SUPREME COURT OF FLORIDA

CASE NO. 92,629

ROAN PEART,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

BRIEF ON THE MERITS OF PETITIONER ROAN PEART

ON REVIEW UPON CERTIFIED CONFLICT FROM
THE THIRD DISTRICT COURT OF APPEAL

BENJAMIN S. WAXMAN, ESQUIRE
ALAN S. ROSS, ESQUIRE
ROBBINS, TUNKEY, ROSS, AMSEL, RABEN & WAXMAN, P.A.
2250 Southwest Third Avenue, Fourth Floor
Miami, Florida 33129
(305) 858-9550

TABLE OF CONTENTS

PAGE(S)

TABLE OF CITATIONS

TABLE OF CITATIONS (Continued)

CASE **PAGE(S)**

TABLE OF CITATIONS (Continued)

CASE **PAGE(S)**

Florida Rules of Appellate Procedure

TABLE OF CITATIONS (Continued)

STATEMENT OF THE CASE AND FACTS

This is an appeal from a summary denial of a Petition for Writ of Error *Coram Nobis*. This case raises the question of whether the writ of *coram nobis* is available to vacate the involuntary plea of a non-custodial defendant who discovers the trial court's failure to advise him of the immigration consequences when exclusion (deportation) proceedings are initiated against him. It necessarily raises several secondary issues.

A. Procedural History

On November 22, 1993, Mr. Peart, a lawful resident alien who had resided in this country for more than 10 years, entered guilty pleas to the charges in two consolidated cases. (R. 9-10, 46-47). The court briefly inquired of him regarding his understanding of his change of plea. (R. 19-21). However, the judge failed to inform Peart, as required by Florida Rule of Criminal Procedure 3.172(c)(8), that if he were not a United States citizen, his plea might subject him to deportation. (R. 19-24). Nonetheless, upon finding an adequate factual basis, that Peart was alert and intelligent and understood the nature of the charges and consequences of his pleas, and that the pleas were entered freely, voluntarily, and intelligently, the court found Mr. Peart guilty and withheld adjudication on all counts of both cases. (R. 22-23). The judge sentenced Mr. Peart to, *inter alia*, two years probation. (R. 23).

On May 12, 1997, Mr. Peart, who had successfully completed his probation, filed his Petition for Writ of Error *Coram Nobis*. (R. 11-16). He alleged that he was a non-United States citizen who had recently learned that he was going to be deported based upon his guilty pleas. (R. 11-12). He asserted that no one had ever advised him of the immigration consequences of his pleas. (R. 12). He attached the plea colloquy demonstrating the trial court's failure to comply with Rule 3.172(c)(8). (R. 17-26). He further asserted that had he known the immigration consequences, he would not have pled guilty and that had he gone to trial, he most probably would have been acquitted. (R. 12). Mr. Peart stated that he would establish all of these facts at an evidentiary hearing. (R. 12-14). In the event a writ of *coram nobis* was not the appropriate remedy, Mr. Peart requested the trial court to treat his petition as a request for the appropriate remedy and provide any and all relief to which he was entitled. Fla. R. App. P. 9.040(c). (R. 15).

The trial judge denied Mr. Peart's petition without an evidentiary hearing. (R.27-36). On appeal, a panel of the Third District Court of Appeal reversed and remanded for an evidentiary hearing. (R.49-50). However, on its own motion, the court consolidated this case with five others and set them for hearing and rehearing *en banc*. It invited the litigants to address the following issues in supplemental briefs:

> (1) Whether post-conviction relief is available in these cases.
>
> (2) Whether a two-year or other time limit is applicable and if so, what even triggers the commencement of the relevant period.
>
> (3) If relief is properly cognizable in coram nobis, by motion to withdraw or vacate the plea, under Rule 3.850, or any or all of these mechanisms;
>
> (4) The showing necessary to secure relief, if the issue in question is not treated in the plea colloquy, that is,
>
> (a) that the defendant was not aware of the consequences of the plea, or
>
> (b) that the defendant would not have entered the plea if he were aware of the consequences of the plea, or
>
> (c) that the defendant was not likely to have been convicted had he been tried on the relevant charge, or
>
> (d) any variation of the foregoing.

(R.58-59).

B. The District Court's *En Banc* Decision.

On February 18, 1998, the court issued its opinion and held, *inter alia*, that *coram nobis* relief is unavailable to Mr. Peart. The court had consolidated five cases falling into three categories: defendants appealing from denials of *coram nobis* petitions; the state's appeal from a decision granting *coram nobis* relief; and a defendant appealing from the denial of a timely motion for postconviction relief.

The court first acknowledged the right of a criminal defendant to set aside a guilty plea based on the trial court's failure to advise him of the immigration consequences of the plea as required by Rule 3.172(c)(8), if the defendant can show prejudice. (R.66).

