ORIGINAL

IN THE SUPREME COURT OF FLORIDA

CASE NO. **95,975**

SABINA VAN TUYN,

Petitioner,

-vs-

THE STATE OF FLORIDA,

Respondent.

ON PETITION FOR DISCRETIONARY REVIEW

BRIEF OF RESPONDENT ON THE MERITS

ROBERT A. BUTTERWORTH
Attorney General
Tallahassee, Florida

MICHAEL J. NEIMAND
Assistant Attorney General
Florida Bar Number 0239437
Office of the Attorney General
110 S.E. 6th Street, 10th Floor
Ft. Lauderdale, Florida 33301
(954) 712-4600
Fax (954) 712-4761

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INTRODUCTION

The Respondent, the **STATE OF FLORIDA**, was the Appellee below. The Petitioner, **SABINA VAN TUYN**, 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, the symbol "T" will designate the transcript of proceedings 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

The State accepts the Petitioner's statement of the case and facts as a substantially accurate account of the proceedings below.

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

WHETHER CORAM NOBIS RELIEF IS AVAILABLE TO VACATE THE PLEA OF A NON-CUSTODIAL DEFENDANT WHO FIRST FEELS THE EFFECTS OF THE TRIAL COURT'S FAILURE TO ADVISE HIM OF THE IMMIGRATION CONSEQUENCES WHEN INS EXCLUSION PROCEEDINGS ARE INITIATED AGAINST HIM?

B

WHETHER A DEFENDANT SHOULD 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?

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 because the trial court failed to advise the defendant of the deportation consequences of the plea 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 the failure to advise a defendant of the deportation consequences of his plea is not an error of fact or is its ascertainment after the defendant is no longer in custody considered newly discovered evidence.

This Court's decision in *Wood v. State*, 24 Fla. L Weekly S240 (Fla. May 27, 1999) does not change the foregoing rationale. *Wood* incorporated coram nobis into Rule 3.850. The only thing that *Wood* did is to allow an individual who was never in custody to file a Rule 3.850 motion. Wood has not changed the requirement that a

defendant must show factual innocence.

When a defendant is in custody, he can file a timely motion for post conviction relief alleging his plea was involuntary because he was not told of the deportation consequences of his plea. However, the mere fact that the record supports the claim is insufficient to grant relief. The defendant must show prejudice in the form that he would have been acquitted of the charge had he gone to trial.

ARGUMENT

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, now pursuant to *Wood v. State*, 24 Fla. L Weekly S240 (Fla. May 27, 1999) a Rule 3.850 motion filed by a defendant who was never in custody, 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 mater 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 were never in custody a writ of error coram nobis, now pursuant to *Wood v. State*, 24 Fla. L Weekly S240 (Fla. May 27, 1999) a Rule 3.850 motion, is the appropriate remedy to raise claims of newly discovered evidence or other errors in 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 were never 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 NON-CUSTODIAL DEFENDANT WHO FIRST FEELS THE EFFECTS OF THE TRIAL COURT'S FAILURE TO ADVISE HIM OF THE IMMIGRATION CONSEQUENCES WHEN INS EXCLUSION PROCEEDINGS ARE INITIATED AGAINST HIM.

On March 28, 1988 Petitioner plead guilty, adjudication was withheld and he was placed on probation until March 10, 1992. On

July 23, 1997 Petitioner filed a Petition for Writ of Error Coram Nobis. She contended that he was not advised by the trial court and misadvised by his attorney regarding the immigration consequences of the plea. She alleged that had she known that his plea could have resulted in deportation, he would not have pled guilty.

Since Petitioner pled guilty and was placed on probation for four years, her only avenue for post-conviction relief is Rule 3.850. Although she is no longer in custody and 2 year limitation has elapsed, coram nobis, now pursuant to *Wood v. State*, 24 Fla. L Weekly S240 (Fla. May 27, 1999) a Rule 3.850 motion, is not available to Petitioner because she had another remedy, but failed to use 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 for one year 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 she is not entitled to the writ of coram nobis because Petitioner had an available remedy but failed to utilize it, she claims that the two year limitations period did not begin to run until INS began Petitioner's deportation proceeding. Petitioner then reasons, that since she did not learn of the deportation proceedings until after the limitations period ended, she never had a remedy other than coram nobis to cure the defects in the plea.

