IN THE SUPREME COURT
OF FLORIDA

CASE NO. 92,928

ROBERT H. WELLS,

Petitioner,

vs.

THE STATE OF FLORIDA,

Respondent.

APPEAL FROM THE
DISTRICT COURT OF APPEAL OF FLORIDA

THIRD DISTRICT

PETITIONER'S BRIEF ON THE MERITS

STEPHEN J. BRONIS, ESQUIRE
Florida Bar No. 145970
BEATRIZ C. COSCULLUELA, ESQUIRE
Florida Bar No. 0041874
ZUCKERMAN, SPAEDER, TAYLOR & EVANS, LLP
201 South Biscayne Boulevard, Suite 900
Miami, Florida 33131
Tel: (305) 579-0110

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

§ 27.53(3), Fla. Stat.28, 29

28 U.S.C. § 22556, 7

RULES

TREATISES

STATEMENT OF THE CASE AND FACTS

Having served his sentence and thus being out of custody and unable to file a Rule 3.850 postconviction motion, Petitioner timely raised numerous claims of error, including a claim of ineffective assistance of counsel, the only way that he could, that is in a writ of error *coram nobis*. The very same trial court that had adjudicated him guilty of a felony found that had it known of an actual conflict of interest that deprived Petitioner of his Sixth Amendment right to effective assistance of counsel it would not have entered judgment against him. The Third District Court of Appeal held, in direct conflict with the overwhelming majority of courts that have decided this issue, that persons may not raise fundamental defects such as ineffective assistance of counsel in a writ of error *coram nobis*. The Third District thereby foreclosed access to the courts to those persons not in custody who wish to challenge an unconstitutional conviction.

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 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 the Assistant Public Defender who had represented Petitioner, the trial court found that Petitioner's Sixth Amendment right to effective 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 writ, 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. This Court accepted jurisdiction. Petitioner now respectfully requests that this Court restore the availability of the ancient writ of error *coram nobis* to correct errors of a fundamental nature to persons who have served their sentences yet who suffer from an invalid conviction.

SUMMARY OF ARGUMENT

The ancient writ of error *coram nobis* is the sole means of challenging an invalid conviction for persons who are no longer in custody. Notwithstanding that their sentence has been served, persons need a vehicle by which to challenge an invalid conviction because they continue to suffer adverse consequences from the

conviction. For example, a person's civil rights are affected by the conviction; they may be prohibited from continuing in or entering their chosen profession because of the stigma associated with a conviction; they may be punished more severely if they commit another crime; their reputation in the community is tarnished. All of these are examples of adverse consequences which generally flow from a conviction.

Petitioners must satisfy an onerous burden before a court will grant the writ, vacating their conviction. Petitioner must show that there was a fact unknown to the court and to Petitioner that had the court known it would not have entered judgment against Petitioner. The writs are only granted when the error is of such a fundamental character that it rendered the judicial proceeding itself invalid. The writs are also granted to correct a manifest injustice.

The trial court in the instant case found extraordinary circumstances which justified the grant of the writ. It found that it would not have accepted Petitioner's guilty plea had it known of an actual conflict of interest. The Assistant Public Defender who represented Petitioner had also personally represented the state's key witness against Petitioner. In addition, the Office of the Public Defender was representing the key witness during the investigation of Petitioner's case. This conflict of interest was apparent from the documents in the court file. However, Petitioner's counsel never even reviewed the court file. In fact, he never interviewed Petitioner nor did he investigate any possible defenses, some of which were also apparent from the court file

itself. Nor did he advise Petitioner concerning the sentence he might receive if he went to trial and was convicted. Instead, counsel simply recommended that Petitioner plead guilty.

After having the legal issues fully briefed and holding evidentiary hearings at which the court heard from Petitioner's former counsel, the court found a fundamental defect in the judicial proceeding in that Petitioner was denied his Sixth Amendment right to effective assistance of counsel. Specifically, the court held that there was an actual conflict of interest that adversely affected Petitioner. It exercised its discretion to grant the writ in order to correct an error in its own judgment.

The Third District did not even reach the merits of the trial court's well-reasoned and thorough opinion. Instead, it held that as a matter of law claims of ineffective assistance of counsel may never be raised in a writ of error coram nobis. This decision resulted from a superficial analysis of the traditional common law standard for granting these writs. Not only was the reasoning of the Third District erroneous, its decision effectively foreclosed all relief from a conviction entered in violation of the Sixth Amendment to persons no longer in custody. Moreover, trial courts in this District are now without the power to correct those judgments that violate the Sixth Amendment. In so holding, the Third District broke with all precedent.

Petitioner respectfully requests that this Court restore the availability of the ancient writ to persons who are no longer in custody yet whose convictions were entered in violation of the Sixth Amendment.

ARGUMENT

I. A WRIT OF ERROR *CORAM NOBIS* IS THE PROPER AND EXCLUSIVE VEHICLE FOR RAISING A VIOLATION OF THE SIXTH AMENDMENT RIGHT TO COUNSEL WHERE A PERSON IS NO LONGER IN CUSTODY.

The writ of error *coram nobis* was developed at common law as early as the sixteenth century to allow a court to correct an error of fact in a proceeding before it. Pickett's Heirs v. Legerwood, 32 U.S. (7 Pet.) 144, 147, 8 L.Ed. 638 (1833). The scope of the common law writ has been described by reference to *Tidd's Practice*:

> If a judgment in the King's Bench be erroneous in matter of *fact* only, and not in point of law, it may be reversed in the *same* court, by writ of error *coram nobis*, or *quaecoram nobis resident* . . . . for error in fact is not the error of the judges, and reversing it is not reversing their own judgment. So, upon a judgment in the King's Bench, if there be error in the *process*, or through the default of the clerks, it may be reversed by the same court, by writ of error *coram nobis* . . . .

2 Tidd's Practice (4th Amer. Ed.) 1136-1137 (cited in United States v. Morgan, 346 U.S. 502, 507 n.9 (1954)). The writ was allowed without limitation of time to correct errors that affected the "validity and regularity" of the judgment. Morgan, 346 U.S. at 507 (citation omitted).

In criminal proceedings,[1] their use appeared to decline when statutes and court rules were enacted applying to postconviction proceedings. For example, 28 U.S.C. § 2255 was enacted as the exclusive vehicle by which a person in custody could move to vacate, set aside, or correct a sentence based upon a violation of the Constitution or law of the United States. Similarly, states enacted court rules like Rule 3.850 of the Florida Rules of Criminal Procedure to serve as the exclusive postconviction remedy for persons in custody. These statutes and rules, however, did not apply to persons who were not in custody.

A person's custodial status is irrelevant to whether or not a conviction is invalid. Persons not in custody must also have a vehicle by which to challenge errors of such a fundamental character that they render the judicial proceeding itself invalid. Significantly, persons who have served their

[1] In 1946, Rule 60(b) of the Federal Rules of Civil Procedure was amended abolishing these writs in civil cases.

sentences continue to suffer from the stigma and disabilities which flow from a conviction. Both Florida trial courts and federal trial courts have recognized this and in extraordinary circumstances have exercised their vast discretion in this area to grant the ancient writ.

A. IN *UNITED STATES V. MORGAN* THE SUPREME COURT HELD THAT THE DENIAL OF THE SIXTH AMENDMENT RIGHT TO COUNSEL WAS AN ERROR OF SUCH A "FUNDAMENTAL CHARACTER" AS TO RENDER THE COURT PROCEEDING ITSELF INVALID THUS WARRANTING *CORAM NOBIS* RELIEF.

