

**ORIGINAL**

IN THE SUPREME COURT OF FLORIDA

**FILED**  
DEBBIE CAUSSEAU

SEP 23 1999

CLERK, SUPREME COURT  
By BAW

CASE NO. 96,587

STATE OF FLORIDA,

Petitioner,

vs.

GINO KALICI,

Respondent.

\*\*\*\*\*

ON PETITION FOR DISCRETIONARY REVIEW

\*\*\*\*\*

BRIEF OF PETITIONER ON JURISDICTION

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CERTIFICATE OF INTERESTED PERSONS

Counsel for the State of Florida, Appellant 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.**  
(Trial counsel for Respondent)
5. **Melvyn Schlessler, Esq.**  
(Trial counsel for Respondent)
6. **Neal A. Dupree, Esq.**  
(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, Appellant 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 and Appellee in the Fourth District Court of Appeal below. Petitioner will be referred to herein as "Petitioner" or the "State". Respondent, Gino Kalici, was the defendant in the trial court and Appellant in the District Court below. Respondent and will be referred to herein as "Respondent" or "Defendant". Reference to the Appendix will be by the symbol "A".

STATEMENT OF THE CASE AND FACTS  
(Limited to the issue of jurisdiction)

Petitioner seeks discretionary review of the decision of the Fourth District Court of Appeal in Kalici v. State, 24 Fla. L. Weekly D1714 (Fla. 4th DCA July 21, 1999) (A 1). As found by the Fourth District Court of Appeal ("Fourth District"), 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. Id. Such probation terminated in January 1988. Id.

On March 4, 1998, after deportation proceedings were initiated by the Immigration and Naturalization Service and approximately twelve years after having entered his guilty plea, Respondent filed a Petition for Writ of Error Coram Nobis. Id. In this pleading he alleged he was facing deportation and claimed the plea should be withdraw 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 either hearing on the matter, the petition and request for rehearing were considered and denied by the trial court. (A 2, pgs. 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. (A 2, pgs. 27-37). Later, 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.

(A 2, pg. 47). 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. (A 2, pg. 47).

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 was denied on August 19, 1999. Notice to invoke this Court's jurisdiction was filed on September 17, 1999.

SUMMARY OF THE ARGUMENT

Under Article V, section 3(b)(3) of the Florida Constitution, jurisdiction lies with this Court to review Kalici v. State, 24 Fla. L. Weekly D1714 (Fla. 4th DCA July 21, 1999) because the Fourth District misapplied Wood v. State, 24 Fla. L. Weekly S240 (Fla. May 27, 1999), and in so doing, effectively overruled McCray v. State, 699 So. 2d 1366 (Fla. 1997). In Wood, defendants were given two years from May 27, 1999 to file claims "traditionally cognizable under coram nobis." Wood, 24 Fla. L. Weekly at S241.

The Fourth District misapplied Wood in two respects. First, it disregarded the doctrine of laches where more than 12 years elapsed between Respondent's plea and petition, during which time, records were destroyed, thereby, prejudicing the State. Second, Wood was misapplied when new life was breathed into Respondent's challenge to his plea colloquy regarding deportation. There is no entitlement to relief because the plea was entered in 1986 before the amendment to Florida Rule of Criminal Procedure 3.172(c)(8) and Respondent did not use due diligence to investigate any potential claim after the amendment. This Court has jurisdiction to determine whether the doctrine of laches may be applied to defendants seeking claims traditionally cognizable under coram nobis and whether relief is available to aliens who entered pleas before Rule 3.172(c)(8) was amended but were not informed of deportation consequences.

## ARGUMENT

JURISDICTION LIES WITH THIS COURT BECAUSE THE  
FOURTH DISTRICT COURT OF APPEAL MISAPPLIED  
WOOD V. STATE, 24 FLA. L. WEEKLY S240 (FLA.  
MAY 27, 1999).

This Court has jurisdiction because the Fourth District misapplied Wood v. State, 24 Fla. L. Weekly S240 (Fla. May 27, 1999). Pender v. State, 700 So. 2d 664, 665 (Fla. 1997) (finding jurisdiction where district court misapplied a decision of the Florida Supreme Court); Armstrong v. State, 656 So.2d 455 (Fla. 1995). Also, jurisdiction was accepted in Gregersen v. State, 699 so. 2d 1366 (Fla. 4th DCA), rev. granted, 728 So. 2d 205 (Fla. 1998) in which the Fourth District recognized the doctrine of laches operated to bar coram nobis relief.

Recently, the use and time limits to be applied to writs of error coram nobis were addressed. Wood, 24 Fla. L. Weekly at 5240. A new two year time limit was announced, commencing on May 27, 1999, for those defendants convicted prior to the issuance of Wood, within which to file "claims traditionally cognizable under coram nobis." Id. at S241. However, nowhere in the opinion does the Court reject or abrogate the effect of laches on such petitions or overrule McCray v. State, 699 So. 2d 1366, 1368 (Fla. 1997). Further, the Court made it clear that coram nobis could not be used to breath new life into barred claims. Wood, 24 Fla. L. Weekly at S241. Yet, the Fourth District has disregarded the traditional doctrine of laches and has permitted the Respondent to breath new

live into a claim where no basis for relief existed. As such, Wood has been misapplied.

This Court has Gregersen for review. In Greersen, the Fourth District recognized the use of laches to bar relief in a coram nobis proceeding where more than ten years had elapsed since the defendant's adjudication and records had been destroyed. While a similar situation exists here, the Fourth District refused to apply the doctrine of laches. Instead, it used Wood to grant Respondent an evidentiary hearing. Yet, in McCray v. State, 699 So. 2d 1366, 1368 (Fla. 1997) this Court recognized that "the doctrine of 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 an extraordinary delay has been provided." While addressing how laches applied in habeas corpus petitions 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. at 1368. See also, Anderson v. Singletary, 688 So. 2d 462, 463 (Fla. 4th DCA 1997) (a petition, filed 15 years after finalized appeal, is barred by laches where records were destroyed).

In the instant case, it has been more than 12 years since Respondent entered his plea on November 17, 1986; records have been destroyed and memories have faded. (A 2 pg. 5). The 12 year delay

was recognized by the trial judge when he stated:

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 gone.

(A 2, pg. 37). The trial court recognized the traditional doctrine of laches in denying the petition for error coram nobis, but the Fourth District ordered an evidentiary hearing. This Court should accept jurisdiction and determine that the doctrine of laches is a viable basis for denying a petition for coram nobis. The Fourth District's blind adherence to the May 27, 1999 date for the commencement of a new two year limit announced in Wood certainly was not intended to apply in cases such as this where records have been destroyed and the delay is presumed prejudicial to the State.

In addition to its failure to recognize that the doctrine of laches was not abandoned by Wood, the Fourth District erred by allowing new life to be breathed into the Respondent's claim. This is in contravention of the dictates of Wood where it was stated, "coram nobis claims cannot breath life into postconviction claims that have previously been held barred." Wood, 24 Fla. L. Weekly at S241 (citing Vonia v. State, 680 So. 2d 438, 439 (Fla. 2d DCA 1996) ). Additionally, this Court held that "[b]y extending rule 3.850 relief to noncustodial claimants, we do not narrow in any way the relief heretofore available to defendants under coram nobis." Wood, 24 Fla. L. Weekly S241(emphasis added). Implicit with this

statement is the corollary that the Court would not expand the relief available before Wood.

Florida Rule of Criminal Procedure 3.172(c)(8), which now requires the trial court to inform a defendant of the possible immigration consequences of the plea, became effective January 1, 1989. Prior to that date, the trial judge did not have to inform defendants of possible deportation<sup>1</sup>. If Respondent had a potential claim, any motion to withdraw the plea should have been brought within two years of the effective date of the amendment. By failing to bring a motion within that time frame, Respondent did not use due diligence to investigate or challenge the plea. Wood, 24 Fla. L. Weekly S241; Hallman v. State, 371 So. 2d 482, 485 (Fla. 1979) ("it must appear that defendant or his counsel could have known [of the alleged facts] by the use of diligence."). Moreover, because Respondent enjoyed the benefits of probation, he should not now be permitted to complain. Cf. Trapp v. State, 711 So.2d 138

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<sup>1</sup> In 1986, when Respondent entered his plea, there was **no requirement** that judges advise defendants of deportation issues. Medina v. State, 711 So. 2d 256, 257 (Fla. 3d DCA 1998) (defendants who entered pleas before January 1, 1989 were not required to be informed of deportation consequences, thus, no coram nobis relief available). Deportation consequences are collateral issues for which postconviction relief is not available. Fundora v. State, 513 So. 2d 122 (Fla. 1987); State v. Ginebra, 511 So. 2d 960 (Fla. 1987). See, Peart v. State, 705 so. 2d 1059, 1062 (Fla. 3d DCA) (en banc), **rev. granted**, 722 So. 2d 193 (Fla. 1998). Under the 1986 version of Florida Rule of Criminal Procedure 3.172, the trial judge did not have to inform Respondent of deportation consequences, therefore, he has no basis for relief.

