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IN THE SUPREME COURT OF FLORIDA

CASE NUMBER-92,653

VICTOR WILLIAM ROSS,

PETITIONER

V.

THE STATE OF FLORIDA,

RESPONDENT

# INITIAL BRIEF OF PETITIONER ON THE MERITS

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**OTHER SOURCES:**

33 [illegible] **ALR 5th 571** **25**

## STATEMENT OF THE CASE AND FACTS

This case, along with four others[1], was decided by an EN BANC Third District Court of Appeal. The facts pertinent to the appeal of these cases , except for the facts of this case, were similar. In PEART, JIMENEZ, and EVANS, the individuals-none of them citizens of the United States-- alleged that they had entered guilty pleas to criminal charges, but that during the plea colloquy the trial court failed to advise them of the potential immigration consequences of the plea, as it was required to do under Florida Rule of Criminal Procedure 3.172(c)(8). In PRIETO, the alien Appellant alleged that neither his attorney nor the trial court had advised him of the potential immigration consequences of his plea.

In this case, unlike the others with which it was grouped below, Petitioner ROSS, a citizen of Grenada,

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[1] The other cases were PEART v. STATE, case number 97-2299, PRIETO v. STATE, 96-2432, STATE v. EVANS, 96-1205, and JIMENEZ v. STATE, 95-3248. All case numbers are from the Third District Court of Appeal.

alleged that in 1980 while pleading guilty to a criminal charge the trial court had expressly, though unintentionally, misadvised him about the immigration consequences of his plea, by telling him no immigration difficulties would flow from the entry of the plea.

In all of the cases referred to above , the affected individuals face deportation by the United States Immigration and Naturalization Service (INS) as a consequence of having entered their guilty pleas.

Each of the individuals referred to above sought relief in the trial court after learning of INS's intention to seek their deportation. In seeking to have the trial court set aside their guilty pleas, they used a variety of vehicles. Petitioner Ross requested that the trial court either allow him to withdraw his plea and set aside his sentence or, alternatively, grant him CORAM NOBIS relief.

All of the individuals referred to above were unsuccessful in their efforts before the trial courts except for EVANS, to whom coram nobis relief was granted.

The foregoing facts are taken from the EN BANC opinion of the district court, at pages 4-7 thereof.

Alone among the Appellants Petitioner ROSS contended, in his supplemental brief to the EN BANC district court, that aside from coram nobis relief, he should also receive the opportunity to have his guilty plea vacated and set aside for the reasons set forth in this court's opinion in WILLIAMS v. STATE, 316 So.2d 267 (Fla. 1975). Petitioner urged the district court to rule, consistent with WILLIAMS, that in order to prevent manifest injustice, withdrawal of a plea of guilty should be allowed even after sentence has been imposed and served. SEE supplemental brief of Petitioner ROSS to the EN BANC district court, at pages 15-17 thereof.

In it's opinion under review here, that court acknowledged that the cases raised the common issue of whether coram nobis relief or post conviction relief was available to attack a conviction based on the trial court's failure to tell defendants of the deportation consequences of their pleas, as F.R. Cr. P. 3.172(c)(8)

requires a trial court to do.

The Third District held that "the traditional writ of error coram nobis is not an available remedy" for the following reasons:

1) The basis for the coram nobis relief sought in these cases was what the court described as an "irregularity in the plea colloquy". This was not, in the lower court's view, an error of fact or an assertion of newly discovered evidence, but, rather, an error of law for which coram nobis relief is not available.

2) Petitioner Ross was on probation for 18 months after entering his guilty plea. The Third District ruled that, during his probationary period, he could have sought post-conviction relief by filing a motion for post-conviction relief pursuant to F.R. Cr.P. 3.850 during that period. Thus, the district court reasoned, he had other relief available beside the writ of coram nobis. Since the writ of coram nobis is not available to those who have an alternative avenue of relief available, it was unavailable to ROSS for this reason

as well. SEE opinion of EN BANC Third District, at pg. 9. [2]

3)The motion filed pursuant to F.R.Cr.P. 3.850 seeking post conviction relief must be brought within two years after the judgment and sentence become final, so ROSS lost on this statute-of-limitation point as well. SEE pages 8-10 of the opinion of the EN BANC district court.

