

**IN THE CIRCUIT COURT OF MARYLAND
FOR BALTIMORE CITY**

JEROME HENDERSON,
Petitioner

*

*

Criminal No. 201022015

v.

*

STATE OF MARYLAND,
Respondent

*

*

* * * * *

**PETITION FOR WRIT OF ERROR CORAM NOBIS
AND REQUEST FOR AN EXPEDITED HEARING**

Petitioner Jerome Henderson, through counsel, James Wyda, Federal Public Defender for the District of Maryland, and Joanna Silver, Assistant Federal Public Defender, hereby requests that this Honorable Court issue a writ of error coram nobis vacating his conviction in case number 201022015 in the Circuit Court for Baltimore City. Mr. Henderson further requests an expedited hearing on this matter. Without prompt action by this Court, Mr. Henderson risks a federal sentence of fifteen years to life based on the faulty conviction.

Factual and Procedural Background

On May 10, 2001, in the Circuit Court for Baltimore City, in case number 201022015, Jerome Henderson pleaded guilty to possession with intent to distribute twenty-one gel-capsules of heroin. On the same date, the Honorable John N. Prevas, Circuit Court Judge, sentenced Mr. Henderson to two years imprisonment.¹ Mr. Henderson did not file an appeal, nor did he file a petition for writ of habeas corpus or a petition under the Post Conviction Procedure Act .

Mr. Henderson now is pending sentencing in United States District Court for the District of

¹ The Circuit Court's docket entries for May 10, 2001, are attached as **Exhibit A**.

Maryland, on a charge of illegal possession of a firearm, in violation of 18 U.S.C. § 922(g)(1).² Ordinarily, the maximum possible penalty for this offense is ten years imprisonment—an appropriate range, given the facts of this case. However, under the “Armed Career Criminal Act,” 18 U.S.C. § 924(e), defendants who have previously been convicted of three or more serious felonies must be sentenced to a mandatory term of fifteen years and the maximum possible penalty rises to life in prison. The conviction at issue here would be Mr. Henderson’s third such conviction, and would require that he be sentenced according to the Armed Career Criminal Act to a mandatory fifteen years and up to life in prison.

The term of the sentence between fifteen years and life is set by the federal sentencing guidelines. Under the Guidelines, a criminal history “category”—which determines the severity of the sentence—is calculated for a defendant by assessing points for each prior conviction and adding these points together. *See* U.S.S.G. § 4A1.1-1.2 For Mr. Henderson’s conviction in the above-captioned case, he will receive a total of six criminal history points because he received a sentence of more than a year and because he committed the federal offense shortly after being convicted in state court. As a result of this sentence and others, Mr. Henderson will be placed in a criminal history Category V. Without the six points for this sentence, he would be a criminal history Category III. This is likely to translate to a difference of three to four years in Mr. Henderson’s sentence, on top of the fifteen-year mandatory minimum. *See* U.S.S.G. Sentencing Table.

Notwithstanding the significant impact of prior convictions on the federal sentencing process,

² The “firearm” that Mr. Henderson was convicted of possessing was barely operable. The grip was broken and had been duct-taped together, the magazine was missing, and the weapon was so badly corroded that examiners had to apply penetrant oil to it several times before it would fire.

federal law provides a limited mechanism for challenging the use of faulty convictions to enhance a defendant's sentence. That mechanism is not available to Mr. Henderson. *See Custis v. United States*, 511 U.S. 485 (1994) (holding that collateral attack on prior sentence is not permitted at federal sentencing unless defendant was deprived of right to counsel). As a result, this Court offers Mr. Henderson his only hope for achieving a fair federal sentence.³

Argument

I. A Petition for Writ of Error Coram Nobis is the Proper Vehicle for Relief.

Mr. Henderson properly seeks relief in the form of a writ of error coram nobis pursuant to *Skok v. State*, 361 Md. 52, 78, 760 A.2d 647, 661 (2001). In that case, the Court of Appeals significantly expanded the scope of coram nobis relief:

[T]here 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 regardless of whether the alleged infirmity in the conviction is an error of fact or an error of law.

