IN THE SUPREME COURT OF FLORIDA

CASE NO. 96,587

STATE OF FLORIDA,

Petitioner,

v.

GINO KALICI,

Respondent.

ANSWER BRIEF OF RESPONDENT

NEAL A. DUPREE, ESQ.
Law Offices of Neal A. Dupree
440 South Andrews Avenue
Ft. Lauderdale, FL 33301
(954)766-8872
Florida Bar No. 311545

Counsel for Respondent

CERTIFICATE OF INTERESTED PERSONS

Respondent, GINO KALICI, states that to his knowledge the following individuals or entities have an interest in the outcome of this case:

Honorable Arthur Birken, Circuit Court Judge

Honorable Robert B. Carney, Circuit Court Judge

Neal A. Dupree, Esq., Attorney for Respondent

Gino Kalici, Respondent

Todd Neesum, Immigration Attorney for Respondent

Assistant Attorney General, W.P.B., FL, Attorney for Petitioner

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PRELIMINARY STATEMENT

The following symbols, abbreviation and references will be used in this instant cause:

The term "Respondent" shall refer to Gino Kalici.

The term "Petitioner" or "State" shall refer to the Petitioner.

"R." shall refer to the record on appeal to the Fourth District Court of Appeal (Attached as Exhibit 2 of Petitioner's Initial Brief on Jurisdiction).

All other citations will be self-explanatory or will be otherwise explained.

STATEMENT OF FONT

The font is 14 point Times New Roman, not proportionately spaced.

STATEMENT OF THE CASE AND FACTS

Respondent, Gino Kalici, requests this Court to affirm the decision of the Fourth District Court of Appeal in Kalici v. State, 24 Fla. L. Weekly D1714 (Fla. 4th DCA July 21, 1999). The Fourth District found that Respondent, a resident alien, pled guilty to delivery of a controlled substance on November 17, 1986. Id. Respondent was sentenced to two years probation and was required to pay a fine. Id. Respondent successfully completed probation in January, 1988.

In December 1997, the Immigration and Naturalization service arrested Respondent and initiated deportation proceedings against him as a result of the 1986 conviction. Id. Respondent filed a Petition for Writ of Error Coram Nobis on March 4, 1998. In his petition, Respondent requests that his plea be withdrawn because the trial court failed to inform him that a guilty plea could affect his immigration status, and, could possibly result in his deportation. Not only did the trial court fail to inform Respondent of the adverse consequences of his plea, his trial counsel affirmatively misadvised Respondent that he could not be deported since he was not receiving jail time. Respondent's counsel also failed to request a judicial recommendation against

deportation. (R. 16, 17). Furthermore, the Respondent asserted that had he known of the immigration consequences, he would not have pled guilty and gone to trial (R. 17).

At hearings conducted on March 20th and 24th, 1998, the trial court refused to allow Respondent to withdraw his guilty plea, stating that a Writ of Error Coram Nobis was not a valid vehicle to withdraw Respondent's plea (R. 5). The trial court denied Respondent's petition on the basis that a Writ of Error Coram Nobis was not viable because it had been untimely filed. (R. 48). The trial court ruled that the two (2) year limitation set in Fla. Rule Crim. P. 3.850 also applied to Coram Nobis petitions. (R. 36, 47, and 48). However, the trial court allowed Respondent additional time to answer certain questions the trial court raised at these two hearings.

After several conversations with Respondent and former trial counsel, Respondent filed a supplemental affidavit with the trial court alleging that he had been affirmatively misadvised by his original trial counsel of the consequences of his plea, and that his attorney failed to request a judicial recommendation against deportation.