However, the court concluded that *coram nobis* relief is unavailable because this writ is designed to correct fundamental errors of fact, not law. (R.67). The court characterized the issue raised by the litigants before it as "an error of law, to wit, an irregularity in their plea colloquy rendering their pleas involuntary." *Id*. The court went on to conclude that the claims asserted were not "of such a vital nature that had they been known to the trial court, they conclusively would have prevented the entry of the judgment." *Id*. (quoting ***Hallman v. State***, 371 So.2d 482, 485 (Fla. 1979)).

The court held that a motion for postconviction relief pursuant to Rule 3.850 is the appropriate vehicle for raising these claims. (R.67-68). Quoting ***Richardson v. State***, 546 So.2d 1037 (Fla. 1989), the court asserted: "Rule 3.850 has supplanted the writ of error *coram nobis*." (R.68). To the extent that the claims could have been considered under Rule 3.850, the court noted that they were untimely as they had not been filed within two years after the judgments and sentences had become final. Regarding the defendants' argument that the claims should fall within the exception to Rule 3.850's two year time bar because the deportation proceedings that alerted them to the plea defects had just been initiated, the court simply asserted: "These claims are <u>not</u> founded on newly discovered evidence . . . ." *Id*.

The court noted that for Peart and one co-appellant, because

they had previously been in custody (probation) but had failed to seek relief under 3.850, *coram nobis* would have been an improper remedy because they had other relief available. Regarding two other co-appellants who had never been in custody (pled guilty to time served), the court recognized that its decision, making *coram nobis* relief unavailable, "may be a harsh and unfair result." (R.69)(original emphasis). Feeling constrained by the applicable procedural rules, the court "respectfully suggest[ed] that the Florida Supreme Court consider whether a rule should be adopted to address the issue of post-conviction relief for persons not in custody, either as a general proposition or as relates specifically to the issue of immigration consequences." *Id*.

Regarding claims under Rule 3.850, to obtain relief, the court held that a defendant must assert and prove:

> a) The defendant was not advised by the court of the immigration consequences;
> b) That defendant had no actual knowledge of same;
> c) That INS had instituted deportation proceedings, or defendant is at risk of deportation;
> d) That defendant would not have pled had defendant known of the deportation consequences; and
> e) That had defendant declined the plea offer and gone to trial, defendant most probably would have been acquitted.

(R.70-71). The court explained that the last requirement was consistent with Rule 3.172's requirement that a defendant show prejudice to set aside a plea: "To require any less of a showing

would subject the trial court to entertaining petitions for relief to set aside pleas in cases where the defendant would nonetheless be found guilty at trial and therefore would be facing the same consequence of deportation." (R.71). The court certified conflict with ***Marriott v. State***, 605 So.2d 985 (Fla. 4th DCA 1992), and ***Wood v. State***, 698 So.2d 293 (Fla. 1st DCA 1997), *rev.granted*, No. 91,333 (Fla. Jan. 12, 1998)(reply brief filed on or about December 11, 1997).

On or about March 11, 1998, Mr. Peart timely filed his Notice to Invoke Discretionary Jurisdiction of Supreme Court based on certified conflict. (R.74-75). This court deferred its jurisdiction decision and requested briefs on the merits.

STATEMENT OF THE ISSUES

I. Whether *coram nobis* relief is available to vacate the involuntary plea of a non-custodial defendant who discovers the trial court's failure to advise him of the immigration consequences when INS exclusion proceedings are initiated against him?

II. Whether Rule 3.850's two year period of limitations should be superimposed upon petitions for writs of error *coram nobis* where such a limitation is not recognized by the common law and will place the writ out of the reach of a large segment of the class of defendants to whom it is intended to provide relief?

III. Whether a defendant must assert and prove a probability of acquittal at trial to secure relief from an involuntary plea resulting from the trial court's failure to advise the defendant of adverse immigration consequences?

SUMMARY OF THE ARGUMENTS

I. *Coram nobis* relief should be available to vacate the involuntary plea of a non-custodial defendant who discovers the trial court's failure to advise him of the immigration consequences when INS exclusion proceedings are initiated against him. Such claims, based on the trial court's failure to advise a defendant of

the immigration consequences of his plea, satisfy the traditional requirements of this writ. These claims raise a question of fact, i.e., whether the defendant's guilty plea was involuntary as a result of the trial court's failure to advise him of the immigration consequences. These claims are also based on "newly discovered evidence." The newly discovered evidence is the initiation of INS exclusion proceedings, an event that establishes the "prejudice" necessary to vacate the plea, Fla. R. Crim. P. 3.172(i), and the consequential discovery that the trial court failed to advise the defendant of these immigration consequences. Also, these claims are "of such a vital nature that had [it] been known to the trial court, [it] conclusively would have prevented the entry of the judgment." A trial court's failure to advise an unknowing defendant of the immigration consequences of his plea renders the plea unknowing and involuntary. Such pleas and the resulting judgments must be vacated upon the request of the defendant. Accordingly, these claims made by non-custodial defendants satisfy the prerequisites for *coram nobis* relief.

