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IN THE SUPREME COURT OF THE STATE OF FLORIDA

CASE NO. 93,801

STATE OF FLORIDA,

Petitioner,

vs.

EVA GREGERSEN,

Respondent.

PETITIONER'S AMENDED INITIAL BRIEF ON THE MERITS

ROBERT A. BUTTERWORTH

Attorney General
Tallahassee, Florida

CELIA TERENZIO
Bureau Chief
Florida Bar No. 656879

SARAH B. MAYER
Assistant Attorney General
Florida Bar No. 367893
1655 Palm Beach Lakes Boulevard
Suite 300
West Palm Beach, Florida 33401
Telephone: (561) 688-7759

Counsel for Petitioner

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PRELIMINARY STATEMENT

Petitioner was the prosecution and Respondent was the defendant in the Criminal Division of the Circuit Court of the Fifteenth Judicial Circuit, in and for Palm Beach County, Florida. Petitioner was the Appellee and Respondent was the Appellant in the Fourth District Court of Appeal. In this brief, the parties shall be referred to as they appear before this Honorable Court of Appeal except that Petitioner may also be referred to as the State.

In this brief, the symbol "R" will be used to denote the record on appeal in the Fourth District, and the symbol "A" will be used to denote the appendix attached hereto.

All emphasis in this brief is supplied by Petitioner unless otherwise indicated.

CERTIFICATE OF TYPE SIZE AND STYLE

In accordance with the Administrative Order of this Court dated July 13, 1998, the undersigned hereby certifies that the instant brief has been prepared with 12 point Courier New type.

STATEMENT OF THE CASE AND FACTS

In Case No. 86-748, Respondent was charged by information filed January 16, 1986, with one count of obtaining property in return for worthless check (R 2-3). In Case No. 85-5499, Respondent was charged by information filed July 24, 1985, with two counts of obtaining property in return for worthless check (R 12-13). In Case No. 84-8220, Respondent was charged by information filed December 7, 1984, and amended information filed December 9, 1985, with two counts of grand theft, one count of petit theft, and three counts of obtaining property in return for worthless check (R 28-32). In Case No. 84-3620, Respondent was charged by amended information filed December 9, 1986, with two counts of grand theft and two counts of obtaining property in return for worthless check (R 42-46). On January 22, 1986, Respondent pled guilty to these offenses (R 47), was adjudicated (R 4, 14, 16, 33-34, 54), and was sentenced to concurrent 5 year terms of probation in each case; the probation order provided that if Respondent completed restitution in less than 5 years, her probation would be terminated early (R 6, 16, 34, 58). Respondent did not appeal these judgments and sentences.

In April 1987, Respondent was charged with violating her probation in these cases by failing to pay the costs of her supervision and by failing to pay restitution (R 7, 20, 38, 59). In August 1987, she was found guilty of violating her probation

although her probationary sentence was not revoked (R 8, 21, 39).

In November 1996, Respondent, a German resident alien, filed her petition for error coram nobis alleging that the trial court erroneously failed to inform her of the possible deportation consequences of her pleas, that she was forced to sign the plea agreement and did not know what she was signing, that no plea colloquy was conducted, and that because she wanted to go to trial, she was deprived of that opportunity (R 61-64). The State responded to Respondent's petition arguing that it should be denied because the petition did not set forth newly discovered evidence or evidence which could not have been discovered with due diligence, that the factual allegations of her petition were refuted by the record, and that because a transcript of the plea colloquy was no longer available, the doctrine of laches should apply to bar the petition (R 84-89). The trial court denied Respondent's petition, adopting and incorporating the State's response to the petition as part of its order (R 92).

On appeal, Respondent argued that the trial court erred in denying her petition for writ of error coram nobis without a hearing, asserting that her petition set forth a sufficient basis for the issuance of the writ, in that she was not informed that her plea might have adverse immigration consequences (Appellant's Initial Brief). Petitioner argued that the trial court properly denied Respondent's petition because she did not meet her burden

of establishing that the facts which formed the basis of her claims were not or could not have been known by the use of due diligence, that as the law in effect at the time Respondent entered her pleas did not require that she be informed of possible immigration consequences to her pleas, her claims were without merit, and that as Respondent's claims were known to her for nearly 11 years before she filed her petition, and as the State was prejudiced by Respondent's delay because it could no longer obtain a transcript of the plea and sentencing proceedings in Respondent's case, Respondent's petition was barred by the doctrine of laches (Appellee's Answer Brief).

