SUPREME COURT OF FLORIDA



CASE NO. 92,629

ROAN PEART,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

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# REPLY BRIEF OF PETITIONER ROAN PEART

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

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## ARGUMENT AND CITATIONS OF AUTHORITY

### I. *CORAM NOBIS* RELIEF IS AVAILABLE TO VACATE THE INVOLUNTARY PLEA OF A NON-CUSTODIAL DEFENDANT WHO DISCOVERS THE TRIAL COURT'S FAILURE TO ADVISE HIM OF THE IMMIGRATION CONSEQUENCES WHEN INS EXCLUSION PROCEEDINGS ARE INITIATED AGAINST HIM.

The state, by its argument, seeks to place Mr. Peart in an untenable catch 22. On the one hand, it asserts that Mr. Peart's "only avenue for postconviction relief is Rule 3.850." Brief of Respondent ("BR") at 12. It knows full well that Peart could obtain no relief there because he did not satisfy the "in custody" prerequisite. On the other hand, the state asserts that "*coram nobis* is not available to [Mr. Peart] because he ha[d] another remedy, but failed to use it." *Id.* It knows full well that at the time Mr. Peart was in custody, his claim for vacation of his sentence and involuntary plea was unknown and not ripe. Contrary to the state's argument, the law does not place Mr. Peart in this inescapable abyss.

The state is correct that *coram nobis* relief is intended for defendants who have no other remedy. BR at 9. However, this court has never said that *coram nobis* relief is unavailable if a defendant once had, but no longer has, a remedy. ***Sullivan v. State,*** 154 Fla. 496, 18 So.2d 163 (Fla. 1944), cited for this proposition by the state, does not say this, either. It merely holds that *coram nobis* relief is not available for all errors of fact, only errors that would have precluded judgment against the



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petitioner. Mr. Peart agrees this is the law. The error in entering judgment upon his involuntary pleas satisfies this requirement. Peart's Initial Brief on the Merits ("IB") at 14-15. Mr. Peart never had an alternative remedy to *coram nobis*, either at the time he filed his petition or before.

Clearly, when he filed his *coram nobis* petition, Mr. Peart could have obtained no relief pursuant to Rule 3.850. He did not meet the in custody requirement. Although the state fails to specify what remedy supposedly was available previously, presumably it means a Rule 3.850 motion for postconviction relief. Mr. Peart only met Rule 3.850's "in custody" requirement during his two years of probation, from late 1993 through late 1995. However, at that time Mr. Peart had no knowledge whatsoever that there would be adverse immigration consequences to his plea. The trial judge failed to advise him of these consequences as required by Rule 3.172(c)(8). (R. 17-26). His attorney never advised him. Indeed, no one had ever told him of the immigration consequences of his guilty pleas. (R. 12). Accordingly, he had no knowledge of the circumstance that rendered his plea involuntary and could not have filed a claim. For this same reason, Mr. Peart could not have moved for relief from his pleas at the time he entered them pursuant to Rule 3.170(f).

As the state recognizes, in addition to demonstrating his plea was involuntary as a result of the trial courts omission, to

substantiate any Rule 3.850 motion to vacate his plea, Mr. Peart also would have had to demonstrate prejudice resulting from the trial court's failure to comply with 3.172(c)(8). BR at 17. As noted in Mr. Peart's initial brief, cases addressing this issue have uniformly recognized that to demonstrate prejudice, a defendant must show the initiation, or imminent threat, of INS exclusion proceedings. IB at 12. However, INS proceedings were not initiated against Mr. Peart until approximately 1997, several years after his probation (and in custody status) had concluded. (R. 11-12). Thus, for this reason too, Rule 3.850 had never been available to Mr. Peart. True to the *coram nobis* remedy, at the time he filed his petition, Mr. Peart did not have, nor did he ever have, any other avenue for relief.

The state's assertion that "[r]elief is ... 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" BR at 12, is a blatant misstatement of the law. The case ***Suarez v. State***, 616 So.2d 1067 (Fla. 3d DCA 1993) which is cited by the state, does not support this proposition. There are numerous cases in which courts have recognized that a defendant may seek to withdraw or vacate a guilty plea through collateral (non-direct appeal) proceedings. *See, e.g.* ***Mikenas v. State***, 460 So.2d 359, 361 (Fla. 1984); ***Nichols v. State***, 86 Fla. 208, 99 So.2d 121 (1924); ***Xayavongsa v. State***, 656 So.2d 548, 550 (Fla. 2d DCA 1995);



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*Franklin v. State*, 645 So.2d 166, (Fla. 4th DCA 1994); *Montgomery v. State*, 615 So.2d 226, 227 (Fla. 5th DCA 1993). The court below recognized the availability of such relief through a Rule 3.850 motion for post-conviction relief. (R.68, 70-72). Rule 3.850 specifically states that it provides relief on the ground "that the plea was given involuntarily."

