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IN THE SUPREME COURT OF FLORIDA

CASE NO. 92,928

FILED
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DEC 24 1998
CLERK, SUPREME COURT
By
Chief Deputy Clerk

ROBERT H. WELLS,

Petitioner,

-vs-

THE STATE OF FLORIDA,

Respondent.

ON PETITION FOR DISCRETIONARY REVIEW

BRIEF OF RESPONDENT ON THE MERITS

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INTRODUCTION

The Respondent, the **STATE OF FLORIDA**, was the Appellee below. The Petitioner, **ROBERT H. WELLS**, was the Appellant below. The parties will be referred to as the State and the Petitioner. The symbol "R" will designate the record on appeal and the symbol "A" will designate the Appendix to this brief.

STATEMENT OF TYPE SIZE AND FONT

The size and style of type used in this brief is 12 point Courier New.

STATEMENT OF THE CASE AND FACTS

On January 18, 1995, Petitioner entered a guilty plea to possession of a short barreled shotgun. The relevant portions of the plea colloquy follow:

> THE COURT: Robert Wells.
>
> [PROSECUTOR]: The State is filing a felony information charging unlawful possession of a short barreled rifle, short barreled shotgun or machine gun.
>
> THE CLERK: Written plea of not guilty by the P.D.
>
> THE COURT: Is that Mr. Wells? Is there an offer?
>
> ....
>
> [PROSECUTOR]: The police officers in this case are looking for maximum punishment which would be 18 months.
>
> THE COURT: What are his guidelines?
>
> [PROSECUTOR]: In months, 18 months state prison is his guideline.
>
> ....
>
> MR. BOBER [Defense counsel]: Not knowing anything about the case, I am now speaking to Mr. Wells. He has no prior record.
>
> Withhold and some kind of probation, he said that that could be --
>
> Is that going to resolve the case?
>
> THE COURT: Withhold and 18 months probation, special condition he gives up the gun and shall not possess any other guns.
>
> Pass.
>
> ....

THE COURT: Okay.
On Robert Wells on our arraignment calendar, do we have that resolved?

....

MR. BOBER: No, we don't -- I've been talking to the -- I've been talking to several other people.

....

MR. BOBER: It's going to have to go forward.
I've spoken with the officer and we have no problem.
We're asking that man be taken off calendar.
I spoke with the officer as well as the defendant.

....

THE COURT: They have not been arraigned.

[PROSECUTOR]: It's been filed and I have discovery if we can arraign him.

....

[PROSECUTOR]: Judge, as to Mr. Wells on page 44, we did not formally arraign him.

THE COURT: I guess it's not -- well, no, Mr. Bober didn't have time to talk to him.

MR. BOBER: Mr. Wells, we're talking to him right now.

THE COURT: Mr. Bober, if you could take care of it, because I want to go to --

....

THE COURT: Okay, Mr. Wells.

MR. BOBER: Mr Wells.
Mr. wells has no prior records. He asked me to inquire to the Court --

THE COURT: I offered a withhold.

MR. BOBER: That wasn't the problem. He intends to move out of the Florida area.

In this case, basically he believed someone was trying to burglarize his house so he took out a shotgun.

THE COURT: Well, you're not supposed to have a short barreled shotgun anywhere.

MR. BOBER: He intends to leave Florida. He has injuries through his own doing. He asked for credit for time served.

THE COURT: You have a police officer who asked for five years in state prison, I think I can't do that.

....

THE COURT: Now, what about Mr. Bober, how are we doing over there?

MR. BOBER: I think we're ready, Judge.

[PROSECUTOR]: We need to arraign Mr. Wells.

THE COURT: Well, no, you don't if the plea entered is guilty, then that's the plea.

[PROSECUTOR]: For the record I provided discovery because counsel asked me for it.

THE COURT: I understand.

MR. BOBER: Page 44, top of the page, Wells.

I conveyed the Court's offer to Mr. Wells, withhold of adjudication, 18 months of probation, and he wishes to accept the plea.

THE COURT: Mr. Wells, you are charged with possession of a short barreled shotgun.

Sir, how do you plead?

THE DEFENDANT: Guilty.

THE COURT: Do you want to enter this plea?

MR. BOBER: Plea of guilty in exchange for withhold of adjudication, 18 months for probation and forfeiture of a firearm.

....

THE COURT: Before I can accept your plea of guilty I must ascertain if your plea is freely and voluntarily given and knowingly given.

Do you understand that by entering into this plea of guilty to this charge you give up your right to trial by jury, you waive or give up the right to question witnesses against you or to have Mr. Bober, your attorney, do that in your behalf?

THE DEFENDANT: Yes.

THE COURT: You waive and give up the right to make the State prove the case against you beyond and to the exclusion of every reasonable doubt to prove you guilty?

THE DEFENDANT: Yes.

THE COURT: You waive or give up your right to remain silent?

THE DEFENDANT: Yes.

THE COURT: You waive or give up the right to present witnesses to testify in your behalf?

THE DEFENDANT: Yes.

THE COURT: You waive or give up your right to appeal?

THE DEFENDANT: Yes.

THE COURT: Has anyone forced you or threatened you at any time enter into this

plea against your will?

THE DEFENDANT: No.

THE COURT: You're giving up these rights that I explained to you freely and voluntarily?

THE DEFENDANT: Yes.

THE COURT: Other than what's been said here has anyone promised you anything to condition your plea?

THE DEFENDANT: No.

THE COURT: This is your arraignment and you've only had a short time with Mr. Bober.
Do you feel you had sufficient time to speak with your attorney in order to make an informed decision about the case?

THE DEFENDANT: Yes.

THE COURT: Are you satisfied with his services?

THE DEFENDANT: Yes.

THE COURT: Are you today under the influence of drugs or alcohol?

THE DEFENDANT: No.

THE COURT: What's the level of your education?

THE DEFENDANT: I have two Master's Degrees.

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.

THE COURT: Stipulate to the arrest form?

> MR. BOBER: Yeah, Judge.
> I've indicated to Mr. Wells, that it's all new, the A-form hasn't been --
> The discovery that's been handed to me I would stipulate.
>
> THE COURT: The arrest form indicates Mr. Wells was inside his residence, that he heard somebody break in and he grabbed his shotgun and in so doing he injured himself and the firearm was examined by MVPD Criminal Support.
> It was sawed off at the top on the barrel and it does seem to fit the criteria of being a sawed-off shotgun.

