IN THE SUPREME COURT OF FLORIDA

CASE NO. 96,587

STATE OF FLORIDA,

Petitioner,

vs.

GINO KALICI,

Respondent.

****

ON DISCRETIONARY REVIEW FROM THE FOURTH DISTRICT COURT OF APPEAL

****

PETITIONER'S INITIAL BRIEF ON THE MERITS

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CASE NO. 96,587

STATE OF FLORIDA v. GINO KALICI

CERTIFICATE OF INTERESTED PERSONS

Counsel for the State of Florida, Petitioner herein, certifies that the following persons and entities have or may have an interest in the outcome of this case.

1. **The Honorable Arthur Birken**, Circuit Court Judge, Seventeenth Judicial Circuit in and for Broward County, Florida

2. **Leslie T. Campbell, Esq., Assistant Attorney General**
   Office of the Attorney General, State of Florida
   The Honorable Robert Butterworth, Attorney General
   (Appellate counsel for the State of Florida, Petitioner)

3. **The Honorable Michael Satz, State Attorney**
   Seventeenth Judicial Circuit
   (Prosecuting Attorney)

4. **Morgan Cronin, Esq.**
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   (Postconviction/Appellate counsel for Respondent)

7. **Todd Neesum, Esq.**
   (Immigration counsel for Respondent)

CERTIFICATE OF TYPE SIZE AND STYLE

In accordance with the Florida Supreme Court Administrative Order, issued on July 13, 1998, and modeled after Rule 28-2(d), Rules of the United States Court of Appeals for the Eleventh Circuit, counsel for the State of Florida, Petitioner herein, hereby certifies that the instant brief has been prepared with 12 point Courier New type, a font that is not spaced proportionately.

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PRELIMINARY STATEMENT

Petitioner, the State of Florida, was the prosecution in the trial court, Appellee before the Fourth District Court of Appeal, and will be referred to herein as “Petitioner” or the “State”. Respondent was the defendant in the trial court, Appellant on appeal to the Fourth District Court of Appeal, and will be referred to herein as “Respondent” or “Defendant”. Reference to the record on appeal will be by the symbol “R” followed by the appropriate page number. References to appellate documents will be by their title followed by the appropriate page number.

STATEMENT OF THE CASE AND FACTS

On November 17, 1986, Respondent entered a guilty plea to delivery of a controlled substance, was placed on two years probation, and ordered to pay a fine. Such probation terminated successfully in January 1988. Kalici v. State, 24 Fla. L. Weekly D1714 (Fla. 4th DCA July 21, 1999). After deportation proceedings were initiated by the Immigration and Naturalization Service, Respondent filed a petition for writ of coram nobis on March 4, 1998, approximately **twelve years** after having entered his guilty plea. Id. In this pleading, Respondent alleged he was facing deportation and claimed the plea should be withdrawn because the **trial court** had not informed him of possible deportation consequences. Id.

Without ordering a response from the State or, requiring the State's attendance at the hearings on the matter, the petition and request for rehearing were considered and denied by the trial court. (R 10, 27-37). These decisions were based upon the facts that at the time Respondent entered his plea, the trial court was not required to inform defendants about deportation consequences, the matter was not cognizable under Florida Rule of Criminal Procedure 3.850, and because of the twelve year gap between the plea and the petition, the State most likely would not be able to

re-try the Respondent. (R 27-37). In particular, the trial judge reasoned:

> I see enormous disadvantages to the State. It may not be prosecutable. The State does not have anything anymore. It is 12 years ago. Where they have destroyed things on this because it was so long ago.

(R 37). Respondent admitted that the plea hearing transcripts were destroyed. (R 5).

Approximately one month after the rehearing was denied, Respondent filed an affidavit alleging that his trial counsel had mis-advised him about the deportation consequences associated with the plea. The trial court reasoned:

> I don't think it can be raised on a 1986 case at this point where that is not the law. There is no requirement, all time limits have expired, the sentence is over with, everything is done. It is 12 years later, and the defendant is being deported. I don't think he has any legal basis to withdraw the plea.

(R 47). Subsequently, defense counsel admitted that before Florida Rule of Criminal Procedure, 3.172 was amended, the trial court was not required to inform a defendant of the potential deportation consequences associated with a guilty plea. (R 47).