At the crux of it's opinion, the district court acknowledged what it considered to be shortcomings in the law:

"It is this court's view that the law does not presently provide non-custodial defendants relief. (citations omitted.) We recognize thatas to non-custodial defendants this may be a harsh and unfair

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[2] The case from this court which the district court cited to support it's contention that persons on probation were nevertheless considered "in custody" while they were on probation for purposes of being eligible to seek post conviction relief under F.R. Cr.P. 3.850 -and thus being ineligible for CORAM NOBIS relief; STATE v. BOYLEA, 520 So.2d 562, was decided in 1988, 8 years after Petitioner entered his plea. To use this decision, as the district court did, to **retroactively** deny Petitioner CORAM NOBIS relief is patently unjust.

result. ... We believe that persons not in custody should be allowed post-conviction relief for failure of a trial court to advise them of the deportation consequences of their plea as required by F.R.Cr. P. 3.172(c)(8). We recognize that Rule 3.850 does not presently provide these defendants with a remedy. In view of our present holding denying coram nobis relief on these cases, we respectfully suggest that the Florida Supreme Court consider whether a rule should be adopted to address the issue of post-conviction relief for persons not in custody, either as a general proposition or as related specifically to the issue of immigration consequences." EN BANC opinion, at pg. 10.

The court went on to say that the 2 year period within which motions for relief must be brought is triggered not by the onset of deportation proceedings, which may occur many years after the judgment and sentence become final, but rather by the entry of the judgment and sentence themselves. No allowance was made for situations such as that of petitioner, who no one

has ever legitimately contended would have known anything was amiss until many years after his judgment and sentence had become final.

Finally, the district court certified conflict between it's opinion, and the opinions of the Fourth District in MARRIOT v. STATE, 605 So.2d 985( 4th DCA Fla. 1992) and WOOD v. STATE, 698 So.2d 293 (1st DCA Fla. 1997) review granted, No. 91,333.

In MARRIOT, a case where the EN BANC Fourth District ruled on the question of whether the trial court's failure to advise him of the immigration consequences of his plea sufficiently prejudiced him so that he should be permitted to withdraw his plea, the critical holdings were as follows:

1) The failure of a trial court to advise the pleading defendant of the immigration consequences of his plea is in and of itself sufficient prejudice so that he should be permitted to withdraw his plea. 605 So.2d at 987.

2) The writ of coram nobis is the proper vehicle to

raise claims such as those raised in these cases for defendants no longer in custody.

These two holdings are, as the Third District recognized, in conflict with it's holdings as set forth at pages 7-9 and 11-12 of it's opinion.

In WOOD, the First District held that the two-year statute of limitations applicable to F.R.Cr. P. 3.850 motions applied to petitions for writs of coram nobis as well. 698 So.2nd at 294. Thus the court did implicitly hold, 698 So.2nd at 294 contrary to the holding of the Third District here, SEE opinion of EN BANC Third District at page 3, that claims such as these could be raised by petitions for writs of error coram nobis.

Relief was denied Petitioner ROSS, and he brings this case to this court, based on the certification of conflict by the Third District Court of Appeal between its decision here, and those of the First and Fourth

District in WOOD and MARRIOT, respectively.[2]

[2]Additionally, the Third District acknowledged that it's holding was in conflict with VONIA v. STATE, 680 So.2nd 438 ( 2nd DCA Fla. 1996), although it did not certify conflict with that decision. Opinion of Third District, Pg. 10.

## SUMMARY OF THE ARGUMENT

### I

Article V, section 2(a) of the Florida Constitution provides this Court with exclusive authority to adopt rules for practice and procedure in the Courts of this State. TGI FRIDAY'S v. DVORAK, 663 So.2d 606 (Fla. 1995). Such matters as setting the time for seeking appellate review, the transfer to the court having jurisdiction of any proceedings when the jurisdiction of another court has been improvidently invoked, and most importantly to this case, promulgation of rules of criminal procedure, are within the exclusive authority of this court. Fla. Const. Art. V, section 2.