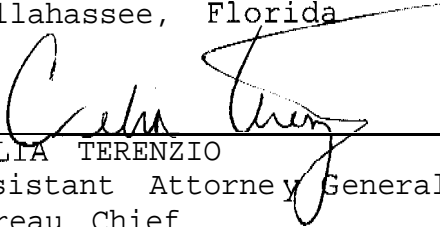
(Fla. 4th DCA 1998) (defendant may not wait until revocation to challenge condition of probation); Stroble v. State, 689 So. 2d 1089, 1090 (Fla. 5th DCA), ("One who takes advantage of an invalid sentence until he violates community control is estopped to assert the invalidity of his original sentence"), rev. denied, 697 So. 2d 512 (Fla. 1997); Gaskins v. State, 607 So. 2d 475, 476 (Fla. 1st DCA 1992) (once a defendant has enjoyed the benefits of probation without challenging the terms, he is barred from complaining about those in an appeal from an order revoking probation), disapproved on other grounds, State v. Powell, 703 So.2d 444 (Fla.1997). Hence, the doctrine of laches should apply because there is no basis for the inordinate delay in seeking relief. Clearly, even under Wood's new time limit, relief was not warranted in 1986 nor today. The Fourth District misapplied Wood and McCray when it ordered an evidentiary hearing.


Because the Fourth District failed to recognize the traditional doctrine of laches, and because it breathed new life into a claim where relief was never available, it misapplied this Court's decisions in Wood and McCray. Jurisdiction should be accepted to rectify this error and announce clearly that the doctrine of laches remains a proper defense to claims for coram nobis relief, and that the new time limit announced in Wood cannot be used to form a basis for a claim which never existed.

CONCLUSION

Wherefore, based on the foregoing, Respondent requests respectfully this Court ACCEPT jurisdiction.

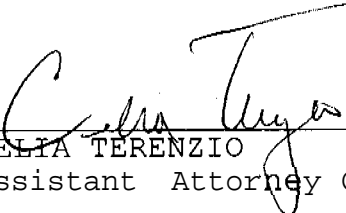
Respectfully submitted,  
ROBERT A. BUTTERWORTH  
Attorney General  
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CELIA TERENCE  
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(561) 688-7759  
Counsel for Petitioner

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing "Initial Brief of Appellant" has been furnished by courier, to: NEAL DUPREE, Esq. 440 South Andrews Avenue, Fort Lauderdale, FL 33301 on September 21, 1999.

  
\_\_\_\_\_  
CELIA TERENCE  
Assistant Attorney General.

  
\_\_\_\_\_  
LESLIE T. CAMPBELL  
Assistant Attorney General



**EXHIBIT 1**

*W/A*

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA  
FOURTH DISTRICT  
JULY TERM 1999

RECEIVED  
OFFICE OF THE ATTORNEY GENERAL  
JUL 21 1999  
CRIMINAL DIVISION  
WEST PALM BEACH

*GINO KALICI,*

Appellant,

v.

**STATE OF FLORIDA,**

Appellee.

\_\_\_\_\_  
CASE NO. 98-2923  
\_\_\_\_\_

Opinion filed July 21, 1999

Appeal from the Circuit Court for the Seventeenth Judicial Circuit, Broward County; Robert B. Carney, Judge; L.T. Case No. 86-4020CF10-B.

Neal A. Dupree of Law Offices of Neal A. Dupree, Fort Lauderdale, for appellant.

Robert A. Butterworth, Attorney General, Tallahassee, and Leslie T. Campbell, Assistant Attorney General, West Palm Beach, for appellee.

HAZOURI, J.

Appellant, Gino Kalici ("Kalici"), appeals from an order which denied his petition for writ of error coram nobis. Based upon the recent decision of the Florida Supreme Court in Wood v. State, 24 Fla. L. Weekly S240 (Fla. May 28, 1999), we reverse and remand for the trial court to conduct an evidentiary hearing on Kalici's coram nobis petition.

On November 17, 1986, Kalici, a resident alien, pled guilty to delivery of a controlled substance. Kalici was sentenced to two years probation and ordered to pay a fine. Although Kalici's probation ended in 1988, the Immigration and Naturalization Service ("INS") arrested him in December of 1997 and initiated deportation proceedings based upon

his conviction. On March 4, 1998, Kalici filed a petition for writ of error coram nobis claiming his plea should be withdrawn because the trial court had not informed him of possible deportation consequences when he pled guilty. In denying the motion, the trial court indicated Kalici could not withdraw his plea because he failed to file the coram nobis petition within the applicable two-year time limit.

This court has repeatedly held petitions for writs of error coram nobis are time barred by laches if filed more than two years after judgment and sentence have become final. See State v. Elise, 727 So. 2d 1030 (Fla. 4th DCA 1999); Gabriel v. State, 723 So. 2d 899 (Fla. 4th DCA 1998); State v. Taylor, 722 So. 2d 890 (Fla. 4th DCA 1998). The Florida Supreme Court recently agreed with this position when it held the two-year time limit contained in rule 3.850 applies to petitions for writs of error coram nobis. See Wood, 24 Fla. L. Weekly at S241. However, the court also stated:

*Wood's petition is not time-barred since this Court is only now applying this limitation period to writs of error coram nobis. However, this decision shall apply to all defendants adjudicated guilty after the date this decision is filed, while 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. (emphasis added). A plain reading of this language indicates that Kalici now has two years from the filing date of Wood to file a claim traditionally cognizable under coram nobis. Therefore, we reverse the trial court's order and remand for an evidentiary hearing on Kalici's coram nobis petition.

GUNTHER and GROSS, JJ., concur.

**NOT FINAL UNTIL THE DISPOSITION OF ANY TIMELY FILED MOTION FOR REHEARING.**

# **EXHIBIT 2**

**IN THE DISTRICT COURT OF APPEAL FOURTH DISTRICT  
WEST PALM BEACH, FLORIDA**

**CLOCK IN**

**DIVISION:  
APPELLATE**

**RECORD ON APPEAL FROM THE CIRCUIT COURT  
OF THE SEVENTEENTH JUDICIAL CIRCUIT  
IN AND FOR BROWARD COUNTY, FLORIDA  
CRIMINAL DIVISION**

TBA

GINO KALICI,  
vs.  
STATE OF FLORIDA

**Appellant**

**Appellee**

**CASE NUMBER  
86-4020 CF108  
APPEAL NUMBER  
98-2923**

**RECEIVED  
OFFICE OF THE ATTORNEY GENERAL  
MAR 16 1999  
CRIMINAL DIVISION  
WEST PALM BEACH**

NEAL DUPREE, P.A.,  
Attorney for Appellant

GEORGINA JIMENEZ-AROSA  
Assistant Attorney General

<b>DATE OF FILING</b>	<b>KIND OF INSTRUMENT</b>	<b>PAGES</b>
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FL 98  
3-4-98

IN THE CIRCUIT COURT OF THE 17TH  
JUDICIAL CIRCUIT, IN AND FOR  
BROWARD COUNTY, FLORIDA

STATE OF FLORIDA,

CASE NO.: 86-4020 CF10B

Plaintiff,

JUDGE: CARNEY  
(BIRKEN)

v.

GINO KALICI,

Defendant.

\_\_\_\_\_ /

WF b

RECEIVED  
CIRCUIT COURT OF  
BROWARD COUNTY  
MARCH 11 1988

**PETITION FOR WRIT OF ERROR CORAM NOBIS and/or  
MOTION TO WITHDRAW PLEA**

Petitioner, GINO KALICI, through counsel, requests this Honorable. Court enter an Order granting a Writ of Error Coram **Nobis** and/or allow him with withdraw his previously entered guilty plea and as grounds would state as follows:

1. On March 29, 1986, Petitioner was arrested and charged with delivery of cocaine in violation of Florida Statute **893.13(1)(a)**.

- 2. On May 8, 1986, Petitioner was arraigned before this Honorable Court and entered a Plea of Not Guilty to the one (1) Count information filed by the State of Florida.

3. On November 17, 1986, Petitioner entered a guilty plea to the charge of delivery of cocaine, and was sentenced to two (2) years probation, along with a \$500.00 **fine** and a \$25 .00 Statutory surcharge.

4. Petitioner did not file a Notice of Appeal, and no other post-conviction relief has been requested by Petitioner.

5. On January 15, 1988, this Court terminated Petitioner's probation.

6. Prior to accepting Petitioner's Change of Plea, the Trial Court failed to inform Petitioner that a Guilty Plea could affect his immigration status, since Petitioner was not, and is not now, a United States Citizen. Not only did the Trial Court fail to inform Petitioner of **the** consequences of his guilty plea, Petitioner's counsel likewise failed to inform Petitioner of the immigration consequences that a guilty plea carried.

7. Petitioner is now in INS custody in **Oakdale**, Louisiana, threatened with deportation due to his guilty plea in the above-styled case. Deportation proceedings have actually commenced, and Petitioner is facing expulsion from this country due to his counsel and the Trial Court's failure to inform him that a change of plea could have immigration consequences potentially causing him to be deported.

8. Had Petitioner been aware that a Change of Plea was subject him to the possibility of deportation, Petitioner would not have entered a plea of **guilty** in this matter. Due to the Trial Court and counsel's failure to inform him of the immigration consequences of his plea, Petitioner has been prejudiced due to the current threat of deportation.

9. Rule **3.172(c)(8)** requires that a trial judge inform a Defendant that if he is not a United States citizen his plea may subject him to deportation. Perriello v. State, 684 **So.2d** 258 (Fla. 4th DCA 1996); Marriott v. State, 605 **So.2d** 985 (**Fla.** 4th DCA 1992). Use of a pre-printed plea form alone is insufficient, unless the Court orally verifies on the record during the Plea Colloquy that the Defendant has intelligently consumed the written information contained within it. Lu v. State, 683 **So.2d** 1110 (Fla. **4th** DCA 1996)

10. Petitioner contends that his Change of Plea was not knowingly and voluntarily entered into since he was not informed either orally or in writing of the immigration consequences of his change of plea,

11. Since there can be no showing that Petitioner understood the consequences of his plea, his due process rights have been violated and this Court should grant the foregoing Petition for Writ of Error Coram Novis allowing Petitioner to withdraw his previously entered guilty plea.