This decision was appealed to the Fourth District Court of Appeal ("Fourth District") which then issued an opinion on July 21, 1999. (Exhibit 1). The Fourth District relied upon this Court's

recent decision of Wood v. State, 24 Fla. L. Weekly S240 (Fla. May 27, 1999) in reversing and remanding the cause for an evidentiary hearing. The State's Motion for Rehearing addressed to the misapplication of Wood and the apparent rejection of the traditional laches argument was denied on August 19, 1999. Notice to invoke this Court's jurisdiction was filed on September 17, 1999. On October 15, 1999, the Fourth District denied the State's motion to recall and stay the mandate, but noted that the State was not precluded from raising the laches defense at the trial level. (Exhibit 2). However, such is not clear from the opinion.

SUMMARY OF THE ARGUMENT

POINT I - Having entered a guilty plea in 1986, completed his probation in 1988, Respondent's 1998 petition for writ of coram nobis is barred by the traditional doctrine of laches. The Fourth District Court of Appeal erred in applying Wood v. State, 24 Fla. L. Weekly S240 (Fla. May 27, 1999) and disregarding the doctrine of laches announced in McCray v, State, 699 So. 2d 1366 (Fla. 1997) because the trial court found the 12 year delay between Respondent's plea and his petition for relief placed the State at an enormous disadvantage. This Court should find that the traditional doctrine of laches applies even in light of Wood, quash the decision of the district court and remand the matter with instructions to reinstate the trial court's denial of the petition for writ of error coram nobis.

POINT II - The district court breathed new life into a claim in contravention of the dictates of Wood. At the time Respondent entered his plea in 1986, the trial court had no responsibility to advise defendants of potential deportation consequences under Florida Rule of Criminal Procedure 3.172. This requirement was not put into effect until January 1989. By reversing the trial court's decision, the Fourth District Court of Appeal breathed life into the claim that does not exist. As such, it was error to reverse

and remand the case for an evidentiary hearing. The district court's decision should be quashed.

POINT III - Announcing a two year time limit for presenting collateral relief claims, this Court in Wood ruled that all claims that were cognizable under the writ of error coram nobis would now be available to noncustodial petitioners. Thus, those claims that were not cognizable under the writ were still barred. The writ of error coram nobis was available to challenges questions of fact, not questions of law. The sufficiency of a plea colloquy is a question of law, thus, not cognizable under the writ. Even under the new two year time limit for claims traditionally cognizable under the writ, the time limit announced in Wood, does not give Respondent a cause of action. The trial court's order should have been affirmed.

POINT IV - Assuming the new time limit announced in Wood gave Respondent a two year window to file his claim, the trial court's denial of the claim was proper nonetheless. Wood reenforced the long standing requirement that due diligence be used to discover any alleged claims and bring them to the court's attention. Respondent did not use due diligence in this case as he allowed more than nine years to pass after the promulgation of Florida Rule of Criminal Procedure 3.172(c)(8) before challenging his plea.

Because Respondent did not plead or show due diligence was employed to discover the claim, it was error to reverse the trial court's denial of Respondent's petition for writ of error coram nobis. The trial court's order should be reinstated.

POINT V - By reversing the trial court and remanding the matter for an evidentiary hearing, the Fourth District Court of Appeal erred. Respondent's petition for error coram nobis does not meet the pleading requirements for withdrawal of a plea as announced in Peart v. State, 705 So. 2d 1059 (Fla. 3d DCA 1997)(en banc), rev. granted, 722 So. 2d 193 (Fla. 1998) and Florida Rule of Criminal Procedure 3.172(i). The trial court denied the petition properly. The district court erred in remanding the case for an evidentiary hearing based upon the legally insufficient pleading. This Court should quash the decision of the Fourth District Court of Appeal and remand with directions that the trial court's order by reinstated.

POINT VI - Respondent should not be permitted to withdraw his plea based upon his claim that trial counsel misadvised him about possible deportation consequences. Because Respondent has failed to allege any facts in his petition for writ of error coram nobis supporting his claim of prejudice, the pleading is legally insufficient under Strickland v. Washington, 466 U.S. 668 (1984).

The petition had been denied properly by the trial court and should not have been reversed for an evidentiary hearing.

ARGUMENT

POINT I

THE FOURTH DISTRICT COURT OF APPEAL ERRED IN ITS APPLICATION OF WOOD V. STATE, 24 FLA. L. WEEKLY S240 (FLA. MAT 27, 1999) WHEN IT DID NOT ACKNOWLEDGE THAT RESPONDENT'S CORAM NOBIS CLAIM WAS BARRED BY TRADITIONAL LACHES.

