

IN THE SUPREME COURT OF FLORIDA

CASE NO. 96,044

BOOKER BIRDSONG,

Petitioner,

-vs-

THE STATE OF FLORIDA,

Respondent.

693  
FILED  
DEBBIE CAUSSEAU

DEC 13 1999

CLERK, SUPREME COURT  
BY \_\_\_\_\_ *m*

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ON PETITION FOR DISCRETIONARY REVIEW FROM  
THE DISTRICT COURT OF APPEAL OF FLORIDA,  
THIRD DISTRICT

---

BRIEF OF RESPONDENT ON JURISDICTION

ROBERT A. BUTTERWORTH  
Attorney General  
Tallahassee, Florida

✓  
CHRISTINE E. ZAHRALBAN  
Assistant Attorney General  
Florida Bar No. 0122807  
Office of the Attorney General  
Department of Legal Affairs  
444 Brickell Avenue, Suite 950  
Miami, Florida 33131  
(305) 377-5441 Fax No. 377-5655

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PRELIMINARY STATEMENT

Respondent, THE STATE OF FLORIDA, was the prosecution in the trial court and Appellant in the District Court of Appeal of Florida, Third District (hereinafter "Third District"). Petitioner, BOOKER BIRDSONG, Jr. was the defendant in the trial court and the Appellee in the District Court of Appeal. The parties shall be referred to as they stand before this Court or as they stood in the trial court. The symbol "Ex." will refer to the appendix attached to the Respondent's brief on jurisdiction.

CERTIFICATE OF FONT AND TYPE SIZE

Counsel certifies that this brief was typed using Courier New 12.

**STATEMENT OF THE CASE AND FACTS**

The State rejects the statement of the case and facts contained in the Petitioner's Brief on Jurisdiction as it includes facts that are not included in the district court's opinion.<sup>1</sup>

The facts as contained in the district court's opinion, dated May 19, 1999, are as follows:

We affirm the denial of defendant's motion for postconviction relief, and deny both his Petition for Writ of Error Coram Nobis and his Petition for Writ of Mandamus. See Fla. R. Crim. P. 3.850(b) (imposing two year limitation on seeking postconviction relief in noncapital case unless facts on which claim is predicated were unknown to movant or movant's attorney and could not have been ascertained by the exercise of due diligence); see also Calloway v. State, 699 So.2d 849 (Fla. 3d DCA 1997) (holding that habeas petition cannot be used to circumvent the limitations period imposed by rule 3.850); Smith v. State, 506 So. 2d 69 (Fla. 1st DCA 1987) (holding that laches may bar claim for postconviction relief).

Denial of Motion for Postconviction relief, affirmed; Petitions for Writ of Error Coram Nobis and Mandamus, denied.

(Ex. A).

On July 16, 1999, Petitioner filed a notice to invoke the discretionary review of this Court. (Ex. B). On October 5, 1999, Petitioner filed a "Brief on Jurisdiction." (Ex. C). In his brief, the Petitioner framed the issue as "Does The Court Have

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<sup>1</sup>See Reaves v. State, 485 So. 2d 829 (Fla. 1986) ("conflict must be express and direct, i.e., it must appear within the four corners of the majority decision....")

Jurisdiction to Grant Petitioner Certiorari." The relief that Petitioner prayed for is that this Court remand this cause to the trial court for further postconviction proceedings. On or about October 13, 1999, the State filed a motion to dismiss the Petitioner's appeal with prejudice arguing that this Court was without original jurisdiction to review a common law Petition Writ of Certiorari. (Ex. D). Additionally, the State argued that even if Petitioner's Petition was treated as a petition for discretionary review, this Court still lacks jurisdiction pursuant to Vetrick v. Hollander, 464 So. 2d 552 (Fla. 1985) because, absolutely no jurisdictional basis had been alleged to support this petition for discretionary review.

On October 11, 1999, this Court entered an order directing Petitioner to amend his brief to conform with Fla. R. App. P. 9.120. (Ex. E). On or about November 1, 1999, Petitioner filed an amended brief in which he asked this Court to pass upon the following questions:

WHETHER FLORIDA COURTS ARE MISINTERPRETING FLORIDA RULE OF CRIMINAL PROCEDURE §3.850(B) AS BEING SO BROAD AS TO TIME BAR OR GIVE RISE TO LACHES WITH RESPECT TO A "PETITION" FOR WRIT OF ERROR CORAM NOBIS FILED ON BEHALF OF A LITIGANT WHO IS NOT "IN CUSTODY" AS REQUIRED UNDER §3.850(A)'S JURISDICTIONAL SCHEME?

WHETHER THE CIRCUIT COURT ERRED IN FAILING TO EXPLAIN OR ADVISE PETITIONER OF HIS CONSTITUTIONAL RIGHTS AND PROTECTIONS BEFORE ACCEPTING GUILTY PLEAS IN CRIMINAL CASE NO. 86-9201, AS MANDATED UNDER BOYKING V. ALABAMA, 395 U.S. 238 (1969), AND WHETHER PETITIONER

EFFECTIVELY WAIVED HIS CONSTITUTIONAL RIGHTS AND PROTECTIONS ABSENT AN "ON THE RECORD" EXPLANATION OR ADVISEMENT?

(Ex. F). On November 11, 1999, this Court acknowledged receipt of the Petitioner's amended brief filed on November 4, 1999 but permitted Petitioner to file a second amended brief because the amended brief exceeded the required page limit. (Ex. G). On or about November 14, 1999 Petitioner filed a "Second Amended Brief on Jurisdiction" in which he asks this Court to pass upon the following questions:

WHETHER FLORIDA COURTS ARE MISINTERPRETING FLORIDA RULE OF CRIMINAL PROCEDURE § 3.850(B) AS BEING SO BROAD AS TO TIME BAR OR GIVE RISE TO LACHES WITH RESPECT TO A "PETITION" FOR WRIT OF ERROR CORAM NOBIS FILED ON BEHALF OF A LITIGANT WHO IS NOT "IN CUSTODY" AS REQUIRED UNDER §3.850(A)'S JURISDICTIONAL SCHEME?

WHETHER THE CIRCUIT COURT ERRED IN FAILING TO EXPLAIN OR ADVISE PETITIONER OF HIS CONSTITUTIONAL RIGHTS AND PROTECTIONS BEFORE ACCEPTING GUILTY PLEAS IN CRIMINAL CASE NO. 86-9201, AS MANDATED UNDER BOYKING V. ALABAMA, 395 U.S. 238 (1969), AND WHETHER PETITIONER EFFECTIVELY WAIVED HIS CONSTITUTIONAL RIGHTS AND PROTECTIONS ABSENT AN "ON THE RECORD" EXPLANATION OR ADVISEMENT?

(Ex. H). The State's response follows.

**QUESTION PRESENTED**

WHETHER THIS COURT SHOULD DECLINE TO EXERCISE ITS DISCRETIONARY JURISDICTION BASED ON THE RESOLUTION OF PETITIONER'S QUESTIONS WHERE NO JURISDICTIONAL BASIS HAS BEEN ALLEGED TO SUPPORT DISCRETIONARY REVIEW.

### SUMMARY OF THE ARGUMENT

The requirements for the exercise of the discretionary jurisdiction of this Court to review decisions from the district courts are set forth in Florida Rule of Appellate Procedure 9.030(a)(2). A review of the decision below clearly does not satisfy any of the requirements for the exercise of discretionary jurisdiction of this Court. The decision of the Third District Court of Appeal is not in conflict with any decision from this Court or any other district court on the same question of law.

Furthermore, to the extent the Petitioner seeks to establish jurisdiction by asking this Court to pass upon his two stated questions, this Court should decline to accept discretionary jurisdiction. Pursuant to Article V §3(b)(4) Fla. Const. this Court "[m]ay review any decision of a district court of appeal that passes upon a question certified by it to be one of great public importance." The District Court of Appeal of Florida, Third District has not certified the Petitioner's stated questions.

Lastly, the Respondent respectfully submits that this Court is without original jurisdiction to review a common law Petition Writ of Certiorari. Art. V, Section 3, Fla. Const.; Fla. R. App. P. 9.030 (3). Therefore, this Court should decline to exercise its discretionary jurisdiction on that basis.



ARGUMENT

THIS COURT SHOULD DECLINE TO EXERCISE ITS DISCRETIONARY JURISDICTION BASED ON THE RESOLUTION OF PETITIONER'S QUESTIONS WHERE NO JURISDICTIONAL BASIS HAS BEEN ALLEGED TO SUPPORT DISCRETIONARY REVIEW.

Petitioner seeks discretionary review of a decision of the Third District Court of Appeal which, *inter alia*, affirmed the denial of the Petitioner's Motion for Postconviction Relief. Petitioner urges this Court to grant a Writ of Certiorari and thereafter a Writ of Habeas Corpus. In his brief, the Petitioner asks this Court to pass upon the following questions:

WHETHER FLORIDA COURTS ARE MISINTERPRETING FLORIDA RULE OF CRIMINAL PROCEDURE § 3.850(B) AS BEING SO BROAD AS TO TIME BAR OR GIVE RISE TO LACHES WITH RESPECT TO A "PETITION" FOR WRIT OF ERROR CORAM NOBIS FILED ON BEHALF OF A LITIGANT WHO IS NOT "IN CUSTODY" AS REQUIRED UNDER §3.850(A)'S JURISDICTIONAL SCHEME?