WHEREFORE, the Petitioner, GINO KALICI, requests this Honorable Court enter an Order granting his Petition for Writ of Coram Novis and/or allow him to withdraw his guilty plea.

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished this 4 day of March, 1998, to the Office of the State Attorney, 201 S.E. 6th Street, 6th Floor, Ft. Lauderdale, FL 33301.

LAW OFFICES OF NEAL A. DUPREE  
440 South Andrews Avenue .  
Ft. Lauderdale, FL 33301  
(954) 766-8872  
FBN: 311545

BY: 


STATE OF LOUISIANA

SS:

ALLEN PARRISH

BEFORE ME, the undersigned authority authorized to administer oaths, personally appeared GINO KALICI, who, after having first been duly sworn by me, acknowledged that the statements made in the foregoing document are true and correct to the best of his knowledge and belief, and in my presence he executed same.

SWORN TO AND SUBSCRIBED before me this 3rd day of March, 1998.

  
GINO KALICI

  
NOTARY PUBLIC

My Commission Expires :  
at my death



IN THE CIRCUIT COURT OF THE SEVENTEENTH JUDICIAL CIRCUIT IN AND FOR BROWARD COUNTY.,+ FLORIDA

STATE OF FLORIDA,  
Plaintiff,

CASE NO. 86-4020 CF 100

JUDGE

v.

GINO KALICI,  
Defendant.

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*B*

RULE 3.850 MOTION TO VACATE/SET ASIDE PLEA/SENTENCE

COMES NOW, the Defendant, GINO KALICI, by and through undersigned counsel, and moves this Court to set aside and/or vacate the plea/sentence in this cause and as grounds therefore would state:

1. The judgment and/or plea/sentence under attack is an order by the Court entered on November 17, 1986 as a result of a plea entered on the same date in which Defendant was convicted of Delivery of Cocaine. The Court which sentenced Defendant was the Honorable Robert Birken.

2. Defendant has not previously filed any motions for-post conviction relief.

3. There has been no other appeal filed by Defendant in this matter.

4. Defendant seeks relief by having the plea entered on his behalf and the resulting sentence set aside and or vacated.

**STATEMENT OF FACTS AND LAW IN SUPPORT OF RULE 3.850 MOTION**

5. This motion requests that the plea/sentence in this cause be vacated and/or set aside on the basis that the plea entered in this cause was not made either on a voluntary or intelligent basis.

6. No one can make or enter a voluntary or intelligent plea unless the advice provided by the attorney and the consequences related by the Court are correct. In this case during the plea negotiations, the Defendant was not advised of the consequences a conviction could have on his immigration status or of possible immigration proceedings against Defendant as a result of his entering the plea, by either counsel or the Court.

7. The Court failed to inquire of Defendant as to his understanding of the rights he would waive including his understanding of the consequences to his immigration status.

8. The record of the hearing in which the plea' was entered was made by Justice Reporting, Court Reporter, Bill Brown, these recordings cannot be transcribed as they are routinely destroyed after 10 years as in this case,. Attempts to reconstruct the record **including** attempts to review the files of the State Attorney and to interview the counsel present have failed to produce any evidence of an intelligent and voluntary plea. Further, a review of the Court files reveals no document purporting to be a waiver/acknowledgement of rights bearing Defendants signature, nor does any other entry therein reflect an inquiry by the Court -regarding Defendants understanding of the consequences of his plea on his immigration status. Defendants recollection of the plea hearing is that no discussion regarding his plea having potential

immigration related consequences occurred nor was any inquiry made by the Court of his understanding such consequences.

9. Defendant entered his plea unaware of facts which were essential to his ability to do so voluntarily and intelligently and was not capable of ascertaining that knowledge through any exercise of due diligence on his own.

10. Defendant discovered the aforementioned consequences only upon being served with a notice to appear before the U.S. Department of Justice Immigration and Naturalization Service (Ins.) for deportation proceedings on October 27, 1997. (See attached "Exhibit A").

#### **THE LAW**

11. In the case of **S.D., A CHILD v. STATE**, 677 So. 2d 861 (Fla. App. 1 Dist. 1995), the Court held that "the granting of a new trial is the proper remedy where an adequate record cannot be prepared. (see also **J.W., A CHILD, v. STATE**, 667 So. 2d 207 (Fla. App. 1 Dist. 1995). In the instant case efforts to reconstruct the record pursuant to Fla. Rules of Appellate Procedure have produced no record inconsistent with Defendant's version and as such the said version must be accepted and Defendant must be permitted to withdraw his plea.

12. Florida Rule of Criminal Procedure 3.172 (c)(8) provides that "when a plea of guilty or nolo contendere is taken the trial Judge must inform him or her that, if her or she is not a United States citizen the plea may subject him or her to deportation..." In the case of **SANDERS v. STATE**, 685 So.2d 1385 (Fla. App. 4 Dist.

1996) the Court ruled that neither written plea nor reading of written plea agreement to Defendant by trial counsel satisfies the requirement that trial Judge actually ascertain that Defendant understands consequences of conviction on resident alien status. The Court further found that Defendant was prejudiced, as he was later notified by Immigration and Naturalization that he was subject to deportation.

Defendant, KALICI, is similarly prejudiced in that he is now being held by Immigration and Naturalization facing deportation proceedings as a result of the plea being attacked herein.

13. In the Florida Supreme Court case of KOENIG v. STATE, 564 So.2d 1060 (Fla. 1990) the Court pronounced the following dictates regarding the standard for a- voluntary plea based upon an intelligent waiver of rights:

A plea colloquy that does **not show** a knowing and intelligent waiver of rights will get plea reversed.

Because a plea of guilty or no contest has such serious consequences for the accused, the taking of a plea **"demands** the utmost solicitude of which the Court is capable in canvassing the matter with the accused to make sure he has a full understanding of what the plea connotes."

The Court must specifically explain the rights the Defendant is giving up. Where the colloquy only states that Defendant is giving up **"certain** rights" without explaining what they are, the colloquy is insufficient. Where the plea **form** explains what the

rights are, merely stating that Defendant discussed the rights with his lawyer is not sufficient.

CONCLUSION

14. A review of the **facts** as aforestated shows:

A. That the Defendant entered **a plea to** an offense unaware of essential facts, especially the effect such a plea would have on his status with the U.S. Department of Justice Immigration and Naturalization Service.

B. The Court failed to advise the Defendant of such consequences during the plea colloquy and failed to inquire as to Defendant's knowledge of those consequences. Therefore, the Court did not conduct adequate inquires during the plea colloquy leaving Defendant unaware of essential facts without which no effective binding plea could **be** entered or accepted.

C. Defendant has been prejudiced in that he now **faces** deportation **as** a direct result of the entering **of** this plea, a plea he would not have entered has he known of the possibility **of** this result.

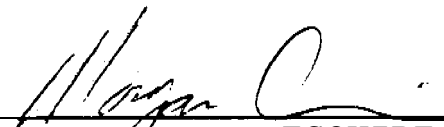
D. The essential facts unknown to Defendant could not have been previously discovered by any reasonable efforts which could be expected of Defendant.

15. In light of the foregoing **LAW** and **FACTS**, this motion should be GRANTED in all respects.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY, that a true and correct copy of the foregoing Rule 3.850 Motion to Vacate/Set Aside **Plea/Sentence** was

sent to the Office of the State Attorney this 25 day of March, 1998.

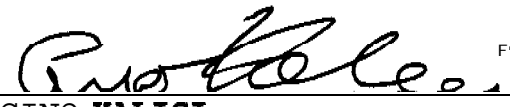
By:   
**MORGAN CRONIN, ESQUIRE**  
Attorney for Defendant  
633 South Federal Highway, 8th Floor  
Post Office Box 14333  
Fort Lauderdale, Florida 33302-4333  
(954) 525-5167  
Florida Bar Number 57411

OATH


I, GINO KALICI, having been duly sworn, make the following statements under oath:

A. I am the Defendant in this case.

B. I state I have read the factual allegations contained within this motion **and** they are true and correct based upon my own knowledge.

  
GINO KALICI

**SWORN TO AND SUBSCRIBED** before me this 20<sup>th</sup> day of March, 1998.

  
NOTARY PUBLIC  
H. Todd Nesom  
Typed/Printed Name of Notary

My commission expires: at death

17th Judicial Circuit in and for Broward County  
 In the County Court in and for Broward County

CLOCK IN

DIVISION:

CRIMINAL  
 TRAFFIC  
 OTHER

ORDER

RECEIVED  
JUN 12 1998

THE STATE OF FLORIDA VS.

GINO KALICI



CASE NUMBER

86-4020cf10-B

PLAINTIFF

DEFENDANT

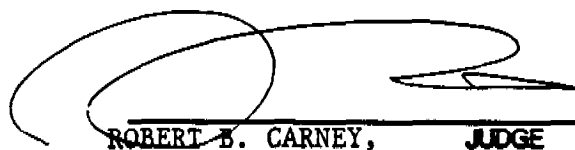
CHARGE Delivery/Cocaine

THIS CAUSE, having come before the Court upon Defendant's Petition for Writ of Error **Coram Nobis** and/or Motion to Withdraw Plea, and the Court having heard argument of counsel and being otherwise fully advised in the premises, it is hereby

ORDERED that Defendant's Petition for Writ of **Error Coram Nobis** and/or Motion to Withdraw Plea be, and the same is hereby denied.