II. Rule 3.850's two year period of limitations should not be superimposed upon petitions for writs of error *coram nobis*. This common law writ has not traditionally been subject to a specific period of limitations. Any such limitation would be arbitrary and render the writ unavailable to litigants with potentially viable claims for whom it was intended to provide relief. Imposition of

such a limitation is not necessary to prevent stale claims under these circumstances. Upon discovering the initiation of INS exclusion proceedings, any defendant harmed by such an unknowing and involuntary plea would immediately seek relief from the court. Any potential unfairness to the state due to unjustified delay for an inordinate period of time can be addressed through application of the common law doctrine of laches.

III. A defendant should not be required to assert and prove a probability of acquittal at trial to secure relief from an involuntary plea resulting from the trial court's failure to advise the defendant of adverse immigration consequences. Once a defendant has demonstrated a basis to withdraw his plea, the defendant should stand in no different shoes than a defendant who has been accused and is awaiting trial. To require such an accused to make a preliminary showing of a likelihood of acquittal would trample fundamental constitutional rights. Moreover, absent an opportunity to exercise the full panoply of constitutional and statutory rights to which a defendant is entitled when faced with criminal charges, no defendant would have a fair opportunity to persuade the court of the likelihood of acquittal. Finally, any such rule would place a substantial and undue administrative burden on the courts. Accordingly, no such showing should be required.

ARGUMENTS AND CITATIONS OF AUTHORITY

I. *CORAM NOBIS* RELIEF IS AVAILABLE TO VACATE THE INVOLUNTARY PLEA OF A NON-CUSTODIAL DEFENDANT WHO

DISCOVERS THE TRIAL COURT'S FAILURE TO ADVISE HIM OF THE IMMIGRATION CONSEQUENCES WHEN INS EXCLUSION PROCEEDINGS ARE INITIATED AGAINST HIM.

It is generally recognized that the purpose of a petition for writ of error *coram nobis* is to correct errors of fact. ***Hallman v. State***, 371 So.2d 482, 485 (Fla. 1979); ***Ex Parte Welles***, 53 So.2d

708, 710 (Fla. 1951). In ***Welles***, the court noted:

> The function of *coram nobis* was to bring to the attention of the court some specific fact or facts then existing but not shown by the record and not known to the court or the party or counsel at the trial, and being of such vital nature that if known to the court would have prevented the rendition of the judgment assailed.

Id. at 711. *But see* ***Vonia v. State***, 680 So.2d 438 (Fla. 2d DCA 1996)(writ of error *coram nobis* appropriate remedy for some legal errors). While it is true that the advent of Florida Rule of Criminal Procedure 3.850 has limited the need for and use of petitions for writs of error *coram nobis*, contrary to the *en banc* court's suggestion in ***Peart v. State***, No. 97-2229 (Fla. 3d DCA Feb. 18, 1998)(*en banc*), the rule did not entirely supplant this common law writ. (R.68). The writ of error *coram nobis* remains viable and stands ready to provide relief to non-custodial defendants who present claims of the type specified above. *See* ***Wood v. State***, 698 So.2d 293, 293-94 (Fla. 1st DCA 1997).

In ***Duggart v. State,*** 578 So.2d 789 (Fla. 4th DCA 1991), the court granted coram nobis relief based on the trial court's failure to advise a defendant of the immigration consequences of his guilty plea, thereby implicitly concluding that this issue raises a question of fact. Previously, the Third District held this same view. *E.g.,* ***Peart v. State,*** No. 97-2229 (Fla. 3d DCA Sept. 11, 1997)(panel decision)(withdrawn)(R.49-50); ***Beckles v State,*** 679

So.2d 892 (Fla. 3d DCA 1996); ***State v. Fox***, 659 So.2d 1324, 1326 (Fla. 3d DCA 1995), *rev.denied*, 668 So.2d 602 (Fla. 1996). However, in the *en banc* ***Peart*** opinion, the court overruled ***Beckles*** and held that coram nobis relief based on a trial court's failure to advise a defendant of the immigration consequences of a guilty plea is unavailable because the issue raises a question of law, not fact. (R.67).

