IN THE SUPREME COURT OF GUAM

FRANK MAY,
Petitioner- Appellant,

v.

PEOPLE OF GUAM,
Respondent-Appellee.

OPINION

Filed: October 18, 2005

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Supreme Court Case No.: CVA03-027
Superior Court Case No.: SP0344-00

Appeal from the Superior Court of Guam
Argued and submitted on February 17, 2005
Hagåtña, Guam

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BEFORE: FRANCES M. TYDINGCO-GATEWOOD, Presiding Justice[1]; ROBERT J. TORRES JR., Associate Justice; ALEXANDRO C. CASTRO, Justice *Pro Tempore*.

TYDINGCO-GATEWOOD, Presiding Justice:

[1] The Plaintiff-Appellant Frank May appeals from a denial of a Petition for Writ of Habeas Corpus. He argues that the trial court erred in determining that he was not "in custody." He also argues that the trial court erred in failing to recharacterize his Petition for Writ of Habeas Corpus as a Petition for Writ of Error in Coram Nobis. In response, Respondent-Appellee The People of Guam contend that the trial court's holding was proper regarding the denial of the habeas petition. However, the People fail to address the issue dealing with the error coram nobis petition.

[2] We elect to treat May's appeal of the denial of the petition for writ of habeas corpus as an original petition for the same relief and hold that May does not satisfy the "in custody" requirement. Therefore we do not have jurisdiction to hear his petition and thus deny it. We further hold that although the trial court erred in failing to recharacterize the Petition for Writ of Habeas corpus as a Petition for Writ of Error in Coram Nobis, the writ of error should nonetheless be denied.

I.

[3] Frank May is currently serving a sentence in federal prison due to a 1993 conviction in the United States Federal District Court of Guam for Importation of Cocaine, Use of a Communication Facility to Import Cocaine, and Use of Firearm During Drug Trafficking. He

[1] Chief Justice F. Philip Carbullido was not available to participate in this matter. Associate Justice Tydingco-Gatewood, as the senior member of the panel, was designated as the Presiding Justice.

was also charged with being an Armed Career Offender under section 924(3)(1) of Title 18 of the United States Code. May had been convicted in the Superior Court of three violent felony offenses prior to 1993: burglary in 1981, Aggravated Assault and Burglary in 1984 and Burglary in 1989.

[4] For his 1993 conviction, May was sentenced by the federal district court to 327 months imprisonment, part of which he contends was enhancement pursuant to the Armed Career Offender statute. He specifically alleges that his 1981 Superior Court conviction, for which he already served his sentence, caused his federal sentence to be enhanced by fifteen years in accordance with the Armed Career Offender statute.

[5] On December of 2000, May submitted a *pro se* Petition for Writ of Habeas Corpus to the trial court requesting habeas relief because his current federal sentence was enhanced by the 1981 Superior Court conviction which was unconstitutionally invalid. The lower court denied his request, finding that May was not "in custody" of the Government of Guam but rather, was in custody of the federal government and therefore the Superior Court had no jurisdiction to consider the merits of May's Petition.

[6] May filed his timely appeal to this court on November 12, 2003.

II.

A. Jurisdiction.

[7] We must first decide whether we have jurisdiction to hear an appeal denying writ relief in a habeas matter. Title 8 GCA § 135.10 provides that "[e]very person unlawfully imprisoned or restrained of his liberty, under any pretense whatever, may prosecute a writ of habeas corpus, to inquire into the cause of such imprisonment or restraint." Title 8 GCA § 135.10 (West,

WESTLAW through Guam Pub. L. 28-037 (Apr. 22, 2005)). We ruled previously that a defendant has no right to appeal the denial of his petition for habeas corpus. *Borja v. Bitanga*, 1998 Guam 29, ¶ 12. Because a defendant has no right to appeal such denial, he must file a new petition with this court after he has exhausted his remedies at the trial court. *Id*. at ¶ 13.