The Fourth District affirmed the denial of Respondent's petition based on the doctrine of laches, but disagreed with the Petitioner's contention that error coram nobis was not available to remedy the type of error alleged (A 1-2). The Fourth District found, contrary to the Third District's opinion in *Peart v. State*, 705 So. 2d 1059 (Fla. 3d DCA 1998), that the failure to inform a defendant of possible immigration consequences of his or her plea was an error of fact, rather than an error of law (A 1). Thus the Fourth District concluded that coram nobis was available to correct the error alleged, but certified that its decision conflicted with the decision in *Peart* (A 1).

SUMMARY OF THE ARGUMENT

The purpose of the writ of error coram nobis is to enable a party against whom a judgment has been rendered to gain relief from the judgment by applying to the same court in which the judgment was rendered. It is brought to show an error in fact, defect in process, default in performance of duty by ministerial officers, and other matters none of which are apparent from the record. The showing must be such that if the matters shown had been before the trial court when the judgment was entered, the trial court would have been precluded from entering the judgment. The party seeking the writ must have no other remedy.

Thus a claim that a plea was involuntary because the trial court failed to advise the defendant of the deportation consequences of the plea is not the proper subject for a coram nobis petition where the defendant was not in custody after the plea. Coram nobis is also not available since the failure to advise a defendant of the deportation consequences of his plea is not an error of fact, nor is its ascertainment after the defendant is no longer in custody considered newly discovered evidence.

There is no two year time limit to file a coram nobis petition since it applies only to claims which a defendant can allege factual innocence or show a defect in process. These are exceptions to the two year time period for filing post conviction

relief motions and thus such a holding would be in accordance with established precedents.

When a defendant is in custody, he can file a timely motion for post conviction relief alleging his plea was involuntary because he was not told of the deportation consequences of his plea. However, the mere fact that the record supports the claim is insufficient to grant relief. The defendant must show prejudice in the form that he would have been acquitted of the charge had he gone to trial.

Finally, the question of whether Rule 3.850 should be amended to provide relief to defendants who were never in custody after conviction should be referred to the Criminal Rules Committee for consideration.

ARGUMENT

CORAM NOBIS IS A LIMITED REMEDY FOR INDIVIDUALS WHO ARE NOT IN CUSTODY, HAVE A NEWLY DISCOVERED EVIDENCE CLAIM OR AN ERROR IN FACT THAT WOULD HAVE CONCLUSIVELY PREVENTED THE TRIAL COURT FROM ENTERING THE JUDGMENT AND FOR WHICH ANOTHER REMEDY NEVER EXISTED.

The purpose of the writ of error coram nobis is to enable a party against whom a judgment has been rendered to gain relief from the judgment by applying to the same court in which the judgment was rendered. It is brought to show an error in fact, defect in process, default in performance of duty by ministerial officers, and other matters, none of which are apparent from the record. The showing must be such that if the matters shown had been before the trial court when the judgment was entered, the trial court would have been precluded from entering the judgment. The party seeking the writ must have no other remedy. *Russ v. State*, 95 So. 2d 594, (Fla. 1957).

In *Richardson v. State*, 546 So. 2d 1037 (Fla. 1989) this Court recognized that Florida Rule of Criminal Procedure 3.850 has absorbed many of the claims traditionally brought under habeas corpus and coram nobis. This Court found the a Rule 3.850 motion is the appropriate place to bring newly discovered evidence claims since it is one of the exceptions to the two year time limitation for bringing claims under the rule where it is alleged that the facts upon which the claim is predicated were unknown to the movant or his attorney and could not have been

ascertained by the exercise of due diligence. This Court then held that the only currently viable use for the writ of error coram nobis is where the defendant is no longer in custody, thereby precluding the use of Rule 3.850 as a remedy. Therefore, errors of fact which are newly discovered as contemplated by Rule 3.850, unascertainable by the exercise of due diligence, are those that are cognizable by writ of error coram nobis.