On July 20, 1998, the trial court conducted oral argument on Respondent's additional allegations and determined that there was "no legal basis to withdraw the plea" since Respondent's change of plea had been conducted before the requirements of Rule 3.172 had been changed to reflect an affirmative duty by trial courts to inform a defendant

of the immigration consequences of his plea (R. 45, 46). The trial court reiterated that a Writ of Error Coram Nobis was not viable because it should have been filed in 1989 (R. 44, 47)

On appeal, the Fourth District, relying on this Court's decision in Wood v. State, 24 Fla. L. Weekly S240 (Fla. May 27, 1999), reversed the trial court's order and remanded for an evidentiary hearing. Petitioner's motion for rehearing was denied on August 19, 1999. This appeal ensued.

SUMMARY OF THE ARGUMENT

A. Respondent is entitled to withdraw his plea based on the allegations in his petition for writ of error coram nobis since this Court and several district courts have recognized that coram nobis is the proper method by which to challenge the sufficiency of a plea colloquy. Therefore, the Fourth District did not err in recognizing coram nobis as the proper avenue for Respondent's claim.

B. The Fourth District did not err in its application of Wood v. State, 24 Fla. L. Weekly S240 (May 27, 1999), because the doctrine of laches does not apply to Respondent's case. Once Respondent became aware of the facts giving rise to his petition, he exercised due diligence in filing his petition for writ of error coram nobis. The Fourth District did not ignore the doctrine of laches, in fact, it recognized its past decisions involving the doctrine and determined under the plain language of Wood that Respondent has two years from the filing of Wood to file a claim traditionally cognizable under coram nobis.

C. Respondent's petition is legally sufficient since prejudice is established by

the fact that deportation proceedings were initiated against Respondent, and Respondent has since been deported. In cases involving a trial court's failure to advise the defendant of the immigration consequences of his change of plea, or as in this case, a defendant's lawyer misadvising him of the immigration consequences, it is the commencement of deportation proceedings that constitutes the "prejudice" that is necessary to assert a defect in the plea colloquy as a basis for relief. Marriott v. State, 605 So. 2d 985 (Fla. 4th D.C.A. 1992).

D. The Fourth District did not err by breathing new life into Respondent's claim since no determination on the claim has been previously made and the petition alleges a valid claim for relief. The Fourth District did not breathe new life into a postconviction claim which has been previously held barred. Respondent presented his claim, pertaining to the failure of the trial court to advise him of the consequences of his plea and the affirmative misadvice of his original counsel regarding the same plea, for the first time in his Motion for Writ of Error Coram Nobis. There was no previous ruling based on procedural time limits or the merits of the motion prior to the instant decision. Respondent in no way used coram nobis as a means of circumventing the procedural requirements of other collateral avenues.

E. Respondent is entitled to withdraw his plea based on the affirmative misadvice of counsel. A claim involving affirmative misadvice must allege that counsel misadvised the defendant and had it not been for that advice the defendant would not have entered the plea, but proceeded to trial. Respondent has alleged both.

ARGUMENT

A. Respondent is entitled to withdraw his plea based on the allegations in his petition for writ of error coram nobis since this Court and several district courts have recognized that coram nobis is the proper method by which to challenge the sufficiency of a plea colloquy.

In Wood v. State this Court held that writs of error coram nobis are subject to the two-year time limitation delineated in Fla. R. Crim. P. 3.850 and determined that "all defendants adjudicated prior to this opinion shall have two years from the filing date within which to file claims traditionally cognizable under coram nobis." Id. at S241. As the Fourth District indicated, Respondent falls into this category of defendants who were adjudicated prior to the Wood opinion, and whose claim is cognizable under coram nobis. As such, Respondent is entitled to withdraw his plea based on his claim filed under the Writ of Error Coram Nobis.

The State asserts that Respondent is not entitled to withdraw his plea based upon his challenge to the plea colloquy, as the sufficiency of the colloquy is a question of law not cognizable under coram nobis. The State is correct that traditionally the writ of error coram nobis is the method used to correct errors of fact, not errors of law. See Hallman v. State, 371 So. 2d 482, 485 (Fla. 1979). However, in relying on Peart v. State, 705 So. 2d 1059 (Fla. 3d D.C.A. 1997) and Somintac v. State, 24 Fla. L. Weekly D2241 (Fla. 3d

D.C.A. Sept. 29, 1999), the State has ignored the numerous cases from this Court and other district courts which allow challenges to plea colloquies to be brought under coram nobis.