(R. 87-93). Pursuant to that plea, the trial court entered an order withholding adjudication and placing Petitioner on probation for eighteen (18) months with, *inter alia,* a special condition that the shotgun be forfeited. (R. 94, 9-10). Petitioner's sentencing guidelines scoresheet reflects a prison sentencing range of 13.5 to 22.5 months with a recommended sentence of 18 months in state prison. (R. 11-12).

On January 23, 1995, the State filed an affidavit of violation of probation alleging that Petitioner violated his probation by testing positive for illegal drugs on January 20, 1995. (R. 71-73, 104-105). The trial court, following a hearing, revoked Petitioner's probation, entered adjudication of guilt and imposed sentence of 364 days in jail with a special condition that Petitioner successfully complete the TASC program. (R. 5). On July 27, 1995 the court granted Petitioner's motion for early termination of his jail sentence. (R. 5).

On January 21, 1997, approximately eighteen (18) months after Petitioner completed his jail sentence, Petitioner filed a Sworn Petition for Writ of Error Coram Nobis in the trial court seeking to vacate his conviction because he had been unable to secure a teaching position in Georgia as a result of that conviction. (R. 17-73). Petitioner claimed involuntary plea in support of his petition. In support of his claim, Petitioner alleged that he was under the influence of drugs at the time that he entered the plea and that he was denied the effective assistance of trial counsel.

As the first allegation on support of his claim of involuntary plea, Petitioner alleged that he was a chronic drug abuser and was under the influence of drugs when he entered the plea. As facts to substantiate that allegation, Petitioner, by sworn affidavit, claimed that he was a chronic drug abuser, had been hospitalized for drug abuse, had been up all night injecting cocaine prior to entering his plea, and had smoked "some powerful crack cocaine" just before he appeared in court to enter the plea. (R. 65-69).

As the second allegation in support of his claim, Petitioner alleged that his trial counsel's performance was constitutionally deficient. Petitioner cited three instances of alleged deficient performance of trial counsel. As the first instance, Petitioner claimed that a conflict of interest existed within the Public Defender's Office because that office also represented a material State's witness, his ex-roommate Francisco Jiminez. In support of

this claim, Petitioner cited to the arrest affidavit which indicated that Francisco Jiminez had given a sworn statement to the police that he had observed Petitioner in possession of the short-barreled shotgun, and to a letter allegedly written by the Office of the State Attorney to the Public Defender's Office giving notice that the prosecutor intended to depose a Francisco Jiminez who was then in the county jail and was apparently represented by the Public Defender. (R. 31-34,41-42,45,47-49). Petitioner claimed that Mr. Jiminez's interests were so adverse and hostile that to his own that the appointment of different counsel was mandated. (R. 18).

As the second instance of alleged deficient performance, Petitioner claimed that his counsel failed to investigate the circumstances surrounding the seizure of the shotgun. Petitioner claimed that the arrest affidavit indicated that the police seized the shotgun after Ms. Arp, a month-to-month tenant residing at petitioner's house, pointed out its location to the police. Petitioner claimed that Ms. Arp did not have the authority to consent to the search, and as such, his counsel should have investigated and sought to suppress the shotgun by raising a search and seizure issue. (R. 34-36).

As the third instance of alleged deficient performance, Petitioner claimed that his counsel failed to raise the complete defense of drug induced insanity. Petitioner claimed that he was

a chronic drug abuser and was hallucinating on the day of the shooting incident. Petitioner claimed that the shooting was the result of the hallucination.

The State filed a Response to Petitioner's petition. (R. 74-112). In that response, the State argued that Petitioner's allegations failed to meet the requirements for a writ of error coram nobis. Specifically, that Petitioner had not alleged any facts that were not known, nor could have been discovered with the exercise of due diligence, by him or his counsel at the time that he entered the plea. The State argued further that Petitioner's allegations failed to meet the requirements for a writ of error coram nobis also because Petitioner did not allege any facts that were of such a vital nature that had they been known by the trial court, they conclusively would have prevented the entry of judgment.

Petitioner filed a Reply to the State's Response. (R. 113-129). In that reply, Petitioner argued that the writ of error coram nobis is available to correct a "defect of process", and that his allegation of ineffective assistance of counsel was a claim of "defect of process". (R. 114). Petitioner claimed further that his sworn affidavit was evidence that the facts on which he relied were not known by him at the time that he entered the plea, and that his counsel and the prosecutor were aware of the conflict of interest. (R. 115-118).

On May 2, 1997, the trial court heard argument on the petition. (R. 207-235). At that time, the court indicated that Petitioner's claim that he was under the influence of drugs at the time that he entered the plea was without merit. (R. 209). The court, however, found merit in Petitioner's claims concerning the alleged conflict of interest and the failure to investigate the drug induced insanity defense. (R. 9-10). Consequently, the court found that an evidentiary hearing was necessary to determine whether and to what extent Petitioner was prejudiced by the apparent conflict; to determine "whether the lawyer would have counseled him differently, whether the lawyer even had knowledge of the conflict." (R. 222).

On May 23, 1997, Respondent filed an Emergency Petition for Writ of Certiorari in the Third District Court of Appeal seeking to prohibit the trial court from conducting the evidentiary hearing. On May 27, 1997, the Third District denied the petition without prejudice to review the final order.

On or about May 29, 1997, Petitioner filed an addendum to his affidavit. (R. 137-138). By that addendum Petitioner alleged that had he known of the alleged conflict of interest within the Public Defender's Office, he would not have waived the conflict and would have rejected the plea offer and proceeded to trial.

At the evidentiary hearing, Mr. Bober testified that he had no independent recollection of Petitioner's plea hearing. (R. 258-

259). Mr. Bober conceded that the trial court records reflected that the Public Defender's Office was appointed to represent Petitioner on December 30, 1994 and that Petitioner entered his plea at arraignment on January 18, 1995. (R. 260-266). Mr. Bober conceded further that the transcript reflected that at the time the case was called he informed the court that he did not know anything about the case. (R. 268).