The Fourth District misapplied Wood v. State, 24 Fla. L. Weekly S240 (Fla. May 27, 1999) when it failed to apply the traditional doctrine of laches as outlined in McCray v. State, 699 So. 2d 1366 (Fla. 1997). In McCray, this Court concluded that "the doctrine of laches has been applied to bar collateral relief proceedings when, from the face of the petition, it is obvious that the state has been manifestly prejudiced and no reason for an extraordinary dely has been provided." Id. at 1368. While addressing how laches applied in habeas corpus petitions alleging ineffective assistance of appellate counsel, this Court concluded the petition "is presumed to be the result of an unreasonable delay and to prejudice the state if the petition has been filed **more than five years** from the date the petitioner's conviction became final." Id. (emphasis supplied). See also, Anderson v. Singletary, 688 So. 2d 462, 463 (Fla. 4th DCA 1997)(finding petition filed fifteen years after appeal was decided without alleging basis for delay would be barred by laches where trial transcripts and appellate

records had been destroyed); Gregersen v. State, 699 So. 2d 1366 (Fla. 4th DCA) (recognizing that the traditional doctrine of laches operates to bar error coram nobis relief), rev. granted, 728 So. 2d 205 (Fla. 1998).

At the time the Defendant pleaded guilty, the trial court did not have to advise him of deportation consequences. See Florida Rule of Criminal Procedure 3.172(c) (1986). It was not until January 1, 1989 that Florida Rule of Criminal Procedure 3.172(c)(8) (1989) was promulgated, thereby mandating that the trial court advise a defendant that his plea could carry deportation consequences. In re Amendments to Florida Rules of Criminal Procedure, 536 So. 2d 992, 992 (Fla. 1988). Clearly, there was no error even if deportation consequences were not discussed at the time Respondent's plea was entered. Moreover, if it could be concluded there is a cause of action, such arose as of January 1, 1989. However, by permitting more than nine years to pass after the rule was amended, Respondent did not use due diligence to investigate or challenge the voluntariness of his plea. Hallman v. State, 371 So. 2d 482, 485 (Fla. 1979)(reasoning "it must appear that defendant or his counsel could have known [of the alleged facts] by the use of due diligence"), overruled on other grounds, Jones v. State, 591 So. 2d 911 (Fla. 1992). Because a defendant is

presumed to have notice of the law, Respondent has not shown he used due diligence in uncovering any alleged defect in his plea and he should not be permitted to complain in the face of the State's prejudice.

In the instant case, on November 17, 1986, the Defendant entered his guilty plea to delivery of a controlled substance. Kalici v. State, 24 Fla. L. Weekly D1714 (Fla. 4th DCA July 24, 1999). Almost 12 years lapsed between the entry of the plea and the filing of a petition for writ of error coram nobis. Id. During that intervening time, as admitted by the Defendant, and found by the trial court, records and the transcript of the plea hearing were destroyed. (R 5, 37). The trial judge noted:

> I see enormous disadvantages to the State. [The case] may not be prosecutable. The State does not have anything anymore. It is 12 years ago. Where they have destroyed things on this because it was no long gone.

(R 37). Thus, the trial judge recognized that the State was prejudiced by this late request to withdraw a plea, thus finding laches applied.

In Wood, the sole issue was "whether writs of error coram nobis are subject to the time limitations contained in rule 3.850." Wood, 24 Fla. L. Weekly at S241. The doctrine of laches was not addressed. However, here, the trial court found laches applied and

the State argued that position on appeal (State's Answer Brief 6-7). Nonetheless, the Fourth District ignored this and found the Petitioner entitled to an evidentiary hearing based upon the new two year time limit announced in Wood. Kalici, 24 Fla. L. Weekly at 1714. This was error.