This position, as recognized by the Third District in *Peart v. State*, 705 So. 2d 1059 (Fla. 3d DCA 1998), is directly contrary to the terms of Florida Rules of Criminal Procedure 3.850. Rule 3.850(b), specifically states that a motion thereunder must be brought within two years "after judgment and sentence become final." This provision has consistently been applied to claims of involuntary pleas. See *Gradison v. State*, 654 So. 2d 635, (Fla. 1st DCA 1995)(postconviction motion challenging voluntariness of nolo contendre plea was untimely where it was filed more than two years after the judgment and sentence became final); *Mitchell v. State*, 638 So. 2d 606 (Fla. 1st DCA 1994)(same); *Baggett v. State*, 637 So. 2d 303 (Fla. 1st DCA 1994)(same); *State v. Morris*, 538 So. 2d 514 (Fla.3d DCA 1989)(same). The application of this principle to a claim of involuntary plea is within the proper framework of Rule 3.850 litigation because the alleged defect in the plea

occurred at the time the plea was entered and not when the effects of the defect are felt by the defendant. Any other interpretation would be contrary to the terms of Rule 3.850 (a) which specifically lists as a ground covered by the Rule a plea that was involuntarily given. As such, Petitoner had a remedy to challenge the voluntariness of his plea. 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 is a error of fact which is newly discovered evidence. Neither of these claims withstand close scrutiny.

To support his contention that the claim of an involuntary plea is an error of fact, Petitioner relies on cases which hold that the determination of the voluntariness of a plea is a question of fact. 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. 2d 574 (Fla. 1943). This definition as applied to the determination of the voluntariness of a plea is correct since the trial court usually has to make its decision based on two sets of facts. 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 sentenced 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 establishment of the error of fact regardless of what other evidence is present. Therefore, it is clear that a claim of an involuntary plea does not involve an error of fact but instead involves a error of law. *State v. Garcia*, 571 So. 2d 38 (Fla 3d DCA 1990)(claim that guilty plea had not been knowingly and intelligently made because the defendant was not aware of the consequences of his plea is an error of law and not within the function of a writ of error coram nobis.)

The Petitioner's claim of newly discovered evidence is the same reason why he is not barred by the two year time limit of Rule 3.850 and that is that the plea did not become involuntary until INS sought his deportation. This position is meritless since a defendant in oder to establish evidence as newly discovered he must show that it (1) was not known to him or his counsel at the time of or plea and could not have been ascertained by the exercise of due diligence; and (2) of such a nature that it would probably produce an acquittal. *Jones v. State*, 591 So. 2d 911 (Fla. 1991). Petitioner's claim fails because the "fact" that he was not advised of the immigration consequences of his plea was evident from her

plea colloquy and thus was easily ascertainable with the minimal exercise of diligence. Further, the "fact" that he was not advised of the immigration consequences of her plea would not provide for an acquittal, just a retrial or a new plea. Thus, it is evident that Petitioner's claim of an involuntary plea can not meet the requirements of newly discovered evidence.

Finally, the Petitioner attempts to avoid the harsh results dictated by the caselaw by alleging that the State's motion for rehearing was untimely and thus the order vacating the plea is a final unchallengeable order. The record clearly refutes this allegation. The trial court, when it granted the petition for writ of coram nobis, was aware that *Peart* was pending in the District Court. The trial court specifically stated that it was granting the writ as a favor to petitioner since she could have been deported prior to the issuance of *Peart*. The trial court, at the time he granted the petition, allowed the State to file an oral motion for rehearing. This was done to insure that the trial court would have jurisdiction to reverse his previous order if this Court's decision so required. (R. 90-91). Since the motion for rehearing was timely filed, the trial court had jurisdiction to grant it and vacate its order granting the petition. By this contention, Defendant is attempting a "gotcha" maneuver and the same should not be tolerated. *State v. Belien*, 379 So. 2d 446 (Fla. 3d DCA 1980).

B

A DEFENDANT SHOULD 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.

Florida Rule of Criminal Procedure 3.172(c)(8) requires trial judges to inform all defendants of the possibility of deportation when accepting guilty or nolo pleas. However, Florida Rule of Criminal Procedure 3.172(I) also provides that "[f]ailure to follow any of the procedures in this rule shall not render a plea void absent a showing of prejudice." (emphasis added). Furthermore in *Wuornos v. State*, 676 So. 2d 966 (Fla. 1996), this Court specifically approved of the following portion of the First District's opinion in *Fuller v. State*, 578 So. 2d 887, 889 (Fla. 1st DCA 1991), *quashed on other grounds*, 595 So. 2d 20 (Fla. 1992):

> In the absence of an allegation of prejudice or manifest injustice to the defendant, the trial court's failure to adhere to rule 3.172 is an insufficient basis for reversal.

Id.; *see also State v. Fox*, 659 So. 2d 1324, 1326 (Fla. 3d DCA 1995), *rev. denied*, 668 So. 2d 602 (Fla. 1996) (citing *Willkerson v. State*, 401 So. 2d 1110, 1112 (Fla. 1981); *State v. Will*, 645 So. 2d 91, 93 (Fla. 3d DCA 1994); *Suarez v. State*, 616 So. 2d 1067, 1068 (Fla. 3d DCA 1993). Also, "it is the defendant's burden to

establish prejudice or manifest injustice. '[I]t is not sufficient to simply make bald assertions.'" *Fox*, 659 So. 2d at 1327 (quoting *State v. Caudle*, 504 So. 2d 419, 421 (Fla. 5th DCA 1987)).