The *en banc* court in ***Peart*** took an unduly narrow view of the issue that is at the heart of a litigant's claim that he was not advised of the immigration consequences of his plea (or any other material fact bearing on his plea). The core issue, as the ***Peart*** court acknowledged Peart pled in his petition,[1] is whether, as a result of the trial court's failure to advise a defendant about the immigration consequences of his plea and the defendant's ignorance about these consequences, his plea was involuntary. "Due process requires a court accepting a guilty plea to carefully inquire into the defendant's understanding of the plea, so that the record contains an affirmative showing that the plea was intelligent and voluntary." ***Koenig v. State***, 597 So.2d 256, 258 (Fla. 1992)(citing ***Boykin v. Alabama***, 395 U.S. 238, 89 S.Ct. 1709 (1969)). "Because a guilty, or no contest plea has serious consequences for the

[1]"In 1997, Peart filed a petition for writ of error *coram nobis* asserting that his plea was involuntarily entered because he was not advised of the deportation consequence of his plea." (R.63).

accused, the taking of a plea 'demands the utmost solicitude of which courts are capable in canvassing the matter with the accused to make sure he has a full understanding of what the plea connotes and of its consequence.'" *Id*. (quoting ***Boykin***, 395 U.S. at 243-44, 89 S.Ct. at 1712).

The specific components of a Florida state court plea colloquy prescribed by Florida Rule of Criminal Procedure 3.172 were adopted to ensure that a plea is tendered knowingly, intelligently, and voluntarily. *See* ***Koenig v. State***, 597 So.2d 256, 258 (Fla. 1992); ***Williams v. State***, 316 So.2d 267, 271-72 (Fla. 1975); ***Watson v. State***, 667 So.2d 242, 244 (Fla. 1st DCA 1995); *cf.* ***State v. Wilson***, 658 So.2d 521 (Fla. 1995)(plea involuntary where court failed to advise defendant entering a habitual offender plea of "collateral gain time consequences," including ones affecting eligibility for early release); ***Ashley v. State***, 614 So.2d 486, 490 and n. 8 (Fla. 1993)(same); ***Gilmore v. State***, 696 So.2d 890 (Fla. 2d DCA 1997); ***Horton v. State***, 682 So.2d 647 (Fla. 1st DCA 1996). Accordingly, a failure to fully comply with sub-section (c) calls into question the voluntariness of a plea.

The issue of whether a plea is voluntary clearly involves a question of fact. *See* ***Whittlesey v. State***, 486 So.2d 705 (Fla. 1st DCA 1986)(issue regarding voluntariness of plea precluded summary denial of motion for postconviction relief); ***United States v. Marrero-Rivera***, 124 F.3d 342, 347 (1st Cir. 1997)(discussing "fact

bound assessment" underlying determination if plea was voluntary for purposes of withdrawal); ***United States v. DePace***, 120 F.3d 233, 236 (11th Cir. 1997)(review of adequacy of plea colloquy requires consideration of "[trial] court's implicit factual finding that the requirements of the [plea colloquy] Rule . . . were satisfied . . ."); ***Martin v. Kemp***, 760 F.2d 1244, 1247 (11th Cir. 1985)(review of determination of voluntariness of plea involves consideration of factual issues). Accordingly, these claims raise an issue of fact and satisfy this prerequisite for *coram nobis* relief.[2] *See* ***Duggart***.

The claim brought by Mr. Peart is also cognizable upon a petition for writ of error *coram nobis* because, contrary to the *en banc* opinion in ***Peart***, (R.67), it is based upon newly discovered evidence. To establish a basis to set aside a plea for failure of the court to provide one of the advisements required by Florida Rule of Criminal Procedure 3.172, a defendant must demonstrate both the omission *and resulting prejudice*. ***Wurnos v. State***, 676 So.2d 966, 969-70 (Fla. 1995); ***Williams***, 316 So.2d at 274; Fla. R. Crim. P. 3.172(i). A showing of prejudice is essential to succeed on

---

[2]Because the trial court denied Mr. Peart's claim that his plea was involuntary because he was not advised of its immigration consequences, (R.14-15), this assertion must be accepted as true. ***Harich v. State***, 484 So.2d 1239, 1241 (Fla. 1986); ***Edwards v. State***, 652 So.2d 1276, 1277 (Fla. 5th DCA 1995); s***ee Haynes v. State***, 451 So.2d 1043, 1044 (Fla. 1st DCA 1984)(defendant entitled to hearing on voluntariness of plea where allegations, if true, might entitle defendant to relief).