Petitioner submits that, pursuant to it's supervisory authority and rule-making power as delineated in the Constitution, and recognized by the Court below when it suggested that this Court adopt a rule addressing the issue of post conviction relief for persons not in custody, this Court should promulgate a

rule of criminal procedure providing that if a defendant is either not advised, or misadvised, by the trial judge concerning the immigration consequences of his plea, he ought to be able by motion to withdraw that plea. Further, petitioner suggests that contrary to what the court below ruled, the only fair triggering point for a statute of limitations on the right created by this rule should be measured from the time the movant should reasonably be aware that circumstances exist which justify him in seeking to withdraw his plea.

To do what the court below did, and limit the bringing of a motion to withdraw a plea to two years from the time the judgment and sentence become final, would bar people such as Petitioner from seeking relief for no good purpose. Such a ruling appears to contradict Article I, Section 21 of the Florida Constitution which provides that the Courts shall be open to every person for redress of any injury, unless there is an overpowering public necessity to limit such access. SEE DAMIANO v. McDANIEL, 689 So.2d 1659 (Fla. 1997).

## II

Petitioner submits that the issue in his case, which involved an error of fact committed by the trial judge, is precisely the type of error designed to be rectified by CORAM NOBIS relief.

The question of how to distinguish an error of law from an error of fact is one which has vexed and continues to vex courts all over the country. One practical way to separate one from the other is this: If the question is: what happened?, then a question of fact exists. If there is no dispute over what happened, but the question is what is the **significance** of what happened, then a question of law exists.

In Petitioner ROSS'S case, Petitioner alleged that he was misadvised by the trial judge. The state argued that this allegation was not proven. Thus, a factual dispute existed which CORAM NOBIS relief is precisely designed to address.

## III

Petitioner has alleged throughout this litigation that he entered his guilty plea based on a misunderstanding or misapprehension of the facts presented to him, specifically the erroneous advice given him by the well-meaning trial judge. This situation is one which, for nearly fifty years in this State, has entitled a defendant to withdraw his guilty plea.

Quite apart from whether or not CORAM NOBIS relief is available to petitioner, an unbroken string of decisions from this Court has consistently held that on the facts he has presented, he should have been allowed to withdraw his guilty plea.

## ARGUMENT

## I

## THIS COURT SHOULD, PURSUANT TO IT'S RULE-MAKING POWERS, ADOPT A RULE OF CRIMINAL PROCEDURE ADDRESSING THE ISSUES PRESENTED IN THIS CASE

The lower court, in it's EN BANC decision, expressly suggested that this court "consider whether a rule should be adopted to address the issue of post-conviction relief for persons not in custody, either as a general proposition or as relates specifically to the issue of immigration consequences." Pg. 10, EN BANC opinion.

This court should accept that suggestion.

Why? Because as things currently stand, F.R. Cr.P. 3.172(c)(8)[3] is susceptible of different interpretations.

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[3]Bear in mind that this rule did not take effect until 8 years after Petitioner ROSS had entered his plea, But for purposes of the argument, we will assume the rule was in effect at the time the plea took place.

Consider this: the rule requires that the trial judge personally advise the defendant that, if he or she is not a U.S. citizen, the entry of a plea of guilty or nolo contendere may subject him or her to deportation, and that this admonition should be given to defendants in all cases. In section (i) of rule 3.172, it is stated that failure to follow any of the procedures of this rule shall not render a plea void absent a showing of prejudice.

What does the term "prejudice" mean?

To a reasonable person, Petitioner submits that prejudice means a person is adversely affected by a non-compliance with the Rule. Surely Petitioner fits this description. After all, he relied upon advice given to the trial judge, and as a result faces deportation. This appears to constitute prejudice by any commonly accepted definition of the word.

The EN BANC decision below, on the other hand, took a more constrained view of prejudice. It held that "prejudice" meant that a defendant most probably would

have been acquitted had he gone to trial. EN BANC opinion at Pg. 12. It relied on this Court's opinion in JONES v. STATE, 591 So.2d 911. (Fla. 1991)

There are two things wrong with this constrained view. First, in a practical sense, the art of forecasting, whether in weather or law, is a notoriously unreliable endeavor. Second, in a legal sense, JONES does not apply to this case.

