IN THE SUPREME COURT OF FLORIDA

CASE NO. SC96,044

BOOKER BIRDSONG,

Petitioner,

vs.

THE STATE OF FLORIDA.

Respondent.

ON PETITION FOR DISCRETIONARY REVIEW

BRIEF OF RESPONDENT ON THE MERITS

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INTRODUCTION

This cause is currently pending on the merits pursuant to a petition for discretionary review filed by BOOKER BIRDSONG. The Petitioner, BOOKER BIRDSONG, was the defendant in the trial court, and was the Appellant/Petitioner in the District Court of Appeal, Third District. In this brief he will be referred to as Petitioner or by name. The Respondent, THE STATE OF FLORIDA, was the prosecution in the trial court, and was the Appellee/Respondent in the Third District. It will be referred to as Respondent or THE STATE.

In this brief, the symbol "R" shall stand for the Record of Appeal prepared by the Clerk of the Circuit Court. The symbol "A" shall stand for the Appendix submitted by Petitioner. The symbol "SA" shall stand for the Appendix submitted by THE STATE. All emphasis in quotations is furnished by counsel.

Petitioner seeks review of ***Birdsong v. State***, 732 So. 2d 1208 (Fla. 3d DCA 1999). For the reasons hereafter set forth, THE STATE submits that jurisdiction should not have been accepted by this Court but that position notwithstanding, there is no ground upon which the decision sought to be reviewed should be quashed.

STATEMENT OF CASE AND FACTS

Ordinarily, discretionary "**direct** conflict" review is based on facts and procedures contained on the face of the decision sought to be reviewed. In order to provide even a skeletal view of the case and facts ***sub judice***, resort to the "record proper" is required.[1]

BIRDSONG was charged by Information with robbery of a purse from one Beth Bronson on April 2, 1986, by violence, force, or putting in fear, in violation of §812.13, **Fla.Stat.** (R. 1-2; A. 5-6). The Information was dated April 22, 1986. A "not guilty" plea was entered On April 23, 1986, when BIRDSONG stood mute. (R. 3). However, on August 11, **1986**, BIRDSONG changed his plea to nolo, he was adjudicated guilty, and was sentenced to 12 years imprisonment. (A. 7-10). The sentencing order **recommended** that BIRDSONG be "incarcerated at the Lantana Correctional facility where he can receive drug treatment." (A. 10).

There is no plea colloquy in the record.[2] The docket sheet states that BIRDSONG was "sworn" and that costs were waived. (R. 4; A. 2). The docket also shows that BIRDSONG filed a pro se motion for mitigation and reduction of sentence not quite a month later. (A. 2). That motion was denied. Approximately 12 years later,

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[1]See, ***Foley v. Weaver Drugs, Inc.***, 177 So. 2d 221 (Fla. 1965).

[2]See, Rule 2.075(e)(2), **Fla.R.Jud.Admin.**, more about which is contained ***infra***.

BIRDSONG, by then a federal prisoner, filed a Petition for Writ of Error Coram Nobis. (R. 7-13; A. 13-19). In the petition, BIRDSONG essentially alleged:

> 1. That his plea of "guilty" (sic) was not voluntary, in that he did not understand his rights;
>
> 2. That "unfortunately for the State," there is no record of the plea as required by Rule 3.721;
>
> 3. That in the absence of a record, Petitioner is entitled "as a matter of law" to"be released from the judgment and conviction;"
>
> 4. That Petitioner did not understand the consequences of the "guilty" (sic) plea; and
>
> 5. That Petitioner was not sent to the Lantana Correctional Facility for drug treatment as recommended by the trial court.

The court denied BIRDSONG's petitions[3] as "legally insufficient" on May 8, 1998, (A. 21), and as failing to claim errors of fact "as required by law[,]" on June 19, 1998. (A. 22). BIRDSONG filed appeals to the third district (A. 25-27) and also filed a Petition for Writ of Mandamus on December 15, 1998. (SA. 1-38).