Arguably, under the dictates of Wood, the Fourth District was correct to find that Respondent was not time barred from presenting his claim given the fact that this Court gave non-custodial defendants in Respondent's position two years from May 27, 1999 to bring forward claims "traditionally cognizable under coram nobis." Wood, 24 Fla. L. Weekly at S241, However, the Fourth District erred in not applying the traditional doctrine of laches. See Bartz v. State, 740 So. 2d 1243 (Fla. 3d DCA 1999)(finding petition for error coram nobis not time-barred under Wood, but applying doctrine of laches where defendant did not use due diligence and transcripts were destroyed after ten years). The Fourth District's opinion is erroneous on its face as it does not recognize McCray and the traditional doctrine of laches as a valid defense to claims brought more than five years after the alleged error occurred. This Court should find that laches applies to this case and reverse the Fourth District's decision with directions to affirm the trial court's denial of the petition for writ of error coram nobis.

POINT II

THE DISTRICT COURT ERRED IN BREATHING LIFE INTO A NON-EXISTENT CLAIM AS A PLEA COLLOQUY CONDUCTED IN 1986 WAS NOT REQUIRED TO INCLUDE A DISCUSSION OF POSSIBLE DEPORTATION CONSEQUENCES.

The Fourth District erroneously breathed life into the Defendant's claim in contravention of the dictates of Wood. Because the Defendant entered his plea before the promulgation of Rule 3.171(c)(8), the alleged failure of the trial court to discuss possible deportation with the Respondent prior to accepting his plea was not error. However, the Fourth District reversed the trial court and improperly ordered that the lower tribunal conduct an evidentiary hearing on this non-existent claim even though such was not required under Wood.

This Court opined in Wood that:

> By extending rule 3.850 relief to noncustodial claimants, we do not narrow in any way the relief heretofore available to defendants under coram nobis. All claims cognizable under the writ are now available to noncustodial movants under the rule.

Wood, 24 Fla. L. Weekly at S241. Implied with this statement that the Court was not narrowing the relief available previously is the corollary that the relief would not be expanded. Here, the Defendant was never entitled to a specific inquiry related to deportation, therefore, he cannot complain that one was not made. Medina v. State, 711 So. 2d 256, 257 (Fla. 3d DCA 1998)(holding that defendant who entered plea prior to January 1, 1989 was not required to be informed of deportation consequences, therefore, he had no claim in coram nobis petition).

Prior to 1989, challenges to a plea entered without discussion of deportation consequences were not cognizable under either coram nobis or Rule 3.850 as there was no duty to discuss this matter with the defendant. Furthermore, the amendment to Rule 3.172 was not made retroactive. Medina, 711 So. 2d at 257. This fact was acknowledged by the trial judge when he stated:

> As I say, the problem that I'm having here is that this was a plea that was entered into 12 years ago. The case law problem is that 12 years ago, these admonitions were not given, and so it does not mean that every plea that was ever entered into then, where admonitions were not given, from when Florida became a

> state, are subject to filing a writ of error [coram] nobis. I think the law was they absolutely are not....

(R 29). Moreover, the trial court noted, "Immigration doesn't recognize [advising defendant of deportation] at all. They cite here that it is a collateral issue which does not render, essentially, ineffective assistance of counsel." (R 32).

It is well settled that deportation consequences are collateral issues for which postconviction relief is not available. Fundora v. State, 513 So. 2d 122 (Fla. 1987)(finding immigration/deportation repercussions are collateral to a plea, thus, such consequences may not form the basis for an ineffective assistance of counsel claim); State v. Ginebra, 511 So. 2d 960 (Fla. 1987)(rejecting availability of Rule 3.850 relief); Chaar v. State, 685 So. 2d 1037 (Fla. 3d DCA 1997)(holding coram nobis relief unavailable). See also, Peart v. State, 705 So. 2d 1059, 1062 (Fla. 3d DCA)(*en banc*)(finding coram nobis relief not available to defendants seeking to withdraw their plea absent a showing of prejudice), rev. granted, 722 So. 2d 193 (Fla. 1998).

Base upon the foregoing, the new two year time limitation announced in Wood should not apply to the Defendant as he was never entitled to any relief. By reversing the trial court's order, the Fourth District breathed life into a claim that has no basis in

law. Moreover, ordering an evidentiary hearing is inapposite to Wood, 24 Fla. L. Weekly at S241 where this Court held that "coram nobis claims cannot breathe life into postconviction claims that have previously been held barred." If a basis for relief never existed, the new time frame announced in Wood certainly would not created a cause of action. The Fourth District's decision in this matter is clear error. Hence, this Court should reverse the decision of the Fourth District and remand with instructions that the trial court's order be affirmed.