To start with, every lawyer with any experience knows he or she has lost cases that should have been won, and won cases that should have been lost. No lawyer worthy of the title can or should tell a client how a case will be resolved. Advice can be given, predictions can be made. But anyone with experience in the profession, from the perspective of either judge or lawyer, knows that no one can predict with any degree of certainty what a fact finder will do. Therefore, to force a party to prove that he or she "most probably" would have been acquitted at trial is simply an exercise in speculation. This sort of vague, subjective law is a

recipe for injustice. Depending on the attitude of the judge, or the panel of judges, the exact same set of facts could yield different conclusions. Thus, using this criteria to prove prejudice is a mistake.

Second, this court's decision in JONES v. STATE, cited by the district court in support of it's holding that a defendant must prove he probably would have been acquitted at trial in order to be able to withdraw his guilty plea, involved an issue very different than that involved here.

In JONES, the recently executed murderer LEO JONES appealed to this court the denial of a motion he had filed seeking postconviction relief. The issue in the case was whether his claims of newly discovered evidence should entitle him to set aside his conviction. 591 So.2d at 914.

This Court held that to overturn a conviction, a defendant alleging that he had newly discovered evidence must prove that this evidence was of such a nature that it probably would produce an acquittal on retrial. 591

So.2d 915.

This standard makes sense in the context of analyzing whether newly discovered evidence should result in a new trial. To import this standard-as the district court did here-- into a situation which did not involve a trial at all but involved instead a trial judge's failure to comply with the plain dictates of the law makes no sense whatsoever, and is akin to importing a Valencia orange tree to Hibbing, Minnesota and expecting it to thrive.

The approach taken by the Fourth District, in MARRIOT, has two virtues that the decision of the Third District lacks: ease of application and certainty.

EASE OF APPLICATION:

As the Fourth District in MARRIOT stated:

"We conclude that F.R. Cr. P. 3.172(c)(8) renders it mandatory for the trial judge to instruct all defendants in all cases regarding possible immigration consequences." 605 So.2d at 987.

Thus, all a appellate court applying the Fourth

District's rule needs to do is to see if the rule was complied with by the trial judge. No "mini-trial" necessary under the procedure required by the Third District, at Pgs. 11-12 of it's opinion, is required.

CERTAINTY

The Fourth District also said in MARRIOT that "We hold that the threat of deportation was sufficient for a showing of prejudice as required under SIMMONS v. STATE, 489 So.2d 43."(4th DCA Fla. 1986).

There is no need to consult a soothsayer, legal or otherwise, to determine if the defendant "most probably" would have been acquitted.

Again, all an appellate court applying the Fourth District's rule needs to do is to see:

1) Whether Rule 3.172(c)(8) was complied with? If not, the only other question is

2) Whether the guilty or nolo contendere plea entered in the case led to the institution of deportation proceedings?

If so, than the defendant should be allowed to

withdraw his plea.

So, in sum, Petitioner urges this Court to adopt the rule of the Fourth District in MARRIOT that failure to comply[4] with F.R. Cr.P. 3.172(c)(8) gives the defendant the right, where deportation proceedings have been instituted based on the entry of the plea, to withdraw his plea.

The rule urged by Petitioner here would need to be invoked within a specific period of time, to respond to the concerns raised by the Third District at Pages 12-13 of it's opinion. However, to say as did the Third District that the triggering point for the rule should two years from when the judgment and sentence become final is unduly rigid. No case better illustrates the potential for injustice posed by the Third District's ruling than Petitioner's. Recall his facts:

He pled guilty in 1980. He was put on 18 months

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[4]Petitioner observes that the rule he urges here should apply with even greater force to those hopefully rare situations such as his where the trial judge affirmatively misadvises the defendant who is tendering a plea.

probation which he successfully completed. For more than a decade after his probation ended, he lived a legally uneventful life, with no reason to believe that his case from 1980 would be a factor in his life again. It was only after he applied to become a citizen in 1996, and his application was answered by a notice of deportation, that he realized something was amiss. Thereafter, he took speedy action. Pg. 5 of Opinion.

The Third District would deny him relief based upon it's concern about stale court files and unavailable witnesses or evidence, Pgs. 12-13 of opinion. These are surely legitimate concerns. But what about the competing considerations of equity and justice? These are given short shrift by the Third District. Surely if Petitioner had received his deportation notice in 1985 and then did nothing for 11 years, it could be argued that laches should apply. But that was not the case, as the facts demonstrate.