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[3]As noted in Petitioner's Brief, he actually filed three identical petitions.

The Petition for Writ of Mandamus, although phrased somewhat differently, alleged the same general claims as those which had been raised in the coram nobis petitions. BIRDSONG asked the district court of appeal to either "examine the merits of his claims and reverse his convictions (sic)[,]" or to remand the case to the circuit court to "determine the constitutionality of" his plea. Attached to the petition was an "Affidavit of Fact" (SA. 38) which was signed but not sworn before a notary or other authority.

Petitioner's cases were consolidated by the district court and on April 16, 1999, the court ordered THE STATE to file a transcript of the plea. (SA. 39). THE STATE responded on May 3, 1999. (SA. 40-44). The Response advised the third district that there was no transcript in the court file, that the state attorney had no file, and that the court reporter did not keep notes beyond ten years "as allowed by the rules of court."

Shortly thereafter, the court rendered its decision. See, ***Birdsong v. State***, 732 So. 2d 1208 (Fla. 3d DCA 1999). The opinion gave no factual background, listed none of the procedures utilized, and did not even state Petitioner's crime or sentence. It merely affirmed the denial of BIRDSONG's "motion for postconviction relief"[4] and denied his Petition for Writ of Error Coram Nobis and Petition for Writ of Mandamus. In so doing,

[4]The record does not disclose any post conviction motions under Rule 3.800 or 3.850. The index mentions only a pro se motion for mitigation and reduction in sentence about a month after Petitioner's conviction.

the court cited Rule 3.850(b), parenthetically mentioning the two-year limit in the rule, and secondarily referred to two cases.

Petitioner then filed his notice to invoke this Court's discretionary jurisdiction. (SA. 45-46). He alleged that the decision of the third district "expressly affects a class of persons, and expressly and directly conflicts with a decision of the United States Supreme Court on the same question of law." He followed that notice with a Petition for Writ of Certiorari, alleging that this Court's jurisdiction was invoked pursuant to Rule 9.100(a). The former was assigned case number 96,044 and the latter was assigned number 96,310. THE STATE filed a motion to dismiss and the certiorari proceeding was dismissed as untimely.

BIRDSONG then filed a Brief on Jurisdiction which again appeared to seek certiorari. THE STATE again moved to dismiss. Petitioner followed with an Amended Brief followed by a Second Amended Brief on Jurisdiction. He framed the jurisdictional issues as 1) whether Florida courts were misinterpreting Rule 3.850(b), and, 2) whether the **circuit court** erred in failing to follow a United States Supreme Court decision.

This Court then accepted jurisdiction and appointed the Public Defender to represent BIRDSONG in these proceedings. The Public Defender filed a Brief on the Merits which argued neither of the issues which BIRDSONG had raised in his pro se

notice to invoke this Court's jurisdiction.[5] It argued the essence of the issues raised in the previously dismissed certiorari petition.

[5]In all fairness, the able public defender who prepared the brief inherited the file from the pro se Petitioner and THE STATE intends no criticism whatever by pointing out the variance between the notice and the brief. The public defender obviously recognized that the issues as framed by BIRDSONG were not proper grounds for "direct conflict" review.

SUMMARY OF THE ARGUMENT

Petitioner entered a nolo plea in 1986 to robbery by violence or force. He was sentenced to 12 years in prison and the circuit court **recommended** that Petitioner be sent to the Lantana Correctional Facility for drug treatment. After Petitioner completed his state sentence, he was apparently convicted in federal court and sentenced to federal prison on some charge which does not appear in the record. It is probably safe to speculate that his federal sentence was enhanced due to his state conviction because 12 years after his nolo plea, he filed a petition for writ of error coram nobis is circuit court.

Petitioner alleged that his plea was not voluntary because he did not understand his rights. He also alleged that he had not been sent to Lantana and drug treatment there was an inducement to his plea. Petitioner also pointed out that there existed no transcript of the plea colloquy and, in his view, he was entitled to an automatic reversal of his conviction and sentence. His attempt to obtain relief in the trial court was denied and he appealed to the third district. He also filed a petition for writ of mandamus in the appellate court.