Id.

Mr. Henderson is not incarcerated on the conviction at issue here and is not on parole or probation from that conviction. Thus, he cannot challenge his conviction by a petition for writ of habeas corpus or a petition under the Post Conviction Procedure Act. *See* 361 Md. at 77, 760 A.2d at 660. However, Mr. Henderson faces significant collateral consequences at his upcoming federal sentencing from the conviction. As explained above, the prior conviction automatically and

³ Even assuming that this Court grants the requested relief, Mr. Henderson will receive a substantial federal sentence. If the Armed Career Criminal Act does not apply, and if Mr. Henderson's criminal history category is reduced to Category III, he will be sentenced to a term of at least five years. *See* U.S.S.G. § 2K2.1.

significantly increases the amount of incarceration required under the federal law and the federal sentencing guidelines. A writ of error coram nobis is thus proper. *See State v. Hicks*, 139 Md. App. 1, 8-9, 773 A.2d 1056, 1060-1061 (2001) (holding that a possible increase in a pending federal sentencing as a result of state conviction was a “significant collateral consequence” for which coram nobis relief was appropriate).

Mr. Henderson legitimately challenges his conviction on fundamental and constitutional grounds. As argued more fully below, the Circuit Court erred in accepting Mr. Henderson’s plea of guilty without ensuring that it was knowing and voluntary pursuant to the principles of *Boykin v. Alabama*, 395 U.S. 238 (1969), and Maryland Rule 4-242(c). “The courts have consistently held that the scope of a coram nobis proceeding encompasses issues concerning the voluntariness of a guilty or nolo contendere plea, and whether the record shows that such a plea was understandingly and voluntarily made under the principles of *Boykin v. Alabama*” *Skok*, 351 Md. at 80-81, 760 A.2d at 662. Moreover, “the courts have regularly held that violations of rules similar to Maryland Rule 4-242, which are designed to insure that guilty and nolo contendere pleas are voluntary, constitute a basis for coram nobis relief.” 351 Md. at 81, 760 A.2d at 663.

II. Mr. Henderson’s guilty plea was not knowing or voluntary.

A transcript of the proceedings in Circuit Court on May 10, 2001 is attached to this petition as **Exhibit B**. Although at first blush the plea colloquy appears substantial, a careful reading reveals important omissions that show that the Circuit Court erred in accepting Mr. Henderson’s plea of guilty. The examination on the record does not demonstrate that Mr. Henderson pled knowingly and

voluntarily as required by the principles of *Boykin*, 395 U.S. 238, and Maryland Rule 4-242(c).⁴

A court must determine, and the record must affirmatively demonstrate, that the defendant entered a guilty plea voluntarily and with an intelligent understanding of his fundamental rights, the nature of the offense to which he is pleading guilty, and the possible consequences of the plea. *See Boykin*, 395 U.S. at 242-43; *Holloway v. State*, 8 Md. App. 618, 620-21, 261 A.2d 811, 812 (1970); Md. Code Ann. [Maryland Rules] 4-242(c). “[T]hese are inflexible requirements,” the absence of any of which calls the legality of the plea into question. *Gant v. State*, 16 Md. App. 382, 383, 297 A.2d 327, 328 (1972). Moreover, the court may not presume a knowing and voluntary plea from a silent record. *See Boykin*, 395 U.S. at 242-43; *Holloway*, 8 Md. App. at 620-21, 261 A.2d at 812. *Cf. Metheny v. State*, 359 Md. 576, 598, 755 A.2d 1088, 1101 (2000).

A. Mr. Henderson did not knowingly and intelligently waive his fundamental right to proof of guilt beyond a reasonable doubt.

