IN THE SUPREME COURT OF FLORIDA

CASE NUMBER-92,653

VICTOR WILLIAM ROSS,

PETITIONER

V.

THE STATE OF FLORIDA,

RESPONDENT

REPLY BRIEF OF PETITIONER ON THE MERITS

LEONARD J. COOPERMAN
1190 N.E. 89th STREET
MIAMI, FLORIDA 33138
(305)754-3118
F.B.217964
ATTORNEY FOR PETITIONER

TABLE OF CONTENTS

TABLE OF CITATIONS

INTRODUCTION

Preparation of a reply brief in this case was challenging, for the following reasons:

1) In its answer brief, the State did not mention, much less discuss or analyze, the cases of MARRIOT v. STATE, 605 So.2nd 986 (4th DCA Fla. 1992) or WOOD v. STATE, 698 So.2nd 293(1st DCA Fla. 1997), with which the Third District's en banc opinion in this case certified conflict.

2) In its answer brief, the State did not mention, much less analyze or discuss, the case of WILLIAMS v. STATE, 316 So.2nd 267 (Fla. 1975), a case expressly relied upon by the Petitioner below and here as a basis for granting him relief.

Nevertheless, several points made in the State's answer brief are worthy of response. That response follows.

ARGUMENT

IS CORAM NOBIS AVAILABLE HERE?

The State argues that coram nobis relief is not available to Petitioner. Why? Because "since petitioner pled guilty and was placed on probation for 18 months, his only avenue for post-conviction relief is Rule 3.850. Although he is no longer in custody and (the) 2 year limitation has elapsed, coram nobis is not available to Petitioner because he had another remedy and failed to use it." Brief of State at Page 12.

This argument contains two fatal flaws, one legal, the other logical.

The legal flaw lies in the assumption that because petitioner was on probation, this probationary period was the legal equivalent of prison or, to use the term of art, custody. Since Petitioner was in custody, the State reasons, he had the opportunity to raise his claim by utilizing Florida Rule of Criminal Procedure 3.850. Since Petitioner has the chance to use Rule 3.850, he was not limited to only being able to seek coram nobis relief. Thus, the reasoning goes, because he had other

relief available he is not entitled to coram nobis relief.

The legal problem with this argument is that it implicitly relies, as the Third District did explicitly, on STATE v. BOYLEA, 520 So.2nd 562 (Fla. 1988). That case, the reader will recall, held that probation was to be considered the same as prison for the purposes of eligibility to use F.R.Cr.P. 3.850.

But note that the BOYLEA case was decided in 1988, eight years after Petitioner has entered his plea and received probation. Nothing in BOYLEA indicates that it's holding was to be retroactive; indeed, such a ruling would be contrary to the provision of the Florida Constitution[1] which forbids ex post facto laws. As a result, it is illegal to apply BOYLEA to this case.

The logical problem with the State's argument is this: The State says Petitioner had a remedy, but failed to use it within the two year time limit the State says should apply here.

But, logically, how was Petitioner to *know* he had a

---

[1]Article One, Section Ten, of the Florida Constitution.

problem, for which he needed a remedy? If you have no symptoms, how would you know if you are ill? Remember the facts here.

Petitioner pled guilty in 1980, after being assured by the trial judge that, despite his immigrant status, entering a guilty plea would cause him no deportation consequences. For the next sixteen years, nothing legally significant happened to Petitioner. It was only in 1996, when his application for naturalization was met with a deportation notice, that he realized something was wrong? Why, indeed **how**, should he have known earlier that something was amiss? What would have alerted him to this? Answer: nothing. Thus, it is illogical to conclude that Petitioner should have acted within two years of the judgment and sentence in his case becoming final.[2]

---

2 The State's argument brings to mind the conversation between Doc Daneeka and Yossarian in Joseph Heller's novel CATCH 22. Yossarian, the reader will recall, was a crew member on an American Bomber in Europe during World War II.

These bombers were being shot down in frighteningly large numbers. Consequently, all bombardiers were trying to make their mission quota so they could be rotated out of the combat theater.

The problem was that the top brass kept upping the quota number, from 20 missions, to 25, to 30, and so on. The only way a bomber crew member could get rotated out was to show he was crazy. But, according to Doc Daneeka, the

It is therefore disingenuous to suggest that Petitioner is not eligible for coram nobis relief because he had other relief available.

The State then cites a number of lower court cases to support it's argument that a defendant contending his plea was involuntary must bring a motion under Rule 3.850 to vacate the plea within 2 years from when the judgment and sentence became final. State's brief at Page 13.

None of these cases, however, involve facts like the ones here. Petitioner continues to assert one simple point: How was he to know that his plea, made in reliance upon the trial judge's well-meaning but erroneous pronouncement, would cause him any problem until INS sent him a deportation notice? The cases cited

---

psychiatrist assigned to evaluate claims of insanity made by bombardiers, there was a "Rule 22", nicknamed "catch 22", which stated that if the crew member claimed he was crazy, that showed he was shrewd enough to want to be rotated out. And, of course, if he was that shrewd, he couldn't be crazy.

As Yossarian said to Doc Daneeka, "That's some catch, that catch 22." And Doc Daneeka replied, "it's the best there is."

by the State do not involve a situation such as this.

An additional assertion by the State also deserves reply. The State argues that "The application of this principle[3] to a claim of involuntary plea is within the proper framework of Rule 3.850 litigation because **the alleged defect in the plea occurred at the time the plea was entered and not when the effects of the defect are felt by the defendant.**"(emphasis supplied) State's brief at Pg. 13.