In 1954, the United States Supreme Court caused the ancient writ to "[rise] phoenix-like from the ashes of American jurisprudence." United States v. Balistrieri, 606 F.2d 216, 219 (7th Cir. 1979). In United States v. Morgan, 346 U.S. 502 (1954), the Supreme Court held that a person who had served his federal sentence and therefore was no longer in custody for purposes of 28 U.S.C. § 2255 could file a writ of error *coram nobis* arguing that his constitutional right to counsel had been violated. The district court had left the defendant without a remedy, holding that he was not entitled to § 2255 relief because he was no longer in custody and that § 2255 had supplanted all common law writs. The Second Circuit reversed holding that the writ was available because the error, that is a violation of the Sixth Amendment right to counsel, was of "fundamental character." Morgan, 346 U.S. at 504.

In resurrecting this ancient writ, the Supreme Court explained that even though its scope has been described by reference to the instances specified in *Tidd's Practice*, "its use has been by no means so limited." Morgan, 346 U.S. at 508. The Court described the most common uses of the writ:

> It has been used, in the United States, with and without statutory authority but always with reference to its common law scope—for example, to inquire as to the imprisonment of a slave not subject to imprisonment, insanity of a defendant, a conviction on a guilty plea through the coercion of fear of mob violence, **failure to advise of right to counsel**.

Id. (emphasis added). The Court also described numerous "interesting" examples of the use of the writ, and concluded that courts appear to grant the writ when a fundamental injustice needs to be corrected and there is no other remedy. The Court adopted this more flexible approach and expressly rejected a strict adherence to the scope of the writ at common law. For example, the Court dismissed the government's argument that the writ was not available because the error of fact was known to the court in that the court must have known that the defendant was not represented by counsel. Id.

Significantly, the majority in Morgan refused to impose the following burdens on a petitioner who seeks the grant of the writ: that the petitioner must set forth facts from which innocence could be inferred, must give a sufficient explanation of his prolonged delay in seeking to remedy the violation of a constitutional right, and must show that he is suffering from some disability as a result of the conviction. Id. at 515.

Instead, the Court set forth the following standard. The Court held that a federal trial court must exercise jurisdiction over the writ when the person has no other remedy and requests the correction of an error "of the most fundamental character." Id. at 512 (citation omitted). The Court reasoned that: "Otherwise a wrong may stand uncorrected which the available remedy would right." Id. The Supreme Court made it clear that courts have the power to hear and defendants have the right to file writs of error *coram nobis* in order to remedy an invalid conviction or sentence. Id. at 513.

The dissenters in Morgan argued that "litigation must eventually come to an end" and maintained that collateral attack on a judgment should only be allowed while a person is still serving a sentence. Id. at 519-20. The majority, however, weighed the principle of "finality" against the principle that courts should have the ability to correct errors of the most fundamental nature in their judgments and litigants who suffer from the stigma and disabilities which accompany a conviction long after their sentences have been served should have a vehicle for complaining of a manifest injustice. Justice won and the ancient writ of error *coram nobis* was reborn to serve as a remedy of last resort.

To sum up, the Supreme Court announced in Morgan that the situations in which a writ of error *coram nobis* is available include correction of errors of such a fundamental character that they render the court proceeding itself invalid and correction of errors where circumstances compel such action to achieve justice. After Morgan, commentators have observed "that the availability of the writ of error coram nobis is essentially an assurance that the guaranties of due process under the Fifth and Fourteenth Amendments to the Federal Constitution will not be denied as a result of technical limitations of other postconviction remedies." See Romualdo Eclavea, Annotation, *Availability,*

Under 28 U.S.C.A. § 1651, of Writ of Error Coram Nobis to Vacate Federal Conviction Where Sentence Has Been Served, 38 A.L.R.Fed 617 at § 2 (1978). Thus, the ancient writ remains available to relieve litigants from judicial wrongs for which there is no other remedy. Id.

B. COURTS HAVE UNIFORMLY ALLOWED SIXTH AMENDMENT VIOLATIONS TO BE RAISED BY WRIT OF ERROR *CORAM NOBIS*.

The United States Supreme Court in Morgan expressly recognized that the violation of the Sixth Amendment right to counsel is an error of "the most fundamental character" and is properly raised in a writ of error *coram nobis*. Virtually every other court in the nation that has considered this issue has held that persons who are no longer in custody may raise a violation of their Sixth Amendment right to effective assistance of counsel by way of writ of error *coram nobis*. See generally Romualdo Eclavea, Annotation, *supra,* 38 A.L.R.Fed 617 at § 7 (1978) (collecting cases).

Federal courts have uniformly allowed defendants who have served their sentences to raise ineffective assistance of counsel claims in writs of error *coram nobis*. See, e.g., United States v. Castro, 26 F.3d 557 (5th Cir. 1994); United States v. Golden, 854 F.2d 31 (3d Cir. 1988); Flippins v. United States, 747 F.2d 1089 (6th Cir. 1984).

To illustrate, in Morgan v. United States, 396 F.2d 110 (2d Cir. 1968), the Second Circuit held that *coram nobis* was available to a defendant who had served his sentence yet complained that he was denied effective assistance of counsel at trial. Specifically, defendant claimed that he was prejudiced by his counsel's representation of a codefendant. The Second Circuit remanded to the trial court to determine if there was an actual conflict of interest that adversely affected defendant. The court recognized the:

waste of time and expense which would be involved in the retrial of defendant, at a time after he has served his sentence, on charges where the record provides such strong evidence of guilt. However, the effective assistance of counsel is so important and paramount a right for a defendant on trial for a serious crime that we are not entitled to assume, merely because there is such substantial support for the conviction, that the defendant was, in fact, adequately represented by counsel.

Id. at 114-15.

Similarly, in Cardall v. United States, 599 F. Supp. 912 (D. Utah 1984), the court held that

"[o]n a writ of error coram nobis, the court may determine whether the defendant received effective assistance of counsel." Id. at 915. Relying on the Supreme Court's decision in Morgan, the court reasoned that "[w]hile coram nobis is a narrow and extraordinary remedy, its present scope encompasses not only errors of fact but also legal errors of a constitutional or fundamental proportion." Id. (citation omitted).

The majority of state courts that have addressed this issue have also allowed ineffective assistance of counsel claims to be raised in a writ of error *coram nobis* where there is no other remedy available to the defendant. To illustrate the Supreme Courts of Alabama and Mississippi hold that *coram nobis* can be used to raise claims of ineffective assistance of counsel. See, e.g, Ex Parte State of Alabama, 525 So.2d 820, 830 (Ala. 1985); In re Hill, 460 So.2d 792, 802 (Miss. 1984). Moreover, the highest court of New York has also held that ineffective assistance of counsel claims with respect to both trial and appellate counsel may be brought by way of writ of error *coram nobis*. See People v. Bachert, 509 N.E.2d 318, 321 (N.Y. 1987). Further, the court in Bachert recognized that New York courts have "not hesitated to expand its scope when necessary to afford the defendant a remedy in those cases in which no other avenue of judicial relief appeared available." Id. at 321 (citation omitted).

Under circumstances similar to those of the instant case, the Supreme Court of Minnesota held that petitioner could raise an ineffective assistance of counsel claim by writ of error *coram nobis* where he asserted that: his first and only conference with counsel took place outside the courtroom immediately prior to his arraignment, at which he plead guilty; and that during such conference, which lasted but a few minutes, he was advised by counsel to enter a plea of guilty based upon misadvice about the sentence which he would receive. State v. Osgood, 123 N.W.2d 593, 599 (Minn. 1963).

C. THE THIRD DISTRICT'S DECISION IN THIS CASE IS CONTRARY TO A L L PRECEDENT.

It was undisputed under Florida law, until the Third District's decision in the instant case, that a person no longer in custody could raise a claim of ineffective assistance of counsel by way of writ of error *coram nobis*. The First, Second, and Fourth Districts have repeatedly held that all claims cognizable in a Rule 3.850 postconviction 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); 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 *coram nobis* 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 the assistance of counsel, could raise claim by writ of error *coram nobis* 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 Sixth Amendment 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 his 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 in a writ of error *coram nobis*.[2]

In Dequesada, supra, 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, supra, 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 its opinion in the instant case, the Third District expressly relied on its decision in Peart v. State, 705 So.2d 1059 (Fla. 3d DCA 1998)(*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.