Among the fundamental rights that the defendant must understand and waive in connection with a guilty plea is the right, guaranteed by the Due Process Clause, to insist that the government’s evidence establishes proof beyond a reasonable doubt. *See In re Winship*, 397 U.S. 358, 364 (1970); *Hicks*, 139 Md. App. at 11, 773 A.2d at 1062. The colloquy in Mr. Henderson’s case made no reference whatsoever to this fundamental right, nor to its corollary, the presumption of innocence. Although Mr. Henderson was informed that he had a right to a jury trial, neither counsel nor the court mentioned, much less explained, the burden of proof. *See Tx.* at 7 (“[The jury] would listen to the facts and the evidence presented at the trial and they would determine whether you were guilty

⁴ Adjunct to this claim, of course, is that Mr. Henderson’s counsel was ineffective in failing to properly advise Mr. Henderson and in failing to note and correct the omissions in the record.

or not guilty.”). “Evidence that [a defendant] was not advised as to the burden of proof, [including] the standard of proof [and] the presumption of innocence[, is] sufficient evidence to support a lack of voluntariness finding.” *Hicks*, 139 Md. App. at 11, 773 A.2d at 1062. Because Mr. Henderson was not advised of this central precept, his plea was involuntary and should be vacated.

B. Mr. Henderson did not knowingly and intelligently waive his fundamental right to assistance of counsel.

Another fundamental right that the defendant must understand and waive at a guilty plea is the right to assistance of counsel at trial and on appeal. *See Boykin*, 395 U.S. at 242; *Carnley v. Cochran*, 369 U.S. 506, 516 (1962); *Metheny*, 359 Md. at 598 & n. 14, 755 A.2d at 1100 & n.14. Mr. Henderson was never advised of his right to counsel at all.⁵

Effective assistance of counsel is the bedrock of the criminal justice system. *See Johnson v. Zerbst*, 304 U.S. 458 (1938); *Strickland v. Washington*, 466 U.S. 688, 104 S. Ct. 2052 (1984); 90 Georgetown L.J. 5, *31st Annual Review of Criminal Procedure* 1601-1606 (2002) (effective assistance of counsel includes performance before trial, actions in jury selection, performance during trial, actions concerning jury instructions, assistance during sentencing, and performance on appeal). Without a full understanding of how and when counsel would assist him, Mr. Henderson could not knowingly waive his right to trial.

⁵ Arguably, advice on the right to counsel was implicit in Mr. Henderson’s counsel’s suggestion that a public defender would be *present* during any trial, *see, e.g.*, Tx. at 8 (“There’s not going to be any testify [sic] from the officers this morning. I’m not going to cross-examine them, Mr. Hitchpack’s not going to cross-examine them); however, “unless the record affirmatively shows that [the defendant] understood [a fundamental right] and waived it in the constitutional sense, acceptance of his plea of guilty is not effective.” *English v. State*, 16 Md. App. 439, 446, 298 A.2d 464, 469 (1973).

C. Mr. Henderson was not advised of the maximum possible penalties for the offenses to which he was pleading guilty.

Before accepting a guilty plea, the court must satisfy itself that the defendant knows the maximum possible penalty for the offenses to which he is pleading guilty. *See Mathews v. State*, 15 Md. App. 686, 692, 292 A.2d 131, 134 (1972). The record in Mr. Henderson’s case does contain a reference to the “[g]uidelines,” Tx. at 3,⁶ but it is completely devoid of any reference to the maximum possible punishment he could have received. Mr. Henderson’s counsel simply stated on the record “I explained to you your options, and you decided to go with the two years.” Tx. at 6. This record does not show that Mr. Henderson ever was apprised of the maximum sentence that might be imposed. Without knowing the maximum sentences to which he was exposing himself, Mr. Henderson could not fairly evaluate whether the plea was in his best interest. *See* Md. Code Ann. [Maryland Rules] 4-242(c)(1) (“The court may accept a plea of guilty only after it determines . . . that (1) the defendant is pleading voluntarily, with an understanding of the . . . consequences of the plea.”); *Cuthrell v. Director, Patuxent Inst.*, 475 F.2d 1364 (4th Cir. 1973) (in order for plea of guilty to be valid, defendant must be made aware of all of the direct consequences of his plea). Because the record does not “demonstrate that the accused [knew] the length of the maximum sentence that the trial court [could] impose,” the plea is not valid. *Mathews*, 15 Md. App. at 692, 292 A.2d at 134.