There is a real difference of opinion here. If the State is right, then a defect which did not manifest itself for 16 years is only correctable for 2 years after it happened. Does this seem fair?

On the other hand, if Petitioner's position is accepted, a non-obvious defect in the taking of a guilty plea can be corrected at any time, subject, of course, to application of the doctrine of laches.[4]

---

[3]The principle that the State refers to is that motions to vacate an involuntary plea must be brought within two years of the judgment and sentence in the case becoming final.

[4] The doctrine of laches would bar a defendant from requesting that a guilty plea be set aside, if the request is made so long after the time the defendant knew or should have known of the circumstances justifying the request that, as a result of the

Which position seems more consistent with justice?

In sum, Petitioner contends that, for someone no longer in custody when he realizes his guilty plea was improperly made, CORAM NOBIS relief is an appropriate and available type of relief. The error in the plea colloquy that Petitioner complains of is factual, since it stems from an erroneous pronouncement, or more accurately, **prediction** of fact, and thus CORAM NOBIS relief is appropriate here.

MUST A DEFENDANT BE REQUIRED TO ASSERT AND PROVE A PROBABILITY OF ACQUITTAL AT TRIAL, TO SECURE RELIEF FROM AN INVOLUNTARY PLEA WHICH RESULTED FROM THE TRIAL COURT'S MISADVICE TO THE DEFENDANT REGARDING ADVERSE IMMIGRATION CONSEQUENCES OF THE PLEA?

The State contends that the term "prejudice" as it is used in Florida Rule of Criminal Procedure 3.172(I)[5] means that a person seeking to withdraw a plea because it was involuntary made; must not only show that the

---

delay, the State is prejudiced.

[5] The full text of which reads "failure to follow any of the procedures in this rule shall not render a plea void absent a showing of prejudice."

plea was involuntary. The person must also show that he or she would probably have been acquitted at trial. State's brief at Page 18.

Petitioner submits that language contained in the State's own brief refutes its position, and, additionally, the State appears to be confused about what standards apply here.

First, the State cites WUORNOS v. STATE, 676 So.2nd 966 (Fla. 1995) for the proposition that "in the absence of an allegation of prejudice or manifest injustice to the defendant, the trial court's failure to adhere to Rule 3.172 is an insufficient basis for reversal." State's brief at Pg. 17.

Petitioner agrees that the WUORNOS standard is appropriate to apply to this case. What did this Court say in WUORNOS?

It said that an allegation of prejudice, or manifest injustice, could be sufficient to justify withdrawal of a guilty plea. One or the other, prejudice or manifest injustice, is sufficient. Both are not required.

As Petitioner contended in his initial brief, could anyone make a more compelling case for manifest injustice than him? Here he is, 16 years after entering a plea based in part upon the trial judge's assurance no bad immigration consequences would come to him by doing so, having completed his probation successfully, having lived a law-abiding life, seeking to become a U.S. Citizen, and what does he get? He gets a deportation notice, based on his having entered that 1980 guilty plea. This situation should shock the conscience of any sentient being.

Also, the State appears confused when it asserts at some length, on Page 18 of it's brief, that one must prove he probably would have been acquitted at trial in order to withdraw an involuntary plea.

Does analysis bear out this assertion?

As was pointed out by Petitioner in his initial brief, the "probably would have been acquitted at trial" definition of prejudice is appropriate in cases where a defendant is seeking to overcome a guilty verdict because he has newly discovered evidence.

Why is it appropriate in such a situation? Because in such a situation, a trial has been held. A reviewing court can then assess the record of the trial, and render an opinion on whether the newly discovered evidence would have effected the outcome. If so, a new trial should be granted. If not, it shouldn't.

On the other hand, in situations like that of Petitioner, no trial was ever held. The focus is not on whether a trial yielded a true result, since no trial took place.

Rather, it is alleged, and not disputed by the State before this Court, that the trial court affirmatively misadvised the Petitioner regarding a crucial consequence of his guilty plea.

The issue here, then, is whether the plea was voluntarily made, with full understanding by the defendant of the consequences of his plea and, if not, was there prejudice to the defendant as a result of the non-compliance. The issue is **not, and should not be,** whether the defendant would have been acquitted had he gone to trial.

The prejudice in this case is clear. It is that the defendant is now the subject of deportation pleadings as a consequence of entering his guilty plea. How much clearer could prejudice be?

CONCLUSION

The Third District itself, at page 5 of it's opinion, recognized that in STATE v. SALLATO, 519 So.2nd 605(Fla. 1988), this Court held that "positive misadvice" to a defendant by counsel concerning the possible immigration consequences of entering a guilty plea may be grounds for withdrawal of a guilty plea.

How much stronger is the case when the misadvice comes not from counsel, but from the one person in court all are expected to consider well-informed; the trial judge?

Petitioner requests that, consistent with it's ruling in SALLATO, and in accordance with the authorities cited in his initial brief, this Court grant him the relief he sought below.

CERTIFICATE OF SERVICE

I hereby certify that a true copy of this document was furnished by deposit in the U. S. Mail to the Attorney General's Office, 444 Brickell Av., 9th Floor, Miami, FL this 21st day of May, 1998.

LEONARD J. COOPERMAN
1190 N.E. 89th Street
Miami, Florida 33138
(305)754-3118
F.B. 217964
Attorney for Petitioner