First and foremost, this Court found the writ of error coram nobis to be the proper method for relief in Wood v. State. Has the State overlooked the fact that the issue being challenged in Wood was sufficiency of a plea colloquy? In fact, the facts in Wood and Respondent's case are similar. Wood was challenging a 1988 plea for which he had already completed probation. Id. at S240. Subsequently, Wood was adjudicated guilty in federal court and received an enhanced sentence due to the previous plea. Id. Ten years after the original plea, Wood sought to have the plea set aside by filing a writ of error coram nobis, which alleged that his attorney failed to tell him of the negative consequences of entering the plea. Id. Likewise, Respondent seeks to set aside his 1986 plea, for which he completed probation in 1988, as a result of the court's failure to advise and his counsel's misadvice regarding the negative deportation consequences of that plea. Therefore, although this Court did not clarify what claims are considered traditionally cognizable under coram nobis, by its decision in Wood, the Court implies that coram nobis may be used to challenge the sufficiency of a plea.

Furthermore, the second district court of appeal recently held that the writ of error

coram nobis is the appropriate vehicle for challenging plea colloquies. Knibbs v. State, (Fla. 2d D.C.A. December 10, 1999); See also, Dequesada v. State, 444 So. 2d 575 (Fla. 2d D.C.A. 1984); Weir v. State, 319 So. 2d 80 (Fla. 2d D.C.A. 1975)(where the court permitted claims based on mistakes of law rather than mistakes of fact to be considered on the merits). In support of its decision the district court detailed precedent from other districts, including Peart v. State. However, relying on Gregerson v. State, 714 So. 2d 1195 (Fla. 4th D.C.A. 1998) and Nickels v. State, 86 Fla. 208, 98 So. 502 (Fla. 1923), the court declined to follow Peart.

In Gregerson v. State, the Fourth District Court of Appeal held that the writ of error coram nobis is available to correct the type of error which results from failure to inform a defendant of the deportation consequences of a plea. The court followed the reasoning in Nickels v. State. Nickels involved a defendant seeking to set aside a rape plea on the basis that he entered the plea out of fear. This Court held that a guilty plea entered out of fear or coercion is an error of fact, thus challengeable through coram nobis. So, as early as 1923, this Court has recognized that involuntary pleas are errors of fact. However, the court in Peart, although acknowledging the plea in that case was involuntary (705 So. 2d at 1062), did not cite to or acknowledge the decision in Nickels.

Although the State acknowledges that Marriott v. State, 605 So. 2d 985 (Fla. 4th

D.C.A. 1992), "appears to indicate a petition for writ of error coram nobis is the proper vehicle for attacking plea colloquies when the defendant is no longer in custody," it still urges this Court to follow Peart (Petitioner's Initial Brief on the Merits at 17-18). This position ignores the numerous decisions from this Court and the second and fourth district courts of appeal which hold that coram nobis is the correct avenue to challenge the sufficiency of a plea colloquy. As such, the Fourth District did not err in reversing the decision of the trial court.

B. The Fourth District did not err in its application of Wood v. State, 24 Fla. L. Weekly S240 (May 27, 1999), because the doctrine of laches does not apply to Respondent's case; Once Respondent became aware of the facts giving rise to his petition, he exercised due diligence in filing his petition for writ of error coram nobis.