D. Mr. Henderson was not advised of the nature of the offense to which he was pleading guilty.

In addition, before accepting a guilty plea, the court must satisfy itself that the defendant

⁶ Even this limited reference occurs during an on-the-record plea negotiation, prior to Mr. Henderson being sworn (or possibly even present).

understands the nature of the offense. *See Priet v. State*, 289 Md. 267, 287-88, 424 A.2d 349, 359 (1980). Concededly, a “ritualistic” recitation of the elements of the offense is not required; rather, the totality of the circumstances must demonstrate the defendant’s understanding of the charges against him. *See Priet*, 289 Md. at 288, 424 A.2d at 361.

Rule 4-242(c) at least “contemplates that the court will explain to the accused, in understandable terms, the nature of the offense to afford him a basic understanding of its essential substance” *Priet*, 289 Md. at 288, 424 A.2d at 359-360. In Mr. Henderson’s case, there was no discussion of the nature of the offenses, other than a statement of facts in support of the plea being taken. Tx. at 12-13. Mr. Henderson was asked, simply, “[d]o you . . . wish to plead guilty to one count of possession with intent to distribute heroin?” Tx. at 12.

Mr. Henderson was not asked whether he understood the indictment or whether he had discussed the charges with counsel. *Cf. Blinken v. State*, 46 Md. App. 579, 587, 420 A.2d 997, 1001 (1980) (“The judge did not merely ask the appellant whether he had discussed the charges with defense counsel, but the judge continued the inquiry on the record to determine that the appellant understood the indictment.”). Moreover, no summary of the elements of the offense was given. *Cf. Priet*, 289 Md. at 272-273, 424 A.2d at 352.

Mr. Henderson has only a high school education. Tx. at 5. He was pleading guilty to possession with intent to distribute heroin, an offense that requires specific intent. In addition, based on the statement of facts, the case involved theories of constructive and/or joint possession. It is therefore not clear, simply from a proffer of the factual basis for the plea, that Mr. Henderson would have understood the nature of the offense to which he was pleading and what the state would have needed to prove at trial. Thus, “the relevant circumstances in their totality as disclosed by the record, including, among other factors, the complexity of the charge, the personal characteristics of the

accused, and the factual basis proffered,” fail to establish that Mr. Henderson was informed of the nature of the offenses. *Priet*, 289 Md. at 288, 424 A.2d at 360.

E. The record does not establish that Mr. Henderson entered his plea voluntarily.

“Voluntariness” generally refers to whether the plea is free from coercion, threats or inducements. *See State v. Brazle*, 296 Md. 375, 383-84, 463 A.2d 798, 802-803 (1983). Mr. Henderson never was asked whether he had been coerced, threatened, or induced to enter his plea. As noted above, voluntariness may not be presumed from a silent record. As a result, Mr. Henderson’s plea must be invalidated.

Each of these shortcomings in the plea colloquy is sufficient on its own to invalidate Mr. Henderson’s conviction. In combination, they certainly establish that Mr. Henderson’s plea was not made knowingly and voluntarily and should be vacated.

III. An Expedited Hearing is Necessary.

Where, as here, a petitioner establishes that coram nobis is an appropriate avenue for relief, he is entitled to a hearing. *See Skok*, 361 Md. at 82, 700 A.2d at 663. In light of his pending federal sentencing, currently scheduled for December 2, 2004, Mr. Henderson requests an expedited hearing and decision on this petition.

Without an expedited hearing and decision, Mr. Henderson’s sentence will be increased dramatically, causing him to serve a period of incarceration beyond what is otherwise necessary and appropriate. If this Court grants Mr. Henderson relief prior to his federal sentencing hearing by vacating his conviction in these cases, he will receive an appropriate sentence of imprisonment. In

order to avoid the additional period of unnecessary incarceration, Mr. Henderson respectfully requests that the hearing and decision on this petition be scheduled as quickly as possible

Respectfully submitted,

JAMES WYDA,
Federal Public Defender for the District of Maryland

Joanna Silver
Assistant Federal Public Defender
100 S. Charles Street, Tower II, Suite 1100
Baltimore, MD 21201
410/962-3962 (phone)
410/962-0872 (facsimile)

**IN THE CIRCUIT COURT OF MARYLAND
FOR BALTIMORE CITY**

JEROME HENDERSON,
Petitioner

*

Criminal No. 201022015

v.