DONE AND ORDERED THIS 10 DAY OF June, 1998, IN

BROWARD COUNTY, FLORIDA nunc pro tunc March 26, 1998.



ROBERT B. CARNEY, JUDGE

COPIES: BSO - SAO

IN THE CIRCUIT COURT OF THE 17TH  
JUDICIAL CIRCUIT, IN AND FOR  
BROWARD COUNTY, FLORIDA.

CASE NO.: 86-4020CF10-B

STATE OF FLORIDA, )  
Plaintiff, )  
vs. )  
GINO KALICI, )  
Defendant. )  
\_\_\_\_\_ )



ORDER

RECEIVED  
17TH JUDICIAL CIRCUIT  
BROWARD COUNTY, FLA  
JUN 12 PM 1:03

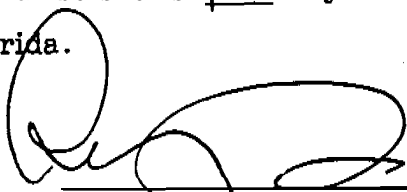
THIS CAUSE, having come before the Court upon Defendant's 3.850 Motion to Vacate/Set Aside Plea/ Sentence, and the Court having reviewed same, together with the Court file, and being otherwise fully advised in the premises, it is hereby

ORDERED that Defendant's 3.850 Motion be, and the same is hereby denied for the following reasons :

1. As Defendant is not in custody and his claims are not cognizable by Rule 3.850. He may file a Petition for Writ of Error Coram Nobis, but that has previously been filed and argued with this Court and was denied.

2. As further grounds for denial, even if the Motion were cognizable by Rule 3.850, the the particular ground asserted by Defendant is not.

DONE AND ORDERED in Chambers this 12 day of June, 1998, at Fort Lauderdale, Broward County, Florida.



ROBERT B. CARNEY,  
Circuit Judge

Copies furnished :

✓  
Morgan Cronin, Esq .  
Attorney for Defendant  
✓



IN THE CIRCUIT COURT OF THE SEVENTEENTH JUDICIAL CIRCUIT IN AND FOR BROWARD COUNTY, FLORIDA

STATE OF FLORIDA,  
Plaintiff,

CASE NO. 86-4020 **CF10B**

v.

JUDGE ROBERT B. CARNEY

GINO **KALICI**,  
Defendant.

**MOTION FOR REHEARING**

**COMES** NOW, Defendant, GINO KALICI, by and through **undersigned** counsel and moves this Court to grant a rehearing on Defendants Motion to Vacate/Set Aside Plea **and as** grounds would state:

1. Defendants Motion to Vacate/Set Aside Plea was denied on June 12, 1998.

2. In said order, the Court ruled that the Defendant was not in custody and that the grounds asserted were not cognizable under Rule 3.850.

3. Defendant is currently in custody in Federal Detention in **Oakdale**, Louisiana. Although the judgment and sentence of the conviction for which relief is being sought has been satisfied, there is a sufficient relationship to the current confinement such as would result in prisoner receiving relief from the current confinement through the motion. Specifically, but for the conviction being attacked herein, Defendant would not be eligible for deportation proceedings and would not be incarcerated. Further Courts have indicated that in reviewing the custody status in such matters such patently illegal convictions have justifiably been set

aside despite the technical requirements of the language of the Rule requiring custody *Rose v. State*, 235 So.2d 353 3rd DCA Fla 1970 and *Pair v. State*, Fla 275 So.2d 581 (1973).

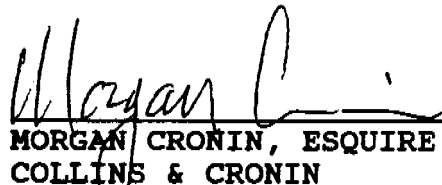
4. The grounds asserted by Defendant for withdrawing his plea are that the plea was neither voluntarily nor intelligently made as set forth in his 3.850 motion.

WHEREFORE, Defendant respectfully requests this Court rehear Defendants Motion to Vacate/Set Aside Plea and grant this motion in all respects.

**CERTIFICATE OF SERVICE**

I **HEREBY CERTIFY**, that a true and correct copy of the foregoing Motion for Rehearing was hand-delivered to the Office of the State Attorney for the Seventeenth Judicial Circuit this **19th day** of June, 1998.

BY:



**MORGAN CRONIN, ESQUIRE  
COLLINS & CRONIN  
Attorney for Defendant**

633 South Federal Highway, **8th** Floor  
Post Office Box 14333  
Fort Lauderdale, Florida 33302-4333  
(954) 522-1213  
Florida **Bar** Number 57411

IN THE CIRCUIT COURT OF THE  
SEVENTEENTH JUDICIAL CIRCUIT IN  
AND FOR BROWARD COUNTY, FLORIDA

STATE OF FLORIDA,  
Plaintiff,

CASE NO. 86-4020 CF10B

JUDGE ROBERT B. CARNEY

v.

GINO KALICI,  
Defendant.

**ORDER**

THIS CAUSE having come on to be considered on Defendant GINO KALICI, Motion for Rehearing, all parties having received due Notice and the Court having being otherwise, fully advised in the herein cause, it is hereupon,

**ORDERED AND ADJUDGED** that said Motion be, and the same is hereby denied.

**DONE AND ORDERED** in Chambers, at Fort Lauderdale, Broward County, Florida, this 22 day of June, 1998.

  
ROBERT B. CARNEY  
Circuit Court Judge

cc: Morgan Cronin, Esquire  
Assistant State Attorney, 17th Judicial Circuit

[ 3 '17th Judicial Circuit in and for Broward County  
[ ] In the County Court in and for Broward County

CLOCK IN  
Filed In Open Court,  
ROBERT E. LOCKWOOD,  
CLERK

DIVISION:

[ ] CRIMINAL  
[ ] TRAFFIC  
[ ] OTHER

ORDER

ON JUL 20 1998

BY \_\_\_\_\_

THE STATE OF FLORIDA VS.

PLAINTIFF

Gino Kalici

DEFENDANT

CASE NUMBER

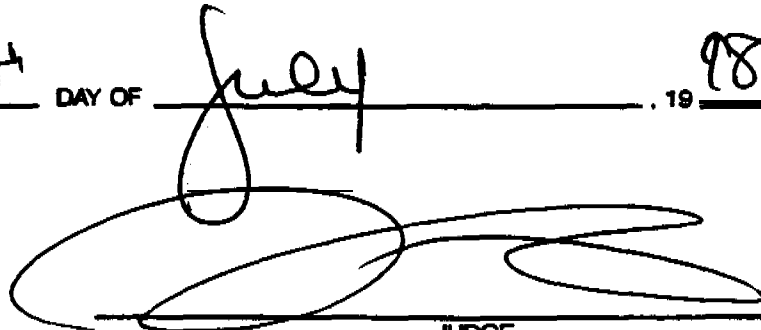
86-4020CF !

CHARGE Del Cont Subst

DEFENSE MOTION TO Withdraw Plea IS HEREBY  
denied. FOR REASONS AS STATED ON THE RECORD  
IN OPEN COURT.

DONE AND ORDERED THIS 20<sup>th</sup> DAY OF July, 19 98, IN

BROWARD COUNTY, FLORIDA

  
\_\_\_\_\_  
JUDGE  
Robert B Corney

COPIES: BSO - SAO

df

IN THE CIRCUIT COURT OF THE 17TH  
JUDICIAL CIRCUIT, IN AND FOR  
BROWARD COUNTY, FLORIDA

STATE OF FLORIDA,

CASE NO.: 86-4020 CF10B

Plaintiff,

JUDGE: CARNEY  
(BIRKEN)

v.

GINO KALICI,

Defendant.

RECEIVED  
CIRCUIT COURT  
BROWARD COUNTY, FL  
JUL 21 PM 12:13

SUPPLEMENTAL AFFIDAVIT OF DEFENDANT

BEFORE ME, the undersigned authority, who after first being duly sworn deposes and states the following:

1. My name is Gino Kalici, and I was the Defendant in the above-styled matter.
2. I am currently being detained by the Immigration and Naturalization Service, and threatened with deportation due to my change of plea in November, 1986, to a charge of delivery of cocaine in the above-styled matter.
3. On March 4, 1998, I caused to be filed through my attorney, Neal A. Dupree, Esquire, I Petition for Writ of Error Coram **Nobis** and/or a Motion to Withdraw my previously enter guilty plea.
4. Based upon conversations I have had with my attorney, I would also like to add the following statements made by my lawyer who represented me in the above-styled matter at the change of plea,
5. In November, 1986, I was represented by Melvyn Schlessner, Esquire, a Dade County attorney. While discussing my change of plea with my attorney, Mr. Schlessner, I

expressed my concern about the affect my change of plea would have on my immigration status since I was not a United States citizen at the time I took the change of plea.

6. I recall that Mr. **Schlessner** indicated that I would have no problem with immigration, since I was being placed on probation, and that my immigration would not be affected by the change of plea.

7. I further inquired of Mr. **Schlessner** as to whether or not the Judge could order that I not be deported, since I had 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.

8. Had I been informed by my attorney of the immigration consequences of my change of plea, I would not have entered a plea in the above-styled matter, and, I have further learned that Judge could recommend against deportation despite my conviction.