The second area covered by coram nobis is defect of process. This area also has its counterpart in Rule 3.850 and can heard under the exception to the two-year time limitation for bringing claims under the rule when the fundamental constitutional right asserted was not established within the period provided for and has been held to apply retroactively. In *Weir v. State*, 319 So. 2d 80 (Fla. 2d DCA 1975), a writ of error coram nobis was granted where the defendant was no longer in custody and he alleged his *Gideon v. Wainwright*, 372 U.S. 335 (1963), right to counsel was violated. The Court found that the right to appointed counsel in felony prosecutions is a fundamental right with retroactive application. Based on defect of process, and not ineffective assistance of counsel, the writ was granted. The writ was granted because, not only was the defendant not in custody but when he was in custody, the right to counsel did not exist and therefore the defendant had no other remedy.

The third area covered by coram nobis is to correct an error

in the court's record caused by a default in the performance of a duty by a ministerial officer. In *Malcolm v. State*, 605 So. 2d 945 (Fla. 3d DCA 1992), the Court held that when a clerk misperforms a ministerial duty by recording the wrong judgment of conviction, coram nobis was appropriate, regardless of due diligence, to correct a patent error in the record caused by the clerk.

The fourth area covered by coram nobis, all other matters not apparent from the face of the record, has been absorbed by Rule. 3.850. *Richardson v. State*, 546 So. 2d 1037 (Fla 1989)(claims based on alleged knowing use of perjured testimony and claims of suppression of evidence by the prosecution are cognizable in Rule 3.850 proceedings).

Not only does a writ of coram nobis require that the petitioner not be in custody at the time it is filed and the subject mater must be one of those listed above, but the party seeking the writ must have no other remedy. This means that the party has no remedy at all and not that the once available remedy is now time barred. *Sullivan v. State*, 18 So 2d 163 (1944) (the writ does not lie to give relief to an irregularity arising in connection with a petit juror's disqualification, although the defendant did not discover the error until after the time for a new trial has expired); *Vonia v. State*, 680 So. 2d 438 (Fla 2d DCA 1996) (writ of error coram nobis did not concern itself with

newly discovered evidence or with questions of fact, could not be used to collaterally attack a defendant's expired sentences, where the defendant had not sought post conviction relief, so that defendant's claim would have been procedurally barred even if he had still been incarcerated on the conviction attacked).

In accordance with the foregoing, a claim of ineffective assistance of counsel is not a proper subject for a writ of error coram nobis since the claim can be raised in either a Rule 3.850 motion or a petition for writ of habeas corpus. *Snell v. State*, 28 So. 2d 863 (Fla 1947). Also a claim that a guilty or nolo plea was not voluntary is also not a proper claim for coram nobis since it can be raised in a Rule 3.850 motion or a motion to withdraw or vacate plea, unless it was unknown to the court at the time of the plea that the plea was entered into because of actual dominating fraud, duress or other unlawful means actually asserted by some one not in privity with the petitioner or counsel. *La Rocca v. State*, 151 So. 2d 64 (Fla. 2d DCA 1963); *Nickels v. State*, 99 So. 121 (1924) (writ of error coram nobis proper vehicle to vacate plea where plea was entered because of fear of mob violence); *State v. Garcia*, 571 So. 2d 38 (Fla. 3d DCA 1990) (coram nobis is an inappropriate remedy when it is alleged the a plea is involuntary for the failure of the trial court to insure that the defendant was aware of the consequences of his plea).

For individuals who are not in custody a writ of error coram nobis is the appropriate remedy to raise claims of newly discovered evidence or other errors in fact, which could not have been discovered with due diligence and the result of which would conclusively have prevented the trial court from originally entering the judgment. It is also available to individuals who are not in custody to raise issues concerning defect of process or failure to do ministerial duties. The individual filing the writ must not have any other remedy available. The failure to timely utilize a remedy which exists, does not equate to the absence of a remedy.

A

CORAM NOBIS RELIEF IS NOT AVAILABLE TO VACATE THE PLEA OF A NON-CUSTODIAL DEFENDANT WHO FIRST FEELS THE EFFECTS OF THE TRIAL COURT'S FAILURE TO ADVISE HIM OF THE IMMIGRATION CONSEQUENCES WHEN INS EXCLUSION PROCEEDINGS ARE INITIATED AGAINST HIM.