---

[2] The court in Weir also found persuasive that federal courts have consistently allowed persons not in custody to raise claims of ineffective assistance of counsel by way of writ of error *coram nobis*. 319 So.2d at 81.

The Third District's decisions in Peart and the instant case effectively abolished the exclusive remedy for persons not in custody to raise constitutional violations. These decisions are contrary to all precedent. Further, courts in the Third District are now without the power to correct errors in their judgments which have resulted in a manifest injustice simply because defendant is no longer in custody. As a result of the Third District's decision in this case, errors of the most "fundamental character" will "stand uncorrected" in this District. Morgan, 346 U.S. at 512.

D. PERSONS WHO SUFFER FROM AN INVALID CONVICTION SHOULD BE PROVIDED WITH A VEHICLE BY WHICH TO PETITION THE COURT FOR ITS CORRECTION BECAUSE THERE ARE ADVERSE CONSEQUENCES WHICH FLOW FROM ALL CRIMINAL CONVICTIONS.

The Morgan Court recognized that persons must have a vehicle to challenge unconstitutional convictions after their sentences have been served because they continue to suffer adverse consequences from the convictions. The Court rejected the dissent's position that a petitioner must demonstrate a specific disability and instead generally held that adverse consequences flow from all convictions. Specifically, the Court explained that: "Although the term has been served, the results of the conviction may persist. Subsequent convictions may carry heavier penalties, civil rights may be affected." 346 U.S. at 512-13.

The majority of courts have recognized that petitioner is not required to show a present adverse effect stemming from the conviction sought to be vacated. See Mathis v. United States, 369 F.2d 43, 48 n.14 (4th Cir. 1966) (collecting cases). The court in Mathis quoted Chief Justice Warren:

> Conviction of a felony imposes a status upon a person which not only makes him vulnerable to future sanctions through new civil disability statutes, but which also seriously affects his reputation and economic opportunities. And the fact that a man has been convicted before does not make the new conviction inconsequential. There is, after all, such a thing as rehabilitation and reintegration into the life of the community.

Mathis, 369 F.2d at 46, n.13 (quoting Parker v. Ellis, 362 U.S. 574, 593-94 (1960)). But see United States v. Osser, 864 F.2d 1056 (3d Cir. 1988).

In fact, the Ninth Circuit has held that even misdemeanors convictions carry collateral legal consequences. In Hirabayashi v. United States, 828 F.2d 591 (9th Cir. 1987), Japanese Americans filed petitions for writs of error *coram nobis* seeking vacation of their convictions for violating

wartime measures requiring them to adhere to curfew and reporting requirements. These convictions were misdemeanors. The government argued that misdemeanors have no collateral consequences and thus the case or controversy requirement was not met because petitioners were not suffering from any legal disability. 828 F.2d at 605. The court held that the case was not moot because "[a]ny judgment of misconduct has consequences for which one may be legally or professionally accountable." Id. at 606-07. Further, the court explained that petitioners in particular were lastingly aggrieved in that they were convicted of a crime on account of their race. Id. at 607.

Because of the stigma and disabilities incident to all convictions, persons should be provided with a vehicle to challenge invalid convictions. Weir, 319 So.2d at 81. Persons who file writs of error *coram nobis* already face the difficult burden of showing "manifest injustice" or error of "fundamental character." Imposing the additional burden of showing a present adverse consequence is unnecessary in light of the adverse consequences which flow from all convictions.

II. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION WHEN IT GRANTED THE WRIT BASED ON ITS FINDING THAT HAD IT KNOWN OF AN ACTUAL CONFLICT OF INTEREST IT WOULD NOT HAVE ACCEPTED PETITIONER'S GUILTY PLEA AND WOULD HAVE APPOINTED CONFLICT-FREE COUNSEL.

A. THE TRIAL COURT APPLIED THE CORRECT STANDARD FOR GRANTING THE WRIT.

In Nickels v. State, 98 So. 502 (Fla. 1923), this Court considered "the somewhat undefined scope of the seldom used and little known common-law writ of error coram nobis." Id. at 503. There, petitioner who had pled guilty and been sentenced to death claimed that his guilty plea was involuntary because it was entered under threat of mob violence. The Court set forth the traditional common law standard for the granting of the writ:

> The functions of a writ of error *coram nobis* are limited to an error of fact, for which the statute provides no other remedy, which fact did not appear of record, or was unknown to the court when judgment was pronounced, and which, if known, would have prevented the judgment, and which was unknown, and could not have been known to the party by the exercise of reasonable diligence in time to have been otherwise presented to the court, unless he was prevented from so presenting them by duress, fear, or other sufficient cause.
>
> . . .
>
> The writ of error *coram nobis* is not intended to authorize any court to revise

> and review its opinions; but only to enable it to recall [sic] some adjudication made while some fact existed which, if before the court, would have prevented the rendition of the judgment, and which, without any fault or negligence of the party, was not presented to the court.
>
> . . .
>
> A writ *coram nobis* will lie when it is necessary for the accused to bring some new fact before the court which cannot be presented in any of the methods provided by statute, but it will not lie in cases covered by statutory provisions.

Id. at 504. Applying this standard, the Court held that defendant could raise in a writ of error *coram nobis* the claim that his guilty plea was involuntary because it was coerced due to the threat of mob violence. Id. The court noted that the question of guilt or innocence was irrelevant to whether the plea was involuntary and should be set aside and remanded to the lower court for rehearing on the issuance of the writ. Id. at 505.

The traditional common law standard for granting writs of error *coram nobis* set forth in Nickels can be summarized as: a fact unknown to the court (and to defendant), which if known would have prevented the entry of judgment. This standard can be easily applied. In sharp contrast, the Third District's analysis is erroneous in that the court focuses exclusively on whether the error is one "of law" or "of fact." This standard is especially confusing when analyzing mixed questions of fact and law like ineffective assistance of counsel or involuntariness of a guilty plea.

For example, in Nickels the Court found determinative that the trial court was not aware of the fact that defendant was entering his plea under the threat of mob violence. Had the trial court known of this coercion it would not have accepted the plea. Instead of simply concluding that involuntariness of a guilty plea is a matter of law and thus cannot be raised by writ, the Court conducted more than a superficial analysis and examined the facts underlying the plea. The Court held that the writ must issue because these facts were unknown to the trial court when it accepted the plea.

Moreover, in Gregersen v. State, 714 So.2d 1195 (Fla. 4th DCA 1998), the Fourth District recently declared that the Third District's holding in Peart that a claim of involuntary plea is an error of law and thus not cognizable in a writ of error *coram nobis* directly conflicts with this Court's

decision in Nickels, where this Court held that an involuntary plea is an error of fact which may be challenged by writ of error *coram nobis*. See also State v. Lackman, 23 Fla. L. Weekly D2353 (Fla. 4th DCA Oct. 14, 1998) (certifying conflict with Peart).

The focus should be on whether there was a fact unknown to the court that had it known would have prevented the entry of judgment. The trial court in the instant case applied the correct standard. It found that had it known that there was an actual conflict of interest in connection with the Public Defender's representation of both defendant and a key prosecution witness it would not have accepted the guilty plea. In sharp contrast, the Third District never considered whether there was a fact unknown to the court which would have prevented the entry of judgment. Instead, it cursorily and generally held that ineffective assistance of counsel was an error of law and could never be raised in a writ of error *coram nobis*. By failing to conduct a more in-depth analysis, the Third District misapplied the standard and managed to break with all federal and state precedent. The Third District's superficial analysis was erroneous.

Furthermore, the Supreme Court in Morgan expanded the scope of the traditional common law standard for granting the writ. The Court held that the writ could be granted to correct a manifest injustice or an error of a "fundamental character." Although this is a more flexible standard, it is still faithful to the traditional purpose of the writ that is to allow courts to correct errors in their own judgments and to serve as the remedy of last resort for litigants suffering from unconstitutional convictions.