Mr. Bober testified that he had no knowledge of whether the Public Defender's Office conducted any investigation of Petitioner's case or interviewed Petitioner between December 30th and January 18th. (R. 266-267). He testified further that he had no independent recollection of whether the letter from the Office of the State Attorney to the Public Defender's Office indicating that the Public Defender represented Francisco Jiminez and that Mr. Jiminez was a material State's witness was in the court file, or that he in fact saw the letter, at the time of Petitioner's arraignment. (R. 273-275). Mr. Bober acknowledged that the State provided discovery to him at Petitioner's arraignment which indicated that Mr. Jiminez had given a statement to the police implicating Petitioner in the offense and that he was a material State's witness. (R. 278-280).

Petitioner presented evidence that Mr. Bober represented Mr. Jiminez at a plea hearing on July 6, 1993. (R. 148-149, 280-282)In that case, Mr. Jiminez entered a plead to credit for time

served, 53 days. (R. 148). However, Mr. Bober testified that he had no recollection of ever representing Mr. Jiminez. (R. 280). Mr. Bober testified further that he had no independent recollection of whether he reviewed the State's discovery packet or Petitioner's court file prior to the arraignment. (R. 285). Mr. Bober conceded that had he been aware of the existence of a conflict he would have discussed it with Petitioner and brought it to the attention of the court. (R. 286). He testified that he had no independent recollection of ever discussing the Public Defender's representation of Mr. Jiminez with Petitioner. (R. 289). He testified further that he would have discussed the prior representation of Mr. Jiminez with Petitioner if he was aware of it and was in possession of any information from that prior representation that would adversely affect his representation of Petitioner. (R. 289).

Petitioner presented additional evidence that Mr. Jiminez was arrested on the same day that the Public Defender's Office was appointed to represent Petitioner and that the Public Defender's Office was appointed to represent Mr. Jiminez two days after his arrest. (R. 291-295, 151-155). The two cases were misdemeanors, petty thefts. (R. 361-362, 151-156). Petitioner also presented evidence that a bench warrant was issued for Mr. Jiminez at the same time that Petitioner's case was being investigated by the police, and that Mr. Jiminez's cases were resolved by plea while

Petitioner's case remained pending. (R. 294-301) Mr. Jiminez's cases were resolved by plea to probation on January 4, 1995. (R. 360). Nevertheless, Mr. Bober testified that he would not have certified a conflict of interest unless he was possessed of information from the representation of Mr. Jiminez that would adversely affect his representation of Petitioner. (R. 301-301). He testified that he did not certify a conflict of interest or discuss the prior representation of Mr. Jiminez with Petitioner because he was not aware of the potential conflict or of the prior representations of Mr. Jiminez. (R. 305).

On cross-examination Mr. Bober testified that although he did not specifically remember Petitioner's case, from his review of the transcript he remembered that Petitioner wanted to resolve his case at arraignment and that Petitioner wanted to leave Florida. (R. 356). He testified further that it was not his practice, nor the practice of the Public Defender's Office, to encourage defendants to enter pleas at arraignment where the defendants are not in custody, or to encourage defendants to plead to probation. (R. 355). Mr. Bober testified that although he was unaware of the potential conflict, he probably would have gone forward with the plea if, after discussing it with Petitioner, Petitioner still wanted to plead at arraignment. (R. 363).

The court found that an actual conflict of interest existed within the Public Defender's Office where that office previously

represented a key State's witness. The court found further that Petitioner was denied his Sixth Amendment right to counsel where Mr. Bober failed to certify the conflict. Based on its finding of an actual conflict of interest, the court ruled that Petitioner's plea was involuntary where Petitioner did not waive the conflict and that it would not have accepted Petitioner's plea had it known of the conflict. (R. 203-206).

The State then appealed to the Third District. After the cause was briefed and argued, the Court held citing to its recent decision in *Peart v. State*, 705 So. 2d 1059 (Fla. 3d DCA 1998)(en banc), that coram nobis does not lie to set aside a conviction on a guilty plea because of alleged ineffective assistance of counsel. The Court did not pass upon the substantive correctness, or lack of it, of the order below. The Court then reversed the judgment and remanded the cause with directions to dismiss the petition. (A. 1-2).

Petitioner then sought the discretionary review of this Court. On October 30, 1998, this Court accepted jurisdiction and dispensing with oral argument.

QUESTION PRESENTED

WHETHER CORAM NOBIS IS A LIMITED REMEDY FOR INDIVIDUALS WHO ARE NOT IN CUSTODY, HAVE A NEWLY DISCOVERED EVIDENCE CLAIM OR AN ERROR IN FACT THAT WOULD HAVE CONCLUSIVELY PREVENTED THE TRIAL COURT FROM ENTERING THE JUDGMENT AND FOR WHICH ANOTHER REMEDY NEVER EXISTED?

A

IS CORAM NOBIS RELIEF AVAILABLE TO VACATE THE PLEA OF A DEFENDANT WHO FIRST FEELS THE COLLATERAL CONSEQUENCES OF HIS PLEA AFTER HE IN NO LONGER IN THE STATE'S CUSTODY?

II

ASSUMING ARGUENDO THAT CORAM NOBIS RELIEF IS AVAILABLE TO VACATE THE PLEA OF A NON-CUSTODIAL DEFENDANT WHO FIRST FEELS THE COLLATERAL CONSEQUENCES OF HIS PLEA AFTER HE IN NO LONGER IN THE STATE'S CUSTODY, DID THE TRIAL COURT ABUSE ITS DISCRETION IN GRANTING CORAM NOBIS RELIEF?

SUMMARY OF THE ARGUMENT

The purpose of the writ of error coram nobis is to enable a party against whom a judgment has been rendered to gain relief from the judgment by applying to the same court in which the judgment was rendered. It is brought to show an error in fact, defect in process, default in performance of duty by ministerial officers, and other matters none of which are apparent from the record. The showing must be such that if the matters shown had been before the trial court when the judgment was entered, the trial court would have been precluded from entering the judgment. The party seeking the writ must have no other remedy.

Thus a claim that a plea was involuntary based on ineffective assistance of counsel is not the proper subject for a coram nobis petition where the defendant was in custody after the plea. Coram nobis is also not available since ineffective assistance of counsel for failing to advise a defendant of a potential conflict in representation is not a defect of process.

The State has a right to appeal the granting of a petition for writ of error coram nobis because the claim brought by the writ is in fact a postconviction claim. Consequently, when used to raise a claim cognizable in a motion for postconviction relief, the petition for writ of error coram nobis is in effect a motion for postconviction. The State clearly has a right to appeal a ruling on a motion for postconviction relief.