such a claim. *Id*. In the context of cases asserting a failure to advise a defendant of the immigration consequences of his plea, the initiation of INS proceedings has been held uniformly to be the *sine qua non* of prejudice. *See, e.g.,* ***Peart*** (R.70-71); ***Perriello v. State***, 684 So.2d 258, 259 (Fla. 4th DCA 1996); ***Marriott***, 605 So.2d at 987; ***DeAbreu v. State***, 593 So.2d 233, 234 (Fla. 1st DCA 1991), *rev.dism.*, 613 So.2d 453 (Fla. 1993). Certainly, the initiation of INS Exclusion proceedings nearly four years after Mr. Peart's conviction and sentence became final, was unknown to Mr. Peart, his counsel, and the trial court at the time of sentencing and could not, through the exercise of due diligence, have become known.[3] ***Jones v. State***, 591 So.2d 911, 916 (Fla. 1991). Even the *en banc* court in ***Peart*** acknowledged, the immigration consequences facing defendants today "stem[] from recent congressional immigration law amendments." (R.69 n. 2). Clearly, the discovery of a defendant, with no prior knowledge that his guilty plea will have any immigration consequences, that the government is seeking to exclude him from this country based on his guilty plea, constitutes "newly discovered evidence" within the meaning of that term contemplated by the common law writ of *coram nobis*.

In this regard, the ***Peart*** *en banc* court's assertion that *coram*

---

[3]Mr. Peart's assertion that he "was never advised by any person of the immigration consequences of his pleas," (R.12), must also be accepted as true. *See* footnote 2.

nobis is an improper remedy because Peart was previously in custody and could have petitioned for Rule 3.850 relief, (R.68), is totally illusory. Within the two years following acceptance of Peart's guilty plea while he was "in custody" on probation, the unrefuted allegation is that exclusion proceedings had not yet been initiated or threatened. Mr. Peart had no idea this consequence would result from his plea. (R.11-14). Accordingly, Mr. Peart did not know, and could not have discovered, the facts that would ultimately give rise to his claim. Even if Mr. Peart could have predicted his

present predicament, any claim back then would not have been ripe.

Even if the claim raised by Mr. Peart is deemed to be legal, not factual, and not to raise an issue of newly discovered evidence, it should be cognizable in *coram nobis*. The court in ***Vonia v. State***, 680 So.2d 438 (Fla. 2d DCA 1996), acknowledged that it, on occasion, has allowed the use of the writ of error *coram nobis* to correct legal errors. ***Id***. at 438-39. Such an exception is appropriate here where Mr. Peart has no other remedy available to seek relief from his involuntary plea. (R.67)(citing ***Russ v. State***, 95 So.2d 594 (Fla. 1957)). Moreover, as the *en banc* court below recognized, a decision making *coram nobis* relief unavailable would be especially harsh and unfair to defendants who were never in custody following their convictions and thus, never had access to a Rule 3.850 or any other vehicle to redress such a legal error. (R.69). Based on this inequity, the court below urged this court to adopt a rule that would provide these claimants a remedy. For this reason, too, *coram nobis* relief should be available.

Contrary to the *en banc* court's assertion in ***Peart***, Mr. Peart's claim of a defective plea colloquy leading to an involuntary plea also satisfies the requirement that the claim be "of such a vital nature that had [it] been known to the trial court, [it] conclusively would have prevented the entry of the judgment." (R.67)(quoting ***Hallman***, 371 So.2d at 485). Again, the core of Mr. Peart's claim is that, as a result of the trial court's

failure to advise him of the immigration consequences of his plea, his plea was not knowingly and voluntarily rendered. This type of claim, and this claim specifically, has been repeatedly held to require vacation of the plea and resulting judgment. *See, e.g.,* ***Sanders v. State***, 685 So.2d 1385 (Fla. 4th DCA 1997); ***Perriello***; ***Spencer v. State***, 608 So.2d 551 (Fla. 4th DCA 1992); ***Marriott***; ***DeAbreu***. Given this court's 1988 amendment to Florida Rule of Criminal Procedure 3.172(c) to add sub-section (8) requiring a court to advise defendants of the possible immigration consequences of their pleas, ***In re Amendment to Florida Rules***, 536 So.2d 992 (Fla. 1988), it can no longer be maintained that these consequences are unimportant and collateral. The amendment speaks for itself regarding the importance placed on this consequence by this court. *See* ***State v. Ginebra***, 511 So.2d 960 (Fla. 1987)("deportation may, in fact, be a much more severe sanction than the prison sentence actually imposed on a defendant"). Thus, Mr. Peart's claim readily satisfies this *coram nobis* requirement.

In the words of ***Welles***, litigants similarly situated to Mr. Peart seek by their petitions to bring to the court's attention their lack of knowledge, at the time they entered their pleas, of the fact that as a result of their pleas, they would be deported. This ignorance existed at the time of their pleas, was not shown by the record, was not known to the court or the parties or counsel at the time the pleas were tendered, and was of such a vital nature

that had it been known by the court, it would have prevented the rendition of the judgments assailed. Accordingly, *coram nobis* should be available to redress his claim.[4]

II. RULE 3.850'S TWO YEAR PERIOD OF LIMITATIONS SHOULD NOT BE SUPERIMPOSED UPON PETITIONS FOR WRITS OF ERROR *CORAM NOBIS* WHERE SUCH A LIMITATION IS NOT RECOGNIZED BY THE COMMON LAW AND WILL PLACE THE WRIT OUT OF THE REACH OF A LARGE SEGMENT OF THE CLASS OF DEFENDANTS TO WHOM IT IS INTENDED TO PROVIDE RELIEF.