The State contends that the Fourth District's application of Wood was incorrect because it ignored the doctrine of laches, where both the Fourth District and this Court have applied the doctrine to bar coram nobis claims in the past. It is of importance to note that the trial court did not base its decision to deny Respondent's writ on the doctrine of laches, nor did the State make this argument to the trial court. The trial court expressed that its concerns were whether the requirement to inform defendants of the

negative deportation consequences of a plea should apply to Respondent where the change in the law occurred after Respondent entered his plea, and whether the time limits in filing a writ of error coram nobis had expired (R. 44). Interestingly, the trial court concluded that because coram nobis is analogous to Rule 3.850 motions, the time limit to file a writ is two years (R. 46, 48). Obviously, this was the exact problem which occurred in Wood. Therefore, the Fourth District did not err in applying Wood since the decision of the trial court was based on the same error discussed by this Court in Wood.

The premise that the Fourth District's decision is consistent with Wood is further evidenced by the similarities between Respondent's circumstances and the facts of the Wood case. In Wood, the petitioner was seeking to set aside a plea more than ten years after such plea was entered. Likewise, Respondent's writ of error coram nobis seeks to vacate a plea approximately twelve years old, a similar time frame as that in Wood. Also, both Wood and Respondent entered pleas based on misrepresentations of the law by their attorneys. Therefore, similar problems regarding records and possible prejudice to the State would exist in both cases due to the time that has elapsed. Yet, this Court concluded, without any discussion regarding laches, that the petitioner in Wood was "not time barred since this Court is only now applying this limitation period to writs of error coram nobis." Wood at S241. Based on these facts and this Court's conclusion, it is

evident that the Fourth District properly considered its previous rulings pertaining to the doctrine of laches and properly applied Wood v. State.

Even if the trial court's decision is interpreted as relying on the doctrine of laches, the decision of the district court is not improper because laches should not apply to Respondent's case. In support of its position, the State relies on several cases which are distinguishable from the Respondent's case and all of which are clearly decided prior to Wood. First, the State recites the application of the doctrine of laches as set forth by this Court in McCray v. State, 699 So. 2d 1366(Fla. 1997). McCray held that defendant's habeas corpus petition was barred by the doctrine of laches and recognized that laches "has been applied to bar a collateral relief proceeding when, from the face of the petition, it is obvious that the state has been manifestly prejudiced and no reason for the extraordinary delay has been provided." Id. At 1368. The State also cites to Anderson v. Singletary, 688 So. 2d 462 (Fla. 4th D.C.A. 1997) and Gregerson v. State, 699 So. 2d 1366 (Fla. 4th D.C.A. 1998), both of which hold that laches apply where a petitioner has not alleged a basis for delay. Respondent has provided a reason for the delay in filing his writ of error coram nobis, specifically that the first time he was aware of the deportation consequences of his change of plea was in 1998 when deportation proceedings were initiated against him. Respondent has asserted in a sworn statement that he did not

proceed sooner with the writ for error coram nobis because he was not made aware of the basis of the writ until deportation proceedings were begun against him in 1997. From the time his plea was entered in 1986, Respondent was under the false impression that he could not be deported as a result of his plea. This perception was created by not only the failure of the trial court to inform Respondent that his resident alien status may be affected by the plea, but by the affirmative misrepresentation of Respondent's original counsel that he could not be deported because he was not receiving jail time. (R. 16, 17). All of these factors were presented to the Fourth District for its determination of Respondent's appeal. (See Initial Brief of Appellant Gino Kalici).

Even given these representations by the Respondent, the State argues that Respondent failed to use due diligence in bringing his claim as required by Hallman v. State, 371 So. 2d 482 (Fla. 1979). Under Hallman and Wood v. State, "it must appear that the defendant or his counsel could not have known [of the facts giving rise to the petition] by the use of due diligence." Hallman at 484; Wood at S242. The facts in Respondent's case are unique and demonstrate that Respondent used due diligence in filing his claim. First, by the time Fla. R. Crim. P. 3.172(c)(8) became effective, requiring trial courts to advise defendant's of deportation consequences, Responded had already pleaded his case, served his probation and no longer retained counsel. Further,