The trial court abused its discretion in granting Petitioner's petition for writ of error coram nobis because Petitioner's allegations and proof failed to satisfy the requirements for a writ of error coram nobis. Petitioner did not allege or prove any facts which conclusively established that he is factually innocent of the crime for which he entered the plea, nor did he allege or prove any facts that were unknown to him or could not have been discovered with the exercise of due diligence, at the time that he entered the plea.

The trial court abused its discretion in granting the writ also because Petitioner did not prove that an actual conflict of interest adversely affected his counsel's performance. Nor did Petitioner prove that his decision to enter the plea was in any was connected with, or influenced by, the alleged conflict of interest.

The trial court did not abuse its discretion in summarily denying Petitioner relief on his claim that his trial counsel was ineffective for failing to investigate a possible search and seizure claim. Petitioner relinquished his Fourth Amendment right to the evidence when he gave it to another person to hide.

The trial court also did not abuse its discretion in summarily denying Petitioner relief on his claim that his plea was involuntary because he was under the influence of drugs when he entered the plea. Petitioner's own statement during the plea colloquy refutes his claim. Petitioner's responses to the court

during the plea colloquy also refutes his claim.

ARGUMENT

I

CORAM NOBIS IS A LIMITED REMEDY FOR INDIVIDUALS WHO ARE NOT IN CUSTODY, HAVE A NEWLY DISCOVERED EVIDENCE CLAIM OR AN ERROR IN FACT THAT WOULD HAVE CONCLUSIVELY PREVENTED THE TRIAL COURT FROM ENTERING THE JUDGMENT AND FOR WHICH ANOTHER REMEDY NEVER EXISTED.

The purpose of the writ of error coram nobis is to enable a party against whom a judgment has been rendered to gain relief from the judgment by applying to the same court in which the judgment was rendered. It is brought to show an error in fact, defect in process, default in performance of duty by ministerial officers, and other matters none of which are apparent from the record. The showing must be such that if the matters shown had been before the trial court when the judgment was entered, the trial court would have been precluded from entering the judgment. The party seeking the writ must have no other remedy. *Russ v. State*, 95 So. 2d 594, (Fla. 1957).

In *Richardson v. State*, 546 So. 2d 1037 (Fla. 1989) this Court recognized that Florida Rule of Criminal Procedure 3.850 has absorbed many of the claims traditionally brought under habeas corpus and coram nobis. This Court found the a Rule 3.850 motion is the appropriate place to bring newly discovered evidence claims since it is one of the exceptions to the two year time limitation

for bringing claims under the rule where it is alleged that the facts upon which the claim is predicated were unknown to the movant or his attorney and could not have been ascertained by the exercise of due diligence. This Court then held that the only currently viable use for the writ of error coram nobis is where the defendant is no longer in custody, thereby precluding the use of Rule 3.850 as a remedy. Therefore, errors of fact which are newly discovered as contemplated by Rule 3.850, unascertainable by the exercise of due diligence, are those that are cognizable by writ of error coram nobis.

The second area covered by coram nobis is defect of process. This area also has its counterpart in Rule 3.850 and can heard under the exception to the two-year time limitation for bringing claims under the rule when the fundamental constitutional right asserted was not established within the period provided for and has been held to apply retroactively. In *Weir v. State*, 319 So. 2d 80 (Fla. 2d DCA 1975) a writ of error coram nobis was granted where the defendant was no longer in custody and he alleged his *Gideon v. Wainwright*, 372 U.S. 335 (1963) right to counsel was violated. The Court found that the right to appointed counsel in felony prosecutions is a fundamental right with retroactive application. Based on defect of process, and not ineffective assistance of counsel, the writ was granted. The writ was granted because not only was the defendant not in custody but when he was in custody

the right to counsel did not exist and therefore the defendant had no other remedy.

The third area covered by coram nobis is to correct an error in the court's record caused by a default in the performance of a duty by a ministerial officer. In *Malcolm v. State*, 605 So. 2d 945 (Fla. 3d DCA 1992) the Court held that when a clerk misperforms a ministerial duty by recording the wrong judgment of conviction, coram nobis was appropriate, regardless of due diligence, to correct a patent error in the record caused by the clerk.

The fourth area covered by coram nobis, all other matters not apparent from the face of the record, has been absorbed by Rule. 3.850. *Richardson v. State*, 546 So. 2d 1037 (Fla 1989)(claims based on alleged knowing use of perjured testimony and claims of suppression of evidence by the prosecution are cognizable in Rule 3.850 proceedings).

Not only does a writ of coram nobis require that the petitioner not be in custody at the time it is filed and the subject matter must be one of those listed above, but the party seeking the writ must have no other remedy. This means that the party has no remedy at all and not that the once available remedy is now time barred. *Sullivan v. State*, 154 Fla 496, 18 So 2d 163 (1944) (the writ does not lie to give relief to an irregularity arising in connection with a petit juror's disqualification, although the defendant did not discover the error until after the

time for a new trial has expired); *Vonia v. State*, 680 So. 2d 438 (Fla 2nd DCA 1996) (writ of error coram nobis did not concern itself with newly discovered evidence or with questions of fact, could not be used to collaterally attack a defendant's expired sentences, where the defendant had not sought post conviction relief, so that defendant's claim would have been procedurally barred even if he had still been incarcerated on the conviction attacked).

In accordance with the foregoing a claim of ineffective assistance of counsel is not a proper subject for a writ of error coram nobis since the claim can be raised in either a Rule 3.850 motion or a petition for writ of habeas corpus. *Snell v. State*, 28 So. 2d 863 (Fla 1947). Also a claim that a guilty or nolo plea was not voluntary is also not a proper claim for coram nobis since in can be raised in a Rule 3.850 motion or a motion to withdraw or vacate plea, unless it was unknown to the court at the time of the plea that the plea was entered into because of actual dominating fraud, duress or other unlawful means actually asserted by some one not in privity with the petitioner or counsel. *La Rocca v. State*, 151 So. 2d 64 (Fla. 2d DCA 1963); *Nickels v. State*, 86 Fla. 208, 99 So. 121 (1924) (writ of error coram nobis proper vehicle to vacate plea where plea was entered because of fear of mob violence); *State v. Garcia*, 571 So. 2d 38 (Fla. 3d DCA 1990) (coram nobis is an inappropriate remedy when it is alleged the a plea is involuntary

for the failure of the trial court to insure that the defendant was aware of the consequences of his plea).