Because the court below held that *coram nobis* relief is unavailable to claimants such as Peart, it failed to address the question whether the two year period of limitations incorporated into Rule 3.850 should be superimposed upon the petition for writ of error *coram nobis* procedure. This issue is before this court in its review of ***Wood v. State***, 698 So.2d 293 (Fla. 1st DCA 1997), *rev.granted*, No. 91,133 (Fla. Jan. 12, 1998)(review pending), which held that Rule 3.850's two year period of limitations applies to petitions for writs of error *coram nobis*. Mr. Peart urges this court to reject the conclusion in ***Wood***.

With regard to custodial defendants requesting relief from involuntary pleas under Rule 3.850, the court below held that a defendant's discovery of impending deportation proceedings does not qualify as "newly discovered evidence" so as to excuse the filing

---

[4]The *en banc* court in ***Peart*** recognized that a claim of involuntary plea based on a trial court's failure to advise the defendant of its immigration consequences can be brought under Rule 3.850 if the defendant is in custody. (R.68, 70-72).

of a claim more than two years "after judgment and sentence become final" pursuant to Rule 3.850(b)(1). (R.68). This conclusion is not supported by precedent. It is harsh and unfair and should also be rejected by this court.

A. The Rule of *Wood* Adopting a Two Year Period of Limitations for Petitions for Error *Coram Nobis* Should be Rejected.

The writ of *coram nobis* is a common law writ that has no specific period of limitations. *E.g.,* ***United States v. Morgan***, 346 U.S. 502, 507, 74 S.Ct. 247, 250 (1954); ***Vonia v. State***, 680 So.2d 438, 439 (Fla. 2d DCA 1996); ***Malcolm v. State***, 605 So.2d 945, 949 (Fla. 3d DCA 1992). Accordingly, its use has been approved to facilitate vacation of convictions and sentences entered several years before the writs have been sought. *See, e.g.,* ***State v. Woods***, 400 So.2d 456 (Fla. 1981)(recognizing propriety of seeking writ of error *coram nobis* in 1978 to vacate conviction entered in 1967); ***Hallman v. State***, 371 So.2d 482 (Fla. 1979)(approving use of writ of error *coram nobis* to address two year old conviction and sentence). The very purpose served by the writ, correcting errors of fact based on information discovered after trial, further indicates the appropriateness of its use to redress old convictions and sentences. *See* ***Hallman*** at 485; ***Richardson v. State***, 546 So.2d 1037 (Fla. 1989). To superimpose a two year period of limitations on petitions for this invaluable writ would be arbitrary and make

it unavailable to a large class of litigants with potentially viable claims who have no place else to turn.

The decision in ***Wood*** to superimpose a two year period of limitation on petitions for writs or error *coram nobis* is unsound and should be rejected. The court essentially reasoned that because an in-custody defendant would have only two years to collaterally challenge a conviction under Rule 3.850, it would be unfair to allow someone who is not in custody more than two years. While this type of "equal protection" challenge may be one that could be successfully waged by a defendant whose ability to seek relief had been *restricted* as a result of the expiration of his custodial status, *cf.* ***Vonia v. State***, 680 So.2d 438 (Fla. 2d DCA 1996)(out of custody defendant entitled to raise question of law on petition for writ of error *coram nobis* where he would have been able to do so under rule 3.850 had his sentence not expired), it does not follow that this disparity justifies a court in *restricting* a litigant's ability to secure relief by superimposing a two year limit upon use of this common law writ.

The rule of ***Wood*** also should be rejected because there the court was concerned with the abuse of the writ by defendants who attempt to revitalize claims that have become time-barred under Rule 3.850, by waiting to assert them after the defendants' sentences have expired and a petition for writ of error *coram nobis* becomes available. Such instances of abuse can be adequately

addressed through application of the common law doctrine of laches. *See* ***Smith v. Wainwright***, 425 So.2d 618 (Fla. 2d DCA 1982)(no justification for 13 year delay after publication of leading case giving rise to right asserted); ***Remp v. State***, 248 So.2d 677, 679 (Fla. 1st DCA 1970)(reason for and length of delay to be considered); ***Cayson v. State***, 139 So.2d 719, 723-24 (Fla. 1st DCA 1962)(6 ½ month delay from discovery of previously unknown facts until filing of application for relief unreasonable).