The third district directed the Respondent to furnish a copy of the plea transcript. The Respondent advised the district court that THE STATE had no transcript, the prosecutor had no file, and the court reporter had disposed of the notes in accord with applicable law. Shortly after that, the third district rendered the decision sought to be

reviewed herein, providing no facts or procedural background in its opinion, and merely stating that Petitioner's post conviction motion was barred by Rule 3.850(b), and that he was not entitled to coram nobis or mandamus. The court cited two cases - - one dealing with prohibited use of mandamus to circumvent the time limits in the rules, and the other holding that the doctrine of laches can bar post conviction relief. Petitioner has sought "direct conflict" review of that decision and this Court has accepted jurisdiction.

Respondent submits that there is no direct and express conflict apparent from the face of the decision sought to be reviewed. Only a resort to the now-discredited "record proper" provides any background; and even then, the record as it fleshes out the decision, fails to demonstrate conflict. THE STATE believes that this Court should find that jurisdiction was granted improvidently and should dismiss the cause.

However, on the merits, the third district was correct. The doctrine of laches will bar a motion or petition for post conviction relief if there was an inordinate delay in seeking relief and the state has been prejudiced. Even if the third district was incorrect, ***arguendo***, regarding its pre-***Wood*** and pre-***Peart*** decision to apply Rule 3.850(b) and to prohibit the use of mandamus to circumvent the rule, its decision is absolutely sustainable under the doctrine of laches.

Where a decision is right, although one or more of its stated reasons may be wrong, the decision must be affirmed. Application of the doctrine of laches to Petitioner's tardy

claim is a classic use of that doctrine. The record shows that Petitioner waited 12 years to complain that his plea was not voluntary. This Court has adopted a rule which allows court reporters to destroy their notes of proceedings in felony cases after ten years if no transcript has ever been generated. As a result of the reporter following this Court's rule, there is no transcript and one can never be prepared. If, as Petitioner alleges, a plea colloquy can never be recreated from memory or extrinsic sources, Respondent has been prejudiced. Laches is a complete bar to the relief now sought by Petitioner. If this Court reaches the merits, it should approve the third district's decision.

ARGUMENT

THE DECISION OF THE DISTRICT COURT OF APPEAL IS NOT IN EXPRESS AND DIRECT CONFLICT WITH ANY OTHER DECISIONS; AND IN ANY EVENT, WHEN A DEFENDANT ENTERS A NOLO PLEA, SERVES HIS 12-YEAR SENTENCE, AND RAISES A QUESTION CONCERNING THE PLEA WHICH WAS, AT ALL TIMES, KNOWN TO THAT DEFENDANT, ONLY AFTER IT IS IMPOSSIBLE TO OBTAIN A TRANSCRIPT OF THE PLEA COLLOQUY, THAT DEFENDANT IS BARRED BY LACHES, IF NOTHING ELSE, FROM ATTACKING THE PLEA.

Jurisdiction

Although this Court has accepted jurisdiction, THE STATE suggests that upon full consideration of the instant case, this Court has the authority to dismiss the instant case and find that there is an absence of "direct conflict" jurisdiction. This Court often exercises its authority and dismisses cases upon a finding that "jurisdiction was granted improvidently." ***Burns v. State***, 676 So. 2d 1366 (Fla. 1996).

From the face of the decision sought to be reviewed, it appears that a defendant filed some type of motion under Rule 3.850 for post conviction relief, that the motion was filed beyond the time limit in Rule 3.850(b), that the same defendant also filed a petition for writ of mandamus and a petition for writ of error coram nobis, and that those petitions

were either an attempt to circumvent the time limitations in Rule 3.850(b) or were barred by the doctrine of laches.[6]

Obviously, Rule 3.850(b) can be applied to bar a motion under Rule 3.850 as untimely. Just as obviously, a petition for writ of habeas corpus cannot be used to circumvent Rule 3.850(b)'s time limitations;[7] and just as clear is the rule that the doctrine of laches **may** bar a claim for post conviction relief. See, e.g., ***McCray v. State***, 699 So. 2d 1366 (Fla. 1997).