In 1986, Respondent plead guilty (R 47), was adjudicated and sentenced to concurrent 5 year terms of probation (R 4, 11, 16, 33-34). In April 1987, Respondent was charged with violating her probation in these cases by failing to pay the costs of her supervision and by failing to pay restitution (R 7, 20, 38, 59). In August 1987, she was found guilty of violating her probation although her probationary sentence was not revoked (R 8, 21, 39). On November 1996, Respondent her petition for writ of error coram nobis (R 61-64). She contended that she was not advised by the

trial court or her attorney regarding the immigration consequences of the plea. She alleged that she did not know she was entering a plea, that she had no intention of pleading guilty, and that she was prepared to go to trial (R 61-64). She asserted that when she signed the papers as instructed by her trial lawyer, she did not understand what they were, and that no one had explained them to her (R 61-64). Additionally she asserted that she was not aware she had pled guilty until she was contacted by the probation office (R 61-64).

Since Respondent pled guilty and was placed on probation for five years, her only avenue for post-conviction relief was Rule 3.850. Although she is no longer in custody and 2 year limitation has elapsed, coram nobis is not available to Respondent because she had another remedy, but failed to use it. Relief is also not available by a motion to withdraw or vacate the plea pursuant to Rule 3.170 Fla.R.Crim.P because it is only cognizable on direct appeal. *Suarez v. State*, 616 So. 2d 1067 (Fla. 3d DCA 1993). Since Respondent was in custody for five years and this claim could only be raised in a Rule 3.850 motion, the two year limitation period began to run when the judgment and sentence was final. *Vonia v. State*, 680 So. 2d 438 (Fla. 2d DCA 1996) (writ of error coram nobis that did not concern itself with newly discovered evidence or with questions of fact could not be used to collaterally attack defendant's expired sentences, where

defendant had not sought post-conviction relief, so that defendant's claim would have been procedurally barred even if he had still been incarcerated on conviction he attacked).

In order to avoid the harsh reality that she is not entitled to the writ of coram nobis because respondent had an available remedy but failed to utilize it, she reasons, that since she did not learn of the deportation proceedings until after the limitations period ended, she never had a remedy other than coram nobis to cure the defects in the plea.

This position, as recognized by the Third District in *Peart v. State*, 705 So. 2d 1059 (Fla. 3d DCA 1998), is directly contrary to the terms of Florida Rules of Criminal Procedure 3.850. Rule 3.850(b), specifically states that a motion thereunder must be brought within two years "after judgment and sentence become final." *Peart* at 1062. This provision has consistently been applied to claims of involuntary pleas. See *Gradison v. State*, 654 So. 2d 635, (Fla. 1st DCA 1995) (post conviction motion challenging voluntariness of nolo contendere plea was untimely where it was filed more than two years after the judgment and sentence became final); *Mitchell v. State*, 638 So. 2d 606 (Fla. 1st DCA 1994)(same); *Baggett v. State*, 637 So. 2d 303 (Fla. 1st DCA 1994)(same); *State v. Morris*, 538 So. 2d 514 (Fla.3d DCA 1989)(same). The application of this principle to a claim of involuntary plea is within the proper framework of Rule

3.850 litigation because the alleged defect in the plea occurred at the time the plea was entered and not when the effects of the defect are felt by the defendant. Any other interpretation would be contrary to the terms of Rule 3.850 (a) which specifically lists as a ground covered by the rule, a plea that was involuntarily given. As such, Respondent had a remedy to challenge the voluntariness of her plea. Thus, the Fourth District incorrectly held that coram nobis was a proper remedy because Respondent had had Rule 3.850 relief available to her.

The Fourth District's conclusion that respondent's plea was not voluntary because the trial court failed to inform her of the possible immigration consequences does not withstand close scrutiny.