In the instant case, as would be expected in other similar cases, critical facts giving rise to the claim. INS's initiation of exclusion proceedings against Mr. Peart - did not occur until more than two years after Peart's sentence and conviction had become final. Peart did not wait to file his claim by a petition for writ of *coram nobis* to circumvent Rule 3.850's two year limitation. Indeed, upon learning that one's guilty plea has given rise to the imminent threat of INS exclusion proceedings, any non-custodial defendant in Mr. Peart's position would race to the courthouse to file his petition. For this reason, too, this court should reject the rule of ***Wood*** and not impose any specific time limit upon the filing of a petition for writ of error *coram nobis*.

B. The Initiation of INS Exclusion Proceedings Constitutes Newly Discovered Evidence Under Rule 3.850(b)(1).

Florida Rule of Criminal Procedure 3.850 requires that all claims for relief pursuant to it be filed within two years. It excepts from this time limitation claims based upon facts which were unknown to the movant or the movant's attorney at the time of conviction and could not have been ascertained by the exercise of due diligence. Fla. R. Crim. P. 3.850(b)(1). Contrary to the conclusion of the *en banc* court in ***Peart***, the initiation of deportation proceedings that triggers a defendants' realization of the trial court's failure to advise him of the immigration consequences of his plea and the concomitant involuntary nature of

the plea constitutes "newly discovered evidence" and, thus, should fall within the Rule 3.850(b)(1) exclusion. (R.68).

As explained *supra*, an essential component to any claim of this nature is a showing of "prejudice." Fla. R. Crim. P. 3.172(i). In the context of a trial court's failure to advise a defendant of the immigration consequences of his plea, prejudice consists of the initiation of INS exclusion proceedings against the defendant. *See, e.g.,* ***Perriello***, 684 So.2d at 259; ***Marriott***, 605 So.2d at 987. Typically, as in the instant case, it is the initiation of the exclusion proceedings that alerts the defendant to this immigration consequence of his plea and the trial court's failure to have provided the advisement mandated by Rule 3.172(c)(8). Under these circumstances, the initiation of exclusion proceedings would, and should, always satisfy the newly discovered evidence exception to Rule 3.850's two year limit. *Cf.* ***Jones v. State***, 591 So.2d 911, 913 (Fla. 1991)(recanted testimony falls within newly discovered evidence exception to rule 3.850's time bar); ***Herrick v. State***, 590 So.2d 1109 (Fla. 2d DCA 1991)(same).[5]

III. A DEFENDANT SHOULD NOT BE REQUIRED TO ASSERT AND PROVE A PROBABILITY OF ACQUITTAL AT TRIAL TO SECURE RELIEF FROM AN INVOLUNTARY PLEA RESULTING FROM THE

[5]For this same reason, any unjustifiable or inordinate delay that might serve as a basis for an assertion of laches against a petition for writ of error *coram nobis* must be measured from the initiation of INS exclusion proceedings.

TRIAL COURT'S FAILURE TO ADVISE THE DEFENDANT OF ADVERSE IMMIGRATION CONSEQUENCES.

Addressing co-appellant Prieto's request for relief under Rule 3.850, the *en banc* court in ***Peart*** concluded that any such motion

must assert, and the defendant must prove the following:

a) The defendant was not advised by the court of the immigration consequences;
b) That defendant had no actual knowledge of same;
c) That INS had instituted deportation proceedings, or defendant is at risk of deportation;
d) That defendant would not have pled had defendant known of the deportation consequences; and
e) That had defendant declined the plea offer and gone to trial, defendant most probably would have been acquitted.

(R.70-71). The court gave no further explanation to requirements a-d which generally had been accepted as the preconditions to relief under the caselaw. ***E.g., Marriott***. Regarding the final requirement, the court reasoned that "[t]o require any less of a showing would subject the trial court to entertaining petitions for relief to set aside pleas in cases where the defendant would nonetheless be found guilty at trial and therefore would be facing the same consequence of deportation." (R.71). The court noted that this was "concordant" with its requirement that these motions be brought within two years of judgment and sentence thus assuring "some realistic probability that evidence will remain available and that the trial court can reliably determine whether defendant most likely would have prevailed at trial." (R.71-72). It cautioned that, if it deemed the onset of deportation proceedings as the triggering event, "in many cases the court files will be quite stale and evidence or witnesses may or may not be available. The

two-year limit addresses this problem." (R.72).