WHETHER THE CIRCUIT COURT ERRED IN FAILING TO EXPLAIN OR ADVISE PETITIONER OF HIS CONSTITUTIONAL RIGHTS AND PROTECTIONS BEFORE ACCEPTING GUILTY PLEAS IN CRIMINAL CASE NO. 86-9201, AS MANDATED UNDER BOYKING V. ALABAMA, 395 U.S. 238 (1969), AND WHETHER PETITIONER EFFECTIVELY WAIVED HIS CONSTITUTIONAL RIGHTS AND PROTECTIONS ABSENT AN "ON THE RECORD" EXPLANATION OR ADVISEMENT?

(App. B, p. 1).

The requirements for the exercise of the discretionary jurisdiction of this Court to review decisions from the district courts are set forth in Florida Rule of Appellate Procedure

9.030(a)(2). A review of the decision below clearly does not satisfy any of the requirements for the exercise of discretionary jurisdiction of this Court. The decision of the Third District Cour of Appeal is not in conflict with any decision from this Court or any other district court on the same question of law. "Conflict between decisions must be express and direct, i.e., it must appear within the four corners of the majority decision. Neither a dissenting opinion nor the record itself can be used to establish jurisdiction." Reeves v. State, 485 So. 2d 829, 830 (Fla. 1986).

Furthermore, to the extent the Petitioner seeks to establish jurisdiction by asking this Court to pass upon his two stated questions, this Court should decline to accept discretionary jurisdiction. Pursuant to Article V §3(b)(4) Fla. Const. this Court "[m]ay review any decision of a district court of appeal that passes upon a question certified by it to be one of great public importance." The District Court of Appeal of Florida, Third District has not certified the above stated questions. Therefore, this Court should decline to exercise its discretionary jurisdiction. See State v. Perry, 687 So. 2d 831 (Fla. 1997); Ratliff v. State, 682 So. 2d 556 (Fla. 1996).

Lastly, the Respondent respectfully submits that this Court is without original jurisdiction to review a common law Petition Writ of Certiorari. Art. V, Section 3, Fla. Const.; Fla. R. App. P. 9.030 (3). Therefore, this Court should decline to exercise its

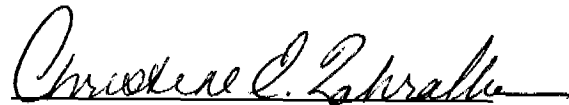
discretionary jurisdiction on that basis. See Vetrick v. Hollander,  
464 So. 2d 552 (Fla. 1985).

**CONCLUSION**

WHEREFORE, based on the preceding authorities and arguments,  
Respondent respectfully requests that the Court decline to exercise  
its discretionary jurisdiction.

Respectfully Submitted,

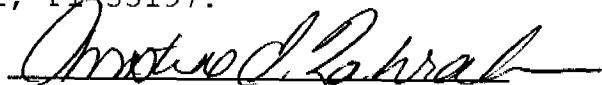
ROBERT A. BUTTERWORTH  
Attorney General



CHRISTINE E. ZAHRALBAN  
Assistant Attorney General  
Florida Bar Number 0122807  
Office of the Attorney General  
Department of Legal Affairs  
444 Brickell Ave., Suite 950  
Miami, Florida 33131  
(305) 377-5441

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true and correct copy of the foregoing  
Brief of Respondent was mailed this 10 day of December 1999, to  
Mr. Booker Birdsong Jr., DC# 42831-004, Federal Corrections  
Institution, P.O. Box 979137, Miami, Fl 33197.



CHRISTINE E. ZAHRALBAN  
Assistant Attorney General

IN THE SUPREME COURT OF FLORIDA

CASE NO. 96,044

**BOOKER BIRDSONG,**

Petitioner,

vs.

**THE STATE OF FLORIDA,**

Respondent.

---

APPENDIX TO RESPONDENT'S BRIEF

IN THE SUPREME OF FLORIDA

**BOOKER BIRDSONG,**

CASE NO. 96,044

Petitioner,

Lower Case No. 94-3028-A

vs.

**THE STATE OF FLORIDA,**

Respondent.

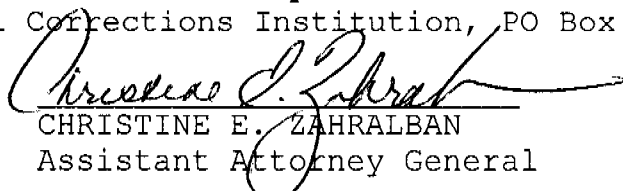
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State's Motion to Dismiss October 13, 1999	Ex. D
Order dated October 11, 1999	Ex. E
Petitioner's Amended Brief Dated November 1, 1999	Ex. F
Order dated November 11, 1999	Ex. G
Second Amended Brief	Ex. H

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing **APPENDIX TO RESPONDENT'S BRIEF** was furnished by mail to Booker Birdsong, No. 42831-004 at Federal Corrections Institution, PO Box 979137, Miami, Fl 33197.

  
CHRISTINE E. ZAHRALEBAN  
Assistant Attorney General

**EXHIBIT A**

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

BOOKER BIRDSONG, JR.,

\*\*

Appellant.

\*\*

CASE NOS. 98-3325  
98-1935

vs.

\*\*

THE STATE OF FLORIDA,

\*\*

LOWER  
TRIBUNAL NO. 86-9201

Appellee.

\*\*

Opinion filed May 19, 1999.

Case No. 98-3325: An Appeal under Fla. R. App. P. 9.140(i) from the Circuit Court for Dade County, and Petition for Writ of Error Coram Nobis, Barbara S. Levenson, Judge.

Case No. 98-1935: On Petition for Writ of Mandamus to the Circuit Court for Dade County, Barbara S. Levenson, Judge.

Booker Birdsong, Jr., in proper person.

Robert A. Butterworth, Attorney General, for appellee.

Before NESBITT, JORGENSEN, and LEVY, JJ.

PER CURIAM.

We affirm the denial of defendant's motion for postconviction

relief, and deny both his Petition for Writ of Error Coram Nobis and his Petition for Writ of Mandamus. See Fla. R. Crim. P. 3.850(b) (imposing two-year limitation on seeking postconviction relief in noncapital case unless facts on which claim is predicated were unknown to movant or movant's attorney and could not have been ascertained by the exercise of due diligence); see also Calloway v. State, 699 So. 2d 849 (Fla. 3d DCA 1997) (holding that habeas petition cannot be used to circumvent the limitations period imposed by rule 3.850); Smith v. State, 506 So. 2d 69 (Fla. 1st DCA 1987) (holding that laches may bar claim for postconviction relief).

Denial of Motion for Postconviction relief, affirmed;  
Petitions for Writ of Error Coram Nobis and Mandamus, denied.



# **EXHIBIT B**

99-19251

Mr. Booker Birdsong, Jr.  
Reg. No. 42831-004  
P.O. Box 979137  
Miami, Florida 33197

7/21/99 filed 7/16/99  
RE: BOOKER BIRDSONG, JR.  
VS.  
STATE OF FLORIDA  
CASE NO. 96,044  
(DCA Nos. 98-1935 and 98-3325)

I have this date received the below-listed pleadings or documents:

Notice to Invoke Discretionary Jurisdiction (filed in DCA 7/9/99) with copy of DCA opinion.

Please make reference to the case number in all correspondence and pleadings.

Most cordially,

*Debbie Caussey*

Acting Clerk  
Supreme Court

**ALL PLEADINGS SIGNED BY  
AN ATTORNEY MUST INCLUDE  
THE ATTORNEY'S FLORIDA  
BAR NUMBER.**

DC/bhp

cc: Hon. Mary Cay Blanks, Clerk  
Hon. Robert A. Butterworth

**RECEIVED**

JUL 23 1999

**ATTORNEY GENERAL  
MIAMI OFFICE**

**EXHIBIT C**

*99-1-9251-B*

IN THE  
SUPREME COURT OF THE STATE OF FLORIDA  
OCTOBER TERM, 1999

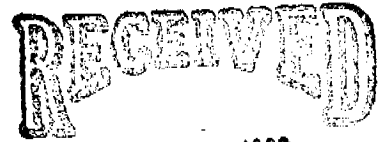
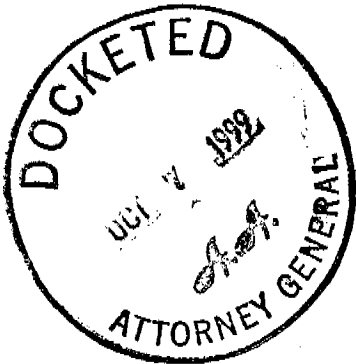
BOOKER BIRDSONG, JR.,

Petitioner,

v.

THE STATE OF FLORIDA,

Respondent.



OCT 7 1999

ATTORNEY GENERAL  
MIAMI OFFICE

BRIEF ON JURISDICTION

*Our brief due  
10-30-99*

Respectfully submitted,

*Booker Birdsong*

Booker Birdsong, Jr., pro se  
Reg. No. 42831-004  
Federal Corrections Institution  
P.O. Box 979137  
Miami, Florida 33197

*[Handwritten mark]*

PRELIMINARY STATEMENT

The Petitioner of record, BOOKER BIRDSONG, JR., appearing pro se, litigated a petition for writ of mandamus and a petition for writ of error coram nobis; case nos. 98-1935, 98-3325. The State of Florida, hereafter as "the Respondent," filed a motion to dismiss for Petitioner's failure to file a jurisdictional brief. The Court, however, extended the time requirements for filing this brief up to and including October 11, 1999.