the facts giving rise to his action did not occur until INS initiated deportation proceedings against him over 9 years after the change of law and 12 years after he entered his change of plea. For 12 years the Respondent relied on the misadvice of his original counsel that he could not be deported. Respondent would have no reason to believe otherwise, and certainly the State cannot expect a layperson, who is not represented by counsel, to stay abreast of the changes in the law.[1] Once he knew the facts upon which Respondent bases his motion, Respondent was timely in filing his Motion for Writ of error Coram Nobis. It was not until deportation proceedings were initiated against him in December of 1997, that he had any knowledge of the consequences of his plea. Respondent then filed his motion on March 4, 1998, well within the two-year period from discovery of the facts giving rise to his motion.

Certainly, the Respondent did not know he was going to be deported until INS actually began the proceedings and took the Respondent in custody. INS delayed initiating deportation proceedings against Respondent for 12 years. Now, the State is attempting to use that delay to bar Respondent's claim. It would be extremely unfair, and

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[1] Even if the Respondent was aware of the change in law at the time it went into effect, the facts giving rise to his claim would not have existed, namely that he was deported. In all likelihood, if the writ had been filed prior to the initiation of deportation proceedings the State would be arguing that the writ was legally insufficient because there was no prejudice.

violate Respondent's due process rights, if one branch of the government could delay proceeding against Respondent and another branch of the government could use that delay against the interests of the Respondent. The Fourth District Court of Appeal did not misapply this Court's decision in Wood v. State. The Fourth District considered its previous decisions in which the doctrine of laches was applied and properly determined that given the language in Wood and the facts of Respondent's case, Respondent must be afforded the opportunity to present his claims at an evidentiary hearing.

C. Respondent's petition is legally sufficient since prejudice is established by the fact that deportation proceedings were initiated against Respondent, and Respondent has since been deported.

In cases involving a trial court's failure to advise the defendant of the immigration consequences of his change of plea, or as in this case, a defendant's lawyer misadvising him of the immigration consequences, it is the commencement of deportation proceedings that constitutes the "prejudice" that is necessary to assert a defect in the plea colloquy as a basis for relief. Marriott v. State, 605 So. 2d 985 (Fla. 4th D.C.A. 1992). To secure relief from an uninformed plea, or one to which he was misadvised, it is clearly necessary for a defendant to assert that he would not have entered his plea had he been

aware of the immigration consequences. Fla. R. Crim. P. 3.172(i). Contrary to the State's assertion, Respondent has so stated in this case (R. 17). If immigration proceedings are never instituted, the defendant will never be prejudiced. As the court in DeAbreu v. State, 593 So. 2d 233 (Fla. 1st D.C.A. 1991) stated "we find prejudice in the fact that Appellant is now facing the precise dilemma against which the rule is designed to protect – the surprise threat of deportation resulting from an uninformed plea of guilty or nolo contendre." Accord, Marriott, 605 So. 2d at 987.

Again, the State relies on Peart v. State, 705 So. 2d 1059 (Fla. 3d D.C.A. 1998) and ignores the decisions from other district courts when stating that the Fourth District erred in requiring an evidentiary hearing on a petition that was legally insufficient. In Peart, the Third District Court of Appeal concluded in order to establish prejudice, not only must the defendant allege that he was not advised of deportation consequences, had no knowledge of the possible consequences, and deportation proceedings had actually begun, but also must show that had he proceeded to trial, he would have been acquitted. Id. At 1063. As both Marriott and DeAbreu confirmed, prejudice accrues when deportation proceedings begin. Respondent should not need to show that he would have succeeded at trial had he been tried on the relevant charge in order to secure relief.[2] Every

[2] Although Respondent contends that a showing that he would be acquitted at trial is not necessary, should this Court agree with the decision in Peart v. State, Respondent

defendant is presumed innocent and has the right to put the State to its burden. Once a defendant has established that deportation proceedings were initiated against him, resulting from an uninformed, involuntary plea, he should be returned to the same standing as a newly accused citizen.

