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CLERK, SUPREME COURT
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IN THE SUPREME COURT
OF FLORIDA

CASE NO. 91,333

ROBERT EARL WOOD,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

PETITIONER'S REPLY 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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ARGUMENT

A. THE THRESHOLD CUSTODY ISSUE - AN ESSENTIAL DETERMINATION IN THIS CASE

The certified conflict in this case - whether a coram nobis petition is subject to any time limitation for filing - need only be reached if Petitioner Robert Earl Wood was ***not*** in custody, because in Florida the writ is only available to defendants who are no longer in custody. Richardson v. State, 546 **So.** 2d 1037 (Fla. 1989). Thus, Petitioner's Initial Brief devoted substantial argument to the issue of whether Wood is **"in** custody" for purposes of Rule 3.850. Initial Brief, pp. 11-16 (noting that the circuit court found Wood was "in custody," but the district court did not address the issue). The Initial Brief discussed conflicting Florida decisions, as **well** as federal law, and suggested that this Court should resolve the question *vis a vis* a federal inmate, such as Wood, whose federal sentence is presently enhanced by a fully-served State sentence, by concluding that the Rule **3.850** "in custody" requirement is not satisfied under those circumstances.

The State's Brief considers the custody issue to **be** "beyond the scope of the certified question. . . ," and devotes only two paragraphs to the subject.[1] State's Answer Brief, **pp. 8-9.** Citing only Howarth **v.** State, **673** ***So.*** 2d 580 (Fla. 5th DCA), rev. denied, 680 So. 2d 422 (Fla. 1996) (the case relied upon by the circuit court below), and cases cited therein, the State concludes that "under Florida law, petitioner was in custody for purposes

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[1] There was no certified question in this case. The review is based on conflict jurisdiction. See Initial Brief, p. **5**; **App.** 1,3 ("we certify conflict").

of filing **a** Rule 3.850 motion." Respondent's Answer Brief, p. 9. That conclusion overstates the status of Florida law on this issue, which at most presents conflicting decisions and no clear controlling precedent, as to whether federal custody enhanced by a fully served state sentence constitutes "custody" for Rule 3.850 purposes. Compare, Vonia v. State, **680 So.** 2d **438** (Fla. 2d DCA **1996)** ("Even though Vonia was in custody at the time the petition was filed, the sentences he collaterally attacks had expired. Custodial status under these circumstances does not bar utilization of the writ."). And the State's Brief wholly ignores the guidance of federal law and fails to comment on Petitioner's suggestion that the Maleng v. **Cook, 490 U.S. 488, 109** S.Ct. **1923,** 104 L.Ed.2d **540** (1989), custody analysis is persuasive. See Initial Brief, pp. 12-15. Where the law is unclear, this Court is empowered to interpret its own rules, and that important task requires a more thorough examination of the issue **than** the States's cursory and rote reliance on Howarth and its internal citations.

This Court's decisions on the meaning of "custody" for post-conviction relief purposes pre-date Maleng v. Cook. See State v. Boylea, 520 ***So.*** 2d **562** (Fla. **1988)** (probation alone constitutes custody); State **v.** Reynolds, 238 **So.** 2d **598** (Fla. **1970).** They did not decide the custody issue presented by this case. Therefore this Court should resolve the conflicting decisions among the district courts just as the Supreme Court **of** the United States did in Maleng **for** 28 **U.S.C.** § 2255, and squarely hold that Florida's Rule **3.850** "custody" does not include the mere enhancement of a federal sentence after a fully-served state sentence. Indeed, in Bovlea the Court noted that:

> Rule 3.850 was taken nearly word-for-word from the federal habeas corpus statute, 28 **U.S.C.** § 2255 (1961), see Roy, 151 ***So.*** 2d at 828, and we plainly have given the rule the same broad scope as its federal counterpart. Moreover, we explicitly have recognized federal precedent interpreting 28 **U.S.C.** § 2255 **as** persuasive authority in construing Rule 3.850. Id. Accord Archer v. State, 166 **So.** 2d 163, 164 (Fla. 2d **DCA** 1964).