  
GINO KALICI

STATE OF LOUISIANA

ss:

ALLEN PARRISH

BEFORE ME, the undersigned authority authorized to administer oaths, personally appeared GINO KALICI, who, after having first been duly sworn by me, acknowledged that the statements made in the foregoing document are true and correct to the best of his knowledge and belief, and in my presence he executed same.

SWORN TO AND SUBSCRIBED before me this 17<sup>th</sup> day of July 9 8 .

  
NOTARY PUBLIC

My Commission Expires:

At Death.

RET # 2625  
7-22-98

IN THE CIRCUIT COURT OF THE 17TH  
JUDICIAL CIRCUIT, IN AND FOR  
BROWARD COUNTY, FLORIDA

STATE OF FLORIDA,

CASE NO. : 86-4020 **CF10B**

Plaintiff,

JUDGE: CARNEY  
**(BIRKEN)**

v.

GINO KALICI,


Defendant .

\_\_\_\_\_ /

**NOTICE OF APPEAL**

Notice is hereby given that GINO ICALICI, Defendant in the above-styled case, hereby appeals to the Fourth District Court of Appeals from the Judge's Denial of Defendant's Petition for Writ of Error Coram **Nobis and/or** Motion to Withdraw Plea entered on the 20th day of July, 1998.

Respectfully submitted,

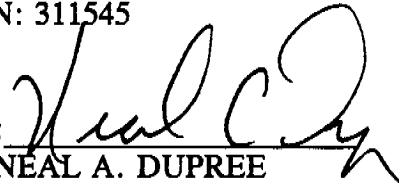
BY:   
NEAL A. DUPREE

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished this 24 day of July, 1998, to the Office of the State Attorney, 201 S.E. 6th Street, 6th Floor, Ft. Lauderdale, FL 33301 and Office of the Attorney General, 110 S.E. 6th Street, The

Republic Tower - 10th Floor, Ft. Lauderdale, FL 33301.

LAW OFFICES OF NEAL A. DUPREE  
440 South Andrews Avenue  
Ft. Lauderdale, FL 33301  
(954) 766-8872  
FBN: 311545

BY:   
NEAL A. DUPREE



7-22-89

IN THE CIRCUIT COURT OF THE 17TH  
JUDICIAL CIRCUIT, IN AND FOR  
BROWARD COUNTY, FLORIDA

STATE OF FLORIDA,

CASE NO.: 86-4020 **CF10B**

Plaintiff,

JUDGE: CARNEY  
**(BIRKEN)**

v.

GINO KALICI,

Defendant/Appellant.

\_\_\_\_\_ /

**MOTION TO EXPEDITE APPEAL**

Defendant/Appellant, GINO KALICI, through counsel, and pursuant to Rule 9.300, Florida Rules of Appellate Procedure, hereby requests this Honorable Court enter an Order Expediting **this** Appeal, and as grounds would state the following:

1. On March 4, 1998, and again on July 20, 1998, the Appellant filed with the Circuit motions to withdraw his plea entered November, 1996.
2. By way of Final Order entered July 20, 1998, the Circuit denied Appellant's motions, after conducting three (3) hearings on separate dates.
3. Appellant is presently in **Oakdale**, Louisiana, under an Order of Deportation entered by a U.S. Immigration Judge on June 5, 1998.
4. Appellant is scheduled to be deported due to his change of plea entered before the Circuit Court in 1986, which is the subject matter of this Appeal.
5. Due to Appellant's scheduled threat of deportation, Appellant is requesting this Honorable Court to expedite the Appeal in this matter, since Appellant would be irreparably harmed if this Appeal is not heard on an expedited basis.

WHEREFORE, Appellant requests this Honorable Court enter an Order expediting the Appeal, and advancing the briefing schedule for all parties.

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished this 24 day of July, 1998, to the Office of the State Attorney, 201 S.E. 6th Street, 6th Floor, Ft. Lauderdale, FL 33301 and Office of the Attorney General, 110 S.E. 6th Street, The Republic Tower - 10th Floor, Ft. Lauderdale, FL 33301.

LAW OFFICES OF NEAL A. DUPREE  
440 South Andrews Avenue  
Ft. Lauderdale, FL 33301  
(954) 766-8872  
FBN: 311545

BY:   
NEAL A. DUPREE

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA  
FOURTH DISTRICT, P.O. BOX 3315, WEST PALM BEACH, FL 33402

GINO KALICI

CASE NO. 98-02923

Appellant(s),

vs.

STATE OF FLORIDA

L.T. CASE NO. 86-4020 CF10B  
BROWARD

Appellee(s).

FILED FOR THE COURT  
CLERK, CIRCUIT COURT  
BROWARD COUNTY, FLA

00 SEP 28 AM 11:38

September 23, 1998

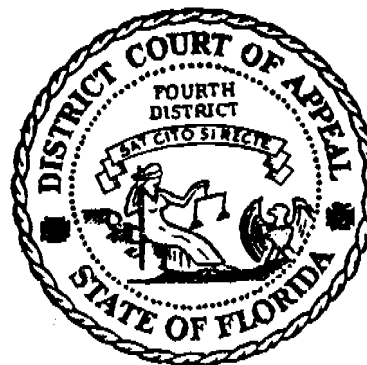
BY ORDER OF THE COURT:

ORDERED that appellant's Motion to Expedite Appeal filed September 18, 1998, is granted insofar as no extensions of time will be granted.

I hereby certify the foregoing is a true copy of the original court order.

*Marilyn Beuttenmuller*  
MARILYN BEUTTENMULLER  
CLERK

cc: Neal A. Dupree  
Attorney General-W. Palm Beach  
Robert E. Lockwood, Clerk  
State Attorney 17



/CH

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA  
FOURTH DISTRICT, P.O. BOX 3315, WEST PALM BEACH, FL 33402

GINO KALICI

CASE NO. 98-02923

Appellant(s),

vs.

STATE OF FLORIDA

L.T. CASE NO. 86-4020 CF108  
BROWARD

Appellee(s).

December 11, 1998

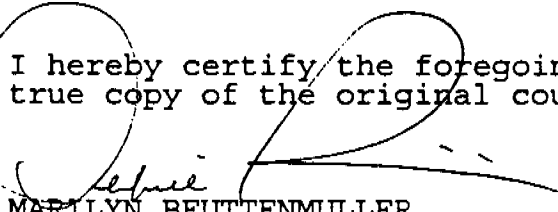
BY ORDER OF THE COURT:

ORDERED that appellee's December 9, 1998 Amended Motion to Set Briefing Schedule is hereby granted and the court reporter and the circuit court clerk's office shall produce a complete record on appeal as soon as possible; further,

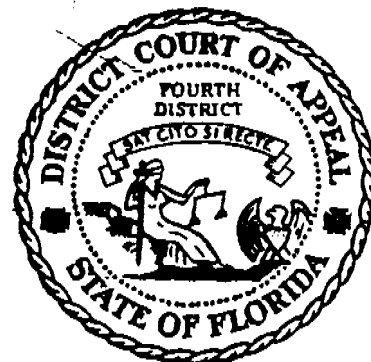
ORDERED that the answer brief is due twenty (20) days after service of appellant's amended initial brief; further,

ORDERED that appellee's December 9, 1998 Emergency Notice to the Court and Motion to Compel Appellant and/or Motion to Set Briefing Schedule is hereby determined to be moot.

I hereby certify the foregoing is a true copy of the original court order.

  
MARILYN BEUTTENMULLER  
CLERK

cc: Neal A. Dupree  
Attorney General-W. Palm Beach  
Robert E Lockwood, Clerk  
State Attorney 17  
Public Defender 17  
Public Defender 15  
Justice Reporting Service



/dm

FILED FOR RECORD  
IN THE DISTRICT COURT  
BROWARD COUNTY, FLA

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IN THE DISTRICT COURT-OF APPEAL OF THE STATE OF FLORIDA  
FOURTH DISTRICT, P.O. BOX 3315, WEST PALM BEACH, FL 33402

GINO KALICI

CASE NO. 98-02923

Appellant(s),

vs.

STATE OF FLORIDA

L.T. CASE NO. 86-4020 CE10B  
BROWARD

Appellee(s).

January 25, 1999

BY ORDER OF THE COURT:

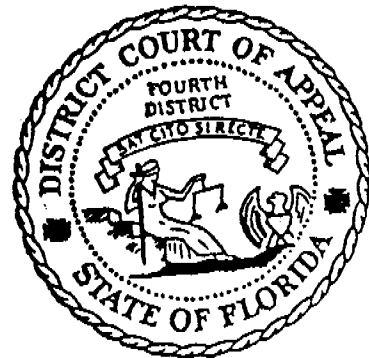
Upon consideration of the Notice of Non-Receipt of Transcript filed by the clerk of the lower tribunal on January 21, 1999, appellant is ordered to file a report within ten (10) days of the date of this order, as to the status of the preparation of the record on appeal.

I hereby certify the foregoing is a true copy of the original court order.

  
MARILYN BEUTTENMULLER  
CLERK

cc: Neal A. Dupree  
Attorney General-W. Palm Beach  
Robert E. Lockwood, Clerk  
State Attorney 17  
Public Defender 17  
Public Defender 15  
Justice Reporting Service

/KB



JAN 27 4 8 31

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA  
FOURTH DISTRICT, P.O. BOX 3315, WEST PALM BEACH, FL 33402

GINO KALICI

CASE NO. 98-02923

Appellant(s),

vs.