Therefore, the rule proposed by petitioner should be tempered by a provision that the concept of laches

should apply, where appropriate, to prevent claims from being brought that should have been brought at an earlier point in time. This will address the concerns expressed by the Third District, yet not work undue hardship upon those seeking relief.

## II

## CORAM NOBIS OUGHT TO BE AN AVAILABLE REMEDY FOR AN OUT OF CUSTODY DEFENDANT SEEKING TO WITHDRAW HIS GUILTY PLEA BASED ON A TRIAL COURT'S FAILURE TO ADVISE, OR AFFIRMATIVE MISADVICE, REGARDING THE IMMIGRATION CONSEQUENCES OF THE PLEA

In holding that the traditional writ of error coram nobis was not an available remedy for the type of cases discussed here, the Third District concluded that the defendants sought coram nobis relief based on what it perceived as an error of law, specifically what it described as an "irregularity" , in the plea colloquy. Since the function of a writ of error coram nobis is to correct fundamental errors of fact, and not to correct errors of law, the district court reasoned, coram nobis relief was not available. Opinion of Third District at Pgs.7-8.

The problem with this broad holding is that it fails to show appropriate concern for the difficulties

in distinguishing between questions or errors, of fact, and questions or errors of law.

At the outset, no one can dispute that courts often differ over what is a question of fact, and what is a question of law. Consider the following situation.

Many jurisdictions have a rule in criminal proceedings that a defendant cannot be convicted based on a confession alone. The confession must be corroborated by other evidence in order to establish the corpus delicti. The purpose of this corroboration, of course, is to prevent a person from being convicted of a crime through his confession, when in fact no such crime has been committed by anyone.

The question is, who should make the determination as to whether there is sufficient evidence of corroboration to establish corpus delicti? Some courts hold that this determination is a question of law to be decided by the trial court alone. Other courts have determined that the issue is one of fact, exclusively for the jury. Still others have concluded that the

determination is a mixed question of law and fact to be made by both the jury and the court.[5]

The point is that there are some issues which are difficult to catagorize as questions of law or fact. This difficulty as it relates to the matters at issue here is pointed up by the fact that both the First and Fourth District have concluded that a petition for writ of coram nobis is appropriate, while the Third District has ruled it is not.

Regardless of the difficulty in distinguishing an error of fact from an error of law, Petitioner submits that his case presents a clear error of fact, and thus coram nobis relief is appropriate.

What was the error of fact? It was, simply, the trial judge telling Petitioner in response to his question that there would be no adverse immigration consequences accruing to him from the entry of his guilty plea. This advice, or perhaps more appropriately

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[5]For an interesting annotation on this subject, and a description of the positions taken by different courts throughout the country, see 33 ALR 5TH 571.

**mis**advice, was factually wrong. SEE HALLMAN v. STATE, 371 So.2d 482( (Fla. 1979), LEAVITT v. STATE, 156 So. 904 (Fla. 1934) and LAMB v. STATE, 107 So.535 (Fla. 1926).

## III

## WELL-ESTABLISHED PRINCIPLES OF LAW ALLOWING A DEFENDANT TO WITHDRAW A GUILTY PLEA IN ORDER TO PREVENT MANIFEST INJUSTICE SUPPORT PETITIONER'S REQUEST FOR WILLIAMS RELIEF

As Petitioner argued to the lower court, this Court in WILLIAMS stated that even after the imposition of sentence, the trial court should allow the defendant to withdraw his guilty plea if the defendant proves, upon a timely motion for withdrawal, that withdrawal is necessary to correct a manifest injustice.

A motion for withdrawal is considered timely if made with due diligence, considering the nature of the allegations therein, and as noted above, is not necessarily barred because made subsequent to the entry of judgment or sentence. WILLIAMS v. STATE, 316 So.2d 267 at 273-4.

Just at this court has recently held that

misrepresentations to a defendant made by his counsel as to the length of a sentence or eligibility for gain time can be the basis for postconviction relief in the form of leave to withdraw a guilty plea, STATE v. LEROUX, 689 So. 2d 235 (Fla. 1996), so too-and all the more so--should misadvice by a trial judge justify similar relief.

