We therefore certify conflict with Malcolm.

AFFIRMED.

WEBSTER and PADOVANO, JJ., CONCUR.

DISTRICT COURT OF APPEAL, FIRST DISTRICT

Tallahassee, Florida 32399
Telephone No. (904)488-6151

August 22, 1997

CASE NO: 96-04336

L.T. CASE NO. 87-1936

Robert Earl Wood v. State of Florida

Appellant(s), Appellee(s).

BY ORDER OF THE COURT:

Motion for rehearing and rehearing en banc and for written opinion, filed July 28, 1997, is DENIED.

I HEREBY CERTIFY that the foregoing is (a true copy of) the original court order.

Jon S. Wheeler, Clerk

By: Anne Moore
Deputy Clerk

Copies:

Robert Earl Wood

Trisha E. Meggs

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C