*

*

STATE OF MARYLAND,
Respondent

*

*

* * * * *

ORDER GRANTING PETITION FOR WRIT OF ERROR CORAM NOBIS

This Court, having considered the foregoing Petition for Writ of Error Coram Nobis, it is this
___ day of _____, 2003,

ORDERED that Petitioner’s Petition for Writ of Error Coram Nobis is **GRANTED** and
Petitioner’s conviction in Case No.201022015 in the Circuit Court for Baltimore City, *State of
Maryland v. Jerome Henderson*, is hereby **VACATED**.

JUDGE OF THE CIRCUIT COURT

CERTIFICATE OF SERVICE

I hereby certify that on this ___ day of September, 2004, a copy of the foregoing Petition for Writ of Error Coram Nobis and Request for an Expedited Hearing was hand-delivered to the Office of the State's Attorney for Baltimore City, Courthouse, 110 N. Calvert Street, Baltimore, MD 21202.

Joanna Silver
Assistant Federal Public Defender

DECLARATION OF JEROME HENDERSON

I, Jerome Henderson, hereby state as follows:

1. I entered a guilty plea on May 10, 2001 to one count of Possession with Intent to Distribute Heroin.
2. I have a prior criminal record, but I have never taken a case to trial until this year, when I challenged the accusation that I possessed a firearm in Federal Court.
3. In the course of my federal trial, I learned for the first time the meaning of some basic principles of criminal law: the burden of proof, the presumption of innocence, proof beyond a reasonable doubt, and constructive possession. I also learned about the right to counsel at trial and on appeal. I did not understand these principles and rights at the time I entered my guilty plea on May 10, 2001.
4. Although I met with my public defender at the jail before my court date, he did not explain these principles and rights to me. In fact, we mostly spoke about how he had asked for a postponement of my case because he had a murder trial coming up. All he told me about my rights was that I could choose whether to have a trial or to plead guilty and that I would get less time if I pled guilty.
5. On my court date, I had a different public defender. It made me very nervous to have a different lawyer show up to court. She told me in the courtroom that if I pled guilty, I would get two years in prison. She said that I could choose to plead guilty or not, but she strongly suggested I plead guilty.
6. I pled guilty because the police said they found drugs nearby me and I

didn't know how to prove that it wasn't true. I now understand that it wasn't up to me to prove anything. I would have had a lawyer who would have put the state to its test, including appealing if an error was made at the trial. I also know now that if my lawyer had done a bad job, I could have asked for post-conviction relief.

7. If I had known then what I know now, I would not have pled guilty. What's more, if I had known then that my lawyers had failed to tell me everything I needed to know, I would have appealed or asked for post-conviction relief at the time. Unfortunately, back then, I didn't know that they'd made mistakes and I didn't know I could file a post-conviction petition.

8. My lawyers had told me the same kinds of things that I had been told in my prior cases. I told the court that I was satisfied with the representation I had received because I didn't know that there was anything more to it.

I declare under penalty of perjury that the foregoing is true and correct.

Jerome Henderson

Dated: _____

**IN THE CIRCUIT COURT OF MARYLAND
FOR BALTIMORE CITY**

JEROME HENDERSON,
Petitioner

*

*

Criminal No. 201022015

v.

*

STATE OF MARYLAND,
Respondent

*

*

* * * * *

**PETITIONER’S REPLY TO STATE’S RESPONSE TO
PETITION FOR WRIT OF ERROR CORAM NOBIS**

Petitioner Jerome Henderson, through counsel, James Wyda, Federal Public Defender for the District of Maryland, and Joanna Silver, Assistant Federal Public Defender, hereby replies to the state’s response to his petition for writ of error coram nobis.