In order to properly allege prejudice in this context, a defendant must claim that had he been informed of the possibility of deportation, he would have rejected the plea offer and gone to trial. Additionally, and more importantly, he must claim that had he gone to trial, he would have most probably been acquitted. The reason this is a necessary allegation is that the defendant would have faced the same deportation consequences if he had been convicted following a trial even if the court withheld adjudication after trial.

The State submits that this reasoning is sound and that this portion of the Third District's opinion fully comports with prejudice requirement as set forth in Florida Rule of Criminal Procedure 3.172(I). This reasoning, as stated by the Third District should be adopted by this Court as its own.

> As guidance to Prieto and others who would assert similar claims, we point out that to set aside a plea for failure to inform a defendant of immigration consequences pursuant to Rule 3.172(c)(8), the motion must assert, and the defendant must prove the following:
>
> a) the defendant was not advised by the court of the immigration consequences;
> b) that defendant had no actual knowledge of same;
> c) that INS had instituted deportation proceedings, or defendant is at risk of deportation;

d) that defendant would not have pled had defendant known of the deportation consequences; and
e) that had defendant declined the plea offer and gone to trial, defendant most probably would have been acquitted.

This last requirement comports with the Rule 3.172 requirement that defendant must show prejudice to set aside a plea as not in conformity with the Rule. Because of the special nature of the claims in these cases, that deportation has resulted as a consequence of the pleas, in order to demonstrate prejudice the defendant must demonstrate a probable likelihood that he or she would have been acquitted. To require any less of a showing would subject the trial court to entertaining petitions for relief to set aside pleas in cases where the defendant would nonetheless be found guilty at trial and therefore would be facing the same consequence of deportation. *See generally Jones v. State*, 591 So. 2d 911 (Fla. 1991); *State v. Fox*, 659 So. 2d 1324 (Fla. 3d DCA 1995), *review denied*, 668 So. 2d 602 (Fla. 1996); *Todd v. State*, 648 So. 2d 249 (Fla. 3d DCA 1994).

Requiring that the defendants establish that they most probably would have been acquitted is concordant with this court's conclusion that these motions must be brought within two years after judgment and sentence become final, as required in Rule 3.850. This two-year limitation assures some realistic probability that evidence will remain available and that the trial court can reliably determine whether defendant most likely would have prevailed at trial. If we adopt defendants' argument that the triggering event is the onset of deportation proceedings, in many cases the court files will be quite stale and evidence or witnesses may or may not be available. The two-year limit addresses this problem.

CONCLUSION

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

Respectfully submitted,
ROBERT A. BUTTERWORTH
Attorney General

MICHAEL J. NEIMAND
Assistant Attorney General
Florida Bar Number 0239437
Office of the Attorney General
110 S.E. 6th Street
Ft Lauderdale, Florida 33131
(954) 712-4600
Fax (954) 712-4761

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 **JOHN H. LIPINSKI**, 1455 N.W. 14th Street, Miami, Florida 33125 and to **FREDERICK C. SAKE**, 999 Washington Avenue, Miami Beach, Florida 33139 Attorney for Petitioners on this 24 day of August, 1999.

MICHAEL J. NEIMAND
Assistant Attorney General

IN THE SUPREME COURT OF FLORIDA

CASE NO. **95,975**

SABINA VAN TUYN,

Petitioner,

vs.

THE STATE OF FLORIDA,

Respondent.
_____/

APPENDIX

ROBERT A. BUTTER WORTH
Attorney General

MICHAEL J. NEIMAND
Assistant Attorney General
Florida Bar No. 0239437
Office of the Attorney General
110 S.E. 6th Street
Ft. Lauderdale, Florida 33301
(954) 712-4600
Fax No. (954) 712-4761

NOT FINAL UNTIL TIME EXPIRES
TO FILE REHEARING MOTION
AND, IF FILED, DISPOSED OF.

IN THE DISTRICT COURT OF APPEAL

OF FLORIDA

THIRD DISTRICT

JANUARY TERM, A.D. 1999

L98-1-6513-E

SABINA MARIA VAN TUYN,	**	
Appellant,	**	
vs.	**	CASE NO. 98-1429
THE STATE OF FLORIDA,	**	LOWER TRIBUNAL NO. 86-34279
Appellee.	**	

Opinion filed April 28, 1999.

An appeal from the Circuit Court for Dade County, Robert N. Scola, Jr., Judge.

Frederick C. Sake, for appellant.

Robert A. Butterworth, Attorney General and Michael J. Neimand, Assistant Attorney General, for appellee.

Before COPE, GODERICH, and GREEN, JJ.

PER CURIAM.

Based upon this court's decision in Peart v. State, 705 So. 2d 1059 (Fla. 3d DCA), review granted, 722 So. 2d 193 (Fla. 1998), the appellant's petition for writ of error coram nobis was properly denied.

Affirmed.