While the first four requirements imposed by the court below are reasonable in light of the substantive right being asserted, i.e., to withdraw a guilty plea that has not been entered knowingly and voluntarily, and are supported by the prevailing caselaw, the final requirement is unprecedented in this context and contrary to fundamental constitutional principles. With the exception of the *en banc* decision in ***Peart*** (and one of the panel decisions withdrawn upon issuance of the *en banc* decision), courts have uniformly held it sufficient for a defendant such as ***Peart*** to assert, and be able to prove, that he was not advised by the court of his plea's immigration consequences, he had no actual knowledge of these consequences, that exclusion proceedings had been instituted or were imminent, and that, had the defendant known of these consequences, he would not have pled guilty. *See, e.g.,* ***Sanders***, 685 So.2d at 1385; ***Perriello***, 684 So.2d at 258; ***Spencer***, 608 So.2d at 551; ***Marriott***, 605 So.2d at 985; ***DeAbreu***, 593 So.2d at 233. Imposing a requirement that a defendant demonstrate that had he proceeded to trial, he probably would have been acquitted, unduly burdens constitutional rights.

Every defendant is constitutionally presumed innocent and has the right to put the state to its burden of proving guilt beyond reasonable doubt, regardless of how likely it is that the defendant will be acquitted. Once a defendant has shown an uninformed, involuntary plea, he should be returned to the same standing as a

newly accused citizen, fully protected by these constitutional rights. Such a defendant can no more be required to show a probability of acquittal in order to put the state to its burden than any other defendant. Saddling a defendant with such a burden would dilute these fundamental constitutional rights.

Additionally, these cases are not like ones in which there are fully developed records, because the defendants have proceeded to trial, from which a trial court could arguably assess the likelihood that the defendant would not have been convicted. Instead, there is no record from which to evaluate this issue. As in the instant case, the defendant can assert the evidence was weak and he would have been acquitted and the state can respond that the evidence was strong and it would have resulted in conviction. However, absent an opportunity to exercise the full panoply of constitutional and statutory rights to which a defendant is entitled when faced with criminal charges, no defendant would have a fair opportunity to persuade the tribunal that if he proceeded to trial, he likely would have been acquitted. Such proceedings would place a substantial and undue administrative burden on the courts. For these reasons, a defendant should not be saddled with the burden of proving that he was not likely to have been convicted had he been tried on the charges.

The instant case is unlike ***Jones*** and ***Hallman*** where the judgments of conviction were based on jury verdicts and the alleged

error of fact undermined the verdicts. Under ***Hallman***, to demonstrate the requisite level of prejudice, a defendant had to demonstrate *conclusively* that had the newly discovered facts been known at the time of trial, he would have been acquitted. ***Hallman***, 371 So.2d at 45; ***Richardson***, 546 So.2d at 1038. In ***Jones***, this court receded from the ***Hallman*** standard and held that to obtain relief, the newly discovered evidence need only be such that it would *probably* produce an acquittal on retrial. *Id*., 591 So.2d at 915. By contrast, in the instant case, the newly discovered evidence need only undermine the plea. The type of "prejudice" required by ***Hallman*** and ***Jones*** is adequately demonstrated if the newly discovered evidence - the defendant's knowledge of the immigration consequences of his plea - would have resulted in the defendant not entering the plea. This fact is amply established by a defendant's affirmative assertion to this effect. Neither ***Hallman*** nor ***Jones*** suggests that under these circumstances a defendant should be required to demonstrate a probability of acquittal at trial.

CONCLUSION

The writ of error *coram nobis* is intended to provide non-custodial defendants a vehicle to seek relief from a conviction or sentence based on an error of fact which would have prevented the entry of the judgment. This is precisely the type of error presented by a defendant who claims his guilty plea was involuntary

due to the trial court's failure to advise him of the immigration consequences, as required by Rule 3.172(c)(8), and his corresponding ignorance of these consequences. The fact of the trial court's omission, as well as the defendant's ignorance, triggered by the initiation of INS exclusion proceedings, constitutes "newly discovered evidence." This discovery is so vital that had it been known by the court at the time of the plea, it would have prevented entry of the judgment assailed. Rule 3.850's two year period of limitations should not be superimposed upon this common law writ. Moreover, no requirement should be imposed that a defendant demonstrate a probability of acquittal in order to secure relief. Accordingly, for the reasons and on the basis of the applicable law and the arguments set forth herein, Mr. Peart respectfully requests this court to quash the decision of the district court and to direct the trial court to grant him a writ of error *coram nobis* or an evidentiary hearing.

Respectfully submitted,

ROBBINS, TUNKEY, ROSS, AMSEL & RABEN, & WAXMAN, P.A.
2250 Southwest Third Avenue
Fourth Floor
Miami, Florida 33129
Telephone: (305) 858-9550

By:_____
BENJAMIN S. WAXMAN
Fla. Bar No. 403237

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing

was sent by United States mail, this 24th day of April, 1998, to: Michael J. Neimand, Esquire, Assistant Attorney General, 444 Brickell Avenue, Miami, Florida 33131.

ROBBINS, TUNKEY, ROSS, AMSEL, RABEN & WAXMAN, P.A.

BY:_____
BENJAMIN S. WAXMAN