The state agrees that the determination of the voluntariness of a plea is a question of fact. BR at 14. However, it disputes the applicability of this precept "to the issue at hand." *Id.* The state's reasoning in this part of its brief eludes Mr. Peart. The state seems to suggest a distinction between a "question of fact" and an "error of fact." Under the state's analysis, the fact that voluntariness is a "question of fact" wins Mr. Peart nothing in terms of meeting the prerequisites of coram nobis relief. He must now demonstrate something different, an "error fact." The state fails to coherently explain how one establishes an "error of fact." It asserts, however, that an error of fact, by definition, is "one which conclusively would have prevented the entry of the judgment and sentence attached." *Id.*

Contrary to the state's argument, it seems inescapable that when a "question of fact" is decided in error, an "error of fact" results. In the instant case, Mr. Peart's claim that his guilty pleas were involuntary because he was not advised of its immigration consequences, (R. 14-15), stands unrebutted. IB at 12



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n. 2. The involuntariness of Mr. Peart's guilty pleas existed at the time he tendered them but was not then known by the trial court, Mr. Peart, or his counsel. To this extent the trial court stated that Mr. Peart's pleas were entered voluntarily, it erred in this determination. Had Mr. Peart been properly advised of the immigration consequences, the record irrefutably establishes that he would not have entered his guilty pleas. Accordingly, the issue of voluntariness involves a "question of fact;" its erroneous determination results in an "error of fact." Even if the litmus test for an error of fact is whether it would prevent the entry of a judgment and sentence, clearly an involuntary plea passes this test, as well. IB at 14-15.

The court below relied solely upon its decision in ***State v. Garcia***, 571 So.2d 38 (Fla. 3d DCA 1990), for the notion that the issue raised by Mr. Peart, the involuntariness of his guilty pleas due to the trial court's failure to advise him of their immigration consequences, is one of law, not fact. (A-5). ***Garcia*** is wrong. It contradicts this court's decision in ***Nichols*** which affirmed the granting of *coram nobis* relief based on an involuntary plea.



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

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

In urging that Rule 3.850's two year period of limitations be superimposed upon *coram nobis* relief, the state cites no authority. BR 16-17. It fails to respond to any of Mr. Peart's arguments why a period of limitations should not be superimposed (*e.g.*, not a part of its common law roots, inconsistent with its purpose of providing a vehicle for relief when no other is available, eviscerates potentially viable claims, unnecessary, etc.). It asserts only that this is necessary to insure that persons no longer in custody acquire no greater rights to vacate judgments and sentences than defendants who are in custody. *Id.*

There is no reason why the scope of relief under *coram nobis* must be identical to that under Rule 3.850. Other common law writs do not impose a two year period of limitations. Even if a period of limitation were adopted, as Mr. Peart argues, it would not eliminate claims such as his which are based on newly discovered evidence. IB at 19-20. As a practical and constitutional matter, any such limitation should only be adopted by the Legislature or, instead, through this court's rule-making procedures, not through



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decisional law. This would allow the thoughtful input of all of those who would be affected and would put the defendants of this state on notice regarding any such new restriction upon this procedure. *Coram nobis* relief should remain as broad as possible to provide this essential last avenue of relief to defendants whose claims are recognized under it.