Although this Court in Nickels did not consider whether the writ should be used to correct a manifest injustice when there is no other remedy, this Court has afforded trial courts vast discretion when it comes to correcting their own judgments. To illustrate, this Court has held that the State has no right to appellate review of the trial court's grant of the writ of error *coram nobis*.

In Lamb v. State, 107 So. 535 (Fla. 1926), this Court 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. 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 in 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. Neither this Court nor the state legislature has modified or abolished this rule and thus the rule still stands.

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.

Further, this Court has held that, with respect to denial of the writ, the standard of review on appeal is "clear abuse of discretion." Specifically, the Court held in Cole v. Walker Fertilizer Co., 1 So. 2d 864 (Fla. 1941) (reviewing order denying defendants' petition for writ of error *coram nobis* in civil case), that:

> It is settled law that the question of granting a writ of error *coram nobis* is vested in the sound discretion of the trial court and his judgment will not be reversed by this Court unless there is shown to be a clear abuse of discretion.

Id. at 866-67. See also La Rocca v. State, 151 So.2d 64, 66 (Fla. 2d DCA 1963) (noting that "[t]he question of granting the writ rests in the sound judicial discretion of the trial court.").

Petitioner has satisfied both the standard announced in Morgan and the traditional common law standard announced in Nickels. The abysmal legal representation received by Petitioner in this case is an error of the most "fundamental character" and thus warrants *coram nobis* relief. In addition, the trial court specifically found that had it know of the actual conflict of interest it would not have accepted the guilty plea.

B. THE TRIAL COURT'S FINDING OF INEFFECTIVE ASSISTANCE OF COUNSEL WAS NOT A CLEAR ABUSE OF DISCRETION.

After holding several hearings, listening to the testimony of witnesses, and reviewing the applicable case law, the trial court granted Petitioner's writ of error *coram nobis*. The trial court granted the writ because it found Petitioner's right to effective assistance of counsel was violated in that both the Public Defender's Office and the particular Assistant Public Defender assigned to Petitioner represented or had represented a material prosecution witness with interests adverse to Petitioner's. The court found that had it been advised of this conflict as required by Florida Statute and the Constitution it would not have accepted Petitioner's guilty plea.[3]

Further, there is evidence that Petitioner himself would not have entered a guilty plea had he been advised of this conflict. In several, uncontested and uncontroverted affidavits filed with the court, Petitioner attested that these facts were unknown to him and had he been aware of them he would not have pleaded guilty and would have gone to trial.[4]

At the hearing held on May 2, 1997, the court rejected the prosecutor's argument that this witness was not material and did not have interests adverse to those of Petitioner. The court found that an actual conflict of interest was apparent from the exhibits to the Petition. [R.210-11].

At the hearing, defense counsel explained that:

> If someone looks at the Arrest Form appended to the petition, it is uncontroverted that Francisco Jimenez gave a sworn statement, not just a statement. The Arrest Form is very specific and says that this individual gave a sworn statement to the police attesting that he was a key witness, implicating Mr. Wells in the very offense of possession of the firearm, the short barrel rifle.
> On top of that, the State in open court files Discovery and a certification of material witnesses where it listed key critical witness against Mr. Wells as Mr. Jimenez. There is also no question that by that the State Attorney's Office

---

[3] See Transcript of evidentiary hearing held on June 6, 1997, at 129, 131; Record on Appeal ("R") at 380, 382 (expressly finding that the FACT that Petitioner's counsel had represented a material witness for the State in the past and that the Office of the Public Defender had represented this witness on numerous occasions and was representing this witness during the investigation and prosecution of Petitioner's case was UNKNOWN to Petitioner, to his counsel who so testified at the hearing, and to the court, and holding that had it been advised of the conflict it would not have accepted Petitioner's guilty plea).

[4] See Petitioner's Affidavit at ¶ 23; [R.68]; see generally Addendum to Petitioner's/Defendant's Affidavit; [R.137-38].

> put the Public Defender's Office on notice, if they didn't know it, although I think the law doesn't require that they be put on notice.
>
> I think they ought to know who they represent and who they don't, but the State Attorney's Office ten days before the arraignment in court provided the Public Defender's Office with written notification that the Public Defender's Office represented Francisco Jimenez, the key critical witness against Mr. Wells, their other client.

[R.211-12].

The court set forth its finding of an actual conflict of interest in its written opinion granting the writ.

> Mr. Jimenez, who at the time was on probation, has a criminal record which includes arrests and convictions that would have been admissible evidence for impeachment. Mr. Jimenez was represented in these matters on several occasions by the Public Defender's Office and on one occasion by Assistant Public Defender Carlton Bober. In addition to his prior convictions, Mr. Jimenez was actively represented by the Public Defender's Office in two open cases that were pending before the Dade County Circuit Court.
>
> At the time of the arraignment, Mr. Bober represented the Petitioner herein. In addition to the State Attorney's Office having notified the Public Defender's Office of a conflict of interest, Mr. Bober was presented, at the time of the arraignment, with a written statement executed by the witness which contained the substance of Mr. Jimenez's testimony. Mr. Bober took no action in response to the State Attorney's notification. Mr. Bober did not at any point file a conflict of interest as required by Florida Statutes § 27.53. At no point was the Court or the Petitioner made aware of the conflict of interest. Mr. Bober does not recall reading the Court file, which would have contained the notice from the State Attorney's Office.
>
> This Court finds that there was an actual conflict of interest. The witness list which included Mr. Jimenez's name was in the court file. There was notification of an active potential conflict of interest provided to the Public Defender's Office by the State Attorney's Office. Mr. Bober was presented with Mr. Jimenez's statements prior to the taking of the plea. The State's key witness against the Petitioner had in the past been represented by the same office as was representing the Petitioner. In addition, the other "eye witness" was Mr. Jimenez's girlfriend, which gives rise to her questionable bias or at the very least, is a cause for further investigation. Mr. Jimenez was in the middle of two proceedings against him and was at the time on probation. Mr. Bober personally had defended Mr. Jimenez at a prior time. For the foregoing reasons the court has found that there existed an actual conflict of interest at the time of the taking of the Petitioner's plea. Had these facts been known to the Court, the plea would not have been taken at that time. The Court would have appointed a Special Assistant Public Defender. The Petitioner would not have waived, and does not waive this heretofore undisclosed conflict of interest between himself and his attorney.

[R.204-05] (emphasis added).

Furthermore, the court was well aware that the law requires an adverse impact on the representation in addition to there being an actual conflict of interest. At the hearing held on May 2, 1997, the court repeatedly stated that notwithstanding the fact that it found the existence of an actual conflict of interest, it needed to hold an evidentiary hearing to determine whether the conflict adversely affected Petitioner's representation. [R.220-230]. For example, the court stated that:

> So, I still think I need to have a hearing. I think I need to hear from Mr. Bober [Petitioner's former counsel]. I think if you think it's appropriate I may need to hear from the defendant, but I think that there is not always a conflict simply because the office represents the two of them.
>
> If your client intended to enter the plea and would have entered the plea because it was a good deal, then I am not sure that the natural consequences suggests a conflict. In other words, if you walk in and at arraignment he wants to enter a plea, then there is not really a conflict of interest in the sense that you are going to have to depose or cross examine a witness of special knowledge.

[R.220-21]. Further, the court stressed that:

> If neither the lawyer nor the client had knowledge of the conflict and if neither one of them would have done anything differently, then the actual results were not affected and the writ doesn't warrant.

[R.223]. Again, the court repeated:

> I think I need to look at these issues, and it seems to me that the case law really talks about if you are dealing with error *coram nobis*, if the practical effect, that is the outcome would have been different, then I think there may be merit here. If the practical effect would not have been different, then I think the case law is telling me.

[R.227].