While Petitioner acknowledges that there are cases which hold that the determination of the voluntariness of a plea is a question of fact, Petitioner disputes their applicability to the issue at hand. A question of fact arises when two or more conclusions can be drawn from the facts. *Loftin v. McGregor*, 14 So. 2d 574 (Fla. 1943). This definition as applied to the determination of the voluntariness of a plea is correct since the trial court usually has to make its decision based on two sets of facts. However simply because the trial court's determination is labeled a question of fact, does not automatically mean an error of fact can arise therefrom. This is so because an error of fact

is defined as one which conclusively would have prevented the entry of the judgment and sentenced attacked. *Hallman v. State*, 371 So. 2d 482 (Fla. 1957). Thus, in a coram nobis proceeding, a defendant is not entitled to relief when a question of fact is determined in his favor, rather a defendant is entitled to relief upon establishment of the error of fact would have prevented entry of the judgment and sentence regardless of what other evidence is present. Therefore, it is clear that a claim of an involuntary plea does not involve an error of fact but instead involves a error of law. *State v. Garcia*, 571 So. 2d 38 (Fla 3d DCA 1990)(claim that guilty plea had not been knowingly and intelligently made because the defendant was not aware of the consequences of his plea is an error of law and not within the function of a writ of error coram nobis.)

The Respondent claims the evidence is newly discovered for the same reasons why she asserts she is not barred by the two year time limit of Rule 3.850; that is, that the plea did not become involuntary until INS sought her deportation. This position is meritless since a defendant in order to establish evidence as newly discovered he must show that it (1) was not known to her or her counsel at the time of or plea and could not have been ascertained by the exercise of due diligence; and (2) of such a nature that it would probably produce an acquittal. *Jones v. State*, 591 So. 2d 911 (Fla. 1991). Respondent's claim

fails because the "fact" that she was not advised of the immigration consequences of her plea (or for that matter that she even entered a plea) was evident from the time probation contacted her, and thus was easily ascertainable with the minimal exercise of diligence. Further, the "fact" that she was not advised of the immigration consequences of her plea would not provide for an acquittal, just a retrial or a new plea. Thus, it is evident that Respondent's claim of an involuntary plea can not meet the requirements of newly discovered evidence.

B

RULE 3.850'S TWO YEAR PERIOD OF LIMITATIONS SHOULD NOT BE SUPERIMPOSED UPON PETITIONS FOR WRITS OF ERROR CORAM NOBIS WHERE THE CLAIMS PROPERLY COGNIZABLE UNDER CORAM NOBIS ARE THE SAME CLAIMS THAT ARE EXCEPTED FROM RULE 3.850'S LIMITATIONS PERIOD.

The only legal claims that can be raised in coram nobis are an error of fact and a defect in process. *Russ v. State*, 95 So. 2d 594 (Fla. 1957). Both of these claims, if the defendant is in custody, are excepted from the two year limitations period of Rule 3.850. An error of fact is covered by Rule 3.850(b)(1) as newly discovered evidence. A defect in process is covered Rule 3.850(b)(2) as a fundamental constitutional right that was not established within the limitations period and has been held to apply retroactively. Thus, if the scope of coram nobis is properly limited, then the State agrees that the two year limitation period of Rule 3.850 should not be superimposed upon

coram nobis.

However, if this Court interprets coram nobis in the expansive manner that the Fourth District suggests, then the two year limitation period of Rule 3.850 should be superimposed upon coram nobis. This so because to do otherwise would give defendants who are no longer in custody greater rights to vacate judgments and sentences than defendants who are in custody.

C

A DEFENDANT SHOULD BE REQUIRED TO ASSERT AND PROVE A PROBABILITY OF ACQUITTAL AT TRIAL TO SECURE RELIEF FROM AN INVOLUNTARY PLEA RESULTING FROM THE TRIAL COURT'S FAILURE TO ADVISE THE DEFENDANT OF ADVERSE IMMIGRATION CONSEQUENCES.

Florida Rule of Criminal Procedure 3.172(c)(8) now[1] requires trial judges to inform all defendants of the possibility of deportation when accepting guilty or nolo pleas. However, Florida Rule of Criminal Procedure 3.172(I) also provides that "[f]ailure to follow any of the procedures in this rule shall not render a plea void absent a showing of prejudice." (emphasis added). Furthermore in *Wuornos v. State*, 676 So. 2d 966 (Fla. 1996), this Court specifically approved of the following portion of the First District's opinion in *Fuller v. State*, 578 So. 2d 887, 889 (Fla. 1st DCA 1991), *quashed on other grounds*, 595 So.

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1. At the time Respondent entered her plea, the rule did not require that a defendant be informed possible immigration consequences at the time a plea was entered.