The instant brief ensues.<sup>1/</sup>

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<sup>1/</sup> A statement of facts is not incorporated nor needed to determine jurisdiction over the instant matter.

**DOES THE COURT HAVE JURISDICTION**  
**TO GRANT PETITIONER CERTIORARI?**

On May 27, 1999, this Court in Wood v. State, 24 Fla.L. Weekly S240 (Fla. May 27, 1999), had occasion to abolish the common law writ of error coram nobis. To accomplish the abolition of the ancient writ, the requirements for habeas corpus relief (i.e., Rule 3.850), were drastically altered.

A petitioner who now seeks habeas relief in the State of Florida will be (or so it appears) allowed a two year grace period running from the date of the opinion in Wood. See e.g., Fla.R.Crim.P. §3.850(b) (computing time limitations period). Since the ancient writ of error coram nobis has now been formally abolished, the grace period is wholly appropriate and should apply in this case as well.

Petitioner's cases in the lower tribunals centered and indeed hinged on the application of the ancient writ of error, which is now nonexistent. Fortunately, this Court hath the power to remand this cause to the circuit court for a timely determination under Florida's Rule 3.850. Certiorari for a nonexistent remedy is not appropriate, but remand for a determination under the now applicable procedural rule is appropriate, and duly sought. It is so prayed.

CONCLUSION

Based upon the foregoing analysis, coupled with the Court's decision in Wood v. State, (citation omitted), it is respectfully prayed that this cause will forthwith be remanded to the lower tribunal for further proceedings pursuant to Florida Rule of Criminal Procedure 3.850.

Respectfully submitted,

*Booker T Birdsong*

Booker Birdsong, Jr., pro se  
Reg. No. 42831-004  
Federal Corrections Institution  
P.O. Box 979137  
Miami, Florida 33197

CERTIFICATE OF SERVICE

The foregoing pleading has been served upon the Respondent of record at: Robert A. Butterworth, Attorney General, c/o: Christine E. Zahralaban, Assistant Attorney General, Florida Bar Number 0122807, Office of the Attorney General, Department of Legal Affairs, 444 Brickell Avenue, Suite 950, Miami, Florida 33131,

On this 5 day of October A.D. 1999.

Respectfully submitted,

*Booker T. Birdsong*

Booker Birdsong, Jr., pro se  
Reg. No. 42831004  
P.O. Box 979137  
Miami, FL 33197



**EXHIBIT D**

299-19257-B

IN THE SUPREME COURT OF  
FLORIDA

BOOKER BIRDSONG, JR.

Petitioner,

vs.

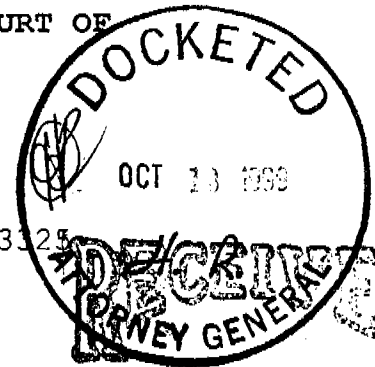
THE STATE OF FLORIDA,

Respondents.

CASE NO. 96,044

LT. 98-1935 & 98-3125

MOTION TO DISMISS  
WITH PREJUDICE



OCT 14 1999

ATTORNEY GENERAL  
MIAMI OFFICE

Respondent, **THE STATE OF FLORIDA** ("State"), hereby moves this Court to dismiss this appeal for lack of jurisdiction under Rule 9.030(2) and (3) and as grounds therefore, states:

1. This is a motion to dismiss the Petitioner's appeal in case number 96,044 with prejudice. In his Petition for Discretionary Review filed on October 5, 1999, Petitioner frames his issue as "Does The Court Have Jurisdiction to Grant Petitioner Certiorari." (See Exhibit A - Petitioner's Brief on Jurisdiction). The relief that Petitioner prays for is that this Court remand this cause to the trial court for further postconviction proceedings.

2. It is well settled that this Court is without original jurisdiction to review a common law Petition Writ of Certiorari. Art. V, Section 3, Fla. Const.; Fla. R. App. P. 9.030 (3).

3. Additionally, even if this Petition is treated as a petition for discretionary review, this Court still lacks

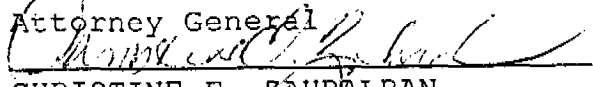
jurisdiction and should therefore dismiss this appeal with prejudice. The Petitioner is seeking review of a Third District Court of Appeal opinion wherein rehearing was denied on June 16, 1999. At the direction of this Court, the instant Petition for Discretionary Review was filed on October 5, 1999. Although Petitioner filed a Notice to Invoke Discretionary jurisdiction on July 7, 1999, absolutely no jurisdictional basis has been alleged to support this petition for discretionary review. (See Exhibit A). Because no jurisdictional basis has been alleged to support the petition for discretionary review, the instant petition should be dismissed with prejudice. Vetrick v. Hollander, 464 So. 2d 552 (Fla. 1985).

4. Consequently, because this Court does not have common law certiorari jurisdiction and because the Petitioner has not alleged a basis for invoking the discretionary jurisdiction of this Court, this Court should dismiss the instant petition with prejudice.

WHEREFORE, Respondent respectfully requests that this Court dismiss this matter with prejudice for lack of jurisdiction.

Respectfully Submitted,

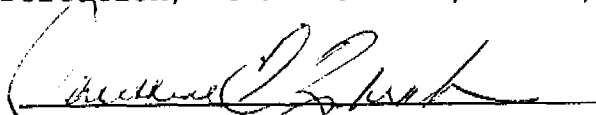
ROBERT A. BUTTERWORTH  
Attorney General

  
CHRISTINE E. ZAHRALBAN  
Assistant Attorney General  
Florida Bar Number 0122807  
Office of the Attorney General  
Department of Legal Affairs  
444 Brickell Ave., Suite 950

Miami, Florida 33131  
(305) 377-5441

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed this 13 day of October, 1999, to Booker Birdsong, No. 42831-004 at Federal Corrections Institution, PO Box 979137, Miami, Fl 33197.



CHRISTINE E. ZAHRALBAN  
Assistant Attorney General  
Florida Bar Number 0122807

**EXHIBIT E**

99-4251-B

Mr. Booker Birdsong, Jr.  
Reg. No. 42831-004  
Federal Corrections Institution  
P. O. Box 979137  
Miami, Florida 33197

10/11/99 filed 10/08/99

Booker Birdsong, Jr.  
v.  
State of Florida

CASE NO. 96,044

I have this date received the below-listed pleadings or documents:

Briefs filed in this Court must conform to Fla. R. App. P. 9.210. We are enclosing a copy of this rule.

Please amend your petitioner's brief on jurisdiction to include a table of contents; table of citations; certificate of font size; statement of the case and the facts; a summary of argument; argument with regard to each issue; conclusion and certificate of service. Your amended brief shall be served on or before October 21, 1999

Please make reference to the case number in all correspondence and pleadings.

Most cordially,

*Debbie Causseau*

Acting Clerk  
Supreme Court

**ALL PLEADINGS SIGNED BY  
AN ATTORNEY MUST INCLUDE  
THE ATTORNEY'S FLORIDA  
BAR NUMBER.**

DC/bdm

✓ cc: Ms. Christine E. Zahralaban

**RECEIVED**  
OCT. 13 1999

**ATTORNEY GENERAL  
MIAMI OFFICE**

**EXHIBIT F**

No: 96,044

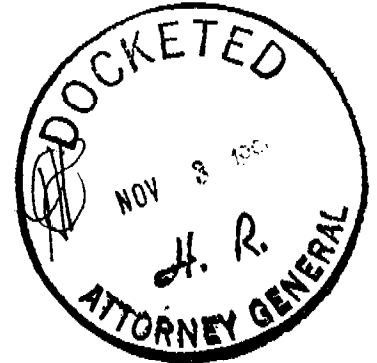
*L99-19251-B*

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IN THE  
SUPREME COURT OF THE STATE OF FLORIDA  
NOVEMBER TERM 1999

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BOOKER BIRDSONG, JR.,  
Petitioner,  
v.  
THE STATE OF FLORIDA,  
Respondent.



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On Petition for Writ of Certiorari to the  
Third District Court of Appeal  
for the State of Florida

---



NOV 3 1999

ATTORNEY GENERAL  
MIAMI OFFICE

AMENDED BRIEF ON JURISDICTION

*Our brief/Juris due  
11-26-99*

Respectfully submitted,

*Booker Birdsong*

Booker Birdsong, Jr., pro se  
Reg. No. 42831-004  
Federal Corrections Institution  
P.O. Box 979137  
Miami, Florida 33197

---



CERTIFICATE OF INTERESTED PARTIES

There are no other parties who have an interest in the just resolution of this cause than those listed in the caption of the case.