At the close of the evidentiary hearing held on June 6, 1997, it was clear that an actual conflict of interest adversely affected Petitioner's representation. Petitioner's former counsel, Mr. Bober, testified that had he known that his Office previously represented and was currently representing Mr. Jimenez, that he had personally represented Mr. Jimenez, and that Mr. Jimenez' interests were adverse to those of Petitioner, he would not have allowed Petitioner to enter a guilty plea until he either waived his right to conflict-free representation or had proper representation. [R.306]. Further, the court held that had it been aware of these facts, it would not have allowed Petitioner to enter the plea. [R.380]. These findings are sufficient to demonstrate an adverse impact on Petitioner's

representation. As a matter of law, prejudice need not be shown.

The trial court applied the correct legal standard in that a defendant who contends that his Sixth Amendment right has been violated, must demonstrate that "an actual conflict of interest adversely affected his lawyer's performance." Cuyler v. Sullivan, 446 U.S. 333, 348 (1980). See also Herring v. State, 23 Fla. L. Weekly S491 (Fla. Sept. 24, 1998)(applying Cuyler); Bouie v. State, 559 So.2d 1113, 1115 (Fla. 1990) (same). The Court in Cuyler explained that unconstitutional multiple representation is never harmless error, and, thus, a defendant need not demonstrate prejudice in order to obtain relief. Cuyler, 446 U.S. at 349-50. See also Volk v. State, 436 So.2d 1064, 1067 (Fla. 5th DCA 1983) (holding that conflict of interest alone warrants reversal and showing of prejudice not required).

The Office of the Public Defender is the functional equivalent of a law firm. Bouie, 559 So.2d at 1115. Different attorneys in the Public Defender's Office cannot represent clients with conflicting interests. Id. Section 27.53 of the Florida Statutes provides that if during the representation of two clients, the Public Defender shall determine that the interests of those accused are so adverse or hostile that they may not be counseled by the same office, it shall be the Public

Defender's duty to move the court to appoint other counsel. § 27.53(3), Fla. Stat. (1963).[5] Further, the statute provides that the court also has the duty to appoint other counsel upon its own motion when the facts developed upon the face of the record and files in the cause disclose such conflict. Id.[6]

Courts have consistently held that an actual conflict of interest arises from the fact that the Public Defender's Office represents both a defendant and a material prosecution witness. In Guzman v. State, 644 So.2d 996 (Fla. 1994), the Florida Supreme Court held that the Public Defender's representation of a defendant and a key prosecution witness resulted in an actual conflict of interest. The Court stressed that:

> We can think of few instances where a conflict is more prejudicial than when one client is being called to testify against another.

Id. at 999.

Likewise, in Bellows v. State, 508 So.2d 1330 (Fla. 2d DCA 1987), the court held that defendant was deprived of effective assistance of counsel when the Public Defender's other client was the State's key witness against defendant. The Bellows court noted that the Public Defender would be forced to defend client Bellows while at the same time cross-examining its other client, the state's witness, during the trial of Bellows. Id. at 1331. The court explained that:

> The key is not whether the defendants are codefendants, but, rather, whether the public defender must serve a dual and adverse stewardship. In the instant case, the public defender was placed in the most difficult position of having to serve a dual and adverse stewardship.

Id. at 1332. The court concluded that the trial court erred when it failed to recognize the conflict and reversed and remanded for retrial. Id.

---

[5] See Cankur v. State, 706 So.2d 944 (Fla. 4th DCA 1998) (holding that trial court improperly denied assistant public defendant's motion to withdraw where public defender certified that there was irreconcilable conflict of interest because his office had previously represented individual identified as state witness).

[6] Cf. Karg v. State, 706 So.2d 124 (Fla. 1st DCA 1998) (holding that when conflict between defendant and trial counsel appears in the record, trial court must appoint conflict-free counsel to represent defendant on motion to withdraw plea).

Furthermore, in Nixon v. Siegel, 626 So.2d 1024 (Fla. 3d DCA 1993), the court held that the conflict of interest which exists when a public defender represents a defendant as well as a prosecution witness, may continue to exist even after the Public Defender's Office concludes its representation of the prosecution witness. Id. at 1025. See also Mayolo v. State, 692 So.2d 939 (Fla. 4th DCA 1997) (reversing denial of motion for post-conviction relief because record did not conclusively refute defendant's allegations that Public Defender's Office had conflict of interest due to its prior representation of state witness). Cf. Lighthouse v. Dugger, 829 F.2d 1012, 1023 (11th Cir. 1987) (stressing that "[a]n attorney who cross-examines a former client inherently encounters divided loyalties.").

The First District recently issued a decision in which it thoroughly discussed the right to a conflict-free attorney and applied it to facts similar to those in the instant case. In Lee v. State, 690 So.2d 664 (Fla. 1st DCA 1997), the First District reversed for a new trial, holding that defendant had not knowingly and intelligently waived his right to the actual conflict of interest that arose from the Public Defender's previous representation of a key witness for the prosecution. The Assistant Public Defender in Lee had informed the court that the Public Defender's Office had recently represented a key witness against defendant and that he personally had also represented the witness. The Assistant Public Defender told the court that he had no memory of his own prior representation of the witness and indicated that he did not believe that it created a conflict of interest. The trial court obtained an on-the-record waiver of the conflict of interest from defendant. Notwithstanding this on-the-record waiver, the First District reversed because the record did not clearly show that defendant knew that he had the right to obtain other court-appointed counsel at the time the trial court accepted the waiver.

After setting forth the law on ineffective assistance of counsel and conflict of interest, the court in Lee declared:

> In this case, there can be no doubt that attorney Loveless [the Assistant Public Defender] and the defendant had an actual conflict of interest. Attorney Loveless had personally represented a primary witness against the defendant in the past and his office had also represented that witness about the time he was assisting law enforcement officers in their effort to obtain a confession from the defendant.

Id. at 667. Further, the trial court in Lee explained how the conflict might affect the Public Defender's cross examination of the government witness and stressed his inability to use any privileged information gained from the Office's past representation of the witness.

The First District rejected the State's argument that defendant had not shown prejudice. The court stressed that: "The assistance of counsel is among those 'constitutional rights so basic to a fair trial that their infraction can never be treated as harmless error.'" Id. at 668 (citing Chapman v. California, 386 U.S. 18, 23 & n.8 (1967)). Moreover, the court explained that:

> When ineffective assistance of counsel is first asserted in a postconviction motion, the defendant must show that the conflict impaired the performance of the defense lawyer. Cuyler v. Sullivan, 446 U.S. at 348. Even then, it is not necessary to show that counsel's deficient performance affected the outcome of the trial. As the Court held in Sullivan, prejudice is presumed. Id. at 349.

Id. at 669.

In the instant case, an actual conflict of interest arose from the Public Defender's previous representation of a key state's government witness against Petitioner, from the Office's representation of the witness in at least two cases during the investigation and prosecution of Petitioner's case, and from the fact that Petitioner's counsel had personally represented this witness in the past. Neither the Assistant Public Defender nor the Assistant State Attorney brought this actual conflict of interest to the attention of the Court or Petitioner. Thus, no one ever explained to Petitioner how the conflict could affect his case or advised him of his right to obtain other court-appointed and conflict-free representation. The trial court's finding that had it been aware of these facts it would not have allowed Petitioner

to enter a plea and would have appointed other counsel was not a clear abuse of discretion.

C. THE ERROR WAS OF SUFFICIENT MAGNITUDE TO JUSTIFY THE GRANT OF THE WRIT.

As previously discussed, courts have held that in order to warrant the extraordinary remedy of *coram nobis* relief the error has to be of a "fundamental character." Generally, courts have held that the violation of the Sixth Amendment right to counsel is such an error. In particular, in the instant case, the representation of Petitioner by the conflicted Assistant Public Defender was so woefully inadequate that in effect no assistance of counsel was provided.