For individuals who are not in custody a writ of error coram nobis is the appropriate remedy to raise claims of newly discovered evidence or other errors of fact, which could not have been discovered with due diligence and the result of which would conclusively have prevented the trial court from originally entering the judgment. It is also available to individuals who are not in custody to raise issues concerning defect of process or failure to do ministerial duties. The individual filing the writ must not have any other remedy available. The failure to timely utilize a remedy it, does not equate to the absence of a remedy.

With these legal principles in mind the State will address the issues raised by the Petitioner herein.

A

CORAM NOBIS RELIEF IS NOT AVAILABLE TO VACATE THE PLEA OF A DEFENDANT WHO FIRST FEELS THE COLLATERAL CONSEQUENCES OF HIS PLEA AFTER HE IN NO LONGER IN THE STATE'S CUSTODY.

On January 18, 1995 Petitioner plead guilty to possession of a short barreled shotgun, adjudication was withheld with 18 months probation. On January 23, 1995 Petitioner violated his probation which was then revoked, adjudication was entered and he was sentenced to 364 days in county jail. On July 27, 1995, the trial court granted Petitioner's motion for early termination of his jail

sentence. On January 21, 1997, 18 months after his jail sentence was completed, Petitioner filed a Sworn Petition for Writ of Error Coram Nobis seeking to vacate his conviction because the conviction prevented him from securing a teaching position. He contended that his plea was involuntary because it was entered while he was under the influence of drugs and that counsel was ineffective since he represented Petitioner while laboring under a conflict of interest, that counsel failed to investigate the seizure of the shotgun, and counsel failed to raise the drug induced insanity defense.

Since Petitioner pled guilty and was placed on probation , his only avenue for post-conviction relief is Rule 3.850. Although he is no longer in custody, coram nobis is not available to Petitioner because he had another remedy, but failed to timely utilize it. Relief is also not available by a motion to withdraw or vacate the plea pursuant to Rule 3.170 Fla.R.Crim.P because it is only cognizable on direct appeal. *Suarez v. State*, 616 So. 2d 1067 (Fla. 3d DCA 1993). Since Petitioner was in custody and this claim could only be raised in a Rule 3.850 motion, the two year limitation period began to run when the judgment and sentence was final. *Vonia v. State*, 680 So. 2d 438 (Fla. 2d DCA 1996) (writ of error coram nobis that did not concern itself with newly discovered evidence or with questions of fact could not be used to collaterally attack defendant's expired sentences, where defendant had not sought post-conviction relief, so that defendant's claim

would have been procedurally barred even if he had still been incarcerated on conviction he attacked).

In order to avoid the harsh reality that he is not entitled to the writ of coram nobis because Petitioner had an available remedy but failed to utilize it, he claims that he filed the petition within the two year limitations period. However, as the Third District noted in *Peart v. State*, 705 So. 2d 1059, 1063, (Fla. 3d DCA 1998)(en banc) the law does not presently provide non-custodial defendants relief from involuntary pleas even if petitions are filed within the two year limitation period. Thus, the Third District correctly held that coram nobis was an improper remedy because Petitioner had Rule 3.850 relief available to him.

The Petitioner next contends that the instant claim also satisfies the next prong of coram nobis since an involuntary plea based on ineffective assistance of counsel is an error of fact since the fact that counsel was ineffective, if known to the court, would have prevented the entry of the judgment. Petitioner relies on cases that hold that the determination of ineffective assistance of counsel or the voluntariness of a plea is a mixed question of fact and law.

The State does not dispute this statement, but does dispute its applicability to the issue at hand. A question of fact arises when two or more conclusions can be drawn from the facts. *Loftin v. McGregor*, 152 Fla. 813, 14 So. 574 (1943). This definition as

applied to the determination of counsel's performance or the voluntariness of a plea is correct since the trial court usually has to make its legal decision based on two sets of facts. That is why it is considered a mixed question of fact and law.

However, simply because the trial court's determination is labeled a question of fact, it does not automatically mean an error of fact. This is so because an error of fact is defined as one which conclusively would have prevented the entry of the judgment and the sentence attacked. *Hallman v. State*, 371 So. 2d 482 (Fla. 1957). Thus, a defendant is entitled to relief only when the question of fact is determined in his favor, while a defendant is entitled to relief upon the establishment of the error of fact regardless of what other evidence is present. Therefore, it is clear that claims of ineffective assistance of counsel and an involuntary plea do not involve errors of fact.

Petitioner next contends that counsel's ineffectiveness, if known to the trial court, would have prevented the entry of the judgment. When faced with the mixed question of law and fact of ineffective assistance of counsel, the trial court's finding thereon would require the vacation of the judgment. However, that standard is not the same as the coram nobis requirement that the error of fact would have conclusively prevented the entry of judgment. The term conclusively requires a showing of factual innocence. Petitioner's claims do not meet this requirement.

II

ASSUMING ARGUENDO THAT CORAM NOBIS RELIEF IS AVAILABLE TO VACATE THE PLEA OF A NON-CUSTODIAL DEFENDANT WHO FIRST FEELS THE COLLATERAL CONSEQUENCES OF HIS PLEA AFTER HE IN NO LONGER IN THE STATE'S CUSTODY, THE TRIAL COURT ABUSED ITS DISCRETION IN GRANTING CORAM NOBIS RELIEF.

Petitioner contends that the State has no remedy where the trial court erroneously grants a writ of error coram nobis. Petitioner relies on the following three cases in support of this argument: *Lamb v. State,* 107 So. 535 (Fla. 1926), *Washington v. State,* 110 So. 259 (Fla. 1926), and *Chambers v. State,* 158 So. 153 (Fla. 1934). These cases were decided long before the adoption of Rule 3.850, Florida Rules of Criminal Procedure, effective April 1, 1993. *Richardson v. State,* 546 So. 2d 1037 (Fla. 1989); *Roy v. Wainwright,* 151 So. 2d 825 (Fla. 1963).

> Florida Rule of Criminal Procedure 3.850 was adopted in 1963 as Criminal Procedure Rule No. 1 to 'provide a complete and efficacious post-conviction remedy to correct convictions on any grounds which subject them to collateral attack.' [c.o.]. It therefore appears that from the very beginning this rule was intended to serve the function of a writ of error coram nobis... We believe the only currently viable use for the writ of error coram nobis is where the defendant is no longer in custody, thereby precluding the use of rule 3.850 as a remedy. [underlining in original].