CERTIFICATE OF TYPE SIZE AND STYLE

The foregoing brief is formulated with 10-point Courier type, a font that is not proportionately spaced.

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ISSUE ONE:

WHETHER FLORIDA COURTS ARE MISINTERPRETING  
FLORIDA RULE OF CRIMINAL PROCEDURE  
§3.850(b) AS BEING SO BROAD AS TO TIME  
BAR OR GIVE RISE TO LACHES WITH RESPECT  
TO A "PETITION" FOR WRIT OF ERROR CORAM  
NOBIS FILED ON BEHALF OF A LITIGANT WHO  
IS NOT "IN CUSTODY" AS REQUIRED UNDER  
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ISSUE TWO:

WHETHER THE CIRCUIT COURT ERRED IN FAILING  
TO EXPLAIN OR ADVISE PETITIONER OF HIS  
CONSTITUTIONAL RIGHTS AND PROTECTIONS  
BEFORE ACCEPTING GUILTY PLEAS IN CRIMINAL  
CASE NUMBER 86-9201, AS MANDATED UNDER  
BOYKING V. ALABAMA, 395 U.S. 238 (1969),  
AND WHETHER PETITIONER EFFECTIVELY WAIVED  
HIS CONSTITUTIONAL RIGHTS AND PROTECTIONS  
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* <u>Fox v. Kelso,</u> 911 F.2d 563 (11th Cir. 1990).....	10
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- (A-1) - Third District Court of Appeal's order denying petition for writ of mandamus and order affirming circuit court's denial of petition for writ of error coram nobis, May 19, 1999. (Circuit Court's May 8 and June 19, 1998 orders denying petition for writ of error coram nobis attached hereto).
- (A-2) - Third District Court of Appeal's order denying motion for rehearing
- (A-3) - Mandate of the Third District Court of Appeal sending the case down to the lower tribunal
- (A-4) - Full text of Fla.R.Crim.P. 3.850(a) and (b)
- (A-5) - Order of insolvency, January 8, 1999.

STATEMENT OF THE CASE AND FACTS

On August 11, 1986, Petitioner entered a plea of guilty to a charge of robbery and was sentenced to twelve years imprisonment; case number 86-9201.<sup>1/</sup> The circuit court entered judgment and then remanded Petitioner to the custody of the Department of Corrections. Petitioner fully served his sentence of imprisonment.

On February 17, 1998, Petitioner sought a writ of error coram nobis, which was subsequently denied on May 8, 1999.<sup>2/</sup> A timely notice of appeal was filed. Following a period of approximately eight months from the date of the filing of the notice of appeal, absent an acknowledgment of the notice of appeal, Petitioner sought a writ of mandamus in the appellate court.

The Third District Court of Appeal, in a per curiam opinion "affirm[ed] the denial of defendant's motion for postconviction relief and den[ied] both his Petition for

---

1/ Petitioner initially raised the following grounds: (1) that his plea was not voluntarily, knowingly, and intelligently entered into; (2) that he did not understand the consequences of his plea. As a result of the procedural bar, Petitioner has usurped an issue in his attempt to demonstrate that the procedural bar under §3.850(b) is improper. (This issue is, of course, the first claim for relief).

2/ Rather obscurely the circuit court entered a second order on June 19, 1998 denying Petitioner's common law petition. The court then failed to grant an appeal which led to the request for mandamus.

Writ of Error Coram Nobis and his Petition for Writ of Mandamus." (Opinion order, May 19, 1999, (A-1 at 1, 2)). The appellate court found that "laches may bar claim for postconviction relief," quoting Smith v. State, 506 So.2d 69 (Fla. 1st DCA 1987) and that Florida Rule of Criminal Procedure §3.850(b) imposes a two-year limitation period for the timely filing of postconviction motions, which Petitioner cannot satisfy. The appellate court's decision is final, in that a timely petition for rehearing was denied on June 16, 1999. (A-2).

STATEMENT OF THE ISSUES

1. WHETHER FLORIDA COURTS ARE MISINTERPRETING FLORIDA RULE OF CRIMINAL PROCEDURE §3.850(b) AS BEING SO BROAD AS TO TIME BAR OR GIVE RISE TO LACHES WITH RESPECT TO A "PETITION" FOR WRIT OF ERROR CORAM NOBIS FILED ON BEHALF OF A LITIGANT WHO IS NOT "IN CUSTODY" AS REQUIRED UNDER §3.850(a)'s JURISDICTIONAL SCHEME?

2. WHETHER THE CIRCUIT COURT ERRED IN FAILING TO EXPLAIN OR ADVISE PETITIONER OF HIS CONSTITUTIONAL RIGHTS AND PROTECTIONS BEFORE ACCEPTING GUILTY PLEA IN CRIMINAL CASE NUMBER 86-9201, AS MANDATED UNDER BOYKIN V. ALABAMA, 395 U.S. 238 (1969), AND WHETHER PETITIONER EFFECTIVELY WAIVED HIS CONSTITUTIONAL RIGHTS AND PROTECTIONS ABSENT AN "ON THE RECORD" EXPLANATION OR ADVISEMENT?



SUMMARY OF THE ARGUMENT

The Court should grant the writ of certiorari and thereafter cause a writ of habeas corpus to issue pursuant to Article V, Section 3(b)(9) of the Florida Constitution, in that, prior to the decision in Wood v. State, 24 Fla.L.Weekly &240 (Fla. May 27, 1999), the Petitioner's ancient common law writ of error petition was the appropriate remedy. As he is no longer "in custody," (at least not physical custody) and the ancient writ of error has been abolished (via Wood), his claim that his (federally protected) Sixth Amendment right --as explained in Boykin v. Alabama, 395 U.S. 238 (1969) --has been denied, states a valid cause for the issuance of habeas corpus. See, Article I, Section 13. ("Habeas corpus"), Fla. Const.; Article I, Section 9. ("Due process"), Fla. Const.; Article I, Section 16.(a) ("Rights of accused..."). Further the Court recognizes, under oath [see, Article VI, Section 3. ("Oath... 'I do solemnly swear... that I will protect and defend the Constitution of the United States...'")], that the denial of a federally protected right is no mere trifle, but rather tests the intellectual honesty of those who are charged with enforcing our great Constitution, regarding it above personal preferences, political motivations, and the ever increasingly dishonest notions of good social

policy.

In reliance upon the clear and convincing argument that Petitioner was denied three specifically enumerated rights, guaranteed under the Sixth Amendment to the United States Constitution, it is correctly and succinctly stated that a remedy in the nature of habeas corpus must lie.

ISSUE ONE

WHETHER FLORIDA COURTS ARE MISINTERPRETING  
FLORIDA RULE OF CRIMINAL PROCEDURE §3.850(b)  
AS BEING SO BROAD AS TO TIME BAR OR GIVE  
RISE TO LACHES WITH RESPECT TO A "PETITION"  
FOR WRIT OF ERROR CORAM NOBIS FILED ON BEHALF  
OF A LITIGANT WHO IS NOT "IN CUSTODY" AS  
REQUIRED UNDER §3.850(a)'s JURISDICTIONAL  
SCHEME?

On May 27, 1999, this Court in Wood v. State, 24 Fla.L. Weekly S240 (Fla. May 27, 1999,) had occasion to abolish the common law writ of error coram nobis. To accomplish the abolition of the ancient writ, the requirements for habeas corpus relief (i.e., Rule 3.850), were drastically altered.

A petitioner who now seeks habeas relief in the State of Florida will be (or so it appears) allowed a two year grace period running from the date of the opinion in Wood. See e.g., Fla.R.Crim.P. §3.850(b) (computing time limitations period). Since the ancient writ of error coram nobis has now been formally abolished, the grace period is wholly appropriate and should apply in this case as well.

Petitioner's cases in the lower tribunals centered and indeed hinged on the application of the ancient writ of

error, which is now nonexistent. Fortunately, this Court hath the power to remand this cause to the circuit court for a timely determination under Rule 3.850, or in its sound discretion, to issue a writ of habeas corpus pursuant to Article V, Section 3(b)(9). Certiorari for a nonexistent remedy is not appropriate, but under Wood this Court may cause the issuance of a writ of habeas corpus.

ISSUE TWO

WHETHER THE CIRCUIT COURT ERRED IN FAILING TO EXPLAIN OR ADVISE PETITIONER OF HIS CONSTITUTIONAL RIGHTS AND PROTECTIONS BEFORE ACCEPTING GUILTY PLEA IN CRIMINAL CASE NUMBER 86-9201, AS MANDATED UNDER BOYKIN V. ALABAMA, 395 U.S. 238 (1969), AND WHETHER PETITIONER EFFECTIVELY WAIVED HIS CONSTITUTIONAL RIGHTS AND PROTECTIONS ABSENT AN "ON THE RECORD" EXPLANATION OR ADVISEMENT?

The issue herein presented asks this Court to determine two factors: (1) If the Petitioner has sufficiently met his threshold burden of demonstrating noncompliance with the requirements of Boykin, and (2) if under federal standards Petitioner effectively waived his constitutional rights. The question of an effective waiver of a constitutional right, is, of course, governed by federal standards. Douglas v. Alabama, 380 U.S. 415, 422 (1965); Boykin, 395 U.S. at 242-243.