[8] In the instant case, May appeals from the trial court's denial of his Petition for Writ of Habeas Corpus. He did not file a new petition for a writ of habeas corpus pursuant to this court's original jurisdiction. We can, however, exercise our discretion to treat his appeal as an original petition for a writ of habeas corpus. *See id.* at ¶ 14. This court has the authority to hear habeas corpus proceedings pursuant to its original jurisdiction under the "similar remedies" language of Title 7 GCA § 3107(b). *Id. at* ¶ 11. This section delineates the jurisdictional boundaries of our court. It provides, in part, that "[i]ts authority also includes jurisdiction of original proceedings for mandamus, prohibition, injunction, and similar remedies to protect its appellate jurisdiction." Title 7 GCA § 3107(b) (West, WESTLAW through Guam Pub. L. 28-037 (Apr. 22, 2005)). We elect to treat May's appeal of the denial of the petition for writ of habeas corpus as an original petition for the same relief. Just as we did in *Borja*, we will also treat the People's brief as the appropriate response to the petition. *Borja*, 1998 Guam 29 at ¶ 15.

III.

B. May's Request for Habeas Corpus Relief.

[9] We next address whether we should grant May's request for habeas corpus relief. Pursuant to Title 8 GCA § 135.10, May is entitled to such relief if he has been unlawfully imprisoned or restrained of his liberty." 8 GCA § 135.10 (West, WESTLAW through Guam Pub. L. 28-037 (Apr. 22, 2005)). Section 1473 of the California Penal Code is identical to Title 8

GCA § 135.10, and thus California cases interpreting section 1473 are persuasive. *See People v. Hall*, 2004 Guam 12, ¶ 18 (finding that California case law interpreting a California statute from which a Guam statute was derived is persuasive authority, and adopting such case law "absent a compelling reason to deviate."); *Fajardo v. Liberty House Guam*, 2000 Guam 4, ¶ 17 (adopting California case law construing a similar Guam statute where "there [wa]s no compelling reason to deviate from that jurisdiction's interpretation of these statutes").

[10] In its determination of whether May met the requirements for a successful Petition for Writ of Habeas Corpus, the trial court concluded that the phrase "unlawfully imprisoned or restrained of his liberty" found in the Guam and California writ statutes has the same meaning as the phrase "in custody" found in federal law, specifically, section 2254(a) of Title 28 of the United States Code. Section 2254(a) states in part that federal courts have jurisdiction to hear a petition for habeas corpus "only on the ground that he is *in custody* in violation of the . . . laws" 28 U.S.C. § 2254(a) (1996) (emphasis added). The trial court based its conclusion on its reading of the California case, *In re Azurin*, 87 Cal. App. 4th 20 (Cal. Ct. App. 2001). In the *Azurin* case, the California Court of Appeals made no distinction between the California phrase, "unlawfully imprisoned or restrained of his liberty" and the federal phrase "in custody." The trial court therefore surmised that the meanings were identical and it would take guidance from California state and federal cases.

[11] In its reliance on *Azurin*, the lower court found that May did not satisfy the "in custody" requirement. In that case, Azurin petitioned the Superior Court of California for habeas corpus relief while he was in federal custody pursuant to an INS deportation proceeding which was based solely upon an already expired 1990 California state conviction. *Id*. at 26. The California Court of Appeals found that petitioner was not in custody of California, but was "in custody of

the INS, an agency of a different sovereign" and further highlighted that "once the sentence imposed for a conviction has completely expired, the collateral consequences of that conviction are not themselves sufficient to render an individual 'in custody' for the purposes of a habeas attack upon it." *Id*. at 26 (quoting *Maleng v. Cook*, 490 U.S. 488, 492, 109 S. Ct. 1923, 1926 (1989)). Thus, the California Court held that it had no jurisdiction to hear the petition for writ of habeas corpus and dismissed the case. *Azurin*, 87 Cal. App. 4th at 26.