Richardson v. State, 546 So. 2d at 1038-1039. Clearly then, a

petition for writ of error coram nobis filed by a person no longer in custody raising a claim cognizable in a motion for postconviction relief is in effect a motion for postconviction relief. *See, Vonia v. State,* 680 So. 2d 438 (Fla. 2nd DCA 1996) (Writ of error coram nobis cannot be used by persons no longer in custody to breathe life into a procedurally barred postconviction claim.)

The State has a right to appeal a ruling on a motion for postconviction relief. In *State v. White,* 470 So. 2d 1378 (Fla. 1985), this Court in response to a similar challenge, held that the State's postconviction remedies provided by Rule 3.850, writs of coram nobis and habeas corpus are not steps in a criminal prosecution but are in the nature of independent collateral civil actions governed by the practice of appeals in civil actions from which either the government or the defendant may appeal. This Court realized that to find that the State did not have a right to appeal the granting of a postconviction motion or petition would establish the trial courts as the supreme authority on constitutional law and rejected the proposition. Consequently, Petitioner's argument, that the State has no right to appeal the erroneous granting of a writ of error coram nobis, is without merit.

As to the merits, the trial court granted Petitioner's petition for writ of error coram nobis on the basis that Petitioner

was denied the effective assistance of counsel because an actual conflict of interest existed within the Public Defender's Office since that office also represented a material State's witness against Petitioner, Francisco Jiminez. The trial court found that Petitioner's trial counsel, Carl Bober, had previously represented Mr. Jiminez, and that Mr. Jiminez was on probation, having been represented by the Public Defender's Office, at the time that Petitioner entered his plea. The court ruled that because Petitioner averred that he would not have waived the conflict, it would not have accepted Petitioner's plea had it known of the conflict. The trial court abused its discretion in granting the writ because Petitioner did not demonstrate, and the court did not find, that an actual conflict of interest adversely affected Mr. Bober's performance in representing petitioner.

> The sixth amendment right to counsel assures fairness in adversarial criminal proceedings, *United States v. Morrison*, 449 U.S. 361, 101 S.Ct. 665, 66 L.Ed.2d 564 (1981), but a lawyer representing clients with conflicting interests cannot provide the adequate assistance required by that amendment. *Holloway v. Arkansas*, 435 U.S. 475, 98 S.Ct. 1173, 55 L.Ed.2d 426 (1978). As a general rule, a public defender's office is the functional equivalent of a law firm. Different attorneys in the same public defender's office cannot represent defendants with conflicting interests. *Turner v. State*, 340 So.2d 132 (Fla. 2d DCA 1976). To show a violation of the right to conflict-free counsel, however, "a defendant must establish that an actual conflict of interest adversely affected his lawyer's performance." *Cuyler v. Sullivan*, 446 U.S. 335, 350, 100 S.Ct. 1708,

1719, 64 L.Ed.2d 333 (1980).

Bouie v. State, 559 So. 2d 1113, 1115 (Fla. 1990). Petitioner did not meet this burden.

First, the record does not support the trial court's finding that an actual conflict of interest existed within the Public Defender's Office.

> A conflict of interest arises when "... one codefendant stands to gain significantly by counsel adducing probative evidence or advancing plausible arguments that are damaging to the cause of a codefendant whom counsel is also representing.'

Webb v. State, 433 So. 2d 496, 489 (Fla. 1983), *citing, Foxworth v. Wainwright,* 516 F.2d 1072, 1076 (5th Cir. 1975). In *Webb,* the Court found that no conflict of interest existed between that defendant who was tried for first-degree murder, and his wife who was a State's witness, where the public defender had represented the wife in a contempt proceeding. The Court found that the defendant and his wife were not codefendants, that their interests were not adverse or hostile, and that neither the defendant nor his wife had an interest in the outcome of the other's case such as would impair the public defender's representation of either client. *Webb v. State,* 433 So. 2d at 498.

Similarly in *Bouie,* the Court found no conflict of interest where the public defender represented a material state's witness. In that case, both the witness and the defendant were represented

by the public defender when the defendant allegedly confessed to the witness. *Bouie v. State,* 559 So. 2d at 1114. On the date of the alleged confession, the witness resolved his case by plea. *Id.* at. 1115. The trial court denied the public defender's motion to withdraw. On appeal, the Court found that the witness was not represented by counsel at the time he gave his trial testimony. The Court found also that defense counsel extensively cross-examined the former client, sacrificing his interest in favor of the defendant's. On these facts, the Court found that there was no conflict of interest since the witness and the defendant were not codefendants and their interest were neither hostile nor adverse to one another. *Id.* Consequently, the Court held that the trial court did not abuse its discretion in denying the public defender's motion to withdraw. *Id.*

In the instant case, Petitioner presented evidence that Mr. Bober represented Mr. Jiminez at a plea hearing in 1993, and that the Public Defender's Office had represented him in several recent misdemeanor cases. Petitioner, however, presented no evidence that Mr. Jiminez had any interest in the outcome of Petitioner's case, that he gave his statement implicating Petitioner in exchange for any benefit, or that he gained any benefit from giving the statement. Indeed, the evidence established that Mr. Jiminez was not under any legal constraint or had any open cases at the time that he gave his statement, and that his cases were resolved before

Petitioner entered his plea. On this evidence, Petitioner did not establish that his interests were adverse or hostile to Mr. Jiminez's interest. And, as *Webb* and *Bouie* establish, the fact that the Public Defender's Office previously represented the State's witness does not establish a per se conflict of interest. The trial court was influenced by the fact that Mr. Jiminez's prior convictions were proper impeachment evidence. (R. 204). The trial court was apparently of the opinion that because of the prior representation Mr. Bober would be precluded from inquiring into Mr. Jiminez's prior convictions. However, since Mr. Jiminez's prior convictions are a matter of public record, Mr. Bober could have elicited that evidence. Petitioner presented no evidence that Mr. Bober was possessed of any confidential information which would have limited his cross-examination of Mr. Jiminez. Indeed, Mr Bober could have zealously guarded Petitioner's interests at the expense of Mr. Jiminez's. *See, Bouie, supra.* Thus, the trial court's concern raised only the possibility of a conflict. The possibility of a conflict, however, is insufficient to impugn a criminal conviction." *Cuyler v. Sullivan*, 446 U.S. at 350, 100 S.Ct. at 1719. Consequently, the record does not support the trial court's finding that an actual conflict of interest existed within the Public Defender's Office.