520 So. 2d at 563 (footnote omitted).

If, based upon the above principles, the Maleng v. **Cook** § 2255 custody analysis is adopted and this Court concludes that Petitioner was not in custody for purposes of Rule 3.850, it will then be necessary to move on to the conflict certified by the court below on the issue of whether a petition for writ of error corarn nobis is subject to a bright-line two-year filing time **limitation.**[2]

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[2] If this Court should reject Petitioner's arguments and hold that Wood was "in custody" and thus subject to the strictures of Rule 3.850, the circuit court's untimeliness conclusion seems supportable under Adams v. State, **543 So.** 2d 1244 (Fla. 1989). See Initial Brief, **p.** 15, n. **5.**

B. *MALCOLM* AND *VONIA* CORRECTLY HELD THAT NO EXPRESS TIME LIMIT EXISTS FOR CORAM NOBIS PETITIONS: THE STATE'S CASES, WHICH IT CLAIMS FAVOR A NEW STRICT TWO-YEAR LIMIT, ARE DISTINGUISHABLE

The Third District Court of Appeal was correct in Malcolm v. State, 605 So. 2d 945 (Fla. 3d DCA 1992), when it stated that "there is no express time limitation for filing a petition for writ of error coram nobis. . . ." 605 **So.** 2d at **949;** accord Vonia, ***supra,*** 680 So. 2d at 439 ("proper use of the traditional writ of error coram nobis, such as a claim of newly discovered evidence . . , has no time limit"). Thus, the court below, in attempting to apply Richardson v. State, 546 So. 2d 1037(Fla. 1989)(discussing coram nobis), constructed a new rule of law inconsistent with at least two other district courts.

The State argues that the considerations used to preclude petitions for habeas corpus, where the identical claims could have and should have been raised in a timely Rule 3.850 petition, also compel the conclusion that limits on coram nobis are necessary to avoid abuses by defendants who would seek to avoid the two-year time limitation of Rule 3.850 by re-casting their post-conviction petitions in the name of coram nobis. See State's Answer Brief, **pp. 6-7.** But an examination of the cases and the differences between habeas corpus claims and coram nobis claims reveals why the analogy fails.

In Isley v. State, 652 So. 2d 409 (Fla. 5th DCA 1995), Judge Sharp figuratively tapped the knuckles of a habeas petitioner whose successive, untimely, and identical claims were found to constitute an abuse of process. In attempting to file a petition for habeas

corpus beyond the time limit for a Rule 3.850 motion, raising issues of ineffective assistance of counsel and the voluntariness of his plea, Isley "merely put a fresh cover page on his standard rule 3.850 motion," id. at **410,** "dressed it in a new cover page, reshuffled the pages, and whited out 'motion' for 'petition' and 'defendant' for 'petitioner." Id. He did not allege new facts which were unknown to the court, counsel, or the defendant at the time of trial -- **the** agreed-upon standard for c o r m nobis relief. *(See* State's Answer Brief, p. *6).*

Similarly, in Patterson v. State, **664** So. 2d **31** (Fla. 4th **DCA** 1995), a habeas petition presenting the same post-conviction issues as in Isley (voluntariness of a plea; ineffective assistance of counsel) were rejected: "[H]abeas corpus is not a vehicle for obtaining ***additional*** appeals on issues which were raised or should have been raised on appeal or could have been challenged pursuant to Florida Rule of Criminal Procedure 3.850"). Id. at 32 (emphasis supplied). And in Robbins v. State, 564 **So.** 2d 256 (Fla. **1st** **DCA** 1990), the court observed that the issues raised by Robbins had been adequately addressed in a previous case, and that habeas corpus does not provide an "additional" appeal. Those cases were concerned with repetitive claims recast **as** habeas corpus petitions simply to avoid the Rule 3.850 two-year filing limit. None of those cases alleged newly discovered facts - a prerequisite to coram nobis relief - which, by definition, could not have been the subject of a previous proceeding. Thus, the potential for abuse of process and repeated, successive claims, as in Isley, Patterson, and Robbins, is not present in a true coram nobis situation. The State's concern that defendants would improperly try use coram nobis to

"'breathe life into a postconviction claim previously time barred'" (State's Answer Brief, pp. 2,6) (quoting Vonia, **680** ***So.*** 2d at **439),** mistakenly equates coram nobis claims with the typical habeas corpus claim involving trial errors. In context and in full, the Second District Court of Appeal wrote in Vonia:

> Our holding that the writ of error coram nobis cannot be used by a person no longer in custody to breathe life into a postconviction claim previously time barred should not be construed to limit collateral attack by proper use of the traditional writ of error coram nobis, such as a claim of newly discovered evidence, which has no time limit.

680 **So.** 2d at **439** (emphasis supplied). That "no time limit" conclusion, consistent with Malcolm, respects the common law history of the ancient writ and its unique role in presenting newly discovered facts to the trial court to undo a judgment which, had the facts been known, would not have been entered. Because, in these circumstances, the potential for abuse is minimal at best, it is not necessary or prudent for this Court to limit the availability of the writ of error coram nobis by imposing any time limit for filing, particularly the relatively short two-year period of Rule 3.850, unless that limit would begin to run at the time the new facts are discovered. And, as we argued in the Initial Brief, if that new rule were to **be** imposed, it should not be applied in this case.