[12] Similarly, May filed his petition for a writ of habeas corpus in the Superior Court of Guam while in federal custody serving a 1993 federal sentence. May alleges that the already expired 1981 Guam Superior Court conviction was used to enhance the 1993 federal conviction whose sentence is currently being served. There is no dispute that May's 1981 Guam Superior Court conviction had fully expired. Like Azurin, May is not in custody of the Guam prison system, but is in custody of the federal prison system, a system of a "different sovereign." As the *Maleng* court held, we also hold, that once the sentence imposed for the 1981 conviction completely expired, the collateral consequence is not itself sufficient to render an individual "in custody" for the purposes of a habeas attack upon it. *See Maleng*, 490 U.S. 488 at 492, 109 S. Ct. at 1926. Thus, we have no jurisdiction to hear the petition for writ of habeas corpus and should dismiss the appeal.

[13] However, this court could construe the attack on May's 1981 conviction as an attack on his current federal sentence, a possibility left open by the Supreme Court in *Maleng*. Therefore, this court could find that May falls under the definition of being "in custody." The Ninth Circuit ruled on this very issue in *Feldman v. Perrill*, 902 F.2d 1445 (9th Cir. 1990), where the court held that an attack on an expired conviction could be construed as an attack on the current sentence, thus considering the petitioner to be "in custody." The petitioner in *Feldman* had a

1976 state conviction and was serving a 1984 federal conviction when he filed a petition for habeas corpus in federal court. *Id*. at 1446-7. The Ninth Circuit followed *Maleng* in holding that an expired conviction cannot satisfy the "in custody" requirement even though it may have had the collateral consequence of enhancing a subsequent federal sentence. *Id*. at 1449. But the Ninth Circuit went further and held that where an expired conviction is relied upon to enhance a pending sentence, a court is obliged to "construe this . . . petition as an attack on petitioner's current federal sentence as enhanced. As [the defendant] is still serving his parole term, he is 'in custody' under this sentence. We therefore have jurisdiction to entertain this petition . . ." *Feldman*, 902 F.2d at 1449.

[14] Although the court found the defendant to be "in custody," the Ninth Circuit further held that "[t]he writ of habeas corpus does not act upon the prisoner who seeks relief, but upon the person who holds him in what is alleged to be unlawful custody." *Id.* at 1450 (quoting *Braden v. 30th Judicial Circuit Court*, 410 U.S. 484, 494-95, 93 S. Ct. 1123, 1129-30 (1973)). It ruled in the *Feldman* case that the petitioner was no longer in custody in California; "that state has extracted its punishment and has no further interest in petitioner . . . [t]he District of Arizona administers his current parole, therefore . . . [that is where the] petitioner must proceed." *Feldman*, 902 F.2d at 1450 (citations omitted).

[15] In the instant case, May is no longer in custody of the Guam prison system. The local Guam court has extracted its punishment and has no further interest in May. The federal prison system administers his current federal enhanced sentence, therefore that is where he must proceed.

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[16] In light of the above, we find that the May is "not in custody" of the Government of Guam and therefore we have no jurisdiction to hear the merits of the habeas corpus petition.

C. May's Argument for Petition for Writ of Error in Coram Nobis relief.

[17] Alternatively, May argues that when a petitioner is found to be no longer "in custody" and is precluded from bringing a petition for a writ of habeas corpus, he should be allowed to seek coram nobis relief. The writ of error coram nobis is an extraordinary writ which is limited to situations where statutory remedies are unavailable or inadequate. *See United States v. Brown*, 117 F.3d 471, 474-5 (llth Cir. 1997). In those instances, federal courts have liberally recharacterized the petition for writ of habeas corpus as a petition for writ of error in coram nobis. *See Azzone v. United States*, 341 F.2d 417, 419 (8th Cir. 1965) ("Inasmuch as any relief to which appellant may be entitled is not available through § 2255 or habeas corpus proceedings, we believe that appellant's motion is entitled to be treated as an application for a writ of error coram nobis"); *United States v. Reguer*, 901 F. Supp. 515, 517-18 (E.D.N.Y. 1995) (petitioner's letter to the court "cannot be construed as a petition for habeas corpus. He still may seek relief, however, if, following the generous pleading standards to be afforded to pro se litigants . . . the letter is considered as a petition for a writ of error coram nobis . . . [t]he writ is used to attack allegedly invalid convictions which have continuing consequences.")(citations omitted).