POINT III

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 TRADITIONALLY COGNIZABLE UNDER THE WRIT OF ERROR CORAM NOBIS.

This Court's decision in Wood does not give Respondent a basis for withdrawing his plea. The new two year time limit only applies

to claims "traditionally cognizable under coram nobis." Wood, 24 Fla. L. Weekly at S241. Because challenges to the sufficiency of the plea colloquy are questions of law, not questions of fact, the writ of error coram nobis is not the appropriate vehicle for seeking relief. The trial court denied Respondent's petition for writ of coram nobis properly. It was error to reverse this decision and remand for an evidentiary hearing.

As announced in Hallman, 371 So. 2d at 485, the writ of error coram nobis is the method used to correct errors of fact, not errors of law. Challenges to the sufficiency of the plea colloquy are questions of law. State v. Garcia, 571 So. 2d 38 (Fla. 3d DCA 1990). Recently, in Peart, the Third District Court of Appeal addressed the issue of whether a writ of error coram nobis is available to attack a conviction based upon the trial court's failure to apprise a defendant of deportation consequences pursuant to Florida Rule of Criminal Procedure 3.172(c)(8). It was concluded that the sufficiency of the plea colloquy was a question of law, thus, the writ was not the proper remedy. Peart, 705 So. 2d at 1062.

Following the decisions of Peart and Wood, the Third District Court of Appeal decided Somintac v. State, 24 Fla. L. Weekly D2241

(Fla. 3d DCA, Sept. 29, 1999)[1]. In that case, a defendant challenged the voluntariness of his plea alleging neither the trial court nor counsel[2] advised him of the possible deportation consequences. Recognizing the claim was not time-barred under Wood, the district court reached the merits of the claim reasoning:

> In Peart, this court said:
>
> > In these cases, the defendants do not seek coram nobis relief asserting errors of fact or newly discovered evidence, but rather on the basis of an error of law, to wit, an irregularity in their plea colloquy rendering their pleas involuntary. State v. Garcia, 571 So. 2d 38 (Fla. 3d DCA 1990). Moreover, these petitions for relief do not assert claims "of such a vital nature that had they been known to the trial court, they conclusively would have prevented the entry of the judgment." Hallman, 371 So. 2d at 485. Coram nobis relief, therefore, is not the appropriate remedy.
>
> 705 So. 2d at 1062. Thus, under this court's precedent, relief must be denied because this type of defect in a plea colloquy is, in this court's view, not traditionally cognizable under coram nobis.

Somintac, 24 Fla. L. Weekly at 2241-42.

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[1] Conflict was certified with Kalici v. State, 24 Fla. L. Weekly D1714 (Fla. 4th DCA July 21, 1999).

[2] See Point VI for argument on allegation that defense counsel misadvised Respondent regarding deportation.

Before the trial and district courts, Respondent challenged the trial judge's alleged failure to advise him of a potential deportation arising from a guilty plea. As such, Respondent sought to have the lower court answer a question of law, not fact. Under both Peart and Somintac, the trial court did not err in denying relief.

In his petition for writ of error coram nobis (R 2), Respondent relied upon Marriott v. State, 605 So. 2d 985 (Fla. 4th DCA 1992). Such reliance is misplaced. The court in Marriott was faced with an in-custody defendant who had filed a motion for postconviction relief under rule 3.850. Furthermore, because the plea was entered after Rule 3.172(c)(8) had gone into effect, and within two years of the entry of the plea[3], the defendant had a basis to complain. However, here, the trial court was not required to discuss deportation at the plea hearing and Respondent failed to file his petition either while on probation, within two years of his conviction becoming final, or within two year of the promulgation of Rule 3.172(c)(8). As such, the State urges that Marriott is not dispositive of the issue at bar.

The State acknowledges Marriott, 605 So. 2d at 986 appears to indicate a petition for writ of error coram nobis is the proper

[3] Marriott v. State, 582 So. 2d 728 (Fla. 4th DCA 1991).

vehicle for attacking plea colloquies when the defendant is no longer in custody. However, it is requested respectfully this Court follow the reasoning in Peart and conclude the sufficiency of the plea colloquy is a question of law not of fact, thereby, finding Respondent is not entitled to withdraw his plea.

POINT IV

THE DISTRICT COURT MISAPPLIED WOOD IN NOT RECOGNIZING RESPONDENT'S FAILURE TO USE DUE DILIGENCE TO BRING FORWARD HIS CLAIM.