C. THE STATE'S DISCUSSION OF THE MERITS OF THE PETITION IS PREMATURE. SINCE THE DECISION BELOW WAS SOLELY ON PROCEDURAL GROUNDS

Because the summary disposition of this case in the courts below was strictly on procedural grounds, with no discussion of the merits of Wood's petition, the Initial Brief in this Court was intentionally limited to issues relating to procedure. If Wood prevails, the best course then would be a remand for full consideration of the merits of his petition. However, the State concludes its Answer Brief by arguing that Wood is not entitled to relief on the merits, even **if** his present post-conviction petition was considered to be timely filed. See State's Answer Brief, pp. 9-10, citing State v. Fox, 659 **So.** 2d 1324 (Fla. 3d DCA 1995), **rev.** denied, 668 **So.** 2d 602 (1996); Rhodes v. State, ___ **So.** 2d ___, 22 Fla. L. Weekly D2528 (Fla. 3d DCA 1997); State v. Garcia, 571 *So.* 2d 38 (Fla. 3d **DCA** 1990); and Simmons v. State, 611 **So.** 2d 1250 (Fla. 2d DCA 1992).[3]

Although we acknowledge that the Third District's **Fox,** Rhodes, and Garcia decisions would appear to preclude relief on the merits if Petitioner were litigating in that

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[3] Simmons' holding that the lack of advice on a consequence of a plea is not sufficient to set aside a plea has been undermined by Ashley **v.** State, 614 **So.** 2d 486,490 n. 8 (Fla. 1993), which held that a defendant sentenced as a habitual offender should be told of the collateral consequences of that sentence. See Freels v. State, *So.* 2d ___, 1997 WL 730606 (Fla. 1st DCA 1997). And, since Simmons did not deal with the same collateral consequence of conviction as in this case - federal sentence enhancement - it does not carry the weight assigned by the State.

district,[4] this Court should not apply those cases or address the merits where the substantive issues presented by Wood's petition were never reached by the First District Court of Appeal or by the circuit court. On the record in this case, the State's arguments are unresponsive to the arguments presented in the Initial Brief, and should first be raised, briefed and argued below, particularly since the State's authorities are not from the First District Court of Appeal, which decided this case. That court may very well depart from the Third District's analysis, exactly as it did on the procedural issue.

The conflict certification between Wood and Malcolm was the procedural, time limitation issue:

> 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.

Initial Brief, Appendix **p. 3.** That conflict provides jurisdiction in this Court. We recognize that "[o]nce a court obtains jurisdiction, it has the discretion to consider any issue affecting the case." PK Ventures. Inc. v. Raymond James & Assoc., 690 *So.* 2d 1296 n. 2 (Fla. 1997). And, that discretion extends even to issues not raised before the trial court. Id. However, that discretion should be used "sparingly." Dralus v. Dralus, 627 **So.** 2d 505 (Fla. 2d DCA

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[4] **Although** not cited by the State, we also note that Second District is in accord with the Third District. See Saccucii v. State, **546** *So.* 2d 1154 (Fla. 2d DCA **1989)** (coram nobis not available to raise continuing collateral consequences of an invalid conviction as a ground to set aside guilty plea).

1993); see also Scott **v.** State, 612 So. 2d 561 (Fla. **1992)** ("We choose not to consider the other issues raised by the petitioner since they were not discussed by the district court in its opinion.").

As in Scott, the other issues -- raised not by Petitioner but by the State in this case - were not discussed by the district court in its opinion, and the prudential course would be for this Court to exercise its discretion not to reach the merits at this stage, but rather to decide only the procedural question and remand with instructions to the district court and the circuit court to consider whether, in the circumstances of this case, the petition satisfies the test **for** coram nobis relief.

CONCLUSION

For the foregoing reasons, and those set forth in Petitioner's Initial Brief, this Court should hold that Petitioner is not "in custody" for purposes of Rule 3.850, and therefore a writ **of** error coram nobis is available. **A** petition for writ of error coram nobis should not be constrained by a time limit, but should remain subject only to principles of laches and prejudice, where the delay in filing is significant. The decision below should be reversed and remanded for a consideration of the merits of the petition. If a time limitation on coram nobis petitions is newly imposed by this Court, it should not be applied to this case.

Respectfully submitted,

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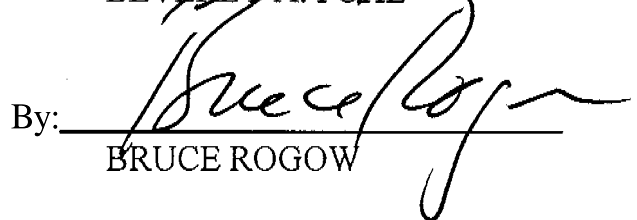

By:______________________
BRUCE ROGOW

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 this 11th day of December, 1997.

____
BEVERLY A. POHL