

IN THE SUPREME COURT  
OF FLORIDA

CASE NO. 92,928

ROBERT H. WELLS,

Petitioner,

vs.

THE STATE OF FLORIDA,

Respondent.

**FILED**

BID J. WHITE

MAY 18 1998

CLERK SUPREME COURT

By                       
Clerk Deputy Clerk

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APPEAL FROM THE  
DISTRICT COURT OF APPEAL OF FLORIDA

THIRD DISTRICT

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AMENDED  
JURISDICTIONAL BRIEF

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## STATEMENT OF THE CASE AND FACTS

Having served his sentence and thus being out of custody for purposes of a Rule 3.850 motion, Petitioner timely raised a claim of ineffective assistance of counsel the only way that he could, that is in a writ of error coram nobis. The trial court which had adjudicated him guilty of a felony found that had it known of an actual conflict of interest that denied Petitioner his Sixth Amendment right to counsel it would not have entered judgment against him. The Third District Court of Appeal expressly held, in direct conflict with several other courts of appeal, that persons may not raise fundamental defects such as ineffective assistance of counsel in a petition for writ of error coram nobis. The Third District has thus denied access to the courts to those suffering from the stigma of a felony conviction entered in violation of the Constitution.

Petitioner entered a plea of guilty to the offense of possession of a short-barreled gun. Thereafter, Petitioner was adjudicated guilty and was sentenced to jail. Petitioner's custodial status terminated within four months of his conviction. After completing his sentence, but within two years after his judgment and conviction became final, Petitioner filed a petition for writ of error coram nobis before the same trial court which accepted his guilty plea, raising, among other claims, ineffective assistance of counsel.

After having the legal issues fully briefed and holding an evidentiary hearing at which it heard testimony from witnesses, including Petitioner's former counsel, the trial court found that

Petitioner's Sixth Amendment right to assistance of counsel had been violated. The trial court expressly found that there were facts that were unknown to Petitioner and to the court which if known would have prevented the entry of a guilty plea. The trial court found an actual conflict of interest that adversely affected Petitioner in that the assistant public defender assigned to represent him had personally represented the State's key witness, the Office of the Public Defender had represented this witness on numerous occasions, and the Office was representing this witness during the investigation and prosecution of Petitioner's case.

The trial court granted the petition, vacating the conviction and setting aside the guilty plea. The State appealed to the Third District which reversed the trial court's judgment and remanded for the trial court to dismiss the petition. Petitioner timely moved before the Third District for certification of the decision for review in this Court based on a direct conflict with decisions of other courts of appeal. This motion was denied without opinion. The Third District issued the Mandate on April 17, 1998. Petitioner now timely files the instant jurisdiction brief.

#### **SUMMARY OF ARGUMENT**

Petitioner invokes the jurisdiction of this Court under Art. V, § 3(b)(3) of the Florida Constitution and Fla.R.App.P. 9.030(a)(2)(iv). The decision of the Third District which reverses the trial court's grant of the writ of error coram nobis

expressly and directly conflicts with decisions of the First, Second, and Fourth Districts and with decisions of this Court.

In its opinion, the Third District did not address the question of whether Petitioner received ineffective assistance of counsel. Instead, the court held that as a matter of law Petitioner could not raise a claim of ineffective assistance of counsel by way of writ of error coram nobis. The decision in the instant case expressly and directly conflicts with the decisions of several other district courts which have held that the all claims cognizable under a Rule 3.850 motion may be raised by way of writ of error coram nobis when the petitioner is no longer in custody. Specifically, these district courts have held that claims of ineffective assistance of counsel may be raised by writ of error coram nobis. Furthermore, the Third District's acceptance of jurisdiction over the State's appeal of the grant of the writ conflicts with several of this Court's decisions holding that the State may not appeal the grant of a writ of error coram nobis.

Not only does this decision directly conflict with the decisions of other courts of appeal and of this Court, it forecloses the only avenue of relief from an unconstitutional conviction for Petitioner and all others similarly situated, that is all persons who are no longer in custody and thus cannot file a postconviction motion under Fla.R.Crim.P. 3.850. Consequently, while those who are still in custody may challenge a conviction entered in violation of their Sixth Amendment rights under Rule 3.850, those who are no longer in custody, because like

Petitioner they have served their sentence, have no way of raising a claim of ineffective assistance of counsel, or any other constitutional claim. Significantly, although these persons are no longer in custody, they still suffer adverse effects resulting from their convictions. Moreover, claims of ineffective assistance of counsel, are properly raised in a postconviction motion, as opposed to in a direct appeal. Thus, as the law now stands in the Third District persons no longer in custody have no way of asserting their constitutional right to effective assistance of counsel.