2d 20 (Fla. 1992):

> In the absence of an allegation of prejudice or manifest injustice to the defendant, the trial court's failure to adhere to rule 3.172 is an insufficient basis for reversal.

Id.; see also State v. Fox, 659 So. 2d 1324, 1326 (Fla. 3d DCA 1995), *rev. denied*, 668 So. 2d 602 (Fla. 1996) (citing *Willkerson v. State*, 401 So. 2d 1110, 1112 (Fla. 1981); *State v. Will*, 645 So. 2d 91, 93 (Fla. 3d DCA 1994); *Suarez v. State*, 616 So. 2d 1067, 1068 (Fla. 3d DCA 1993). Further, "it is the defendant's burden to establish prejudice or manifest injustice. '[I]t is not sufficient to simply make bald assertions.'" *Fox*, 659 So. 2d at 1327 (quoting *State v. Caudle*, 504 So. 2d 419, 421 (Fla. 5th DCA 1987)).

In order to properly allege prejudice in this context, a defendant must claim that had he been informed of the possibility of deportation, he would have rejected the plea offer and gone to trial. Additionally, and more importantly, he must claim that had he gone to trial, he would have most probably been acquitted. The reason this is a necessary allegation is that the defendant would have faced the same deportation consequences if he had been convicted following a trial even if the court withheld adjudication after trial.

Petitioner submits that this reasoning is sound and the portion of the Third District's opinion in *Peart* fully comports with the prejudice requirement as set forth in Florida Rule of

Criminal Procedure 3.172(I). This reasoning of the Third District in *Peart*, should be adopted by this Court as its own:

> As guidance to Prieto and others who would assert similar claims, we point out that to set aside a plea for failure to inform a defendant of immigration consequences pursuant to Rule 3.172(c)(8), the motion must assert, and the defendant must prove the following:
>
> a) the defendant was not advised by the court of the immigration consequences;
>
> b) that defendant had no actual knowledge of same;
>
> c) that INS had instituted deportation proceedings, or defendant is at risk of deportation;
>
> d) that defendant would not have pled had defendant known of the deportation consequences; and
>
> e) that had defendant declined the plea offer and gone to trial, defendant most probably would have been acquitted.
>
> This last requirement comports with the Rule 3.172 requirement that defendant must show prejudice to set aside a plea as not in conformity with the Rule. Because of the special nature of the claims in these cases, that deportation has resulted as a consequence of the pleas, in order to demonstrate prejudice the defendant must demonstrate a probable likelihood that he or she would have been acquitted. To require any less of a showing would subject the trial court to entertaining petitions for relief to set aside pleas in cases where the defendant would nonetheless be found guilty at trial and therefore would be facing the same consequence of deportation. *See generally Jones v. State*, 591 So. 2d 911 (Fla. 1991); *State v. Fox*, 659 So. 2d 1324 (Fla. 3d DCA

1995), *review denied*, 668 So. 2d 602 (Fla. 1996); *Todd v. State*, 648 So. 2d 249 (Fla. 3d DCA 1994).

> Requiring that the defendants establish that they most probably would have been acquitted is concordant with this court's conclusion that these motions must be brought within two years after judgment and sentence become final, as required in Rule 3.850. This two-year limitation assures some realistic probability that evidence will remain available and that the trial court can reliably determine whether defendant most likely would have prevailed at trial. If we adopt defendants' argument that the triggering event is the onset of deportation proceedings, in many cases the court files will be quite stale and evidence or witnesses may or may not be available. The two-year limit addresses this problem.

Peart at 1063-1064.

D

THIS COURT SHOULD REFER TO THE CRIMINAL RULES COMMITTEE THE QUESTION OF WHETHER RULE 3.850 SHOULD BE AMENDED TO PROVIDE RELIEF TO DEFENDANTS WHO WERE NEVER IN CUSTODY AFTER CONVICTION.

Finally, the question of whether Rule 3.850 should be amended to provide relief to Defendant's who were never in custody after conviction should be referred to the Criminal Rules Committee for consideration.

CONCLUSION

Based on the foregoing, Petitioner requests this Court reverse that portion of the decision in this case which conflicts with the decision of the Third District in *Peart*.