In Boykin, the United States Supreme Court specifically enumerated the constitutional rights which courts must explain to a defendant in the taking of a proper plea:

Several constitutional rights are involved in a waiver that takes place when a plea of guilty is entered in a state criminal trial. The first is the privilege against compulsory self-incrimination guaranteed by the Fifth Amendment and applicable to the states by reason of the Fourteenth Amendment. Malloy v. Hogan, 378 U.S. 1 (1964). Second is the right to trial by jury. Duncan v. Louisiana, 391 U.S. 145 (1968). Third is the right to confront one's accusers. Pointer v. Texas, 380 U.S. 400 (1965).

Boykin, 395 U.S. at 243. "We cannot presume a waiver of these three important federal rights from a silent record." Id., at 243 (underscoring added).

The Boykin court stated that the stakes for a criminal defendant are so high that they require the "utmost solicitude...to make sure he has a full understanding of what the plea connotes and its consequences." In addition to the advantages which accrue directly to the defendant when this solicitude is exercised at the trial court level, the court system itself benefits by minimizing of "the spin-off of collateral proceedings that seek to probe murky memories." Boykin, 395 U.S. at 243-44.

Florida's response to the requirements of Boykin is found in Florida Rule of Criminal Procedure §3.172(c)(3). The adjective aspect of §3.172(c)(3) promulgates that the trial judge shall address a pleading defendant personally and shall determine that he understands:

"(3) that the defendant has the right to plead not guilty or to persist in that plea if it has already been made and that the defendant has the right to be tried by a jury and at that trial has the right to assistance of counsel, the right to compel attendance of witnesses on his or her behalf, the right to confront and cross-examine witnesses against him or her, and the right not to be compelled to incriminate himself or herself."

Fla.R.Crim.P. §3.172(c)(3).

Hence, Petitioner has met his threshold burden of showing noncompliance with the requirements of Boykin; to wit: there is no record of the plea, no transcripts, etc. In the context of a collateral proceeding, ordinarily the burden of proving a constitutional violation lies with the petitioner. Bruce v. Estelle, 536 F.2d 1051, 1056 (5th Cir.), cert. denied, 429 U.S. 1053 (1977). Once the petitioner, however, satisfies his threshold burden of showing noncompliance with the requirements of Boykin, the burden of showing that the plea was obtained constitutionally shifts to the State. See, Fox v. Kelso, 911 F.2d 563, 570 (11th Cir. 1990) (applying this standard in a collateral proceeding).

Petitioner initially put his claim in dispute by way of affidavit. Under Fox v. Kelso, supra, lack of a transcript of the plea colloquy coupled with an affidavit by petitioner seeking to vacate plea is a sufficient showing of Petitioner's threshold burden under Boykin. The burden

must now shift to the State. If the State is unable to meet the burden of showing that the Petitioner effectively waived a known right or privilege (meaning his constitutional rights, etc), then the conviction must be vacated.



CONCLUSION

Based upon the foregoing analysis, and the Court's decision in Wood v. State, (citation omitted), jurisdiction has been established. It is respectfully prayed that this Court will cause the issuance of a writ of habeas corpus to vacate the conviction, or remand this cause to the lower tribunal for further proceedings under Rule 3.850, or any other relief as is deemed appropriate.

Respectfully submitted,

*Booker T Birdsong*

Booker Birdsong, Jr., pro se  
Reg. No. 42831-004  
Federal Correction Institution  
P.O. Box 979137  
Miami, Florida 33197

November 1st, 1999

CERTIFICATE OF SERVICE

I certify that on this 1st day of November 1999, in accordance with this Court's October 22, 1999 order, (which was recieved on Thursday, October 28, 1999), the Amended Brief on Jurisdiction was delivered to prison authorities for forwarding, and served upon the Respondent of record: Office of the Attorney General, Department of Legal Affairs, RiverGate Plaza, 444 Brickell Avenue, Miami, Florida 33131.

Respectfully submitted,

*Booker T. Birdsong*

Booker Birdsong, Jr., pro se  
Reg. No. 42831-004  
Federal Correction Institution  
P.O. Box 979137  
Miami, Florida 33197

November 1st, 1999



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

BOOKER BIRDSONG, JR.,

\*\*

Appellant,

\*\* CASE NOS. 98-3325  
98-1935

vs.

\*\*

THE STATE OF FLORIDA,

\*\* LOWER  
TRIBUNAL NO. 86-9201

Appellee.

\*\*

Opinion filed May 19, 1999.

Case No. 98-3325: An Appeal under Fla. R. App. P. 9.140(i) from the Circuit Court for Dade County, and Petition for Writ of Error Coram Nobis, Barbara S. Levenson, Judge.

Case No. 98-1935: On Petition for Writ of Mandamus to the Circuit Court for Dade County, Barbara S. Levenson, Judge.

Booker Birdsong, Jr., in proper person.

Robert A. Butterworth, Attorney General, for appellee.

Before NESBITT, JORGENSEN, and LEVY, JJ.

PER CURIAM.

We affirm the denial of defendant's motion for postconviction

relief, and deny both his Petition for Writ of Error Coram Nobis and his Petition for Writ of Mandamus. See Fla. R. Crim. P. 3.850(b) (imposing two-year limitation on seeking postconviction relief in noncapital case unless facts on which claim is predicated were unknown to movant or movant's attorney and could not have been ascertained by the exercise of due diligence); see also Calloway v. State, 699 So. 2d 849 (Fla. 3d DCA 1997) (holding that habeas petition cannot be used to circumvent the limitations period imposed by rule 3.850); Smith v. State, 506 So. 2d 69 (Fla. 1st DCA 1987) (holding that laches may bar claim for postconviction relief).

Denial of Motion for Postconviction relief, affirmed;  
Petitions for Writ of Error Coram Nobis and Mandamus, denied.

IN THE CIRCUIT COURT OF THE  
ELEVENTH JUDICIAL CIRCUIT IN  
AND FOR DADE COUNTY, FLORIDA

THE STATE OF FLORIDA,

CRIMINAL DIVISION

Plaintiff,

Judge Barbara S. Levenson

vs.

Case No. 86-9201

BOOKER BIRDSON,

**ORDER DENYING DEFENDANT'S  
MOTION FOR POST-CONVICTION  
RELIEF**

Defendant.

---

The Court has considered defendant's motion for post-conviction relief filed pursuant to Florida Rule of Criminal Procedure 3.850 and denies the motion without evidentiary hearing on the following ground(s),

XX Motion is not timely filed

XX Motion is legally insufficient because

XX the defendant's proposition of law is unfounded or the law upon which he relies is faulty, or has changed.

\_\_\_\_\_ oath is legally insufficient

\_\_\_\_\_ defendant's allegations are refuted by the record (see attached)

\_\_\_\_\_ defendant fails to state sufficient facts in support of the motion

\_\_\_\_\_ motion is duplicitous of prior 3.850 motion (s). These grounds were or could have been raised, on direct appeal.

\_\_\_\_\_ Other (specify)

\_\_\_\_\_ See attached page:

The defendant has thirty (30) days from this date to appeal this ruling.

DONE AND ORDERED in Miami, Dade County, Florida this 8<sup>th</sup> day of May,

1998.

Barbara S. Levenson  
JUDGE BARBARA S. LEVENSON

Copies furnished to:  
Booker Birdson, Defendant  
Office of the State Attorney

IN THE CIRCUIT COURT OF THE  
ELEVENTH JUDICIAL CIRCUIT IN  
AND FOR DADE COUNTY, FLORIDA

CRIMINAL DIVISION  
CASE NO: *F86-9201*

THE STATE OF FLORIDA,

Plaintiff,

vs. *Booker Birdson*

Defendant.

**FILED**  
JUN 19 1998

*Petition*

The Court has considered the defendant's ~~Motion~~ *Petition* for Writ of Error Coram Nobis, and having been fully advised in the premise, the Court rules on the following ground(s):

- The motion is not timely filed.
- The motion is legally insufficient because:
  - the defendant's proposition of law is unfounded or the law upon which he relies is faulty, or has changed.
  - the defendant is represented by counsel (motions will only be accepted from counsel).
  - the defendant's is not represented by counsel, but this Court has no jurisdiction.
  - the defendant is not represented by counsel, but motion is not supported by facts
  - motion is duplicitous of prior 3.850 motion(s). These grounds were or could have been raised in prior motion(s).

Other (specify) *denied. Your Writs of Error Coram Nobis do not claim error of fact as required by law. (defendant's) Petitions 4/28/98 and 5/11/98 denied.*

The Defendant has thirty (30) days from this date to appeal this ruling.

DONE AND ORDERED in Miami, Dade County, Florida this \_\_\_\_\_ day of \_\_\_\_\_, 1997.

*E. Seestilly*  
CIRCUIT COURT JUDGE

I certify that a copy of this order has been furnished to the Movant, BOOKER BIRDSON

by mail this 19th day of JUNE

19 98  
*A. [Signature]*  
DEPUTY CLERK





IN THE DISTRICT COURT OF APPEAL  
OF FLORIDA  
THIRD DISTRICT  
JANUARY TERM, A.D. 1999  
WEDNESDAY, JUNE 16, 1999

BOOKER BIRDSONG, JR.,  
Appellant,  
vs.  
THE STATE OF FLORIDA,  
Appellee.