To summarize, on the day that Petitioner entered his guilty plea, his counsel admitted to knowing nothing about the case [R.268-69], to not having reviewed the court file which would have notified him of a conflict of interest and of the fact that Petitioner suffered from psychological problems [R.275], to not having interviewed his client [R.268-69], and to not having investigated any possible defenses [R.311-12] or the applicable sentencing guidelines range [R.320-21].

In addition to the actual conflict of interest previously discussed, the court found at the evidentiary hearing that a combination of factors resulted in Petitioner receiving ineffective assistance of counsel. The court explained:

> Now, maybe there are other times or other circumstances where there is not such a combination of issues that so clearly tells the Court that there was incompetence of counsel, but here I don't just have one thing. I really have a number of things, and I believe that the conflict of interest alone is sufficient. However, in addition to the

> conflict of interest, I have all of these other factors that as I look at the case and just as I sat here today and leafed through Discovery, I saw just a number of things that perhaps had Mr. Bober had the time to reflect or give it some thought when he talked to Mr. Wells, he would have pointed it out to him.

[R.381-82]. Specifically, the court focused on counsel's failure to investigate or raise the defense of drug-induced insanity:

> I do also think that there is the probability of a defense that could have been raised as to insanity, and insanity is a legal defense. It is even a legal defense in this situation.
>
> Obviously, there is other evidence that the State has in its possession in terms of the statements, in terms of the behavior, etcetera, that might have, that they would have rebutted that insanity with, but, clearly, it appears to me that based on defendant's mental history, a legal defense of insanity might have been raised.

[R.382-83].

Moreover, Petitioner's former counsel testified at the evidentiary hearing that had he known that Petitioner had a viable defense of drug-induced insanity he would have discouraged Petitioner against entering a plea of guilty.

> Q. [Defense counsel] Had you seen the notation on the back of the A-form or conferred with Mr. Wells and learned the following, that he had three hospitalizations for drug induced psychosis in the six months before appearing in court, learned that he was under the influence of crack cocaine and heroin at the time of the incident and hallucinating that he was under attack by apparitions, learned that he habitually used cocaine and heroin on a daily basis, had you learned all of that, would you have discouraged the plea of guilty?
>
> A. [Mr. Bober] I can tell you, and I told you when I met with you, that I feel fairly confident that I would have discouraged his plea of guilt, in any event, and the reason was, our office had, as a matter of practice, which I also told you, for clients at arraignment, it is our office policy and

> my practice personally to discourage them from taking a plea at arraignment. It was never in our interest to do so because it didn't give us an opportunity to investigate the case.
>
> Certainly, as your questions poses, had I known of all the reasons why he would have had a valid defense would be all the more reasons why I would have discouraged him from entering a plea of guilty at the time of his arraignment.
>
> Q. [Defense counsel] Do I take your answer to be that had you learned of all of that and known all of that you would have discouraged the plea?
>
> A. [Mr. Bober] Yes, sir. That is what I said.

[R.311-12].

Further, the court at the evidentiary hearing emphasized that Petitioner's Arrest Form (A-Form), attached as an exhibit to the Petition, on which was clearly marked in capital letters the following: "Request psychological evaluation prior to release," was relevant to the defense of drug-induced insanity. [R.307-09]. Petitioner's former counsel did not recall reviewing the Arrest Form which was contained in the court file and did not recall discussing with Petitioner his drug dependency, psychological state, or his prior treatment and/or hospitalization for drug and alcohol abuse. [R.306-07]. Counsel testified that had he reviewed the Arrest Form and subsequently discussed with Petitioner his history of chronic drug abuse he would have discouraged his plea of guilty. [R.311].

The legal defense of drug-induced insanity is described as "insanity super-induced by the long and continued use of intoxicants so as to produce 'a fixed and settled frenzy or insanity either permanent or intermittent.'" Cirack v. State, 201 So.2d 706, 709 (Fla. 1967) (citations omitted). In his affidavit,

Petitioner explains that six months prior to his arrest and on the day of the incident he had used heroin and crack on a daily basis. Petitioner's Affidavit at ¶ 5; [R.66]. Moreover, three times during these six months he was hospitalized for drug-induced psychosis. Id. at ¶¶ 6-10; [R.66]. Furthermore, at the time of the incident he was severely intoxicated and hallucinating, and, as a result, shot himself in the foot and spent sixteen days in the hospital. Id. at ¶¶ 9-10; [R.66]. Thus, in Petitioner's case, drug-induced insanity was a viable defense.

The defense of drug-induced insanity is like the defense of voluntary intoxication in the sense that both involve the ingestion of drugs and/or alcohol. Failure to investigate and raise the defense of voluntary intoxication may be the basis for an ineffective assistance of counsel claim where defendant was drinking or taking drugs at times relevant to the offense. See Scott v. State, 23 Fla. L. Weekly D2048 (Fla. 2d DCA Sept. 2, 1998); Stanley v. State, 703 So.2d 1156 (Fla. 2d DCA 1997); Basinski v. State, 697 So.2d 1015 (Fla. 4th DCA 1997); Elwell v. State, 693 So.2d 1137 (Fla. 1st DCA 1997); Zipperer v. Singletary, 693 So.2d 122 (Fla. 1st DCA 1997); Worden v. State, 688 So.2d 958 (Fla. 4th DCA 1997); Young v. State, 661 So.2d 406 (Fla. 1st DCA 1995); Brunson v. State, 605 So.2d 1006 (Fla. 1st DCA 1992).

In addition to being relevant to the defense of drug-induced insanity, Petitioner's history of chronic drug abuse is relevant to whether Petitioner should have agreed to a plea which included a term of probation. The conditions of probation are typically that one not take drugs. Petitioner violated his probation two days after he entered his guilty plea. Petitioner told the probation officer he was an addict, probation administered a drug test, and Petitioner tested positive for drugs. [R.314]. Petitioner's former counsel testified that he would have discouraged Petitioner from taking the plea had he known about Petitioner's history of chronic drug abuse.

> Q. [Defense counsel] Had you learned that Mr. Wells – had you seen that notation, interviewed him about his hospitalizations, psychological and psychiatric problems, and learned all of that and learned that he was a habitual and daily user of drugs, wouldn't you have also realized and advised Mr. Wells that given his addiction and mental state he would almost certainly violate his probation instantly?
>
> A. [Mr. Bober] . . . So, in response to your question, the answer is yes, notwithstanding all those problems, and especially given all the circumstances that you have just raised had I known them.
>
> Q. [Defense counsel] He would almost certainly have violated his probation instantly; wouldn't he?
>
> A. [Mr. Bober] That is impossible to say, other than I can say certainly that possibility existed, and I would have discouraged him to do so given that history.

[R.312-13].

In contrast to a situation where there is an actual conflict of interest which can never be harmless error, Petitioner must show that the above-described errors of counsel prejudiced him. See Strickland v. Washington, 466 U.S. 668, 693-94 (1984). When defendant challenges a conviction entered after a guilty plea, he "must show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." Hill v. Lockhart, 474 U.S. 52, 59 (1985). The Court in Hill explained that:

> where the alleged error of counsel is failure to investigate or discover potentially exculpatory evidence, the determination whether the error "prejudiced" the defendant by causing him to plead guilty rather than go to trial will depend on the likelihood that discovery of the evidence would have led counsel to change his recommendation as to the plea.

Id. Thus, a court must focus on whether the knowledge of additional information would have led defendant to decline the plea agreement or would have led his attorney to recommend that he do so. Hooper v. Garraghty, 845 F.2d 471, 475 (4th Cir. 1988) (relying on Hill, supra).

Significantly, where the performance of counsel is so inadequate that in effect no assistance of counsel is provided, prejudice is presumed. United States v. Cronic, 466 U.S. 648, 659-60 (1984); Stano v. Dugger, 889 F.2d 962, 967 (11th Cir. 1989). The Supreme Court in Cronic explained that if the circumstances surrounding the representation were such that the likelihood that counsel could have performed as an effective adversary was remote, then ineffective assistance of counsel can be

presumed. 466 U.S. at 660-62.