The State alleges that "a review of the record reveals the Defendant was aware of deportation repercussions at the time he entered his plea (R. 17)." (Initial Brief of Appellant at 22). The portion of the record referred to by the State is the affidavit of the Respondent which reads in part:

> 7. I further inquired of Mr. Schlesser as to whether or not the Judge could order that I not be deported, since I heard that Judges could enter an Order blocking deportation. My attorney informed me that only a Federal Court Judge could enter Order against the deportation of a defendant, and that I shouldn't be concerned anyway, because my offense did not carry a jail term, only probation.

(R. 17). This paragraph confirms that the Respondent was misinformed by his attorney regarding the deportation consequences of his change of plea and because the trial court never informed him of the accurate consequences he was left to believe he could not be deported. Hence, Respondent had no knowledge that he could in fact be deported. Respondent has been prejudiced because he has in fact been deported. As such,

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notes that prior to changing his plea, he had prevailed on a Motion to Suppress.

Respondent did allege prejudice in his original petition, thus the Fourth District committed no error in granting an evidentiary hearing.

D. The Fourth District did not err by breathing new life into Respondent's claim since no determination on the claim has been previously made and the petition alleges a valid claim for relief.

The State additionally contends that the Fourth District erred by allowing new life to be breathed into Respondent's claim. The State explains that this error is in "contravention of the dictates of Wood." (Initial Brief of Petitioner at 12). In Wood, this Court explained "coram nobis claims cannot breath life into postconviction claims which have previously been held barred." Wood at S241 (citing Vonia v. State, 680 So. 2d 438, 439 (Fla. 2d DCA 1996)). The State has seemingly misinterpreted this language in arguing that Respondent's claim would not have been viable in any postconviction proceeding because no relief is available under Fla. R. Crim. P. 3.172 since it went into effect after his plea. As is evident from this Court's opinion, this language addresses petitioners who have already had a determination of their claims under an alternative postconviction remedy such as Fla. R. Crim. P. 3.850. This Court, citing Richardson v.

State, 546 So. 2d 1037, 1038-39 (Fla. 1989), expresses the intent that writs of error coram nobis cannot be used to circumvent Rule 3.850. Wood at S241. Therefore, the Fourth District did not breath life into a claim which has been previously held barred since Respondent has not filed any postconviction pleadings prior to his petition for writ of error coram nobis, nor has any postconviction pleading been previously ruled upon. Respondent's Motion for Writ of Error Coram Nobis is his first avenue for seeking postconviction relief. Respondent's Motion for Writ of Error Coram Nobis is not an attempt to circumvent any previous postconviction ruling, since there has been no prior ruling. Thus, the Fourth District has not breathed life into a postconviction claim that has previously been held barred.

Notwithstanding the State's misinterpretation of Wood, Respondent's petition for writ of error coram nobis establishes a basis for relief. The State is correct that Fla. R. Crim. P. 3.172(c)(8), which requires judges presiding at plea colloquies to inform the defendant of the consequence that his plea may subject him to deportation if he is not a United States citizen, became effective in January 1989. The change in the format for conducting a plea colloquy constitutes a fundamental departure in the law to address the unfairness of allowing deportation proceedings against defendants who are not advised about the immigration consequences of their changes of plea. Although this change

occurred after Respondent entered his plea, Due Process and fundamental fairness require that Respondent be allowed to change his plea.