#### ARGUMENT

#### THE THIRD DISTRICT'S OPINION EXPRESSLY AND DIRECTLY CONFLICTS WITH THE DECISIONS OF OTHER DISTRICT COURTS.

The Florida Constitution grants this Court jurisdiction over a decision of a district court of appeal that "expressly and directly conflicts with a decision of another district court of appeal or of the supreme court on the same question of law." Fla. Const. Art. 5, § 3(b)(3). See Fla.R.App.P. 9.030(a)(2)(iv). In Florida Star v. B.J.F., 530 So.2d 286 (Fla. 1988), this Court explained that it has jurisdiction "over any decision of a district court that expressly addresses a question of law within the four corners of the opinion itself." Id. at 288. A district court need not explicitly identify the conflicting decision in order to create an "express" conflict under § 3(b)(3). Ford Motor Co. v. Kikis, 401 So. 2d 1341, 1342 (Fla. 1981). The discussion of the legal principles which the court applied supplies a sufficient basis for a petition for conflict review. Id.

In the instant case, the Third District expressly held that *coram nobis* does not lie on a claim of ineffective assistance of counsel. This is the legal principle on which the district court based its reversal of the grant of the petition. This legal principle is announced within the four corners of the decision itself and thus the conflict is express. The Third District stated that: "coram nobis does not lie on such a ground." The particular ground was referred to in the preceding sentence, that is "alleged ineffective assistance of counsel."

This holding directly conflicts with decisions of other courts of appeal. The First, Second, and Fourth Districts have repeatedly held that all claims cognizable in a Rule 3.850 post-conviction motion may be raised by writ of error *coram nobis* when a person is no longer in custody. See Wood v. State, 698 So.2d 293 (Fla. 1st DCA 1997); Vonia v. State, 680 So.2d 438 (Fla. 2d DCA 1996); Marriott v. State, 605 So.2d 985 (Fla. 4th DCA 1992); Dugart v. State, 578 So.2d 789 (Fla. 4th DCA 1991); Dequesada v. State, 444 So.2d 575 (Fla. 2d DCA 1984); and Weir v. State, 319 So.2d 80 (Fla. 2d DCA 1975). In addition, the Second and the Fourth Districts have held that claims of ineffective assistance of counsel in particular may be raised by writ of error when a person is no longer in custody. See Marriott, supra, Dugart, supra; and Dequesada, supra. See also Weir, supra (holding that person claiming Gideon violation, that is complete denial of assistance of counsel, could raise claim by writ of error because he was no longer in custody).



In Weir, the Second District stressed the importance of giving persons no longer in custody a vehicle for attacking the constitutionality of their convictions and sentences. There, petitioner argued that his right to assistance of counsel was violated when the court failed to advise him that because he was indigent the court would provide him with legal counsel to assist in his defense. At the time of making this claim, petitioner was no longer in custody, having served his sentence approximately thirty years before. Acknowledging that a Rule 3.850 motion may only be filed by persons in custody, the court posed the following question:

Does that mean that appellant has no vehicle to attack his conviction and sentence since he is no longer in jail?

319 So.2d at 81. The court stressed that petitioner's Sixth Amendment right had been violated regardless of whether he was in custody or had served his sentence and that even though petitioner had served his sentence he was still suffering harm as a result of the conviction. The court explained that:

the stigma and disabilities incident to a felony conviction continue to be substantial detriments even after the sentence is served.

Id. The court concluded that petitioner could raise the claim that he was unconstitutionally denied counsel by way of writ of error.

In Dequesada, the Second District followed its decision in Weir and held that claims of ineffective assistance of counsel may be raised by way of writ of error coram nobis. The court added that:

If ineffective assistance of counsel were proved, the conviction might ultimately be expunged from his criminal record, thereby eliminating the stigma of conviction.

444 So.2d at 576. Adopting the reasoning of the Second District's decision in Dequesada, the Fourth District in Dugart, expressly held that:

A claim of ineffective assistance of counsel may support a petition for writ of error coram nobis provided that the defendant is no longer in custody and the petition is supported by adequate factual allegations.

578 So.2d at 791.

In the instant case, the legal principle announced by the Third District that a claim of ineffective assistance of counsel may not be raised by writ of error coram nobis directly conflicts with the previously discussed decisions of the First, Second, and Fourth Districts holding generally that all claims cognizable under Rule 3.850 may be raised by writ of error when a person is no longer in custody, and specifically that claims of ineffective assistance may be raised by way of the writ.

**PEART V. STATE SIMILARLY CONFLICTS WITH  
DECISIONS OF OTHER DISTRICT COURTS.**

In its opinion, the Third District expressly relied on its decision in Peart v. State, 705 So.2d 1059 (Fla. 3d DCA) (*en banc*), that was decided a week prior to the opinion in the instant case. Specifically, the Third District stated that it had "recently and definitively" held in Peart that "coram nobis does not lie on such a ground." Although Peart did not involve a claim of ineffective assistance of counsel, it did generally hold

that a writ of error coram nobis may not be based on an "error of law." Id. at 1062. In Peart, this error of law was the court's failure to advise defendants of the deportation consequences of their pleas. Id. Thus, Peart also conflicts with the decisions of the First, Second, and Fourth Districts, which hold that all claims cognizable under a Rule 3.850 motion may be raised in a writ of error coram nobis when a person is no longer in custody. Petitioners in Peart and the cases consolidated with Peart have also applied for review before this Court.