[18] May argues that because *pro se* pleadings are held to less stringent standards, and because petitioners should be afforded consideration of the merits when no other remedy is available in this court, the trial court should have recharacterized his petition for writ of habeas corpus as a petition for writ of error in coram nobis. May cites only to federal criminal cases for

this argument and fails to cite to any Guam civil statutory law on error coram nobis. The People completely fail to address the error coram nobis issue, and clearly they should have done so.[2]

[19] As a starting point in determining whether the coram nobis remedy is available to May, this court must first look to Guam law. Rule 60(b) of the Guam Rules of Civil Procedure states, in pertinent part, that "writs of coram nobis . . . are abolished." Guam R. Civ. P. 60(b). This rule is modeled after Rule 60(b) of the Federal Rules of Civil Procedure. In *United States v. Morgan*, 346 U.S. 502, 74 S. Ct. 247 (1954), the United States Supreme Court held that although Federal Rule 60(b) abolished the writ of coram nobis in civil cases, it is not precluded as a remedy in criminal cases in federal court pursuant to the general "All Writs" statute, section 1651 of Title 28 of the United States Code. *United States v. Morgan*, 346 U.S. 502, 506 n.4, 74 S. Ct. 247, 250 n. 4 (1954). The United States Supreme Court ruled earlier in *Mooney v. Holohan*, 294 U.S. 103, 55 S. Ct. 340 (1935), that post conviction remedies for defendants who were convicted without due process of law must be furnished by the states. Based on this decision, coram nobis relief was revived by a majority of the states. However, coram nobis as a post conviction remedy has been disregarded by a number of states.[3]

[20] This is an issue of first impression in our jurisdiction, and we must decide whether this court wishes to follow a majority of states and consider error coram nobis as a post conviction remedy in criminal cases. The majority of state courts allow error coram nobis as a post conviction remedy in order to provide petitioners with a way to challenge the conviction when

[2] According to Rule 13(b)(5) of the Guam Rules of Appellate Procedure, the Appellee's Brief should include "the contentions . . . with respect to the issues presented, and the reasons therefor, with citations to the authorities, statutes and parts of the record relied on . . . . shall include analysis and explanation of the . . . contentions." Guam R. App. P. 13(b)(5). The People failed to respond to May's coram nobis argument, which May presented in his opening brief. The People are hereby warned that they must comply with the Rules of Appellate Procedure and future noncompliance will not be tolerated by this court.

habeas corpus and other means are not available.[3] *See Janiec v. McCorkle*, 144 A.2d 561, 568 (N.J. Super. Ct. App. Div. 1958) ("In recent years [coram nobis] has had a very considerable resurgence . . . as a procedural mechanism in criminal cases to raise and determine, in the trial court after conviction and sentence, alleged violations of constitutional rights of defendants and disregard of the elements of fundamental fairness in criminal trials, which could not be raised by appeal, Habeas corpus or other means"). The rationale for permitting coram nobis is perhaps best explained by the Court of Appeals of Maryland in *Skok v. State*, wherein the court stated:

> Along with the vast majority of appellate courts which have considered the matter, we believe that the scope of coram nobis . . . is justified by contemporary conditions and public policy. Very often in a criminal case, because of a relatively light sanction imposed or for some other reason, a defendant is willing to forego an appeal even if errors of a constitutional or fundamental nature may have occurred. Then, when the defendant later learns of a substantial collateral consequence of the conviction, it may be too late to appeal, and, if the defendant is not incarcerated or on parole or probation, he or she will not be able to challenge the conviction by a petition for a writ of habeas corpus . . . . Moreover, serious collateral consequences of criminal convictions have become much more frequent in recent years. . . . In light of these serious collateral consequences, there should be a remedy for a convicted person who is not incarcerated and not on parole or probation, who is suddenly faced with a significant collateral consequence of his or her conviction, and who can legitimately challenge the conviction on constitutional or fundamental grounds. Such person should be able to file a motion for coram nobis relief . . .