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

The state cites several cases for the proposition that Rule 3.850(b)'s two year time-bar has consistently been applied to claims of involuntary pleas. BR at 13. These cases fail to provide enough detail to demonstrate similarity between them and the instant case, are decided upon alternative grounds, and are otherwise distinguishable. In ***Gradison v. State***, 654 So.2d 635 (Fla. 1st DCA 1995), the court failed to make clear the nature of the involuntariness claim and affirmed the lower court's summary denial based on facial insufficiency, as well. There is no indication that this defendant sought exclusion from Rule 3.850(b)'s two year time-bar. In ***Mitchell v. State***, 638 So.2d 606 (Fla. 1st DCA 1994), the court also found that the motion was facially insufficient. The court noted that the timeliness issue had not been addressed in the trial court. It appears that the litigants did not raise it on appeal either. In ***Baggett v. State***, 637 So.2d 303 (Fla. 1st DCA 1994), the court failed to describe the



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nature of the defendant's involuntariness claim. It also found that the motion was properly denied on its merits. Nowhere does the case indicate that the defendant sought exception from Rule 3.850(b)'s time-bar under subsection (1). Lastly, in ***State v. Morris***, 538 So.2d 514 (Fla. 3d DCA 1989), the court found that Rule 3.850 was unavailable to the defendant because she was not "in custody" under sentence of a court. Although decided in February, 1989, after subsection (8) was added to Rule 3.172(c), given the court's statement that the defendant's claim that she had not been advised of immigration consequences was foreclosed by ***State v. Ginebra***, 511 So.2d 960 (Fla. 1987), it appears that the issue in ***Morris*** was one of ineffective assistance of counsel, not an involuntary plea.

Unlike these cases, in the instant case, the court is presented with a very specific and well-defined claim. As stated in Mr. Peart's initial brief, although the alleged defect giving rise to this type of claim occurs at the time the guilty plea is entered, case law establishes that the claim is not ripe, and susceptible to remedy, until prejudice -- the onset of INS exclusion proceedings -- can be demonstrated. *E.g.*, ***Peart v. State***, No. 97-2229 (Fla. 3d DCA Feb. 18, 1998)(*en banc*) (R.70-71); ***Perriello v. State***, 684 So.2d 258, 259 (Fla. 4th DCA 1996); IB at 12-13. As in the instant case, this unpredictable event often happens years after the guilty pleas are entered. Accordingly, the



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onset of INS exclusion proceedings should always constitute newly discovered evidence under Rule 3.850(b)(1).

## III. A DEFENDANT SHOULD NOT BE REQUIRED TO ASSERT AND PROVE A PROBABILITY OF ACQUITTAL AT TRIAL TO SECURE RELIEF FROM AN INVOLUNTARY PLEA RESULTING FROM THE TRIAL COURT'S FAILURE TO ADVISE THE DEFENDANT OF ADVERSE IMMIGRATION CONSEQUENCES.

The state asserts that to succeed on his claim, Mr. Peart was required to demonstrate prejudice. BR at 17-18. Mr. Peart agrees. *See* Fla.R.Crim.P. 3.172(i). The state urges that in addition, a defendant must demonstrate that had he proceeded to trial, he most probably would have been acquitted. ***Id.*** at 18. The state reasons, as did the court below, that this requirement is necessary because the defendant would face the same deportation consequences if he is convicted following a trial. Other than the decision below, the state cites no authority to support its argument.

Proving factual innocence or the likelihood of acquittal has never been required to secure vacation of an involuntary plea. *See* ***Scott v. State,*** 629 So.2d 888, 890 (Fla. 4th DCA 1993)(***Jones v. State,*** 591 So.2d 911 (Fla. 1991), standard of "likelihood of acquittal" not appropriate for withdrawal of plea where there was no trial or evidence introduced). A defendant is entitled to his day in court and to put the state to its burden of proof even if he is guilty and in doing so will likely be convicted. The paramount consideration is that no defendant, guilty or innocent, can be forced to endure the consequences of a guilty plea that is



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demonstrated to be involuntary.

In ***Williams v. State***, 316 So.2d 267 (Fla. 1975), this court adopted the American Bar Association's Standards of Criminal Justice regarding withdrawal of pleas after sentencing. The court recognized that withdrawal, even after sentencing, is "necessary to correct a manifest injustice whenever the defendant proves that . . . the plea was involuntary . . ." ***Id.*** at 274. This court also adopted the provision declaring that a defendant need not allege he is innocent of the charge to which he has pled guilty in order to move for withdrawal of his plea. ***Id.*** This provision recognizes the preeminence of the defendant's rights which are waived upon entry of a guilty plea, and the due process guarantee that any such waiver be knowing, intelligent, and voluntarily. These rights are guaranteed to innocent and guilty defendants alike, and to ones against whom there is strong evidence and weak evidence, too. For these reasons, and the others recited in Mr. Peart's initial brief, no showing of a likelihood of acquittal should be required.

Respectfully submitted,

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