In the instant case, Petitioner's counsel testified at the evidentiary hearing that had he known of either of the facts relating to the conflict of interest or Petitioner's chronic drug abuse, he would not have recommended that Petitioner enter a guilty plea; in fact, he would have discouraged Petitioner from taking the plea. There is no evidence that Petitioner would have disregarded counsel's recommendation and entered a plea anyway. In fact, Petitioner's unchallenged unrebutted affidavit established that had he known of any of these facts he would not have entered a plea and would have proceeded to trial. The trial court found that had it known of the facts relating to the conflict of interest or Petitioner's chronic drug abuse it would not have accepted a guilty plea. Thus, Petitioner has been prejudiced by counsel's errors.

Finally, a close look at the circumstances surrounding Petitioner's representation demonstrates that the possibility that effective assistance of counsel could have been provided was so remote that prejudice should be presumed.

D. THE ERROR COULD NOT HAVE BEEN RAISED EITHER ON DIRECT APPEAL OR IN ANOTHER POSTCONVICTION PROCEEDING.

Ineffective assistance of counsel generally cannot be raised on direct appeal and instead is properly raised in a postconviction motion or writ. Generally, the record on appeal is not sufficient to support a claim of ineffectiveness and the court needs to hold an evidentiary hearing. These hearings can be held in connection with a postconviction motion, but are not available on direct appeal.

Furthermore, Petitioner cannot file a Rule 3.850 motion because he is no longer in custody. He has, however, complied with Rule 3.850's two-year limitations period. Petitioner filed his writ on January 21, 1997, to vacate the conviction and sentence of this Court dated April 4, 1995.

Thus, Petitioner did not sleep on his rights. He timely raised his claim of error in the only vehicle available to him. The ancient writ is the proper vehicle for raising this claim and the exclusive vehicle.

III. PETITIONER RAISED ADDITIONAL BASES FOR COUNSEL'S INEFFECTIVENESS BEFORE THE TRIAL COURT SUCH AS FAILURE TO INVESTIGATE A VIABLE SEARCH AND SEIZURE ISSUE AND FAILURE TO

ADVISE PETITIONER OF THE SENTENCE THAT HE MOST LIKELY WOULD HAVE RECEIVED HAD HE GONE TO TRIAL AND BEEN CONVICTED.

The trial court found ineffective assistance of counsel due to the actual conflict of interest. Petitioner, however, raised other bases for ineffectiveness. Counsel was ineffective in failing to investigate or raise a significant search and seizure issue and in failing to advise Petitioner of the actual sentence that could have been imposed had he gone to trial and been convicted.

The warrantless search of Petitioner's home violated his constitutional rights and its fruits, i.e. the rifle, should have been suppressed. An ineffective assistance of counsel claim may be based on counsel's failure to move to suppress evidence which results in the entry of an ill-advised plea of guilty. See Williams v. State, 717 So.2d 1066 (Fla. 2d DCA 1998).

While Petitioner was recovering from the self-inflicted gun shot wound in the hospital, the police searched his home without a warrant and found the weapon which was the subject matter of the arrest. Apparently, consent to search was given by "Ms. Arp." The Arrest Affidavit states that: "The shotgun was discovered after its location was pointed out by Ms. Arp (Roommate)." [R.41].

A search conducted pursuant to valid consent is a recognized exception to the warrant and probable cause requirements. Schneckloth v. Bustamonte, 412 U.S. 218, 222 (1973). Consent to search may be given by a third party. United States v. Matlock, 415 U.S. 164 (1974). This third party, however, must either have the authority to consent on behalf of defendant, Matlock, supra, or must reasonably appear to have authority to do so, Illinois v. Rodriguez, 497 U.S. 177 (1990). A third party's authority to consent rests "on mutual use of the property by persons generally having joint access or control for most purposes, so that it is reasonable to recognize that any of the co-inhabitants has the right to permit the inspection in his own right and that the others have assumed the risk that one of their number might permit the common area to be searched." Matlock, 415 U.S. at 171, n.7. Furthermore, the Florida Supreme Court in Silva v. State, 344 So.2d 559 (Fla. 1977), explained that:

> Whether or not an area searched is under the joint dominion and control of the third party consenting has been a crucial question in some cases. These cases have generally been decided on the basis of the individual's reasonable expectation of privacy in the area, whether others generally had access to the area, and/or whether the objects searched were the personal effects of the

individual unavailable to consent.

Id. at 563.

In the instant case, Ms. Arp was the roommate of a boarder (Mr. Jimenez) who had rented a room in Petitioner's home on a month-to-month basis. Such facts scream "invalid consent." Petitioner's counsel, however, never investigated the issue of whether there was a valid consent to search. In fact, neither Ms. Arp nor her boyfriend, Mr. Jimenez, had the authority to give consent to the police to search Petitioner's home or to seize any Petitioner's property. [R.68].

At the evidentiary hearing, the trial court focused on the actual conflict of interest and the defense of drug-induced insanity and not the search and seizure issue. Thus, Petitioner's counsel never had the opportunity to testify that had he known of the search and seizure issue he would not have recommended a guilty plea. Importantly, however, Petitioner in his affidavit testified that had he known of that he had a viable search and seizure issue he would not have entered a guilty plea. [R.138]. Further, Petitioner was prejudiced by counsel's failure to raise the issue of invalid consent because the search produced the weapon that Petitioner was charged with illegally possessing.

In addition, Petitioner's counsel never advised him of the sentence that he most likely would have received had he gone to trial. Considering the circumstances surrounding the crime, i.e. that Petitioner shot himself in the foot and that Petitioner had no prior record, he most likely would have received no more than the high end of the applicable sentencing guidelines range of 22 months. [R.319]. At the time Petitioner entered his guilty plea, however, he was of the erroneous belief that if he had not pled guilty, had gone to trial, and had been convicted, he would have received a sentence of imprisonment of 15 years. At the plea colloquy, the following exchange took place:

> THE COURT: Do you understand that this case is punishable by a maximum of 15 years in the state prison?
>
> THE DEFENDANT: Yes, that's where you got me there.

[R.59].

At the evidentiary hearing, former counsel admitted that it was highly unlikely that if convicted Petitioner would receive a fifteen-year sentence and that had he discussed the guidelines range with Petitioner at the time of plea he would have told him that he would likely be facing the

top of the guidelines range, that is 22 months. [R.320]. Counsel, however, did not recall discussing the applicable guidelines range with Petitioner. [R.320-21].

Failure to advise Petitioner of the sentence that he most likely would have received had he gone to trial and been convicted constitutes ineffective assistance of counsel. See United States v. Gordon, 156 F.3d 376 (2d Cir. 1998); Kelly v. State, 712 So.2d 780 (Fla. 2d DCA 1998); Brim v. State, 696 So.2d 1320 (Fla. 1st DCA 1997); Choi v. State, 692 So.2d 973 (Fla. 2d DCA 1997). See also State v. Leroux, 689 So.2d 235, 237 (Fla. 1996). Further, Petitioner stated in his affidavit that had he known that the applicable sentencing guidelines would have controlled the actual sentence, he would not have entered a plea of guilty. [R.193].

IV. PETITIONER ALSO ARGUED BEFORE THE TRIAL COURT THAT, AS A CHRONIC DRUG USER, HE WAS UNDER THE INFLUENCE OF DRUGS WHEN HE ENTERED HIS PLEA AND THUS HIS GUILTY PLEA WAS NOT KNOWING AND VOLUNTARY.

Petitioner raised before the trial court the claim that drugs impaired his ability to understand the nature of the charges against him and the consequences of his plea and thus his plea was not knowing and voluntary. An involuntary guilty plea is a proper ground for granting a writ of error *coram nobis*. See Nickels, supra. See also Holloway v. United States, 393 F.2d 731 (9th Cir. 1968). See generally Romualdo Eclavea, Annotation, *supra,* 38 A.L.R.Fed 617 at § 9 (1978) (collecting cases).