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[3] *State v. Iverson*, 310 P.2d 803 (Idaho 1957); *Boyd v. Smyth*, 205 N.W. 522 (Iowa 1925); *Commonwealth v. Sacco*, 158 N.E. 167 (Mass. 1927); *Dewey v. Smith*, 230 N.W. 180 (Mich. 1930); *State v. Hayslip*, 107 N.E. 335 (Ohio 1914); *Ex Parte Huddleston*, 194 S.W.2d 401 (Tex. Crim. App. 1946).

[4] *See Johnson v. Williams*, 13 So. 2d 683 (Ala. 1943); *Adler v. State*, 35 Ark. 517 (1880); *People v. Tate*, 288 P.2d 149 (Cal. Dis. Ct. App. 1955); *Medberry v. People*, 108 P.2d 243 (Colo. 1940); *Ex Parte Welles*, 53 So. 2d 708 (Fla. 1951); *Harris v. State*, 603 S.E.2d 490 (Ga. Ct. App. 2004); *People v. Loftus*, 81 N.E. 2d 495 (Ill. 1948); *Sanders v. State*, 85 Ind. 318 (1882); *State v. Calhoun*, 32 P. 38 (Kan. 1893); *Anderson v. Buchanan*, 168 S.W.2d 48 (Ky. Ct. App. 1943); *Pike v. State*, 123 A.2d 774 (Me. 1956); *Blythe v. State*, 870 A.2d 1246 (Md. Ct. Spec. App. 2005); *Dolan v. State*, 13 So. 2d 925 (Miss. 1943); *State v. Stodulski*, 298 S.W.2d 420 (Mo. 1957); *State v. Gollehon*, 906 P.2d 697 (Mont. 1995); *Hawk v. State*, 39 N.W.2d 561 (Neb. 1949); *Janiec v. McCorkle*, 144 A.2d 561 (N.J. Super. Ct. App. Div. 1958); *Miller v. People*, 114 N.Y.S.2d 838 (1952); *In re Taylor*, 53 S.E.2d 857 (N.C. 1949); *State v. Magrum*, 38 N.W.2d 358 (N.D. 1949); *Petition of Blair*, 344 P.2d 282 (Okla. Crim. App. 1959); *State v. Huffman*, 297 P.2d 831 (Or. 1956); *Neal v. Beckstead*, 285 P.2d 129 (Utah 1955); *State v. Armstrong*, 84 P. 584 (Wash. 1906); *Ernst v. State*, 193 N.W. 978 (Wis. 1923); *Alexander v. State*, 123 P. 68 (Wyo. 1912).

Skok v. State, 760 A.2d 647, 660-61 (Md. 2000) (footnote omitted).

[21] We agree with the policy reasons followed by the majority of states and hereby adopt the majority view that error coram nobis should be considered as a post conviction remedy in criminal cases. We now must decide whether coram nobis is available to correct only errors of fact or whether it is also available to correct legal errors.

[22] In general, coram nobis is used to address errors of fact, as opposed to errors of law. *See Morgan*, 346 U.S. at 507, 74 S. Ct. at 250 (1984) (describing the writ as an infrequently used remedy available to correct errors of fact); *Hirabayashi v. United States*, 828 F.2d 591, 604 (9th Cir. 1987) ("Thus, the *coram nobis* writ allows a court to vacate its judgments 'for errors of fact . . . in those cases where the errors [are] of the most fundamental character, that is, such as rendered the proceeding itself invalid.'") (citation omitted); *Gregersen v. State*, 714 So.2d 1195, 1196 (Fla. Dist. Ct. App. 1998) (pointing out that coram nobis is available to correct errors of fact as opposed to errors of law); *People v. Ibanez*, 76 Cal. App. 4th 537 (Cal. Ct. App. 1999) (denying petitioner's writ of error in coram nobis when there was no new evidence and the facts were not in dispute).