The foregoing rules of law are all that the decision sought to be reviewed stand for; all that may be ascertained without a detailed and careful review of the entire contents of the district and circuit court files. Unless there are decisions - - and none have been suggested - - which hold that the time limit in Rule 3.850(b) can never bar a post conviction motion, that habeas corpus may always be used to circumvent the time limits, and that laches can never bar habeas corpus or coram nobis petitions, there is no express and direct conflict and this Court should dismiss this cause.

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[6]The "record proper," mentioned, ***supra***, at footnote 1, became immaterial in 1980. See, ***Reaves v. State***, 485 So. 2d 829, 830 n.3 (Fla. 1986). See also, ***Lake v. Lake***, 103 So. 2d 639 (Fla. 1958), for an early analysis of "direct conflict" review under an earlier version of the constitution.

[7]Such a statement assumes that a defendant has an otherwise valid basis upon which to seek 3.850 relief **but** for no valid reason, does not file until the time limit has expired. That is all that may be gleaned from the face of the third district's decision.

The Merits

Without doubt, this Court's recent decisions in ***Wood v. State***, 750 So. 2d 592 (Fla. 1999), and ***Peart v. State***, 25 F.L.W. S271 (Fla., April 13, 2000), have had a significant impact on the ability of convicted defendants to seek relief from judgments and sentences based on nolo or guilty pleas through the use of writs of error coram nobis. Those cases and others over the past few months have revived hundreds of stale and moribund claims that pleas were involuntary or otherwise improper; but at the same time, they have made Rule 3.850 applicable to non-custodial defendants - - including the future application of 3.850(b)'s time limits to their claims previously brought by petitions for coram nobis.

Defendants, such as BIRDSONG, convicted pre-***Wood***, were given two years from the date of the decision to bring claims traditionally cognizable in coram nobis petitions. Post-***Wood*** defendants will be subject to the time limitations in 3.850(b) should they have claims traditionally brought in coram nobis petitions. This Court emphasized that discovery of facts giving rise to future claims will continue to be governed by the "due diligence standard[.]" 750 So. 2d at 595.[8]

Neither ***Wood*** nor ***Peart*** nor any of the recent similar cases altered any of the

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[8]Quoting with approval from ***Hallman v. State***, 371 So. 2d 482, 485 (Fla. 1979).

other substantive rules concerning the valid grounds upon which relief may be granted or the defenses which may be applied to defeat post conviction motions and petitions.

At the time of the two trial court orders in the instant case, and at the time of the third district's decision, ***Wood*** and its progeny and relatives had not as yet been decided. Thus, to the extent that the trial court or the third district applied a two-year time bar to Petitioner's motions or petitions, they would have been incorrect. BIRDSONG spends much of his brief making this simple point. Furthermore, to the extent that the two-year limit became inapplicable, there would have been no rational reason to utilize habeas corpus to circumvent that limit. These points, however well-taken in Petitioner's brief, are of no consequence to the outcome of the instant case.

It is well-settled that in criminal cases, as in civil litigation, an appellate court should affirm a trial court's decision if it is right, albeit for the wrong stated reason; and should affirm if any one of multiple reasons given for a decision would, by itself, demonstrate the basis to affirm. E.g., ***Stone v. State***, 481 So. 2d 478 (Fla. 1986); ***Nicewonder v. State***, 698 So. 2d 376 (Fla. 1st DCA 1997); ***State v. R.M.***, 696 So. 2d 449 (Fla. 4th DCA 1997); ***Cordova v. State***, 675 So. 2d 632 (Fla. 3d DCA 1996). In the instant case, the doctrine of laches applied in it most classic form to prevent Petitioner's claim.