Where a plea was based upon a misunderstanding or misapprehension of facts considered by the defendant in making the plea, withdrawal of the plea should be allowed. FORBERT v. STATE, 437 So.2d 1079, at 1981 (Fla. 1983).

What could be a clearer case of manifest injustice, or misunderstanding of facts considered in making a plea, than this case? As noted by Petitioner in his briefs to the lower court, he was told by the trial court that his guilty plea would not cause him any immigration problems. Acting on this advice, he proceeded to live the next 16 years of his life in a

law-abiding manner. It was only then, when he sought citizenship at a time well after the death of the original trial judge and the destruction as authorized by law of the court reporters notes of Petitioner's guilty plea, that he realized he had a problem. How could he have been reasonably expected to know of this problem earlier, in view of what the trial judge told him?

Petitioner contends that fidelity to the principles of WILLIAMS, FORBERT, and LEROUX compels the conclusion that the lower court erred in denying him relief, and that he should be allowed to withdraw his guilty plea.

## CONCLUSION AND CERTIFICATE OF SERVICE

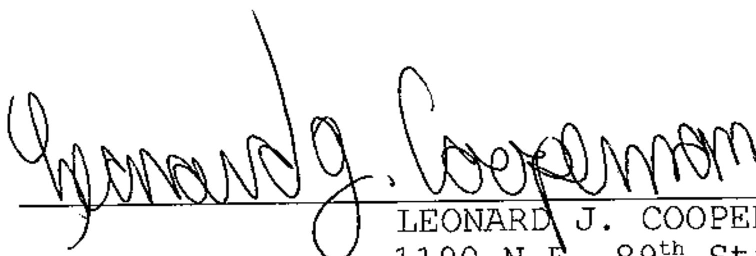
Petitioner asks this court to grant him relief under either or both of the following principles:

1) That this Court adopt the rulings of the Fourth District and First District in MARRIOT and WOOD, respectively, and hold that CORAM NOBIS relief applies to petitioners case, utilizing the statute of limitations petitioner suggests.

2) That regardless of whether coram nobis relief is available to petitioner, he should be granted relief under the principles discussed in this Court's decisions in WILLIAMS , LEROUX, and FORBERT.

**CERTIFICATE OF SERVICE**

I hereby certify that a true copy of this document was furnished by deposit in the U. S. Mail to the Attorney General's Office, 444 Brickell Av., 9th Floor, Miami, FL this 23rd day of April, 1998.



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NOT FINAL UNTIL TIME EXPIRES
TO FILE REHEARING MOTION
AND, IF FILED, DISPOSED OF.

IN THE DISTRICT COURT OF APPEAL

OF FLORIDA

THIRD DISTRICT

JANUARY TERM, A.D. 1998

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| ROAN PEART, | ** | |
| Appellant, | ** | |
| vs. | ** | CASE NO. 97-2229 |
| THE STATE OF FLORIDA, | ** | LOWER<br>TRIBUNAL NOS. 92-41276<br>92-2669 |
| Appellee. | ** | |

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| JORGE PRIETO, | ** | |
| Appellant, | ** | |
| vs. | ** | CASE NOS. 96-2432<br>96-961 |
| THE STATE OF FLORIDA, | ** | |
| Appellee. | ** | LOWER<br>TRIBUNAL NO. 93-38701 |

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| THE STATE OF FLORIDA, | ** | |
| Appellant, | ** | |
| vs. | ** | CASE NO. 96-1205 |
| ANDREW MOSES EVANS, | ** | LOWER<br>TRIBUNAL NO. 89-37421 |
| Appellee. | ** | |

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|---|---|---|
| JOSE JIMENEZ, | ** | |
| Appellant, | ** | |
| vs. | ** | CASE NO. 95-3248 |
| THE STATE OF FLORIDA, | ** | LOWER TRIBUNAL NO. 90-11985 |
| Appellee. | ** | |

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|---|---|---|
| VICTOR WILLIAM ROSS, | ** | |
| Appellant, | ** | |
| vs. | ** | CASE NO. 97-565 |
| THE STATE OF FLORIDA, | ** | LOWER TRIBUNAL NO. 79-19017 |
| Appellee. | ** | |

Opinion filed February 18, 1998.

Appeals from the Circuit Court for Dade County, Leslie B. Rothenberg, Maynard A. Gross, Richard V. Margolius, Leonard Glick, and Jennifer Bailey, Judges.