> The second prong of *Cuyler* requires a showing that the conflict adversely affected the lawyer's performance.... Although prejudice is presumed in

> conflict of interest cases, it is presumed upon a showing by the defendant that the conflict had an adverse effect on counsel's performance -- an actual lapse in representation.

Burnside v. State, 656 So. 2d 241, 244 (Fla. 5th DCA 1995). The record in this case is devoid of any allegation or proof of any lapse in Mr. Bober's representation of Petitioner.

The trial court, however, found that Petitioner was denied the effective assistance of counsel where Mr. Bober failed to certify the alleged conflict of interest. *See Strickland v. Washington,* 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed. 2d 674 (1984). Implicit in this finding by the trial court, is that Petitioner was prejudiced by Mr. Bober's failure to certify the conflict. The record does not support the trial court's finding of prejudice.

Petitioner entered his plea at arraignment. At that time, Petitioner was unaware of the alleged conflict. Mr. Bober testified that he also was unaware of the alleged conflict. Petitioner made no claim that Mr. Bober in any way encouraged him to accept the plea, or that he accepted the plea in reliance on any misleading advice from Mr. Bober. On the contrary, Mr. Bober testified that although he could not specifically remember Petitioner's case, it was not his practice, nor the practice of the Public Defender's Office, to encourage defendants to enter pleas at arraignment where they are not in custody, or to encourage defendants to plead to probation. (R. 355). He testified that

Petitioner wanted to resolve his case at arraignment. (R. 356). Petitioner therefore made absolutely no connection between his decision to enter the plea and the alleged conflict. In this respect, the instant case is indistinguishable from *Dukes v. Warden,* 406 U.S. 250, 92 S.Ct. 1551, 32 L.Ed. 2d 45 (1972).

In that case, the defendant and two codefendants were charged with false pretenses. For that charge the codefendants were represented by Mr. Zaccagnino of the law firm of Zaccagnino, Linardos, & Delaney. The defendant was represented by another lawyer. While that case remained pending, the defendant retained his codefendants' law firm to represent him in several unrelated cases. *Id.* at 251 95 S.Ct. at 1552. Mr. Zaccagnino advised the defendant to accept a plea offer that would resolve all of his pending cases. The defendant declined the plea offer. However, the defendant eventually accepted a plea offer that was negotiated by Mr. Delaney, Mr. Zaccagnino's partner. That agreement was on the same terms as the offer negotiated by Mr. Zaccagnino. *Id.* at 252, 95 S.Ct. at 1552. Several weeks after the defendant entered his plea, his codefendants, represented by Mr. Zaccagnino, appeared before the same judge for sentencing pursuant to a plea agreement negotiated by Mr. Zaccagnino. *Id.* at 253-254, 95 S.Ct. at 1553. At that hearing, in arguing for leniency for the codefendants, Mr. Zaccagnino placed all the blame for the crime on the defendant. He argued also that the defendant was forced to accept the plea

because the codefendants were cooperating with the state. *Id.* The Court rejected as meritless the defendant's claim that the conflict of interest rendered his plea involuntary. Specifically, the Court found that the defendant did not allege or prove that his attorneys induced him to enter the plea in furtherance of any plan to benefit other clients, or that he was induced to enter the plea on misadvise of counsel. The Court concluded that the conflict of interest was not a basis to vacate that plea were the alleged conflict did not affect the plea. *Id.* at 257, 95 S.Ct. at 1555.

Similarly in the instant case, Petitioner did not establish any connection between the alleged conflict and his decision to enter the plea. He made no allegation, and consequently offered no proof, that Mr. Bober was in way motivated by the alleged conflict in counseling him about the plea. Petitioner offered no proof that he relied on any erroneous advice from Mr. Bober, or that his plea was in any way coerced or encouraged by Mr. Bober. On the contrary, Mr. Bober testified that it was not his practice, nor the practice of the Public Defender's Office, to encourage defendants to enter pleas at arraignment where they are not in custody, or to encourage defendants to plead to probation. He testified that Petitioner wanted to resolve his case at arraignment. (R. 356). From this evidence, it appears that Petitioner made the final decision to accept the plea against the advice of counsel. Since Petitioner did not establish any connection between the alleged

conflict of interest and his decision to enter the plea, Petitioner did not demonstrate any prejudice resulting from Mr. Bober's failure to certify the conflict. Consequently, the record does not support the trial court's finding of prejudice.

Thus, since Petitioner's allegations and proof did not satisfy the requirements for a writ of error coram nobis, and since the record does not support the trial court's finding that a conflict of interest existed within the Public Defender's Office and that Petitioner was prejudiced by the alleged conflict, the court abused its discretion in granting the writ. Consequently, this Court,if it reaches the merits, should reverse the order granting the writ and remand for reinstatement of the conviction.

Further, Petitioner's allegations and proof also did not satisfy the requirements of *Strickland v. Washington,* 466 U.S. 668 (1984), for ineffective assistance of counsel. Petitioner made no showing of how he was prejudiced by the alleged conflict of interest. Petitioner did not establish any connection between the alleged conflict and his decision to enter the plea.

Petitioner, however, argues that prejudice was demonstrated when his trial counsel testified that had he known of the alleged conflict he would have certified the conflict and the court would not have accepted the plea. This claim of prejudice is not the type of prejudice required for a showing of ineffective assistance of counsel. In the context of a guilty plea, the prejudice prong

under *Strickland v. Washington* requires a showing that there is a reasonable probability that but for counsel's errors, the defendant would not have plead guilty and would have insisted on going to trial. *Hill v. Lockhart,* 474 U.S. 51 (1985).