STATE OF FLORIDA

L.T. CASE NO. 86-4020 CF10B  
BROWARD

Appellee(s).

February 24, 1999

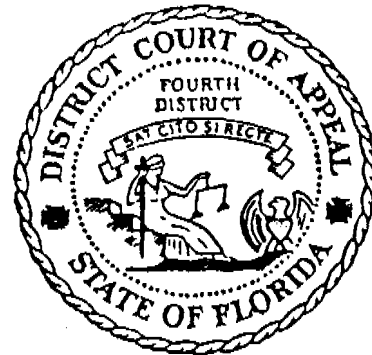
BY ORDER OF THE COURT:

ORDERED that the appellant is hereby directed to show cause within ten (10) days from the date of this order, why the above-styled appeal should not be dismissed for failure to comply with this court's January 25, 1999 order.

I hereby certify the foregoing is a true copy of the original court order.

  
MARILYN BEITTENMULLER  
CLERK

cc: Neal A. Dupree  
Attorney General-W. Palm Beach  
Robert E. Lockwood, Clerk  
State Attorney 17  
Public Defender 17  
Public Defender 15  
Justice Reporting Service



/PB

✓

IN THE DISTRICT COURT OF APPEALS  
FOURTH DISTRICT OF FLORIDA

GINO KALICI,

CASE NO. : 98-2923

Appellant,

L.T. CASE NO.: 86-4020CF10B

v.

STATE OF FLORIDA,

Appellee,

**NOTICE OF FILING**

The Appellant, GINO KALICI, through counsel, hereby give notice of the filing the following documents in support of his pending **Appeal** before this Court:

1. Copy of transcript of proceedings dated March 20, 1998.
2. Copy of transcript of proceedings dated July 20, 1998.

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished this **5th** day of March, 1999, via U.S. Mail to: Clerk of the Court, Fourth District Court of Appeals, 1525 Palm Beach Lakes Blvd., West Palm Beach, FL 33401; Clerk of Court, Appellate Division, Broward County Courthouse, 201 S.E. 6th Street, Ft. Lauderdale, FL 33301; Office of the Attorney General, 1655 Palm Beach Lakes Blvd., West Palm Beach, FL 33401.

LAW OFFICES OF NEAL A. DUPREE  
 440 South Andrews Avenue  
 Ft. Lauderdale, Florida 33301  
 (954) 766-8872

FBN: 3 11545

By:

  
 NEAL A. DUPREE

FILED FOR  
 CLERK OF COURT  
 FOURTH DISTRICT  
 OF FLORIDA  
 BROWARD COUNTY  
 FT. LAUDERDALE

29 MAR 5 4 06

1 State of Florida )  
 ) :ss Judge Carney  
2 County of Broward )  
3

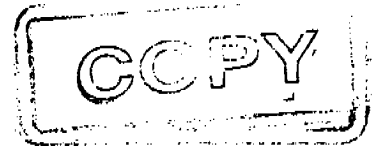
4 IN THE CIRCUIT COURT  
5 OF THE 17TH JUDICIAL CIRCUIT,  
6 IN AND FOR BROWARD COUNTY, FLORIDA

7 Case No.: 86-4020 CF10B

8 STATE OF FLORIDA,  
9 Plaintiff,  
10

11 VS .

12 GINO KALICI,  
13 Defendant.  
14



15 Proceedings had and taken before The Honorable  
16 ROBERT B. CARNEY, one of the Judges of said Court, at  
17 Room 4900, Broward County Courthouse, Fort Lauderdale,  
18 Broward County, Florida, on Friday, the 20th day of  
19 March, 1998, commencing at the hour of **10:15** o'clock  
20 a.m., and being a Hearing.

21  
22 APPEARANCES:

23 No Appearance on behalf of the State.

24 NEAL DUPREE, Esquire,  
25 Appearing on behalf of the Defense.



1 (Thereupon, the following proceedings  
2 were had:)

3 THE COURT: Gino Kalici.

4 It was my understanding that there are, at  
5 least, time frames. It would not require a  
6 vacation of every plea since it has become an  
7 issue now.

8 MR. DUPREE: There is the Marriat case which  
9 is the 4th District Court of Appeals case.

10 THE COURT: I believe I had the issue arise  
11 before. There are some time limits that it can  
12 be raised.

13 MR. DUPREE: I don't think it is true with a  
14 writ of quorum **nobis**. If you look at the rule -  
15 I think when you become aware of the change of  
16 plea, there is an out clause that, basically,  
17 let's him withdraw the plea. I just became aware  
18 of the **problem** in late November.

19 THE COURT: It was a new charge?

20 MR. DUPREE: He was actually picked up for  
21 deportation. He is actually in **Oakdale**,  
22 Louisiana right now undergoing deportation  
23 proceedings.

24 THE COURT: I'm recalling **the case**. I can't  
25 immediately find the case, I had almost the

1 exact issue, in fact, I believe it was the exact  
2 issue arise just recently, and there was case law  
3 right on point that the defendant was not  
4 entitled to vacation of the plea on that ground.

5 MR. DUPREE: Are you talking about the  
6 recent 3rd DCA opinion that came out?

7 THE COURT: No. This came up probably a  
8 year ago.

9 MR. DUPREE: I got everything that cites  
10 that. There is Lou Versus State, which is at 619  
11 Federal --

12 THE COURT: As I say, the problem that I'm  
13 having here is that this was a plea that was  
14 entered into 12 years ago. The case law problem  
15 is that 12 years ago, these admonitions were not  
16 given, and so it does not mean that every plea  
17 that was ever entered into then, where  
18 admonitions were not given, from when Florida  
19 became a State, are subject to filing a writ of  
20 error quorum **nobis**. I think the law was they'  
21 absolutely are not. There are simply time  
22 periods which --

23 MR. DUPREE: Judge, I think the problem with  
24 the time periods is if the person **doesn't** get  
25 picked up. This is why there is an out clause,

1 under 3.850, which basically allows the defendant  
2 to raise the issue when he is aware that his  
3 custody status is affected.

4 As the Court pointed out, when you pick up a  
5 new charge, and you weren't aware that the old  
6 charges would cause you to be a habitual  
7 offender. This is a situation where someone gets  
8 picked up in immigration -- And he is at **Oakdale,**  
9 Louisiana, really time is of the essence at this  
10 point in time. Under 3.850 proceedings, that is  
11 why it was an out clause, which it affected 10,  
12 **12, 13 years ago.**

13 THE COURT: As I recall, the case law says  
14 that he is not entitled to the relief that's  
15 found-under the case law.

16 Whatever the law change was on that issue,  
17 where the defendant certainly could have appeared  
18 with knowledge of any law change, where there is  
19 no request to vacating the plea for years, and,  
20 after the law had changed or, at least,  
21 constructively, now he is fully aware of the law  
22 change. The first request comes 12 years after  
23 the change of plea. Again, I'm having some real  
24 difficulty with whether the defendant is entitled  
25 12 years later to withdraw his plea.

1 MR. DUPREE: I think, Your Honor, **may be**  
2 speaking, and I could be wrong about this, but  
3 there is a 3rd DCA case that **came** out about 20  
4 days ago. If Your Honor wishes to look at the  
5 February 27th Florida Law Weekly. I don't have a  
6 more recent copy here. There is a certified  
7 conflict, not only with the 3rd DCA but with the  
8 4th too, but Marriat says **you're** entitled to  
9 this.

10 The issue by which we are seeking quorum  
11 **nobis**, it could be raised by 3.850, because  
12 specifically, there is an out clause in 3.850.  
13 The 4th says it isn't appropriate, **that's** why we  
14 raised it under quorum **nobis** because after - in  
15 the **Lou(phonetic)** case at 683 So. 2nd - there is  
16 another case that **says** this, **Perry(phonetic)**  
17 **versus State, at 684, 250, both are 4th DCA**  
18 **cases.** They both **fall under** Marriat. I think we  
19 are **bound by** the Marriat decision.

20 **THE COURT:** One issue that **I'm** concerned'  
21 with is the *rules* according to the Marriat case.  
22 The Marriat case says that -- **I'm** reading from  
23 rule 3.172 Subsection C, Subsection 8, renders it  
24 mandatory for the trial judge to instruct all  
25 defendants about all immigration consequences.

1 And, apparently, that was promulgated in 1988,  
2 which would be two years after the taking of this  
3 plea in this case.

4 MR. DUPREE: Right.

5 THE COURT: The question still remains pre  
6 1988. For example, in 1985, was the Court  
7 required to do it? I'm not sure the Court was  
8 required to do it under the rule.

9 MR. DUPREE: I think the Court needs to look  
10 at the subsequent rights of an individuals  
11 immigration --

12 THE COURT: Immigration doesn't recognize it  
13 at all. They cite here that it is a **collateral**  
14 issue which does not render, essentially,  
15 ineffective assistance of counsel.

16 It seems to me that this is a collateral  
17 issue. It is an issue, such as, if you become a  
18 habitual offender later. It is something that  
19 hasn't occurred yet. It has not been done.

20 I'm not sure where the rules -- Certainly in  
21 1986, the rules do not require it. I'm not sure  
22 he really has a ground under quorum **nobis**.

23 The problem with raising it under the  
24 collateral issues or in quorum **nobis** is the  
25 **appropriate** vehicle to raise it under. What I'm

1           indicating is that the issue is - if we accept  
2           for the moment - just for the sake of argument,  
3           that if there were a 1989 plea. Just for the  
4           sake of argument, let's accept that the defendant  
5           is entitled to relief, that's what the question  
6           is. That on a 1986 plea, **are** they entitled to  
7           relief in a 1986 plea? The Court didn't have do  
8           it then. The Court didn't have to do it until  
9           1988.