In Wood, this Court reiterated that "the discovery of facts giving rise to a coram nobis claim will continue to be governed by the due diligence standard" as recognized in Hallman, 371 So. 2d at 485. As noted above, it was not until January 1, 1989, that trial courts were required to advise defendants of deportation consequences. Thus, even if Wood gave the Respondent two years to file his claim, he is unable to prove he used due diligence in discovering any defect in the colloquy. As such, the Fourth District erred in remanding the matter for an evidentiary hearing.

Assuming arguendo, the Defendant had a cause of action as of January 1, 1989 with the promulgation of Rule 3.172(c)(8)[4], he did

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[4] The State submits that Florida Rule of Criminal Procedure 3.172(c)(8) was not made retroactive. In re Amendments to Florida Rules of Criminal Procedure, 536 So. 2d 992 (Fla. 1988); Medina v. State, 711 So. 2d 256, 257 (Fla. 3d DCA 1998). This Court in Witt v. State, 387 So. 2d 922, 926 (Fla. 1980) noted:

> the essential considerations in determining whether a new rule of law should be applied retroactively are essentially three: (a) the purpose to be served by the new rule; (b) the extent of reliance on the old rule; and (c)

not use due diligence in bringing this claim to the court's attention. Hallman, 371 So. 2d at 485 (reasoning "it must appear that defendant or his counsel could have known [of the alleged facts] by the use of diligence"). It was not until March 1998 that Respondent filed his petition attacking the propriety of his plea. He gave no excuse for not discovering the alleged defect sooner. As such, Respondent is unable to overcome this Court's reasoning that claims previously filed under coram nobis will continue to be judged by the due diligence standard. Because the Fourth District failed to recognize this requirement when it reversed the trial court, clear error was committed. This Court must quash the decision of the Fourth District and remand with instructions to affirm the trial court's order denying coram nobis relief.

> the effect on the administration of justice of a retroactive application of the new rule.

Clearly, it would have created an administrative nightmare had the 1989 version of Florida Rule of Criminal Procedure 3.172(c)(viii) been made retroactive. Re-litigation of every case in which a defendant had entered a guilty or nolo contendere plea would have been impossible to administer. On this point alone, the Supreme Court would have found that the rule should not be applied retroactively.

POINT V

THE DISTRICT COURT ERRED IN REQUIRING AN EVIDENTIARY HEARING ON A PETITION THAT WAS LEGALLY INSUFFICIENT UNDER FLORIDA RULE OF CRIMINAL PROCEDURE 3.172(i) AND PEART V. STATE, 705 So. 2d 1059 (FLA. 3d DCA), REV. GRANTED, 722 So. 2d 193 (FLA. 1998).

The petition for writ of coram nobis merely stated that the trial court had failed to advise Respondent of deportation consequences. This failure, along with defense counsel's alleged failure to discuss possible deportation associated with the plea were cited as prejudicing Respondent. (R 2). Such a pleading is legally insufficient as the Defendant has not established that had he been informed of the deportation consequences he would not have entered a guilty plea and either is innocent of the charges or would have been acquitted had he proceeded to trial.

Pursuant to Rule 3.172(i), "failure to follow any of the procedures in this rule shall not render a plea void absent a showing of prejudice." In Peart, the Third District Court of

Appeal reasoned that "prejudice" would be established if the defendant (a) was not advised of deportation possibilities; (b) had no actual knowledge of same; (c) deportation proceedings had been instituted; (d) the defendant would not have pled guilty had he known of consequences; and (e) had he gone to trial, he would most probably have been acquitted. Peart, 705 So. 2d at 1063.

In the instant case, Respondent has failed to make such a showing, let alone allege he is innocent or would have been acquitted. Moreover, a review of the record reveals the Defendant was aware of deportation repercussions at the time he entered his plea. (R 17). With this admission, and other defects, Respondent cannot meet the requirements of Rule 3.172(i) and Peart in order to permit him to withdraw his plea. See also, State v. Evans, 705 So. 2d 631, 632 (Fla. 3d DCA 1998)(holding a plea can be vacated only upon a showing of prejudice or manifest injustice); Buell v. State, 704 So. 2d 552, 553 (Fla. 4th DCA 1997)(finding absent a showing of prejudice, there is no error in denying defendant's request to withdraw his plea). Thus, even if the Fourth District reached the merits of Respondents claim based upon the new time frame announced in Wood, 24 Fla. L. Weekly at S241, the district court erred in not finding the petition legally insufficient under Peart, 705 So. 2d at 1063 and Rule 3.172(i) and denied properly by the trial court.