As this Court wrote in ***McCray v. State***, 699 So. 2d 1366, 1368 (Fla 1997), laches

applies where a defendant has waited an unreasonable length of time to seek relief and the State is prejudiced as a result. ***McCray***, in fact, is similar to the instant case. There, the defendant sought habeas corpus and asserted a claim of ineffective assistance of appellate counsel 15 years earlier. This Court noted that if the defendant had alleged ineffective assistance of trial counsel, he would have been barred by the two-year limitation in Rule 3.850(b). Ineffective assistance of appellate counsel was not covered by the rule and the Court had only recently adopted an amendment to Rule 9.140(j)(3)(B), **Fla.R.App.P.** which applied a two-year limit to such claims.

The amended rule's time limit began to run on the date it became effective - - giving Mr. McCray two years from January 1, 1997, to assert ineffective assistance of appellate counsel. Nevertheless, this Court held that laches would bar the claim. This Court cited examples of situations where laches had been applied. E.g., ***Anderson v. Singletary***, 688 So. 2d 462 (Fla. 4th DCA 1997)(15 year delay and transcript had been destroyed). This Court's reasoning was simple:

> This Court has implemented time restrictions in the filing of collateral relief petitions because inmates must not be allowed to engage in inordinate delays in bringing their claims for relief before the courts without justification and because convictions must eventually become final. **As time goes by, records are destroyed**, essential evidence may become tainted or disappear, memories of witnesses

> fade, and witnesses may die or be otherwise unavailable.

699 So. 2d at 1368. Other cases reach similar results. See, ***Strange v. State***, 732 So. 2d 1117 (Fla. 5th DCA 1999)(delay of six and one-half years barred habeas petition); ***State v. Taylor***, 722 So. 2d 890 (Fla. 4th DCA 1998)(laches barred petition for coram nobis); ***Anderson v. Singletary***, 688 So. 2d 462 (Fla. 4th DCA 1997)(where there is unreasonable delay and State is prejudiced, laches bars post conviction relief).[9]

In the case at bench, Petitioner waited 12 years after his nolo plea to bring his various motions and petitions. As he gleefully and correctly points out, there is no plea colloquy. Pointing then to ***Boykin v. Alabama***, 395 U.S. 238, 89 S.Ct. 1709, 23 L. Ed.2d 274 (1969), he alleges that there is no way the STATE will be able to show that his plea was knowing and voluntary - - thus, he asserts that there is no result possible other than an order vacating the conviction! This Court must presume that the circuit judge and the defense attorney did nothing whatever to protect Petitioner's rights.[10]

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[9]Compare, ***Brown v. State***, 711 So. 2d 236 (Fla. 5th DCA 1998)(laches did not apply where delay only slightly over two years); but see, ***Smith v. Wainwright***, 425 So. 2d 618 (Fla. 2d DCA 1982)(laches applied where delay was eight year); ***Babson v. Wainwright***, 376 So. 2d 1187 (Fla. 5th DCA 1979)(laches applied where defendant waited 14 years and court reporter's notes had been destroyed).

[10]Petitioner's Brief does ask that this case be "sent back to the trial court for a hearing." Brief at 12. The question is: "A hearing on what?" If Petitioner's reliance on ***Boykin*** is deemed correct, and if Petitioner is right that **nothing** can be used to recreate the absent transcript, and if Petitioner is correct that his mere allegation that

In 1980, this Court appointed a study committee "[i]n an effort to relieve the document storage burden now experienced by all segments of Florida's court system while maintaining the integrity of court records. . .." ***In re Florida Rules of Civil Procedure***, 403 So. 2d 926 (Fla. 1981). One result was the adoption of Rule 2.075, **Fla.R.Jud.Admin.** effective January 1, 1982. That rule provides that court reporter notes or electronic records of proceedings shall be retained for ten years in felony cases when a transcript has not been prepared. Rule 2.075(e)(3). Thereafter, the notes or electronic records of proceeding are destroyed.