\*\*  
\*\*  
\*\* CASE NO. 98-3325  
98-1935  
\*\* LOWER  
TRIBUNAL NO. 96-9201  
\*\*  
\*\*

Upon consideration, appellant's motion for rehearing is hereby denied. NESBITT, JORGENSEN and LEVY, JJ., concur.


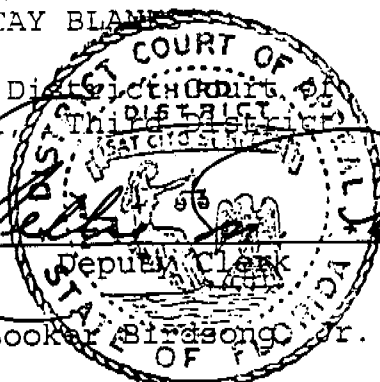
A True Copy

ATTEST:

MARY CAY BLANKS

Clerk District Court of  
Appeal, Third District

By

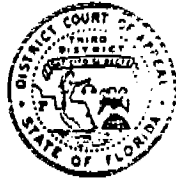
  


cc: Booker Birdsong Jr.

Robert A. Butterworth

/NB





ALAN R. SCHWARTZ  
CHIEF JUDGE

JOSEPH NESBITT  
JAMES R. JORGENSEN  
GERALD B. COPE, JR.  
DAVID L. LEVY  
DAVID M. GERSTEN  
MARIO P. GODERICK  
MELVIA B. GREEN  
JOHN G. FLETCHER  
ROBERT L. SHEVIN  
RODOLFO SORONDO, JR.  
JUDGES

DISTRICT COURT OF APPEAL  
THIRD DISTRICT  
2001 S.W. 117 AVENUE  
MIAMI, FLORIDA 33175-1716  
TELEPHONE (305) 229-3200

MARY CAY BLANKS  
CLERK

KENNETH F. POTTER  
MARSHAL

ANN E. HEARIN  
CHIEF DEPUTY CLERK

DOROTHY L. TUTT  
DEPUTY MARSHAL

July 2, 1999

RE: Booker Birdsong, Jr. vs. State  
CIRCUIT #86-9201  
DCA #98-3325, 98-1935

This is to advise you that the mandate in the above styled cause has been issued this date and mailed to Harvey Ruvin, Clerk of the Circuit Court of Dade County, Florida.

Very truly yours,

*Mary Cay Blanks*

Clerk District Court of  
Appeal, Third District

MCB/kw

cc: Booker Birdsong, Jr.; Robert A. Butterworth



Fla.R.Crim.P. §3.850(a), (b)

Florida Rule of Criminal Procedure §3.850(a) and (b) provide as follows:

(a) Grounds for Motion. A prisoner in custody under sentence of a court established by the laws of Florida claiming the right to be released on the ground that the judgment was entered or that the sentence was imposed in violation of the Constitution or laws of the United States or of the State of Florida, that the court was without jurisdiction to enter the judgment or to impose the sentence, that the sentence was in excess of the maximum authorized by law, that the plea was given involuntarily, or that the judgment or sentence is otherwise subject to collateral attack may move, in the court that entered the judgment or imposed the sentence, to vacate, set aside, or correct the judgment or sentence.

(b) Time Limitations. A motion to vacate a sentence that exceeds the limits provided by law may be filed at any time. No other motion shall be filed or considered pursuant to this rule if filed more than 2 years after the judgment and sentence become final in a noncapital case or more than 1 year after the judgment and sentence become final in a capital case in which a death sentence has been imposed unless it alleges that:

(1) the facts on which the claim is predicated were unknown to the movant or the movant's attorney and could not have been ascertained by the exercise of due diligence, or

(2) the fundamental constitutional right asserted was not established within the period provided for herein and has been held to apply retroactively.



IN THE DISTRICT COURT OF APPEAL  
OF FLORIDA  
THIRD DISTRICT  
JULY TERM, A.D. 1998  
JANUARY 8, 1999

BOOKER BIRDSONG JR.,  
Petitioner(s),  
vs.  
THE STATE OF FLORIDA,  
Respondent(s).

\*\* CASE NO. 98-03325  
98-01935  
\*\*  
\*\*  
\*\* LOWER  
TRIBUNAL NO. 86-9201  
\*\*

The petitioner is deemed insolvent and may proceed in forma pauperis for purposes of this cause.

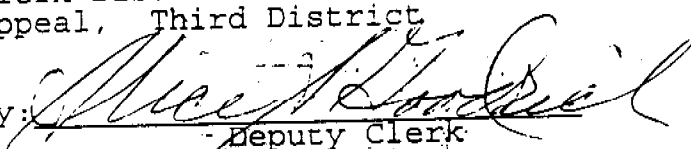
Upon the Court's own motion, it is ordered that the above appeal and petition are hereby consolidated for all appellate purposes under case no. 98-3325.

A True Copy

ATTEST:

MARY CAY BLANKS

Clerk District Court of  
Appeal, Third District

By:   
Deputy Clerk

cc: Booker Birdsong Jr.  
Harvey Ruvins  
/AG

Robert A. Butterworth



**EXHIBIT G**

DEBBIE CAUSSEAU, ACTING CLERK  
Supreme Court of Florida  
500 SOUTH DUVAL STREET  
TALLAHASSEE 32399-1927  
(850) 488-0125

199-9257-B

Mr. Booker Birdsong, Jr.  
Reg. No. 42831-004  
Federal Corrections Institution  
P. O. Box 979137  
Miami, Florida 33197

11/5/99 filed 11-4-99

Booker Birdsong, Jr.  
v.  
State of Florida

CASE NO. 96,044

I have this date received the below-listed pleadings or documents:

Your amended brief was filed on November 4, 1999; however, it exceeds the ten (10) page limit. Please amend your brief not to exceed ten pages and resubmit to the Court and serve opposing counsel.

Please make reference to the case number in all correspondence and pleadings.

Most cordially,

*Debbie Causseau*

Acting Clerk  
Supreme Court

**ALL PLEADINGS SIGNED BY  
AN ATTORNEY MUST INCLUDE  
THE ATTORNEY'S FLORIDA  
BAR NUMBER.**

DC/bdm

cc: ✓ Ms. Christine E. Zahralaban

**RECEIVED**  
NOV 8 1999

**ATTORNEY GENERAL  
MIAMI OFFICE**

**EXHIBIT H**

No: 96,044

99-1-9251-B

IN THE  
SUPREME COURT OF THE STATE OF FLORIDA

NOVEMBER TERM 1999

BOOKER BIRDSONG, JR.,

Petitioner,

v.

THE STATE OF FLORIDA,

Respondent.

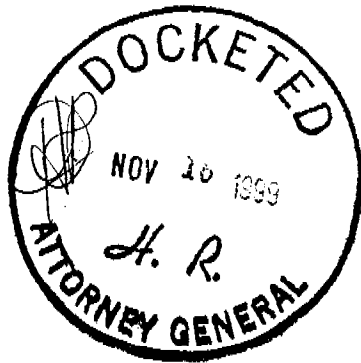
On Petition for Writ of Certiorari to the  
Third District Court of Appeal  
for the State of Florida

RECEIVED

NOV 16 1999

SECOND  
AMENDED BRIEF ON JURISDICTION

ATTORNEY GENERAL  
MIAMI OFFICE



Respectfully submitted,

*Booker T Birdsong*

Booker Birdsong, Jr., pro se  
Reg. No. 42831-004  
Federal Corrections Institution  
P.O. Box 979137.  
Miami, Florida 33197

CERTIFICATE OF INTERESTED PARTIES

There are no other parties who have an interest in the just resolution of this cause than those listed in the caption of the case.

CERTIFICATE OF TYPE SIZE AND STYLE

The foregoing brief is formulated with 10-point Courier type, a font that is not proportionately spaced.

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ISSUE ONE:

WHETHER FLORIDA COURTS ARE MISINTERPRETING  
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BEFORE ACCEPTING GUILTY PLEAS IN CRIMINAL  
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STATEMENT OF THE CASE AND FACTS

On August 11, 1986, Petitioner entered a plea of guilty to a charge of robbery and was sentenced to twelve years imprisonment; case number 86-9201.<sup>1/</sup> The circuit court entered judgment and then remanded Petitioner to the custody of the Department of Corrections. Petitioner fully served his sentence of imprisonment.

On February 17, 1998, Petitioner sought a writ of error coram nobis, which was subsequently denied on May 8, 1999.<sup>2/</sup> A timely notice of appeal was filed. Following a period of approximately eight months from the date of the filing of the notice of appeal, absent an acknowledgment of the notice of appeal, Petitioner sought a writ of mandamus in the appellate court.

The Third District Court of Appeal, in a per curiam opinion "affirm[ed] the denial of defendant's motion for postconviction relief and den[ied] both his Petition for

---

1/ Petitioner initially raised the following grounds: (1) that his plea was not voluntarily, knowingly, and intelligently entered into; (2) that he did not understand the consequences of his plea. As a result of the procedural bar, Petitioner has usurped an issue in his attempt to demonstrate that the procedural bar under §3.850(b) is improper. (This issue is, of course, the first claim for relief).