Based upon the foregoing, this Court should quash the Fourth District's decision in this matter and remand with instruction to reinstate the trial court's order denying coram nobis relief.

POINT VI

RESPONDENT SHOULD NOT BE PERMITTED TO WITHDRAW HIS PLEA BASED UPON ALLEGED MISADVISE OF TRIAL COUNSEL.

The record reflects that Respondent challenged his plea based upon a claim that his trial counsel did not advise him of deportation consequences (R 2 ¶8) and affirmatively misled him about deportation possibilities. (R 16-19; Initial Brief on Appeal 8-11). However, support for this attack was made by way a an affidavit after the petition for writ of coram nobis was denied as well as the subsequent motion for rehearing. (R 10, 14, 15). Moreover, the Fourth District did not address this issue, finding only that Respondent challenged his plea based upon the trial

court's alleged failure to discuss deportation. Kalici, 24 Fla. L. Weekly at S1714. Thus, defense counsel's alleged error is not before this Court, however, the State will address it out of an abundance of caution that the Fourth District's reversal for an evidentiary hearing could be construed to permit further argument or relief on this point.

It must be recognized that Respondent failed to allege either prong of Strickland v. Washington, 466 U.S. 668 (1984) in his petition for writ of error coram nobis. (R 2 ¶8). Under Atkins v, Dugger, 541 So. 2d 1165, 1166 (Fla. 1989), if a defendant is unable to establish that counsel's "conduct included a specific omission or overt act which was a substantial and serious deficiency, measurably below that of competent counsel" then the court is not required to reach the prejudice prong of Strickland. "A court considering a claim of ineffectiveness of counsel need not make a specific ruling on the performance component of the test when it is clear that the prejudice component is not satisfied." Kennedy v. State, 547 So. 2d 912, 914 (Fla. 1989). Here, the Respondent did not show that his defense counsel's comments were erroneous, but more importantly, **he has not alleged prejudice as defined in Strickland**.

In order to establish prejudice, "[t]he defendant must show

that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Strickland. 466 U.S. at 694. Under the circumstances of this case, Appellant would have to show he would have been acquitted had he gone to trial. This has not been done. In fact, Respondent has not alleged any defect in the evidence the police had acquired or the factual basis for the acceptance of his plea to delivery of a controlled substance.

Furthermore, a defendant may not allege ineffective assistance in a conclusory manner. Kennedy, 547 So. 2d at 913("A motion for postconviction relief can be denied without an evidentiary hearing when the motion and the record conclusively demonstrate that the movant is entitled to no relief"). In the coram nobis petition, Respondent's only assertion was that he was prejudiced by defense counsel's failure to discuss deportation. (R 2 ¶8). It was only after the denial of the petition (R 10, 14) that he alleged affirmative misadvise of counsel. However, even in his affidavit, Respondent has failed to allege how the outcome of his case would have been altered; Respondent has not even alleged he would have been be adjudicated guilty had he gone to trial. Having failed to establish counsel's performance was defective professionally, or

that prejudice arose for the alleged error, the petition for writ of error coram nobis relief was legally insufficient and denied properly.

CONCLUSION

Wherefore, based upon the foregoing arguments and the authorities cited therein, Petitioner requests respectfully this Court REVERSE the order of the appellate court below and find that the application of traditional doctrine of laches survives Wood v. State, 24 Fla. L. Weekly S240 (Fla. May 27, 1999) and that Wood

does not create a cause of action for those defendants who entered pleas before January 1, 1989 and were not advised of possible deportation consequences. The trial court's denial of relief should be reinstated.

Respectfully submitted,
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing "Petitioner'S Initial Brief on the Merits" has been furnished by

U.S. Mail to: NEAL ANDRE DUPREE, ESQ., Capital Collateral Regional Counsel, 101 N.E. 3rd Avenue, 4th Floor, Fort Lauderdale, FL 33401 and to NEAL ANDRE DUPREE, ESQ., Law Offices of Neal A. Dupree, 440 South Andrews Avenue, Fort Lauderdale, Fl 33301 on January 27, 2000.

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