Additionally, not only did the court presiding over Respondent's plea colloquy fail to advise him of the immigration consequences of his plea, Respondent's counsel at the plea colloquy affirmatively misadvised Respondent that he could not be deported. See State v. Sallato, 519 So. 2d 605 (Fla. 1988)(holding that a hearing should have been conducted by the trial court when an attorney affirmatively misadvised his client about the consequences of his change of plea). Respondent's counsel then failed to seek a recommendation by the sentencing judge to prevent Respondent's deportation. See Dugart v. State, 578 So. 2d 789 (Fla. 4th DCA 1991)(holding that a defendant should be allowed to withdraw his plea when a defendant received ineffective assistance when his attorney failed to request a recommendation against deportation from the sentencing judge). Thus, even if this Court finds that no relief is available under 3.172(c)(8), Respondent is entitled to withdraw his plea as a result of being misadvised by his original counsel. (See Respondent's Argument E)

E. Respondent is entitled to withdraw his plea based on the affirmative

misadvice of counsel.

Respondent has asserted that his trial counsel not only failed to tell him of the deportation consequences of his change of plea but, affirmatively misadvised him of the negative consequences. In his Writ of Error Coram Nobis, Respondent asserted that his trial counsel failed to inform him of the deportation consequences of his plea, that had he known of the consequences he would not have changed his plea, and as a result of the misinformed plea he was placed in custody of INS awaiting deportation (R. 2).[3] As a result of the deportation proceedings, Respondent has been prejudiced (Id.). In addition, Respondent filed a supplemental affidavit which, among other things, alleged that trial counsel affirmatively misadvised Respondent that he could not be deported since he was only being placed on probation and not receiving any jail time (R. 16-17). This was an incorrect statement of the law. Respondent further alleged that counsel failed to request a judicial recommendation against deportation and again informed Respondent that such an order was not necessary because he could not be deported (Id.). Again, Respondent affirmed that had he been properly informed of the immigration consequences of his plea, he would not have changed his plea, but proceeded to trial (Id.).[1]

In its initial brief, the State first claims that because deportation consequences are

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[3] Since the time of filing Respondent's original petition, Respondent has in fact been deported.

collateral to a plea, such consequences may not form the basis for an ineffective assistance of counsel claim. (Petitioner's Initial Brief on the Merits at 13). In support of this argument, the State cites Fundora v. State, 513 So. 2d 122 (Fla. 1987) and State v. Ginebra, 511 So. 2d 960 (Fla. 1987). The State argues "it is well settled that deportation consequences are collateral issues for which postconviction relief is not available." (Petitioner's Initial Brief on the Merits at 13). It is important to note that both of these decisions were decided prior to the effective date of Fla. R. Crim. P. 3.172(c)(8). Although there are no decisions directly affecting the holding in each case, it is arguable that requiring the trial court to inform defendants of the possible deportation consequences of accepting a plea, implies that such consequences may be more than collateral, especially in a State where there is a large immigrant population. See Dugart v. State, 578 So. 2d 789 (Fla. 4th D.C.A. 1991)(questioning whether Fundora is still viable given the duty placed on the trial court in Rule 3.172(c)(8)). See also, In Re Amendments to Florida Rule of Criminal Procedure, 536 So 2d 992, 1007 (Fla. 1988)(Overton, J., concurring in part, dissenting in part)(recognizing that the rule overrules the Court's decision in State v. Ginebra).

Respondent recognizes that Fundora and Ginebra are based on the reasoning that trial counsel does not have a duty to inform a defendant of every collateral consequence

of entering a plea therefore a failure to inform does not constitute ineffective assistance of counsel. However, Respondent argues that the severity of failing to advise a defendant of possible deportation is comparable to the issue of failing to advise a defendant of habitualization. The Fifth District Court of Appeal recently decided in Lewis v. State, 25 Fla. L. Weekly D451, that the petitioner was entitled to relief because counsel failed to advise him of a potential maximum sentence of thirty years as a habitual offender, but instead told petitioner that his maximum sentence would be two to three years. Although this Court has not required counsel to advise a defendant of immigration consequences in the past, Respondent urges the Court to make such a finding now based on Fla. R. Crim P. 3.172(c)(8) and the holding in Lewis v. State.