2/ Rather obscurely the circuit court entered a second order on June 19, 1998 denying Petitioner's common law petition. The court then failed to grant an appeal which led to the request for mandamus.

Writ of Error Coram Nobis and his Petition for Writ of Mandamus." (Opinion order, May 19, 1999, (A-1 at 1, 2)). The appellate court found that "laches may bar claim for postconviction relief," quoting Smith v. State, 506 So.2d 69 (Fla. 1st DCA 1987) and that Florida Rule of Criminal Procedure §3.850(b) imposes a two-year limitation period for the timely filing of postconviction motions, which Petitioner cannot satisfy. The appellate court's decision is final, in that a timely petition for rehearing was denied on June 16, 1999. (A-2).

STATEMENT OF THE ISSUES

1. WHETHER FLORIDA COURTS ARE MISINTERPRETING FLORIDA RULE OF CRIMINAL PROCEDURE §3.850(b) AS BEING SO BROAD AS TO TIME BAR OR GIVE RISE TO LACHES WITH RESPECT TO A "PETITION" FOR WRIT OF ERROR CORAM NOBIS FILED ON BEHALF OF A LITIGANT WHO IS NOT "IN CUSTODY" AS REQUIRED UNDER §3.850(a)'s JURISDICTIONAL SCHEME?

2. WHETHER THE CIRCUIT COURT ERRED IN FAILING TO EXPLAIN OR ADVISE PETITIONER OF HIS CONSTITUTIONAL RIGHTS AND PROTECTIONS BEFORE ACCEPTING GUILTY PLEA IN CRIMINAL CASE NUMBER 86-9201, AS MANDATED UNDER BOYKIN V. ALABAMA, 395 U.S. 238 (1969), AND WHETHER PETITIONER EFFECTIVELY WAIVED HIS CONSTITUTIONAL RIGHTS AND PROTECTIONS ABSENT AN "ON THE RECORD" EXPLANATION OR ADVISEMENT?

## SUMMARY OF THE ARGUMENT

The Court should grant the writ of certiorari and thereafter cause a writ of habeas corpus to issue pursuant to Article V, Section 3(b)(9) of the Florida Constitution, in that, prior to the decision in Wood v. State, 24 Fla.L.Weekly &240 (Fla. May 27, 1999), the Petitioner's ancient common law writ of error petition was the appropriate remedy. As he is no longer "in custody," (at least not physical custody) and the ancient writ of error has been abolished (via Wood), his claim that his (federally protected) Sixth Amendment right --as explained in Boykin v. Alabama, 395 U.S. 238 (1969) --has been denied, states a valid cause for the issuance of habeas corpus. See, Article I, Section 13. ("Habeas corpus"), Fla. Const.; Article I, Section 9. ("Due process"), Fla. Const.; Article I, Section 16.(a) ("Rights of accused..."). Further the Court recognizes, under oath [see, Article VI, Section 3. ("Oath... 'I do solemnly swear...that I will protect and defend the Constitution of the United States...'")], that the denial of a federally protected right is no mere trifle, but rather tests the intellectual honesty of those who are charged with enforcing our great Constitution, regarding it above personal preferences, political motivations, and the ever increasingly dishonest notions of good social

policy.

In reliance upon the clear and convincing argument that Petitioner was denied three specifically enumerated rights, guaranteed under the Sixth Amendment to the United States Constitution, it is correctly and succinctly stated that a remedy in the nature of habeas corpus must lie.

ISSUE ONE

WHETHER FLORIDA COURTS ARE MISINTERPRETING  
FLORIDA RULE OF CRIMINAL PROCEDURE §3.850(b)  
AS BEING SO BROAD AS TO TIME BAR OR GIVE  
RISE TO LACHES WITH RESPECT TO A "PETITION"  
FOR WRIT OF ERROR CORAM NOBIS FILED ON BEHALF  
OF A LITIGANT WHO IS NOT "IN CUSTODY" AS  
REQUIRED UNDER §3.850(a)'s JURISDICTIONAL  
SCHEME?

On May 27, 1999, this Court in Wood v. State, 24 Fla.L. Weekly S240 (Fla. May 27, 1999,) had occasion to abolish the common law writ of error coram nobis. To accomplish the abolition of the ancient writ, the requirements for habeas corpus relief (i.e., Rule 3.850), were drastically altered.

A petitioner who now seeks habeas relief in the State of Florida will be (or so it appears) allowed a two year grace period running from the date of the opinion in Wood. See e.g., Fla.R.Crim.P. §3.850(b) (computing time limitations period). Since the ancient writ of error coram nobis has now been formally abolished, the grace period is wholly appropriate and should apply in this case as well.

Petitioner's cases in the lower tribunals centered and indeed hinged on the application of the ancient writ of

error, which is now nonexistent. Fortunately, this Court hath the power to remand this cause to the circuit court for a timely determination under Rule 3.850, or in its sound discretion, to issue a writ of habeas corpus pursuant to Article V, Section 3(b)(9). Certiorari for a nonexistent remedy is not appropriate, but under Wood this Court may cause the issuance of a writ of habeas corpus.



ISSUE TWO

WHETHER THE CIRCUIT COURT ERRED IN FAILING TO EXPLAIN OR ADVISE PETITIONER OF HIS CONSTITUTIONAL RIGHTS AND PROTECTIONS BEFORE ACCEPTING GUILTY PLEA IN CRIMINAL CASE NUMBER 86-9201, AS MANDATED UNDER BOYKIN V. ALABAMA, 395 U.S. 238 (1969), AND WHETHER PETITIONER EFFECTIVELY WAIVED HIS CONSTITUTIONAL RIGHTS AND PROTECTIONS ABSENT AN "ON THE RECORD" EXPLANATION OR ADVISEMENT?

The issue herein presented asks this Court to determine two factors: (1) If the Petitioner has sufficiently met his threshold burden of demonstrating noncompliance with the requirements of Boykin, and (2) if under federal standards Petitioner effectively waived his constitutional rights. The question of an effective waiver of a constitutional right, is, of course, governed by federal standards. Douglas v. Alabama, 380 U.S. 415, 422 (1965); Boykin, 395 U.S. at 242-243.

In Boykin, the United States Supreme Court specifically enumerated the constitutional rights which courts must explain to a defendant in the taking of a proper plea:

Several constitutional rights are involved in a waiver that takes place when a plea of guilty is entered in a state criminal trial. The first is the privilege against compulsory self-incrimination guaranteed by the Fifth Amendment and applicable to the states by reason of the Fourteenth Amendment. Malloy v. Hogan, 378 U.S. 1 (1974). Second is the right to trial by jury. Duncan v. Louisiana, 391 U.S. 145 (1968). Third is the right to confront one's accusers. Pointer v. Texas, 380 U.S. 400 (1965).

Boykin, 395 U.S. at 243. "We cannot presume a waiver of these three important federal rights from a silent record." Id., at 243 (underscoring added).

Petitioner Birdsong's claim, as in Boykin, denotes that there is no transcript of the proceedings, meaning that the constitutional rights were not effectively waived on the record. Under the standard set in Fox v. Kelso, 911 F.2d 563, 570 (11th Cir. 1990), coupled with Boykin, this Court may exercise jurisdiction.

CONCLUSION

Based upon the foregoing analysis, and the Court's decision in Wood v. State, (citation omitted), jurisdiction has been established. It is respectfully prayed that this Court will cause the issuance of a writ of habeas corpus to vacate the conviction, or remand this cause to the lower tribunal for further proceedings under Rule 3.850, or any other relief as is deemed appropriate.

Respectfully submitted,

*Booker T Birdsong*

Booker Birdsong, Jr., pro se  
Reg. No. 42831-004  
Federal Correction Institution  
P.O. Box 979137  
Miami, Florida 33197

CERTIFICATE OF SERVICE

I certify that on this 14th day of November 1999, in accordance with this Court's November 5, 1999 order (which was received on November 9, 1999), the Second Amended Brief on Jurisdiction was delivered to prison authorities for forwarding, and served upon the Respondent of Record:

Office of the Attorney General, Department of Legal Affairs,  
RiverGate Plaza, 444 Brickell Avenue, Miami, Florida 33131.

Respectfully submitted,



Booker Birdsong, Jr., pro se  
Reg. No. 42831-004  
Federal Correction Institution  
P.O. Box 979137  
Miami, Florida 33197



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

BOOKER BIRDSONG, JR.,

Appellant,

vs.

THE STATE OF FLORIDA,

Appellee.

\*\*

\*\* CASE NOS. 98-3325  
98-1935

\*\*

\*\* LOWER  
TRIBUNAL NO. 86-9201

\*\*

Opinion filed May 19, 1999.

Case No. 98-3325: An Appeal under Fla. R. App. P. 9.140(i) from the Circuit Court for Dade County, and Petition for Writ of Error Coram Nobis, Barbara S. Levenson, Judge.

Case No. 98-1935: On Petition for Writ of Mandamus to the Circuit Court for Dade County, Barbara S. Levenson, Judge.

Booker Birdsong, Jr., in proper person.

Robert A. Butterworth, Attorney General, for appellee.

Before NESBITT, JORGENSON, and LEVY, JJ.

PER CURIAM.