Furthermore, in Peart, the Third District expressly recognized that its decision was in conflict with the decisions of other districts and, accordingly, certified a conflict with Wood, supra, Marriott, supra. Peart, 705 So.2d at 1063. As previously explained, Wood and Marriott hold that all claims cognizable under a Rule 3.850 motion for postconviction relief may be raised by way of writ of error coram nobis once defendant is no longer in custody. The court in Peart also recognized that its decision was contrary to the decisions in Vonia, supra, and Weir, supra, which held that petitions for coram nobis relief afford defendants out of custody the same relief available to defendants in custody. Id. at 1063. Moreover, the court opined that the this Court should consider whether a court rule should be adopted to address the issue of postconviction relief for persons not in custody. Id.

Petitioner requests that this Court exercise jurisdiction separately over its appeal because the claim of ineffective assistance of counsel is different from other claims of error.

Ineffective assistance of counsel generally cannot be raised on direct appeal and instead is properly raised in a postconviction motion or writ. Thus, the instant decision effectively closes the only avenue for raising a claim of ineffectiveness for persons not in custody. Admittedly, however, Peart does involve the more general issue of what types of claims may be raised in a writ of error and, thus, this Court may wish to consolidate all of these cases. Therefore, Petitioner alternatively suggests consolidation.

**THE THIRD DISTRICT'S OPINION EXPRESSLY  
AND DIRECTLY CONFLICTS WITH DECISIONS OF THIS COURT.**

In Lamb v. State, 107 So. 535 (Fla. 1926), this Court, in the course of setting forth the procedure for obtaining a writ of error coram nobis in criminal cases, explained that:

As the law now stands, if the trial court erroneously grants a writ of error coram nobis the state has no right to an appellate review of such order.

Id. at 540 (emphasis added). The Court reasoned that:

The security of the state's judgment of conviction lies in the faith that the trial court will not grant a writ of error coram nobis except upon a proper and sufficient showing of essential facts duly made by competent legal and adequate evidence and by testimony under oaths of the defendant and of counsel who are responsible to the court for the propriety of their action.

Id. The Court reaffirmed the rule that the State cannot appeal the grant of a writ of error coram nobis in Washington v. State, 110 So. 259, 262 (Fla. 1926), and Chambers v. State, 158 So. 153, 156 (Fla. 1934). In Chambers, the Court stated that:

a writ of error in criminal cases to such judgment lies in behalf of defendant if the final judgment

on the proceedings is against him but not in favor of the state to review the judgment if it is in favor of the defendant.

Id. at 156.

This rule is based on the belief that trial courts should be afforded vast discretion to correct errors in proceedings before them that had they been aware of, they would not have entered judgment against defendant. Washington, 110 So. at 262. Neither this Court nor the state legislature has modified or abolished this rule. Because as the rule now stands the State has no right to appellate review of the trial court's grant of the writ in favor of Petitioner, the Third District's exercise of jurisdiction over the appeal expressly and directly conflicts with decisions of this Court.

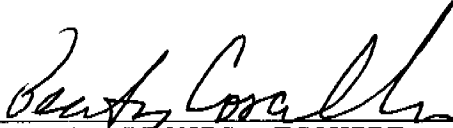
#### CONCLUSION

Petitioner submits that this Court has jurisdiction over his appeal because the legal principle announced within the four corners of the opinion, that is that a claim of ineffective assistance of counsel may not be raised by way of a writ of error coram nobis, expressly and directly conflicts with decisions of other district courts. Further, the exercise of jurisdiction over the State's appeal of the trial court's grant of the writ conflicts with decisions of this Court.

Petitioner urges that this Court exercise its discretion to hear his appeal because the Third District's decision effectively denies a person who is no longer in custody relief from a conviction entered in violation of the Sixth Amendment.

Respectfully submitted,

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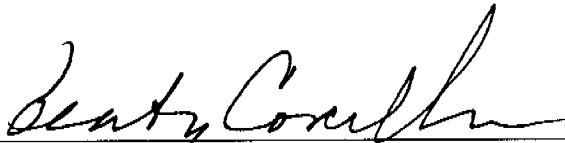


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**CERTIFICATE OF SERVICE**

I **HEREBY CERTIFY** that a true and correct copy of the Amended Brief was mailed this 14th day of May, 1998 to MICHAEL J. NEIMAND, Assistant Attorney General, Office of the Attorney General, Rivergate Plaza, Suite 950, 444 Brickell Avenue, Miami, Florida 33131.



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