[23] Some courts, however, are more liberal and state that the writ of error in coram nobis could also be available to correct "egregious legal errors" in prior convictions. *See United States v. Walgren*, 885 F.2d 1417, 1420 (9th Cir. 1989) ("The writ provides a remedy for those suffering from the 'lingering collateral consequences of an unconstitutional or unlawful conviction based on errors of fact' and 'egregious legal errors.'") (citation omitted); *Yasui v. United States*, 772 F.2d 1496, 1499 n.2 (9th Cir. 1985) ("A writ of error *coram nobis* is also available to correct egregious legal errors in prior convictions). *See, e.g., Navarro v. United States*, 449 F.2d 113 (9th Cir. 1971) (allowing assertion of a self-incrimination defense); *Lewis v.*

United States, 314 F. Supp. 851 (D. Alaska 1970) (same); *see also United States v. Morgan*, 346 U.S. 502, 507-08, 74 S. Ct. 247, 250-51, 98 L.Ed. 248 (1954) (noting that the writ has been commonly used in this fashion); *United States v. Wickham*, 474 F. Supp. 113, 116 (C.D. Cal.1979) (noting that only fundamental legal errors can justify issuance of the writ; refusing to issue the writ); *Skok*, 760 A.2d 647 at 661 (holding that a person should be able to file a motion for coram nobis relief regardless of whether the alleged infirmity in the conviction is considered an error of fact or an error of law). We hereby announce that the writ of error coram nobis is available to correct errors of fact and egregious legal errors.

[24] In the instant case, May claims that the error in the 1981 Superior Court of Guam conviction was that his guilty plea was made involuntarily, unknowingly or unintelligently and thus is invalid. The *Hirabayashi* case sets forth the requirements for a successful petition for writ of error in coram nobis. According to the *Hirabayashi* court, a petitioner must show the following four requirements to qualify for coram nobis relief:

> (1) a more usual remedy is not available;
> (2) valid reasons exist for not attacking the conviction earlier;
> (3) adverse consequences exist from the conviction sufficient to satisfy the case or controversy requirement of Article III; and
> (4) the error is of the most fundamental character.

Hirabayashi, 828 F.2d at 604 (footnote omitted).

[25] May must show all four requirements. *See United States v. Goldberg*, 776 F. Supp 513 , 517 (C.D. Cal. 1991) ("[petitioner] must demonstrate the . . . four elements to obtain *Coram Nobis* relief"); *United States v. Walgren*, 885 F.2d at 1420 ("To qualify for coram nobis relief, the petitioner must demonstrate each of the . . . four factors"). Failure to demonstrate even one factor will disqualify a petitioner from obtaining coram nobis relief.

[26] The *Hirabayashi* case directly addresses the second factor and provides us with an example of a valid reason for not attacking the conviction earlier. This second factor is the most relevant factor to our case and therefore we choose to analyze whether there were valid reasons for May not attacking the conviction earlier. In *Hirabayashi*, petitioner sought coram nobis relief, by seeking to vacate his convictions during World War II. *See Hirabayashi*, 828 F.2d at 604. He argued that the laws he violated were unconstitutional, as they were based upon racial prejudice. *Id*. at 593. He presented facts of proof in a suppressed report which was not known until recently. *Id*. at 593. The government argued that he did not meet the second requirement, because his claims were barred by laches. *Id*. at 605. The government stated that this proof had been part of a public record for quite some time, or that alternatively, the petitioner would have discovered the proof by due diligence. *Id*. at 605. The Ninth Circuit rejected this argument, stating that the proof was based upon only recently discovered material and cited how difficult it was to retrieve the one suppressed report which had been hidden for years. *Id*. The court stated, "petitioner cannot be faulted for not finding and relying upon [the only surviving copy of the initial version of the report] long before he brought this action . . . ." *Id* (quoting *Hirabayashi v. United States*, 627 F. Supp. 1445, 1455 (W.D. Wash. 1986)). Thus the court found that petitioner had a valid reason for not attacking the conviction earlier: the crucial facts were simply unavailable until years later. *See id*.