It would be an incongruous result for this Court to have adopted a rule providing that in cases such as the instant case, no plea colloquy will be available ten years after the plea,[11] yet allow a defendant to then seek an automatic reversal of his conviction on the basis that there is no transcript available. All he need do is allege that his plea was not voluntary.[12] If that indeed were the rule adopted by this Court at Petitioner's behest,

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his plea was not voluntary in a constitutional sense is sufficient, there would be no purpose for a hearing! Petitioner's pro se filings ask that his conviction be set aside.

[11]In the ***Wood*** case itself, Mr. Wood sought coram nobis eight years after the nolo plea. See, ***Wood v. State***, 698 So. 2d 293 (Fla. 1st DCA 1997). His transcript would have been available.

[12]It should be remembered that Petitioner is alleging that his plea was not voluntary in a "constitutional sense." He asserts in an unsworn petition that he did not know his rights, such as the right to maintain his "not guilty" plea, and presumably did not discover for the next 12 years that he could have gone to trial on the charge. He

there would be no reason why every single defendant who was convicted on a nolo or guilty plea more than ten years in the past, and where no appeal or other post conviction proceeding resulted in a transcript, should not immediately claim that his or her plea was not voluntary and obtain automatic relief!

It is interesting to note that Petitioner's argument that laches cannot be determined without a hearing cites as authority a case which is probably contrary to Petitioner's argument. ***Perry v. State***, 25 F.L.W. D541 (Fla. 1st DCA, Feb. 28, 2000) does require an evidentiary hearing based on the record before the first district. Applicable to the instant case is the following:

> While laches may very well be applicable in this case, we cannot determine that it exists as a matter of law **here**. In ***Weir*** [***v. State***, 319 So. 2d 80 (Fla. 2d DCA 1975)], a case factually indistinguishable from the instant case, the court held, '[T]he mere passage of time, standing by itself, would not constitute the prejudice necessary to support a finding of laches.' ***Weir,*** 319 So. 2d at 81. In ***Gregersen*** [***v. State***, 714 So. 2d 1195 (Fla. 4th DCA 1998)], the fourth district determined that the defense of laches applied in that case **because the record before the court established that there had been no transcript available and that the court**

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also asserts that he was not sent to Lantana for drug treatment - something he obviously knew for the past 12 years. Absent are any allegations of prejudice, or allegations that Petitioner would have probably been found not guilty had he proceeded to trial.

> **reporter's notes were also no longer available**. . . . We cannot make the same determination based on the record before us.

25 F.L.W. at D543. In the instant case, the record before this Court establishes the absence of a transcript. The clear implication of the foregoing from ***Perry*** is that where a record demonstrates that there is no transcript, and the court reporter's notes have been discarded, laches will bar a petition for writ of error coram nobis. In sum, while THE STATE believes that this Court should determine on further review that it lacks jurisdiction to review the third district's decision, if this Court does reach the merits, it should approve the decision because at least one of the three grounds mentioned in the decision does bar Petitioner's claims. If laches cannot be applied to the circumstances of the instant case, every person convicted on a nolo or guilty plea more than ten years in the past, where no transcript was generated, will seek to have their convictions set aside. All that will be required is a claim that they did not know their rights, or that their pleas were not voluntary, or that some aspect of the bargain was not honored by the state. If their claims cannot be countered with affidavits or testimony under a ***Boykin*** theory, their convictions will have to be set aside. This Court could not have intended such a result from ***Wood*** or ***Peart***.

CONCLUSION

Based upon the foregoing reasons and authorities, THE STATE respectfully suggests that this Court should conclude that it lacks jurisdiction because there is no "direct and express" conflict. On the merits, the decision of the third district should be approved. At least one of the three reasons given by the district court continues post-***Wood*** to be a valid defense to a post conviction motion or petition. The record demonstrates that laches is a complete bar.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of this brief was mailed this 9th day of June, 2000, to Marti Rothenberg, Assistant Public Defender, 1320 NW 14th Street, Miami, Florida 33125, counsel for Petitioner.

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CERTIFICATE OF FONT

I HEREBY CERTIFY that this brief was prepared in a 14 point proportionately spaced Times New Roman font.

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