ARKANSAS SUPREME COURT

No. CR 99-365

NOT DESIGNATED FOR PUBLICATION

ERIC RANDALL NANCE

PETITIONER

v.

STATE OF ARKANSAS

RESPONDENT

Opinion Delivered April 28, 2005

PETITION TO REINVEST JURISDICTION IN THE TRIAL COURT TO CONSIDER A PETITION FOR WRIT OF ERROR *CORAM NOBIS* [CIRCUIT COURT OF HOT SPRING COUNTY, CR 93-170-4]

PETITION DENIED

PER CURIAM

In 1994, a jury found Eric Randall Nance guilty of capital murder and sentenced him to death. He appealed the conviction to this court, and we affirmed in *Nance v. State*, 323 Ark. 583, 918 S.W.2d 114 (1996). The United States Supreme Court denied certiorari in *Nance v. Arkansas*, 519 U.S. 847 (1996). Nance subsequently filed a petition in the trial court for postconviction relief under Ark. R. Crim. P. 37.1. The petition was denied and that decision affirmed. *Nance v. State*, 339 Ark. 192, 4 S.W.3d 501 (1999). Nance then sought a writ of *habeas corpus* in the federal district court. The denial of the writ was affirmed in a rehearing *en banc*. *Nance v. Norris*, 392 F.3d 284 (8th Cir. 2004).

Nance now asks that this court reinvest jurisdiction in the trial court to consider a petition for writ of error *coram nobis*.[1]

The petition for leave to proceed in the trial court is necessary because the circuit court can entertain a petition for writ of error *coram nobis* after a judgment has been affirmed on appeal only after we grant permission *Dansby v. State*, 343 Ark. 635, 37 S.W.3d 599 (2001).

-A writ of error *coram nobis* is an extraordinarily rare remedy, more known for its denial than its approval. *Larimore v. State*, 341 Ark.397, 17 S.W.3d 87 (2000). The writ is allowed only under compelling circumstances to achieve justice and to address errors of the most fundamental nature. *Pitts v. State*, 336 Ark. 580, 986 S.W.2d 407 (1999). We have held that a writ of error *coram nobis* was available to address certain errors that are found in one of four categories: insanity at the time of trial, a coerced guilty plea, material evidence withheld by the prosecutor, or a third-party confession to the crime during the time between conviction and appeal. *Pitts*, *supra, citing Penn v. State*, 282 Ark. 571, 670 S.W.2d 426 (1984). For the writ to issue following the affirmance of a conviction, the petitioner must show a fundamental error of fact extrinsic to the record. *Larimore v. State*, 327 Ark. 271, 938 S.W.2d 818 (1997). *Coram nobis* proceedings are attended by a strong presumption that the judgment of

conviction is valid. *Echols v. State*, ___ Ark. ___, ___ S.W.3d ___ (January 20, 2005) ("*Echols Error Coram Nobis II*" or "*Echols ECN II*").

After reviewing the instant petition, we do not find that petitioner has stated good cause to grant leave to proceed with a petition for writ of error *coram nobis* in the trial court.

Petitioner contends that he is mentally retarded, and the State is prohibited from imposing the death penalty under Ark. Code Ann. § 5-4-618(b) (Repl. 1997) and *Atkins v. Virginia*, 536 U.S. 304 (2002). Petitioner acknowledges that this claim was not raised at trial, but asserts that the writ should be available in any case, for whatever reason it was not raised below. We disagree.

This court addressed the Eighth Amendment prohibition against execution of a defendant who is mentally retarded under *Atkins* in *Engram v. State*, ___ Ark. ___, ___ S.W.3d ___ (Dec. 16, 2004). In *Engram*, we denied a motion to recall the mandate and reopen the case, where the petitioner could have, but did not, contest imposition of the death penalty at trial through a motion under Ark. Code Ann. § 5-4-618(b) (Repl. 1997). A writ of error *coram nobis* is appropriate only when an issue was not addressed or could not have been addressed at trial because it was somehow hidden or unknown and would have prevented the rendition of the judgment had it been known to the trial court; *Echols ECN II*, at ____, ___ S.W.3d at ___; *Brown v. State*, 571, 670 S.W.2d 4 330 Ark. 627, 955 S.W.2d 901 (1997); *Penn v. State*, 282 Ark. 571, 670 S.W.2d 426 (1984), citing *Troglin v. State*, 257 Ark. 644, 519 S.W.2d 740 (1975). Each of the four categories we have recognized for relief under a writ of error *coram nobis* provides an example of fundamental error that was hidden or unknown and was not or could not be addressed at trial. Petitioner simply has not shown a fundamental error that could not have been addressed. As in *Echols ECN II*, the claim here does not fall within any of the four categories of errors for which error *coram nobis* constitutes appropriate relief.

Here, there was no third party confession following the conviction that would have prevented rendition of the judgment had it been known to the trial court. Petitioner received a jury trial, so there is no question of a coerced guilty plea which remained hidden until after trial. Petitioner does not allege that there was material evidence withheld by the prosecutor which was only discovered after trial. Insanity at the time of trial, the remaining category, most closely resembles the argument presented here. However, even where insanity was alleged, we have demanded due diligence and declined to grant a petition alleging incompetence where it was obvious petitioner and counsel were aware of his mental history at the time of his trial. *Echols v. State*, 354 Ark. 414, 125 S.W.3d 153 (2003) ("*Echols Error Coram Nobis I*"). Petitioner has alleged retardation, rather than insanity, but had available, prior to trial, a psychological evaluation that included comments on the results of a brief I.Q. test administered to him. In this situation, the issue was known to the defense, not hidden.

In *Engram*, we noted that the petitioner likely had not raised the defense earlier because there was no evidence presented that would have supported that defense. Here, although petitioner's I.Q. scores also did not qualify him for the statutory presumption of mental retardation, petitioner has presented additional evidence that could support a finding of mental retardation. As in *Engram*, however, this was still an argument that should have been made to the trial court. Petitioner asserts that the issue may not have been raised as a result

of ineffective assistance of counsel. Again, this was an argument that should have been raised in his petition for postconviction relief under Ark. R. Crim. P. 37.1, and was not.

Although there is no specific time limit for seeking a writ of error *coram nobis,* due diligence is required in making an application for relief and in the absence of a valid excuse for delay, the petition will be denied. *Echols ECN II*, at ____, ___ S.W.3d at ___. Due diligence requires that 1) the defendant be unaware of the fact at the time of trial; 2) he could not have, in the exercise of due diligence, presented the fact at trial; or 3) upon discovering the fact, did not delay bringing the petition. *Id.* The petitioner had information available on a possible defense to the death penalty through a motion under Ark. Code Ann. § 5-4-618(b) (Repl. 1997), or to assert ineffective assistance of counsel, and only now, years later, seeks relief on that basis. Where, as here, the basis for petitioner's claim does not fall within any of the four categories of errors for which error *coram nobis* constitutes appropriate relief, and the petitioner has failed to exercise due diligence in raising these claims, we must decline to reinvest the trial court with jurisdiction to consider the petition for writ of error *coram nobis*.

Petition denied.

1 For clerical purposes, the instant petition to reinvest jurisdiction in the trial court to consider a petition for writ of error *coram nobis* was assigned the same docket number as the direct appeal of the judgment.