Respectfully submitted,

ROBERT A. BUTTERWORTH
Attorney General
Tallahassee, Florida

CELIA TERENZIO
Bureau Chief
Florida Bar No. 656879

SARAH B. MAYER
Assistant Attorney General
Florida Bar No. 367893
1655 Palm Beach Lakes Blvd.
Suite 300
West Palm Beach, FL 33401-2299
(561) 688-7759

Counsel for Petitioner

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing "Petitioner's Brief on the Merits" has been furnished by U.S. Mail to: NEAL R. LEWIS, Esquire, Two Datran Center, Suite 1609, 9130 South Dadeland Boulevard, Miami, FL 33156-7849, this 5th day of ~~September~~ October, 1998.

Of Counsel

EXHIBIT A

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT
JULY TERM 1998

ERA GREGERSEN,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

CASE NO. 97-1373

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WEST PALM BEACH

Opinion filed August 5, 1998

Appeal from the Circuit Court for the Fifteenth Judicial Circuit, Palm Beach County; John L. Phillips, Judge; L.T. Case Nos. 86-748CF, 85-5499CF, 84-8220CF, 84-3620CF A02.

Neal Randolph Lewis, Miami, for appellant.

Robert A. Butterworth, Attorney General, Tallahassee, and Sarah B. Mayer, Assistant Attorney General, West Palm Beach, for appellee.

KLEIN, J.

In January 1986 appellant, a German national with permanent resident alien status in the United States, entered a plea after being charged with grand theft and writing worthless checks. She received probation which was terminated in 1987. In 1996 she filed this petition for writ of coram nobis alleging that she was not informed that her adjudication would have an adverse effect on her status as a resident alien. The state responded alleging, among other things, that her claim was barred by laches. The trial court denied the petition without having an evidentiary hearing, and appellant appeals. We affirm.

The third district has recently concluded that a trial court's failure to inform a defendant of the deportation consequences of a plea is not a basis for coram nobis relief. In Peart v. State, 705 So. 2d 1059 (Fla. 3d DCA 1998), the third district noted that the function of coram nobis is to correct errors of fact, not errors of law, and concluded that the court's failure to inform a defendant about deportation consequences is an error of law, explaining:

> 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.

Id. at 1062.

In one of the earliest cases allowing a writ of coram nobis in Florida, Nickels v. State, 98 So. 502 (Fla. 1923), the defendant in a rape case was attempting to set aside a plea of guilty which he knew would result in his being hanged. He alleged that he had entered his plea because he was afraid of being killed through mob violence. After acknowledging that coram nobis is available only for errors of fact and not errors of law, the Florida Supreme Court held that a plea of guilty entered through fear or coercion is an error of fact which may be challenged by coram nobis.

The plea in Nickels was, of course, an involuntary plea. So was the plea in Peart, as the third district recognized in the above quote. In light of Nickels, which was not cited in Peart, we conclude that the involuntary plea in the present case is an error of fact, not an error of law, and certify conflict with Peart.

Having concluded that the coram nobis is available to correct the type of error alleged, we must now address the defense raised by the State, laches. At this time, over ten years after entry of the plea, there is no transcript available of the plea colloquy. The state, in its response filed in the trial court, attached a copy of a letter from the court reporting office advising that they could not provide

transcripts because the reporter's notes were no longer available.

We conclude, under these circumstances, that appellant's claim is barred by laches. State v. Caudel, 504 So. 2d 419 (Fla. 5th DCA 1987)(laches barred motion to vacate nine to ten year old convictions because court records had been destroyed pursuant to statutory authority). See also, Anderson v. Singletary, 688 So. 2d 462 (Fla. 4th DCA 1997)(laches bars post-conviction relief claim when the delay has been unreasonable and has resulted in prejudice to the state due to the unavailability of the record).[1]

Affirmed.

WARNER and FARMER, JJ., conurs.

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

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[1] This plea occurred before January 1, 1989, after which trial judges were required by Florida Rule of Criminal Procedure 3.172(c)(8) to inform defendants about deportation consequences. Our conclusion that laches is applicable makes it unnecessary for us to address the pre-1989 issue or Wood v. State, 698 So. 2d 293 (Fla. 1st DCA), rev. granted, 699 So. 2d 1377 (Fla. 1997)(coram nobis has a two year statute of limitations).