Petitioner presented absolutely no evidence, other than his own self-serving affidavit, that he would have gone to trial if he had known of the alleged conflict. Petitioner's affidavit was not evidence at the hearing on the motion. *See, Boisvert v. State,* 693 So. 2d 652 (Fla. 5th DCA 1997), *Thomas v. State,* 206 So. 2d 475 (Fla. 2nd DCA 1968). Moreover, Petitioner's own self-serving after the fact statement that he would not have entered the plea and would have insisted on going to trial if he had known of the alleged conflict is in and of itself insufficient. *See, Siao-Pao v. Keane,* 878 F.Supp. 468 (S.D.N.Y. 1995); *Panuccio v. Kelly,* 927 F.2d 106 (2 Cir. 1991) ("a defendant's testimony after the fact 'suffers from obvious credibility problems.'" (citations omitted)). Since Defendant did not present any evidence as to why he would not have entered the plea, or make any connection between his decision to enter the plea and the alleged conflict of interest, Petitioner failed to demonstrate any prejudice resulting from the alleged conflict of interest. Petitioner, therefore, failed to demonstrate ineffective assistance of counsel based on the alleged conflict of interest.

Petitioner, however, relying on *Lee v. State,* 690 So. 2d 664

(Fla. 1st DCA 1997), argues that his prejudice was evidenced when he demonstrated that the Public Defender's Office also represented a material state's witness against him and that he was not informed of the conflict and consequently did not waive the conflict. Petitioner's reliance on that case is misplaced because the facts of that case are clearly and obviously distinguishable from the facts of the instant case.

In that case, the defendant and the witness who was serving a sentence were represented by the Public Defender's Office. The defendant initially waived his right to conflict-free representation after he was informed of the conflict. The defendant subsequently sought to withdraw his waiver after he discovered that the witness was working for the state in procuring evidence against him. The defendant claimed that the witness was planted in his cell with a recording device to elicit incriminating statements from him. The defendant alleged that although he informed his attorney of the apparent entrapment, his attorney conducted no investigation. The defense attorney filed a motion to suppress the witness' testimony but did not pursue that motion. The defendant made other allegations concerning his dissatisfaction with his attorney's performance. The witness testified against the defendant at trial and the tape recording of the jail house confession was played for the jury. The issue presented on appeal was whether the defendant's waiver of conflict-free representation

was knowing where he was not informed of his right to other court appointed counsel.

The waiver of conflict-free representation is not an issue in this case. Furthermore, in the instant case, Petitioner entered a plea, there was no trial and Mr. Jiminez did not testify against him. Mr. Jiminez was under no legal constraint, and there was no case pending against him, at the time that he gave the statement. Additionally, Petitioner did not express any concern about Mr. Jiminez's statement nor did he express any dissatisfaction with his counsel's performance. Furthermore, Petitioner has made no allegation or showing as to how his case would be any different absent the alleged conflict. Consequently, Petitioner failed to prove that he was actually prejudiced by the alleged conflict

Petitioner argues further that, in addition to the conflict of interest, the trial court found that his trial counsel's performance was also deficient where he failed to investigate a possible drug induced insanity defense. This argument is refuted by the trial court's written order. In that order, the trial court stated: "There is not sufficient factual record of the Petitioner's drug use. The Court does not find that the Petitioner has shown sufficient factual proof that the plea was not entered knowingly and voluntarily as to his assertion that he was on drugs at the time of the plea." (R. 205-206). This finding is supported by the evidence adduced at the hearing. Petitioner presented absolutely

no evidence to support his claim that he was a drug abuser and suffered from drug induced insanity.

Petitioner's next claim, that his trial counsel was ineffective for failure to investigate a possible search and seizure issue is without merit. Petitioner claims that consent to search his home was given by a roommate who did not have authority to consent. Petitioner argues that because Ms. Arp was on a month to month tenancy she did not have authority to consent. The law is well settled that co-occupants may consent to a search of their premises. *United States v. Matlock,* 415 U.S. 164 (1974). Moreover, Ms. Arp stated that she had hidden the gun at Petitioner's request. Petitioner therefore relinquished his Fourth Amendment rights to the gun. *U.S. v. Dunkley,* 911 F.2d 522 (11th Cir. 1990).

Petitioner claims also that the trial court did not address his claim that his trial counsel failed to inform him of the sentence he probably would receive had he been sentenced after trial. Petitioner claims that he was under the erroneous belief that he could have been sentenced to fifteen years upon conviction whereas his sentence would probably have been a guidelines sentence of 22 months. This claim would not entitle Petitioner to relief. There is no requirement, statutory or case law, that requires trial counsel to guess at the sentence that a defendant might receive. Indeed, a wrong guess could subject the attorney to an

ineffectiveness claim. *See, e.g., Brim v. State,* 696 So. 2d 1320 (Fla. 1st DCA 1997). Furthermore, Rule 3.172(c)(1), of the Florida Rules of Criminal Procedure requires only that the defendant be informed of the maximum possible penalty provided by law. In this case, Petitioner was informed of the maximum possible sentence.

Petitioner claims also that the trial court did not address his claim that his plea was involuntary because he was a chronic drug abuser and was under the influence of drugs at the time that he entered the plea. The trial court found this claim meritless, and that finding is clearly supported by the plea colloquy. Petitioner's own statement at the plea hearing refutes his claim. The trial court specifically inquired of Petitioner whether he was then under the influence of drugs or alcohol, and Petitioner responded in the negative. (R. 59). Petitioner's declarations in open court carry a strong presumption of veracity. *Blackledge v. Allison,* 431 U.S. 63 (1977). Moreover, a review of the record and the plea hearing also refutes Petitioner's claim that he was under the influence of drugs. Petitioner's responses to the court's questions demonstrates lucidity and understanding. Consequently, Petitioner is clearly not entitled to relief on this claim of involuntary plea.

CONCLUSION

Based on the foregoing, Petitioner requests this Court affirm in total the decision of the District Court.

Respectfully submitted,
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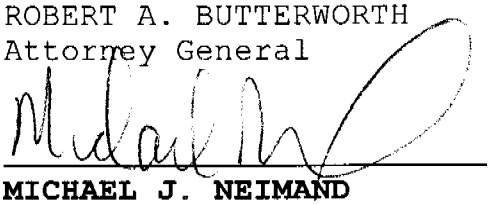

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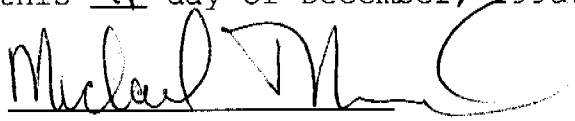
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing **RESPONDENT'S BRIEF ON THE MERITS** was furnished by mail to **BEATTRIZ C. COSCULLUELA**, Attorney for Petitioner, 201 South Biscayne Blvd., Suite 900, Miami, Florida 33131 on this 21 day of December, 1998.



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