We affirm the denial of defendant's motion for postconviction

relief, and deny both his Petition for Writ of Error Coram Nobis and his Petition for Writ of Mandamus. See Fla. R. Crim. P. 3.850(b) (imposing two-year limitation on seeking postconviction relief in noncapital case unless facts on which claim is predicated were unknown to movant or movant's attorney and could not have been ascertained by the exercise of due diligence); see also Calloway v. State, 699 So. 2d 849 (Fla. 3d DCA 1997) (holding that habeas petition cannot be used to circumvent the limitations period imposed by rule 3.850); Smith v. State, 506 So. 2d 69 (Fla. 1st DCA 1987) (holding that laches may bar claim for postconviction relief).

Denial of Motion for Postconviction relief, affirmed;  
Petitions for Writ of Error Coram Nobis and Mandamus, denied.

IN THE CIRCUIT COURT OF THE  
ELEVENTH JUDICIAL CIRCUIT IN  
AND FOR DADE COUNTY, FLORIDA

THE STATE OF FLORIDA,

Plaintiff,

vs.

BOOKER BIRDSON,

Defendant.

---

CRIMINAL DIVISION

Judge Barbara S. Levenson

Case No. 86-9201

**ORDER DENYING DEFENDANT'S  
MOTION FOR POST-CONVICTION  
RELIEF**

The Court has considered defendant's motion for post-conviction relief filed pursuant to Florida Rule of Criminal Procedure 3.850 and denies the motion without evidentiary hearing on the following ground(s),

Motion is not timely filed

Motion is legally insufficient because

the defendant's proposition of law is unfounded or the law upon which he relies is faulty, or has changed.

oath is legally insufficient

defendant's allegations are refuted by the record (see attached)

defendant fails to state sufficient facts in support of the motion

motion is duplicitous of prior 3.850 motion (s). These grounds were or could have been raised, on direct appeal.

Other (specify)

See attached page:

The defendant has thirty (30) days from this date to appeal this ruling.



DONE AND ORDERED in Miami, Dade County, Florida this 8<sup>th</sup> day of May,

1998.

  
JUDGE BARBARA S. LEVENSON

Copies furnished to:  
Booker Birdson, Defendant  
Office of the State Attorney

IN THE CIRCUIT COURT OF THE  
ELEVENTH JUDICIAL CIRCUIT IN  
AND FOR DADE COUNTY, FLORIDA

CRIMINAL DIVISION

CASE NO: *F86-9201*

THE STATE OF FLORIDA,

Plaintiff,

vs. *Booker Birdson*

Defendant.

**FILED**  
JUN 19 1998

*Petition*

The Court has considered the defendant's ~~Motion~~ for *Writ of Error Coram Nobis*, and having been fully advised in the premise, the Court rules on the following ground(s):

The motion is not timely filed.

The motion is legally insufficient because:

the defendant's proposition of law is unfounded or the law upon which he relies is faulty, or has changed.

the defendant is represented by counsel (motions will only be accepted from counsel).

the defendant's is not represented by counsel, but this Court has no jurisdiction.

the defendant is not represented by counsel, but motion is not supported by facts

motion is duplicitous of prior 3.850 motion(s). These grounds were or could have been raised in prior motion(s).

Other (specify) *Denied. Your Writs of Error Coram Nobis do not claim error of fact as required by law. (defendant's) Petitions 4/28/98 and 5/11/98 denied*

The Defendant has thirty (30) days from this date to appeal this ruling.

DONE AND ORDERED in Miami, Dade County, Florida this \_\_\_\_\_ day of \_\_\_\_\_ 1997.

*E. Seesley*  
CIRCUIT COURT JUDGE

I certify that a copy of this order has been furnished to the Movant, *Booker Birdson*

by mail this 19th day of JUNE

*Booker Birdson*  
DEPUTY CLERK



IN THE DISTRICT COURT OF APPEAL  
OF FLORIDA  
THIRD DISTRICT  
JANUARY TERM, A.D. 1999  
WEDNESDAY, JUNE 16, 1999

BOOKER BIRDSONG, JR.,  
Appellant,  
vs.  
THE STATE OF FLORIDA,  
Appellee.

\*\*  
\*\*  
\*\* CASE NO. 98-3325  
98-1935  
\*\* LOWER  
TRIBUNAL NO. 96-9201  
\*\*  
\*\*

Upon consideration, appellant's motion for rehearing is hereby denied. NESBITT, JORGENSEN and LEVY, JJ., concur.

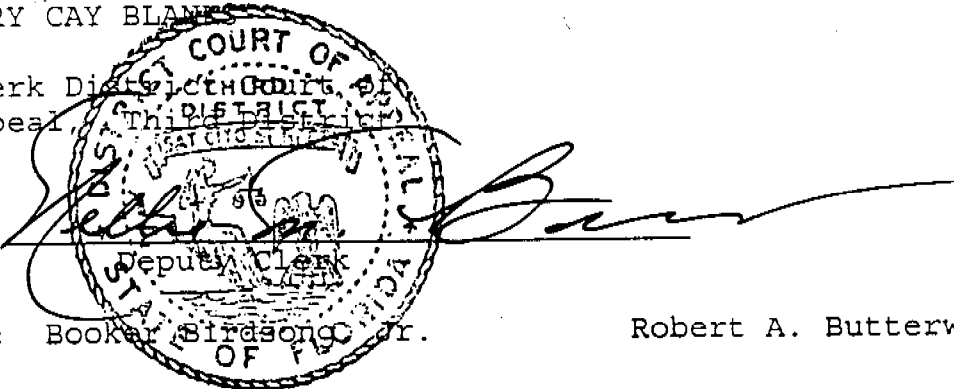
A True Copy

ATTEST:

MARY CAY BLANKS

Clerk District Court of  
Appeal, Third District

By

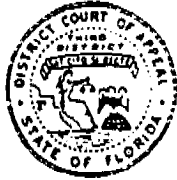


cc: Booker Birdsong, Jr.

Robert A. Butterworth

/NB





ALAN R. SCHWARTZ  
CHIEF JUDGE  
JOSEPH NESBITT  
JAMES R. JORGENSEN  
GERALD B. COPE, JR.  
DAVID L. LEVY  
DAVID M. GERSTEN  
MARIO P. GODERICH  
MELVIA B. GREEN  
JOHN G. FLETCHER  
ROBERT L. SHEVIN  
RODOLFO SORONDO, JR.  
JUDGES

DISTRICT COURT OF APPEAL  
THIRD DISTRICT  
2001 S.W. 117 AVENUE  
MIAMI, FLORIDA 33175-1716  
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MARY CAY BLANKS  
CLERK  
KENNETH F. POTTER  
MARSHAL  
ANN E. HEARIN  
CHIEF DEPUTY CLERK  
DOROTHY L. TUTT  
DEPUTY MARSHAL

July 2, 1999

RE: Booker Birdsong, Jr. vs. State  
CIRCUIT #86-9201  
DCA #98-3325, 98-1935

This is to advise you that the mandate in the above styled cause has been issued this date and mailed to Harvey Ruvin, Clerk of the Circuit Court of Dade County, Florida.

Very truly yours,

*Mary Cay Blanks*

Clerk District Court of  
Appeal, Third District

MCB/kw

cc: Booker Birdsong, Jr.; Robert A. Butterworth



Fla.R.Crim.P. §3.850(a), (b)

Florida Rule of Criminal Procedure §3.850(a) and (b) provide as follows:

(a) Grounds for Motion. A prisoner in custody under sentence of a court established by the laws of Florida claiming the right to be released on the ground that the judgment was entered or that the sentence was imposed in violation of the Constitution or laws of the United States or of the State of Florida, that the court was without jurisdiction to enter the judgment or to impose the sentence, that the sentence was in excess of the maximum authorized by law, that the plea was given involuntarily, or that the judgment or sentence is otherwise subject to collateral attack may move, in the court that entered the judgment or imposed the sentence, to vacate, set aside, or correct the judgment or sentence.

(b) Time Limitations. A motion to vacate a sentence that exceeds the limits provided by law may be filed at any time. No other motion shall be filed or considered pursuant to this rule if filed more than 2 years after the judgment and sentence become final in a noncapital case or more than 1 year after the judgment and sentence become final in a capital case in which a death sentence has been imposed unless it alleges that:

(1) the facts on which the claim is predicated were unknown to the movant or the movant's attorney and could not have been ascertained by the exercise of due diligence, or

(2) the fundamental constitutional right asserted was not established within the period provided for herein and has been held to apply retroactively.





IN THE DISTRICT COURT OF APPEAL  
OF FLORIDA  
THIRD DISTRICT  
JULY TERM, A.D. 1998  
JANUARY 8, 1999

BOOKER BIRDSONG JR.,

Petitioner(s),

vs.

THE STATE OF FLORIDA,

Respondent(s).

\*\* CASE NO. 98-03325  
98-01935

\*\*

\*\*

\*\* LOWER  
TRIBUNAL NO. 86-9201

\*\*

The petitioner is deemed insolvent and may proceed in forma pauperis for purposes of this cause.

Upon the Court's own motion, it is ordered that the above appeal and petition are hereby consolidated for all appellate purposes under case no. 98-3325.

A True Copy

ATTEST:

MARY CAY BLANKS

Clerk District Court of  
Appeal, Third District

By:

Deputy Clerk

cc: Booker Birdsong Jr.  
Harvey Ruvin  
/AG

Robert A. Butterworth