More importantly, this Court has distinguished affirmatively misadvising a client of deportation consequences from simply failing to advise. In State v. Sallato, 519 So. 2d (Fla. 1988), this Court recognized that it expressed no opinion regarding affirmative misadvice in Ginebra. A review of the record in Sallato showed:

> ÿthe instant case involves more than a failure to advise. Sallato alleged in his motion to vacate that he asked counsel whether his plea would jeopardize his chances of becoming a United States citizen. Counsel allegedly replied that 'there was nothing to worry about, he would not have a conviction.'

Sallato at 606. Accordingly, this Court remanded for an evidentiary hearing on the issue

of whether defendant was given positive misadvice regarding immigration consequences. See also Dugart v. State, 578 So. 2d 789 (Fla. 4th DCA 1991)(holding that a defendant should be allowed to withdraw his plea when a defendant received ineffective assistance when his attorney failed to request a recommendation against deportation from the sentencing judge). Here, Respondent's claim is one of misadvice, not simply failing to advise. Under Sallato and Dugart, Respondent is entitled to relief.

The State argues that Respondent should not be allowed to withdraw his plea based on the misadvice of trial counsel because he has failed to allege either prong of Strickland v. Washington, 466 U.S. 668 (1984) in his petition for writ of error coram nobis. (Petitioner's Initial Brief at 23). Respondent has alleged that counsel did not correctly advise him of the law (specifically that he could not be deported because he was not receiving a jail term), he would not have changed his plea had he known of the possibility of deportation, he would have proceeded to trial had he known of the consequences of his change of plea and he has been prejudiced by the fact that ultimately he has been deported (R. 2, 17). Clearly an allegation that counsel incorrectly stated the law when he knew the Respondent was relying on his representation, alleges deficiency. The prejudice prong is satisfied since Respondent has been deported. Marriott v. State, 605 So. 2d 985 (Fla. 4th D.C.A. 1992); DeAbreu v. State, 593 So. 2d 233 (Fla. 1st D.C.A.

1991).

Even though Respondent does meet the requirements of Strickland, Respondent contends that Strickland is not addressed by recent decisions involving affirmative misadvice of counsel. In Little v. State, 673 So. 2d 151 (Fla. 1st D.C.A. 1996), the defendant alleged that he only entered a plea as a result of his counsel's misadvice. The district court held that "these allegations sufficiently allege a colorable claim of ineffective assistance of counsel" and remanded to the trial court for an evidentiary hearing. Id. Following Little, the district court found sufficient the petitioner's allegations in Webster v. State, 744 So. 2d 1033 (Fla. 1st D.C.A. 1999). In Webster, the petitioner claimed that as a result of his counsel's misadvice, "he entered his plea unknowingly and based on counsel's misrepresentations. Had he not been so advised, he alleges he would have gone to trial on the charge." Id. The district court remanded for an evidentiary hearing. Respondent has made similar allegations, as such he is entitled to an evidentiary hearing and/or vacation of his plea.

CONCLUSION

WHEREFORE, Respondent, GINO KALICI, through undersigned counsel respectfully requests that this Court affirm the decision of the Fourth District Court of Appeal and remand to the trial court for proceedings consistent with that decision.

I HEREBY CERTIFY, that a true and correct copy of the foregoing has been provided by U.S. Mail to Celia Terenzio, Assistant Attorney General, Bureau Chief and Leslie T. Campbell, Assistant Attorney General, 1655 Palm Beach Lakes Blvd., Suite 300, West Palm Beach, FL 33401-2299 this ____ day of March, 2000.

Respectfully submitted,

LAW OFFICES OF
NEAL A. DUPREE
440 South Andrews Avenue
Ft. Lauderdale, Florida 33301
(954)766-8872
Florida Bar No. 311545

By: _____
NEAL A. DUPREE

[1] Although the State claims that the assertions in Respondent's affidavit were filed after his petition was denied, the record reflects that the affidavit was filed based on questions from the court which the court allowed counsel to follow up on after the first hearing in March 1998 (R. 41).