The trial court did not address this claim in its written opinion nor did it allow Petitioner's counsel to argue this claim or question former counsel in connection with this claim at the hearings. Apparently, the court rejected this claim because it did not remember Petitioner being intoxicated on the day he entered his plea. At the hearing held on May 2, 1997, the court stated:

> I am not moved by the issue of whether or not your client was under the influence at the time he took the plea, and that's because the Court had the ability to see his demeanor and to determine that he was competent at that moment in time, but I am concerned about the conflict of interest.

[R.209-10]. Further, at the evidentiary hearing, when Petitioner's counsel attempted to question former counsel about Petitioner's condition on the day he entered his plea, the court warned:

> THE COURT: Mr. Bronis, I am not going to let you go into that because I have already ruled as to your first ground, that that is without merit. So I don't think it's relevant for the purposes of this hearing.
>
> I think that our inquiry for the purpose of this hearing should be restricted to the incompetence of counsel situation and also the possibilities of investigation and possible defense.

[R.317-18].

The court, however, did allow questioning relating to the defense of drug-induced insanity, this testimony sets forth Petitioner's history of chronic drug abuse. [R.311-12]. To summarize, Petitioner was a chronic drug and alcohol abuser who had been hospitalized in the past for drug abuse and who had enrolled in drug treatment programs. While under the influence of drugs, Petitioner suffered from hallucinations. In fact, on the day of the incident which led to his arrest,

Petitioner, who had been injecting cocaine and heroin, hallucinated that persons were breaking into his home and armed himself with a gun. Further, the detective who filled out the Arrest Affidavit requested that a psychological evaluation be performed PRIOR TO RELEASE. [R.42] From the time he was released from jail up to and including the day he entered his guilty plea, Petitioner was under the influence of narcotics.

Petitioner continued to abuse drugs after he entered his guilty plea. Just two days after he was placed on probation, Petitioner admitted taking drugs to his probation officer and tested positive for cocaine and heroin. As a result, he was arrested for violation of probation. [R.71-73]. Petitioner informed the probation officer that he was a life-long drug abuser and requested drug treatment. Id. In addition, Petitioner explained to the probation officer that he was an alcoholic as well as a heavy drug user and had been using drugs for over twenty years. Id. Probation recommended drug treatment in light of Petitioner's extensive drug history. Id.

Moreover, Petitioner's former counsel testified that had he reviewed the Arrest Form in the court file he would have questioned Petitioner about his physical and mental state. [R.306-09]. Further, counsel testified that had he conferred with Petitioner and learned about his history of chronic drug abuse, including hospitalizations, he would have discouraged Petitioner from entering a guilty plea. [R.311-12].

A guilty plea is not knowing and voluntary if it was entered while a person was under the influence of drugs or alcohol to such an extent that his judgment was impaired. See State v. Reutter, 644 So.2d 564 (Fla. 2d DCA 1994); Harrison v. State, 562 So.2d 827 (Fla. 2d DCA 1990); Campbell v. State, 488 So.2d 592 (Fla. 2d DCA 1986). See also United States v. Rossillo, 853 F.2d 1062 (2d Cir. 1988); United States v. Cole, 813 F.2d 43 (3d Cir. 1987); Schnautz v. Beto, 416 F.2d 214 (5th Cir. 1969); Manley v. United States, 396 F.2d 699 (5th Cir. 1968).

The facts in United States v. Valentino, 201 F. Supp. 219 (D.C.N.Y. 1962), are similar to those in the instant case. There, the court granted a petition for writ of error *coram nobis*, holding that the evidence showed that at the time of the imposition of sentence petitioner's mental faculties and capacity were so substantially impaired that he was unable to understand the proceedings against him

or to consult with counsel and assist in his defense.

The court's decision in Vonderschmidt v. State, 81 N.E.2d 782 (Ind. 1948), is also instructive. There, the Indiana Supreme Court reversed the denial of the writ of error coram nobis and remanded with instructions that the trial court grant the writ. The court held that petitioner's guilty plea was not knowingly and voluntarily entered because at the time of the plea "he was in a pitiful state both physically and mentally produced by prolonged and continued intoxication." Id. at 784. The petitioner had been drinking heavily and continuously for about a week before the date of his arraignment. Id. at 783. The court stressed that petitioner's on-the-record waiver of his constitutional rights was meaningless because "it is quite improbable, in that condition, that he had any idea what was said to him or what he was saying." Id. at 784. Further, the court stated that: "To advise him of his constitutional rights when he was in the mental condition as conclusively shown by the evidence, was a meaningless ceremony, amounting to a denial of those rights." Id.

The issues of involuntariness of a guilty plea and ineffective assistance of counsel become intertwined when counsel fails to inform the court of a defendant's intoxicated condition at the plea hearing. See Zipperer v. Singletary, 693 So.2d 122 (Fla. 1st DCA 1997) (holding that trial counsel's failure to inform court that defendant was under the influence of psychotropic medication when he entered plea and failure to inform defendant that he had viable defense of voluntary intoxication constituted sufficient claims for post-conviction relief based upon ineffective assistance of counsel); Jones v. State, 421 So.2d 55, 57 (Fla. 1st DCA 1982) (holding that attorney's failure to advise court of defendant's sedated condition may invalidate guilty plea as one having been made involuntarily); Capshaw v. State, 362 So.2d 429 (Fla. 2d DCA 1978)(same). Counsel's failure to inform the court of Petitioner's intoxicated condition at the hearing and history of drug abuse constituted ineffective assistance of counsel.

In Sanders v. United States, 373 U.S. 1 (1963), the Supreme Court held that a court could not reject a petitioner's argument, made in a § 2255 motion, that he was incompetent when tried simply because the file and record of the case did not reveal that he was intoxicated. Id. at 19. The court stressed that the record would not necessarily reflect the fact of petitioner's intoxication. The Court

explained that: "However regular the proceedings at which he signed a waiver of indictment, declined assistance of counsel, and pleaded guilty might appear from the transcript, it still might be the case that petitioner did not make an intelligent and understanding waiver of his constitutional rights." Id. at 19-20 (citations omitted). The Court remanded for an evidentiary hearing because the facts upon which petitioner's claim was predicated were outside of the record. Id. at 20.

Similarly, in Gunn v. State, 379 So.2d 431 (Fla. 2d DCA 1980), the court held that a defendant is entitled to an evidentiary hearing on the allegation that his plea was involuntary because he was intoxicated at the time it was entered, unless the record "conclusively" refutes defendant's allegation. Id. at 432. See also State v. Leroux, 689 So.2d 235 (Fla. 1996); Long v. State, 701 So.2d 409 (Fla. 1st DCA 1997); Bass v. State, 697 So.2d 585 (Fla. 4th DCA 1997).

In sum, Petitioner submits that the law requires an evidentiary hearing on the issue of whether he was under the influence of drugs to such an extent that his guilty plea was not knowing and voluntary. Not only does the record not conclusively refute Petitioner's allegation, documents in the court file actually support Petitioner's allegation.

CONCLUSION

In an effort to limit caseloads and in furtherance of "finality," the Third District has stripped trial courts of their discretion to correct manifest injustice and errors of fundamental character and has denied access to the courts to those who have served their sentences. This Court should restore the availability of the ancient writ of error *coram nobis* to persons in the Third District who have served their sentences yet who can show that there conviction is invalid. Specifically, Petitioner respectfully requests that this Court reverse the Third District's opinion, which vacated the trial court's order granting the writ of error *coram nobis*. Petitioner maintains that the writ should issue and that his conviction should be vacated and his guilty plea set aside.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Brief was mailed this 24th day of November, 1998 to MICHAEL J. NEIMAND, Assistant Attorney General, Office of the Attorney General, Department of Legal Affairs, Rivergate Plaza, Suite 950, 444 Brickell Avenue, Miami, Florida 33131.

_____
Beatriz C. Cosculluela, Esquire