Contrary to the state’s assertion, Maryland law expressly contemplates the availability of the writ of error coram nobis when “a convicted person, who is not incarcerated and not on parole or probation, [] is suddenly faced with a significant collateral consequence of his or her conviction,” *Skok v. State*, 361 Md. 52, 78, 760 A.2d 647, 661 (2000), such as the threat of conviction under a “recidivist statute,” *id.* at 77, 661. This is precisely the situation confronting Mr. Henderson, who faces fifteen years to life in prison because of his prior conviction in what would otherwise be a ten-year case. *Cf. State v. Hicks*, 139 Md. App. 1, 9-10, 773 A.2d 1056, 1061-62 (2001) (approving coram nobis remedy for petitioner facing sentence under the same federal statute at issue here). Because no other remedy is available to him, Mr. Henderson’s coram nobis petition is appropriately

filed. *See Skok*, 361 Md. at 77, 760 A.2d at 660.⁷

As Mr. Henderson acknowledged in his petition, the transcript of the challenged plea proceeding appears comprehensive, Petition at 4; however, a close reading reveals several flaws of a “constitutional or fundamental” nature, *id.* at 78, 661. Those flaws include: the failure to advise as to the burden of proof, standard of proof, and presumption of innocence, *see State v. Hicks*, 139 Md. App. 1, 11, 773 A.2d 1056, 1062 (2001); the failure to advise of the right to assistance of counsel at trial and on appeal, *see Carnley v. Cochran*, 369 U.S. 506, 516 (1962); failure to advise of the maximum possible penalty, *see Mathews v. State*, 15 Md. App. 686, 692, 292 A.2d 131, 134 (1972); and failure to advise as to the nature of the offense, *see Priet v. State*, 289 Md. 267, 287-88, 424 A.2d 349, 359 (1980). The state has responded to only one of these—the failure to advise as to the nature of the offense.⁸

In responding to that claim, the state suggests that because counsel told Mr. Henderson the name of the offense to which he was pleading guilty, “possession with intent to distribute heroin,” and because the state’s attorney read a statement of facts, he was adequately advised of the nature of the offense. Although the law does not require a “ritualistic” recitation of the elements of the offense, *see State v. Priet*, 289 Md 267, 288, 424 A.2d 349, 361 (1981), it requires more than the application of a label to a set of facts, as occurred here.

As noted in Mr. Henderson’s petition, Rule 4-242(c) at least “contemplates that the court will

⁷ Because the court’s finding of voluntariness is not the sort of “fact” contemplated by *Keane v. State*, 164 Md. 685, 166 A.2d 110 (1933) (holding that writ of error coram nobis cannot be invoked to review evidence presented to jury and reverse judgment of conviction), that case does not preclude relief.

⁸ Counsel concedes that Mr. Henderson was asked whether he had been coerced, threatened, or induced to enter his plea. *See Response* at 4, Tx. at 9. We apologize for our error.

explain to the accused, in understandable terms, the nature of the offense to afford him a basic understanding of its essential substance” *Priet*, 289 Md. at 288, 424 A.2d at 359-360. Mr. Henderson was not asked whether he understood the indictment or whether he had discussed the charges with counsel. *Cf. Blinken v. State*, 46 Md. App. 579, 587, 420 A.2d 997, 1001 (1980) (“The judge did not merely ask the appellant whether he had discussed the charges with defense counsel, but the judge continued the inquiry on the record to determine that the appellant understood the indictment.”).⁹ Moreover, no summary of the elements of the offense was given. *Cf. Priet*, 289 Md. at 272-273, 424 A.2d at 352. As noted at page eight of the petition, Mr. Henderson cannot be expected to have understood the complicated concepts underlying the offense of possession with intent to distribute—such as specific intent and constructive possession—from this record. Clearly, he was not adequately advised of the nature of the offense to which he was pleading guilty.