10           **I'm** not sure that a pre 1988 plea that they  
11           are entitled to vacate the plea. If all pre 1988  
12           pleas, having been done then, and that was a  
13           procedural rule change under 3.172, that there  
14           was no such rule then.

15           MR. DUPREE: I understand what the Court is  
16           saying. I think the subsequent right of the  
17           individuals --

18           THE COURT: Not on my case because it  
19           affects the substantive right. It seems to me  
20           that it is utterly a collateral issue to the  
21           defendant. It doesn't even have the **same**  
22           jurisdiction. **I'm** dealing in State Court cases.  
23           It is a State Court prosecution. It is possible  
24           that a Federal Court at some time **may** take  
25           action.

1 I guess, what I would need to see, first, at  
2 this point is, is there is a case that says that  
3 the addition of this rule applies to all cases  
4 retroactively back to the date that Florida  
5 became a state, and that the defendant -- There  
6 was no such rule when this happened. He is not  
7 entitled to the benefits of that particular rule.  
8 Now this became a rule now, but was not known at  
9 the time **of** the plea, the law **was** not known at  
10 the **time**, and was not subject to vacation of the  
11 plea at that time. Now, retroactively, I want to  
12 gain the benefit of that. I don't think  
13 retroactively that a person can gain the benefit  
14 of that rule.

15 MR. DUPREE: Under the **Court's** application  
16 of Wells - and this is not something that  
17 affected him before, this affects him now. I  
18 don't think, otherwise - I **don't** think I can be  
19 seeking relief - that I can seek the relief of  
20 this. **I'm** asking for this now. **He** is in  
21 **Oakdale**, and **I'm** seeking immigration relief. I  
22 **don't** think this is something that is a possible  
23 in the future. It is now.

24 I believe, under the Supreme Court analysis,  
25 it's collateral for tomorrow under 3.850. I

1 think there is a Supreme Court case that says it  
2 is collateral under Wells. It doesn't make it  
3 it is a substantive right under Wells.

4 THE COURT: Here is the issue, at least, the  
5 issues that I'm seeing right now. First of all,  
6 as far as a 3.850 motion, until the defendant is  
7 custodial, he **can't** raise that.

8 So what **you're** indicating is under 3.850,  
9 this is quorum **nobis**. It is not really quorum  
10 **nobis**. Quorum **nobis** is those things that are  
11 cognizable under 3.850. Where those things are  
12 not, the Supreme Court has ruled that it is not  
13 cognizable under 3.850, that immigration is  
14 collateral and not the way under 3.850.

15 I'm not sure this is the basis under quorum  
16 **nobis**. There may be a basis to withdraw the  
17 plea. In terms of withdrawing the plea was that  
18 right that the defendant has a basis in 1986.  
19 There was not a law in 1986 that required that.  
20 I'm not sure that a law change in 1988, was that  
21 law change retroactive at all? It was **my**  
22 understanding that the law **change** was not a  
23 retroactive law change.

24 MR. DUPREE: In terms of Wells, if you want  
25 me to, because time is really of the essence, I



1 would like to get this resolved as quickly as  
2 possible.

3 If you want to reset. I will be in Fort  
4 Pierce on Monday, but I will be here on Tuesday.

5 THE COURT: Who is the prosecuting attorney?

6 MR. DUPREE: I thought, frankly, that it was  
7 Joel Silvershien.

8 THE COURT: Can you notice Mr. Silvershein  
9 and make sure that he is aware that this is -  
10 that I would like something from him also on  
11 Tuesday.

12 At least, what the issues are at this point,  
13 because certainly I'm seeing huge problems with  
14 the time, and I'm seeing a big problem in the  
15 Statute change or rule change. This predates the  
16 rule change.

17 MR. DUPREE: So you want me to find  
18 something that says that it is retroactive?

19 THE COURT: Right. If it is retroactive  
20 **aand** if it can be raised at any time, 10 years  
21 later. Certainly in 1988, with the rule change,  
22 the defendant was entitled. Arguably, he is  
23 entitled to it, but at this point, if it is  
24 retroactive.

25 Again, I'm seeing waiver issues on that. If

1 the defendant doesn't take affirmative action.  
2 If it is a retroactive case. If he doesn't say  
3 that this is what the potential consequence is  
4 now I want to do it.

5 I see enormous disadvantages to the State.  
6 It may not be prosecutable. The State does not  
7 have anything anymore. It is 12 years ago.  
8 Where they have destroyed things on this because  
9 it was so long gone. It seems to me that there  
10 should be some time frames, because I see an  
11 argument with the case under rule 3.172 in 1988,  
12 that the defendant is certainly noticed in 1988.  
13 If it is retroactive at this point. If he is in  
14 a position to withdraw his plea and he elects not  
15 to.

16 MR. DUPREE: It does raise whether the  
17 defendant has a ground to vacate his plea. I  
18 will check it over the weekend.

19 THE COURT: Call Mr. Silvershein and let him  
20 know.

21 (Thereupon, the proceedings were concluded.)

22 - - - - -

C E R T I F I C A T E

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STATE OF FLORIDA        )  
                                  )    ss:  
COUNTY OF BROWARD    )

I, MICHELLE RUSSELL, Shorthand Reporter, Notary Public, do hereby certify that I was authorized to and did stenographically report the foregoing proceedings and that the transcript is a true and correct transcription of my stenotype notes of the proceedings.

Dated this 19th day of October, 1998.



~~MICHELLE RUSSELL~~  
Notary **Public-State** of Florida  
My Commission Expires 11-29-99

State of Florida )  
) :ss  
County of Broward )

Judge Carney

IN THE CIRCUIT COURT  
OF THE 17th JUDICIAL CIRCUIT  
IN AND FOR BROWARD COUNTY, FLORIDA

CASE NO. 86-4020CFB

STATE OF FLORIDA,

Plaintiff,

**Vs.**

**GINO KALICI,**

Defendant.

**COPY**

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Proceedings had and taken before the **Honorable Robert**  
Carney, Judge, one **of** the Judges of said Court, at  
the Broward County Courthouse, Fort Lauderdale, Broward Count:!  
Florida, on the 20th day of July, 1998, commencing,  
at or about the hour of **10:00** a.m., and being a hearing.

APPEARANCES

ON BEHALF OF THE DEFENDANT:  
NEIL DUPREE, ESQUIRE

- - - - -

1 (Thereupon, the following proceedings were had:)

2 THE COURT: Gino **Kalici**. Let me see that file. I  
3 think I've already ruled on it about two or three times.

4 THE CLERK: It's an '86 case.

5 THE COURT: I think we already had multiple hearings  
6 on it. I think I had a hearing with one attorney, and he  
7 got another attorney. I ruled on it with another attorney,  
8 and I don't know whether we still got a third attorney.

9 THE CLERK: Do you know how long ago that was? Do you  
10 remember how long ago you had the last hearing?

11 THE COURT: Six months ago, maybe more. Maybe more or  
12 maybe less.

13 THE CLERK: The 26th was the motion to vacate plea,  
14 set aside sentence hearing. Hearing not held. Filed order  
1 5 denying defendant's motion. Petition for error cosium  
16 novus order, deny defendant's motion.

17 THE COURT: I think I've done two orders on the case.  
18 I'm sure, I'm sure on 6-22-98 I denied a motion for  
19 re-hearing, so I am curious about the hearing.

20 THE CLERK: Neil Dupree asked for it to be reset  
21 again,

22 (Thereupon, a recess was taken **after** which the  
23 following proceedings were had:)

24 THE COURT: The Court is a little 'confused why this **is**  
25 on the docket. There was originally a motion to set aside

1 the plea, which had been denied. There was a motion for  
2 re-hearing, and that was denied. And we seem to be having  
3 a re-hearing after I denied a motion for re-hearing.

4 MR. DUPREE: The reason is when Your Honor originally  
5 denied it the first time, Your Honor left open a couple of  
6 questions that you wanted me to try to address by way of  
7 affidavit with my client, which I did.

8 We had originally, just going back to March when we  
9 had the hearing, we had filed a writ of error **corium novus**  
10 for my client. My client was about to be deported. At the  
11 time of the plea, my **clined** was not informed of the  
12 possible consequences of the plea as to being deported,  
13 therefore, he should be allowed to withdraw his plea, Your  
14 Honor was not convinced at that point in time that we  
1 5 should be able to go forward because the rule did not go  
16 into affect until January 1st of 1988, and the plea  
17 occurred in 1986, and you thought that he should not  
18 benefit from the rule.

19 You left it to find out whether or not there was any  
20 case law that supported our position that he was  
21 affirmatively misadvised by his attorney with regard to the  
22 possibility of the deportation consequence of his plea.  
23 That's what you were interested in, basically, Judge.

24 THE COURT: It was way beyond **that**.

25 MR. DUPREE: Judge, if I can continue!

1 THE COURT: The time limits had appeared to have long  
2 expired.

3 MR. DUPREE: That's right.

4 THE COURT: There is no requirement of custody, there  
5 is no requirement that he be on probation. The plea could  
6 have already been expired. This wasn't done at any time in  
7 the history of Florida that **it** could **be** vacated, and it  
8 just didn't seem to be what the law was.