[27] A policy argument behind the second requirement is that a delay in attacking the conviction is likely to result in an incomplete record after so many years, making it difficult for the government to respond. The petitioner in *United States v. Darnell* filed a petition for writ of coram nobis 20 years after his conviction, arguing that his plea was involuntary. *United States v. Darnell*, 716 F.2d 469, 481 (7th Cir. 1983). The *Darnell* court refused to entertain the petition,

finding that the second requirement was not met. *Id*. It stated that the doctrine of laches protects against inexcusable delay which prejudices the government's ability to respond. The court stated:

> "The doctrine of laches . . . ensures that coram nobis relief will not be granted where a petitioner's inexcusable delay in raising his claim has prejudiced the government. . . . . this case is a textbook example of the problems arising from an inordinate delay in seeking relief. The cognizable claims that Darnell raises--ineffective assistance of counsel and involuntary guilty plea--are troublesome even where a complete record of the proceedings exists. In this case, the court reporter's notes have been lost or destroyed, thus eliminating any exact record of what transpired. Clearly, Darnell's delay has prejudiced the government in its ability to establish the voluntariness of the 1961 plea of guilty . . . . a twenty-year delay is strong evidence of a lack of reasonable diligence in ascertaining potential grounds for relief."

Id. at 481 & n.5..

[28] In the instant case, May presents his argument over twenty-four years after his 1981 conviction and does not provide a sound reason for not attacking the conviction earlier. He provides no facts which had not been previously known at the time of the conviction which could render the conviction invalid. Instead, May argues that from 1981 to 1993 he had no incentive to consider a challenge to his 1981 conviction until it was used to enhance his 1993 federal sentence. May also argues that from 1993 until the present, he was ignorant of the law and had no knowledge of the option of filing a petition for habeas corpus or coram nobis until he was informed by another inmate. His failure to provide unknown facts, his lack of incentive and his ignorance of the law in no way justifies the tardiness of his petition to this court.

[29] In addition, May's delay results in discovery problems which hinders finding the exact record of what transpired in 1981. The file cannot be found, no tape recording or transcript of the plea currently exists, and the only two pertinent documents left which include the minute entry of the plea proceeding and the Judgment of Conviction, do not offer any solid proof of a

constitutional violation. May points to the Judgment of Conviction, arguing that it is a mere form judgment which does not conclusively prove that May knew his rights. But this argument cannot be substantiated, as the record is simply not complete enough to make an accurate judgment. Just as in *Darnell*, an exact record of what transpired twenty-four years ago has been eliminated. This twenty-four year delay has prejudiced the People in its ability to establish the voluntariness of the 1981 plea of guilty. Like the *Darnell* court, we find that a twenty-four year "delay is strong evidence of a lack of reasonable diligence in ascertaining potential grounds for relief." *See Darnell*, 716 F.2d at 481.

[30] For the above reasons, we find that May fails to demonstrate the second requirement necessary for a successful coram nobis petition. Simply put, May has failed to demonstrate errors of fact or egregious legal errors. Such failure constitutes ineligibility for coram nobis relief. Analysis of the other three requirements is simply unnecessary.

IV.

[31] In sum, we elect to treat May's appeal of the denial of the petition for writ of habeas corpus as an original petition for the same relief. We find that May does not fit the "in custody" requirement and therefore we have no jurisdiction to hear the merits of his Writ of Habeas Corpus petition. Thus, May's petition for habeas corpus relief is hereby **DENIED**.

[32] While we deny the Petition for Writ of Habeas Corpus, we nonetheless hold that the trial court erred in the first instance by failing to recharacterize May's Petition for Writ of Habeas Corpus as a Petition for Writ of Error in Coram Nobis. In this case of first impression, along with the majority of the states, we hereby adopt the relief of error coram nobis as a post conviction remedy in criminal cases when "errors of fact" or "egregious legal errors" are

demonstrated. Nonetheless, based on our analysis set forth earlier, we find that May does not have a successful claim for error coram nobis relief. Accordingly, we also **DENY** his Petition for Writ of Error in Coram Nobis.