With respect to Mr. Henderson’s other claims, the state simply asserts that counsel’s advisement covered the rights in question. In fact, it did not. Although counsel advised Mr. Henderson of the right to a jury trial, she did not discuss the burden of proof, the standard of proof, or the presumption of innocence. *See Tx.* at 7-9; *Petition* at 5-6. Although counsel implied in the context of her advice regarding the jury trial that counsel would be present at trial, she did not explain Mr. Henderson’s right to assistance of counsel at the trial. *See Tx.* at 7-9, *Petition* at 6 & n.5. She never mentioned the right to assistance of counsel on appeal. *See Tx.* at 9; *Petition* at 6. She

⁹ The state points to the public defender’s statement that “Mr. Hitchpack [had] been over to the jail and he’s discussed this matter with you concerning your rights to plea and your rights to have a trial,” *Tx.* at 6, in asserting that Mr. Henderson understood the nature of the offense and all of his fundamental rights. In fact, all this statement suggests is that Mr. Henderson knew he had a choice between having a trial or pleading guilty. His awareness of that choice says little about whether he was advised of the rights implicated in the choice or whether he made the choice knowingly, intelligently and voluntarily.

also failed to state the maximum possible penalty for the offense. *See* Tx. at 3; Petition at 7 & n.6. That Mr. Henderson claimed to understand the rights that *were* described to him is irrelevant; he could not knowingly, intelligently and voluntarily give up rights *about which he was not even aware*. *Cf. Boykin v. Alabama*, 395 U.S. 238, 242-43 (1969); *Holloway v. State*, 8 Md. App. 618, 620-21, 261 A.2d 811, 812 (1970); *Metheny v. State*, 359 Md. 576, 598, 755 A.2d 1088, 1101 (2000).

Finally, the state suggests that Mr. Henderson waived his right to bring these claims in coram nobis by failing to lodge an appeal or a post-conviction challenge at the appropriate time. An allegation of error is waived only if a petitioner could have made it, but *intelligently and knowingly* failed to make it. *See* Uniform Post-Conviction Procedure Act, Md. Crim. Proc. § 7-106(b)(1)(i). There is no waiver here because Mr. Henderson was not aware that errors had been made in his plea proceeding and, even if he had been aware of the errors, did not understand that a remedy existed. Thus, an intelligent and knowing waiver was impossible. If Mr. Henderson had known that his counsel had been ineffective in advising him of his fundamental rights and that he could seek relief on that basis, he would have done so. *Cf. Hicks*, 139 Md. App. 1, 14, 773 A.2d 1056, 1064 (“[A] trial court could find that at the time [the petitioner] entered his guilty plea, he was . . . unaware that the wrong analysis had been utilized . . . and that the assumptions that he made were material to his decision to enter a guilty plea”); *Curtis v. State*, 395 A.2d 464, 284 Md. 132 (1978).¹⁰

¹⁰ The court may make these findings from the record, *see Hicks*, 139 Md. App. at 14, 773 A.2d at 1064; however, an affidavit by Mr. Henderson establishing these facts is attached to this Reply at Exhibit A.

The law establishes that the courts must assure that individuals are advised of their fundamental rights prior to entering a guilty plea. Any one of the four grounds raised in Mr. Henderson's petition—three of which the state never meaningfully contests—is sufficient to call into question the voluntariness of his plea. In combination, they certainly warrant vacating the conviction. We respectfully request that the Court grant that relief.

Respectfully submitted,

JAMES WYDA,
Federal Public Defender for the District of Maryland

Joanna Silver
Assistant Federal Public Defender
100 S. Charles Street, Tower II, Suite 1100
Baltimore, MD 21201
410/962-3962 (phone)
410/962-0872 (facsimile)

CERTIFICATE OF SERVICE

I hereby certify that on this ___ day of October, 2004, a copy of the foregoing Reply was hand-delivered to the Office of the State's Attorney for Baltimore City, Courthouse, 111 N. Calvert Street, Lower Level, Baltimore, MD 21202, attn: Ahmet Hisim, Assistant State's Attorney.

Joanna Silver
Assistant Federal Public Defender