9 MR. DUPREE: That was the second issue that we were  
10 addressing, Judge. The first thing that I did, Judge, I  
11 contacted my client, and he had to understand it is  
12 difficult to do that because the attorney is in Louisiana,  
13 and he's going to be deported, and I'm working through his  
14 immigration lawyer in a little town lawyer in Louisiana.  
15 And based upon several conferences that I had with him --

16 THE COURT: Wasn't **there** another lawyer that filed  
17 still another motion on this case, also which was-denied?

18 MR. **DUPREE**: Not that I'm aware **of**. If that occurred,  
19 Judge, I'm not aware **of** it.

20 Anyway, what I did was a supplemental **affidavit for** my  
21 client which claimed that his attorney, at **that time** Melvin  
22 Sleshinger, had basically **affirmatively** misadvised my  
23 client, And in addition, he failed to do something he  
24 requested him to do, and that was he **wanted** to ask the  
25 court to judicially recommend against deportation. He was

1 told by his lawyer as long as he was on probation, there  
2 was no way in the world he would be deported if he was on  
3 probation, it wasn't a jail sentence. Since then he's been  
4 told he could get a judicial recommendation against  
5 deportation, and was told no way in the world the Court  
6 would recommend against deportation, both of those are  
7 affirmative pieces of misadvice.

8 Based upon Supreme Court case law, we filed a  
9 supplement affidavit, because I didn't want to waste the  
10 Court's time, **if** this was even what occurred, then this is  
11 what was happened, he said he was told this was *never* going  
12 to be a problem, was affirmatively told it was never going  
13 to be a problem, and was told you could **no way** in the world  
14 recommend against deportation.

15 Based upon that, we filed a supplement affidavit. And  
16 under Rule 3.850, specifically B, one of the portions of  
17 the rule, it **says** the two **year** limit that was in effect in  
18 1988 would not come into play unless we actually became  
19 aware of the circumstances surrounding this fact that there  
20 was actually legal deportation, then I filed this  
21 supplement --

22 THE COURT: Wouldn't that have been in 1989?

23 MR. DUPREE: Well, as long as it was done by 1989, I  
24 think we are fine. But the ruling was **1988**.

25 THE COURT: The thing is he didn't do it.



1 MR. DUPREE: Absolutely.

2 THE COURT: It seemed like that time limit --

3 MR. DUPREE: I don't think time limits were in affect  
4 because there specifically is a portion of the rule that  
5 outlines the laws. That portion of the rule says as long  
6 as somebody is not aware or could not **have been aware** by  
7 the exercise of due diligence could not **become** aware of the  
8 consequences of the plea, then I think he has the right to  
9 come back **now** when he did become aware.

10 THE COURT: The interesting thing is we seem to be  
11 back in square one with the problem. Number 1, there was  
12 no requirement at the entry of the plea legally that  
13 information **be** provided. Number 2, when the law changes,  
14 the defendant is presumed to know legal changes. And when  
15 the law changed and says that it is required, that  
16 defendant still never filed any motions, never did anything  
17 way past all the time limits expiring in the **case**. And in  
18 1998 after a plea that **was** entered in 1986, in 1998, the  
19 defendant seeks at this point to withdraw his plea. And my  
20 feelings are still the same as they **were** then. I think  
21 it's too late and he doesn't have legal rights to do so at  
22 this point. ..

23 MR. DUPREE: Your Honor, the petition for error **corium**  
24 **novus** as to time limits, there is a time limit that is  
25 attached to it,

1 THE COURT: What I'm indicating, for all the **reasons**  
 2 at this point, I'm not looking to re-hear it because the  
 3 record has been made previously. Those were my rulings. I  
 4 denied **his** motion. I denied his re-hearing. It was set  
 5 for re-hearing after the denial, after the re-hearing  
 6 without me agreeing to it. I'm denying the re-hearing. I  
 7 don't think he is entitled to withdraw his plea for the  
 8 reasons originally outlined.

9 MR. DUPREE: Okay. I want to make the record this is  
 10 not a re-hearing of anything. This is something that Your  
 11 Honor had asked me to do; that if I wanted to come back  
 12 before the Court and show you that it had been a different  
 13 situation then what we originally talked about, that's why  
 14 I did what we did.

15 **THE** COURT: Even with a different situation, I don't  
 16 think legally the defendant has grounds, If I recall,  
 17 there was a case that, and I'm dating back to when this was  
 18 originally done, I believe there was a case that was not a  
 19 3.850 ground to begin with, and error **corium** novus couldn't  
 20 be raised by law that couldn't be raised by 3.850, and that  
 21 time limits would certainly appear to be the same.

22 But what I'm concerned with is where you're dealing  
 23 with something that wasn't the law that we could just as  
 24 well be dealing with a 1945 conviction for robbery; the  
 25 parties **are** dead and gone and should it be set aside

1 because he wasn't advised of his rights of deportation, and  
2 there is some problem with that.

3 There has to be a point where it would have to be put  
4 to bed, at the very least. And I'm not even actually  
5 conceding this point, but at the very least when the law  
6 changed in '87, it would set a two year time limit. And **in**  
7 that course you would have until 1989 to file a motion if  
8 there is a legal change.

9 I'm not even agreeing he **was** entitled to that with a  
10 two year window. Even if one agrees that he is entitled to  
11 a writ of error **corium** novus, in my view that still puts a  
12 two **year** time limit, and he actually has to do it within  
13 two years. He can't wait with a law change that tells him  
14 you can be deported, that's the **entire** reason for the law  
15 change. And where **it's** placed in the rules, he is, again,  
16 presumed to have knowledge of the law, The Court doesn't  
17 guess on that issue. He is presumed to know the **law**.

18 MR. **DUPREE**: Well, Judge, I don't think it was a  
19 situation where there is a change in the law, but a change  
20 in the procedure of plea agreements pursuant to Rule'3.172.  
21 So that is, obviously, a post-dated plea, and it was  
22 something the supreme Court was concerned about to make a  
23 change in the law.

24 Sallato, 519 Southern Second 605, which is a Supreme  
25 Court **case** which says basically if the **defendant** was given

1 positive misadvised by counsel, that could be raised as an  
2 -issue as well as the Judge's recommendation as to  
3 deportation can also be raised as ineffective assistance of  
4 counsel. I think if the Court is saying error corium **novus**  
5 and 3.850 are essentially the same, I think we can still --

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

12 MR. DUPREE: The only additional issue I would raise,  
13 while I would agree with the Court that prior to the rule  
14 being changed, 3.172, while I agree, basically says the  
15 court didn't have to inform anybody, and you didn't have  
16 counsel, didn't have to inform that could be deported, but  
17 there a distinction made by the Supreme Court that's says  
18 essentially if your positively misadvised, that's not that  
19 not.

20 THE COURT: Even if you were positively misadvised,  
21 what the writ of error corium novus is for a not in custody  
22 defendant, not a function to the equivalent, as I  
23 understand, a 3.850 out of custody defendant.

24 My view certainly is if at the time there is a rule  
25 change requiring notification, which puts him on **notice**

1 that he certainly can be deported in that time frame, the  
 2 time frame to do it would be within that two-year window if  
 3 he is going to raise that, that is the period of time to  
 4 raise it. Is can't wait from 1986 to 1998 for the first  
 5 time.

6 MR. DUPREE: This is the first time he's legally been  
 7 informed and the first time as counsel that I was advised  
 8 there was going to be these consequences that we can refile  
 9 the motion we did because we're informed in 1998 when this  
 10 was going to occur.

11 THE COURT: It not actual consequence, but the  
 12 potential for consequence. With the rule change in 1987,  
 13 he was aware of the potential consequences, and did nothing  
 14 until 1998 when there are actual consequences. It's a  
 15 potential for consequence, that's in the Court's view that  
 16 triggers the time frame in 1987. If there is going to be a  
 17 window, the window starts in 1987 with the rule change.

18 (Thereupon, the proceedings were concluded at

19 **10:30** a.m.)

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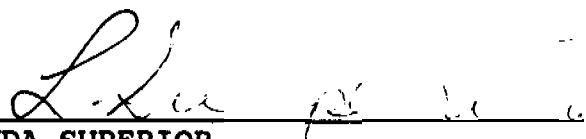
CERTIFICATE

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STATE OF FLORIDA            )  
                                  :    SS  
COUNTY OF BROWARD        )

I, LINDA SUPERIOR, certify that I was authorized to and did  
stenographically report the foregoing proceedings and that the  
foregoing transcript is a true record,

Dated this 5th day of November, 1998,

  
\_\_\_\_\_  
**LINDA SUPERIOR,**  
Court Reporter'

17th Judicial Circuit in and for Broward County  
 In the County Court in and for Broward County

CLOCKIN

DIVISION:  
 Criminal  
 Traffic  
 Other

CERTIFICATE OF THE CLERK

GINO KALICI

CASE NUMBER  
98-2923  
86-4020CF10B

STATE OF FLORIDA :  
COUNTY OF BROWARD :

I, ROBERT E. LOCKWOOD, Clerk of the Circuit Court for the 17th Judicial Circuit, County of Broward, State of Florida, do hereby certify that the foregoing pages 1 to 49 inclusive contain a correct transcript of the record of the judgment in the case of STATE OF FLORIDA vs GINO KALICI, and a true and correct recital and copy of all such papers and proceedings in said cause as appears from the records and files of my office that have been directed to be included in said record by the directions furnished me.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the Seal of said Court this 15TH day of MARCH, 19 99.

ROBERT E. LOCKWOOD, Clerk  
Circuit Court  
Broward County, Florida

BY: *[Signature]*  
Deputy Clerk