Robbins, Tunkey, Ross, Amsel, Raben & Waxman, and Benjamin S. Waxman; Bennett H. Brummer, Public Defender, and Julie Levitt, Assistant Public Defender; Jerold E. Reichler; Ana M. Jhones; Arthur E. Marchetta, Jr.; Bill Clay and Leonard Cooperman, for Roan Peart, Jorge Prieto, Andrew Evans Moses, Jose Jimenez, and Victor William Ross.

Robert A. Butterworth, Attorney General, and Michael J. Neimand, Assistant Attorney General, for the State of Florida.

Before SCHWARTZ, C.J., and NESBITT, JORGENSON, COPE, LEVY, GERSTEN, GODERICH, GREEN, FLETCHER, SHEVIN and SORONDO, JJ.

ON HEARING EN BANC AND REHEARING EN BANC

SHEVIN, Judge.

These appeals have been consolidated for en banc and rehearing en banc consideration because they raise the common issue of whether coram nobis or post-conviction relief is available to attack a conviction based on the trial court's failure to apprise defendants of the deportation consequences of their pleas pursuant to Florida Rule of Criminal Procedure 3.172(c)(8). We hold that the traditional writ of error coram nobis is not an available remedy for the reasons expressed herein. In so holding, we recede from Beckles v. State, 679 So. 2d 892 (Fla. 3d DCA 1996), and all other cases issued by this court to the extent they rely on Beckles. We grant rehearing, withdraw the opinions issued in Peart v. State, No. 97-2229 (Fla. 3d DCA Sept. 11, 1997); in Jimenez v. State, No. 97-3248 (Fla. 3d DCA Sept. 10, 1997); and in Ross v. State, No. 97-565 (Fla. 3d DCA April 30, 1997), and substitute the following:

These consolidated cases may be grouped into three categories: A) Defendants appeal from denials of coram nobis petitions, Peart, Jimenez, and Ross; B) State appealing from coram nobis relief granted, State v. Evans, No. 96-296; C) Defendant appeals from a denial of a timely motion for post-conviction relief, Prieto v. State, Nos. 96-2432; 96-961.

## I. Factual Background

In 1993, Roan Peart pled guilty to aggravated assault, armed robbery and burglary of a conveyance. The court withheld adjudication, credited Peart with seven months served in jail, and placed Peart on two-years probation, which Peart successfully completed. At the time, Peart was a citizen of Jamaica, and was a legal resident alien in the United States for over ten years.

In 1997, Peart filed a petition for writ of error coram nobis asserting that his plea was involuntarily entered because he was not advised of the deportation consequences of his plea. Peart asserted that as a result of his guilty plea, the United States Immigration and Naturalization Service ["INS"] had instituted deportation proceedings against him. Peart asserted that had he been advised he would not have accepted the plea and would have gone to trial. The trial court denied Peart's petition without an evidentiary hearing. Peart appeals.

In 1990, Jose Jimenez pled nolo contendere to possession of cocaine, in exchange for a withhold of adjudication and two days credit for time served. In 1995, INS notified Jimenez, a citizen of the Dominican Republic, that it was revoking his legal permanent resident status and initiating deportation proceedings against him. Like Peart, Jimenez also asserted, by way of petition for writ of coram nobis, that he was not advised of the deportation consequences of his plea, and that, had he known of

those consequences, he would not have entered the plea. The petition was denied. Jimenez appeals.

In 1980, Victor Ross pled guilty to manufacture and/or possession of cannabis with intent to sell, manufacture, or deliver. Ross pled and his adjudication was withheld; he was sentenced to eighteen months probation. Ross asserts that the trial court told him that there should be no deportation consequences as a result of the plea because a "withhold" was not a conviction.[1] Ross was a citizen of Grenada and a legal United States resident alien. In 1996, Ross applied for naturalization. In response to the application, INS informed Ross that he would be deported because of his 1980 plea. Ross filed a motion to withdraw his plea and set aside the sentence or, alternatively, for coram nobis relief. Ross asserted that he should be allowed to set his plea aside because the trial judge misadvised him of his deportation consequences; had he been correctly advised he would not have entered the plea. Ross appeals the denial of his motion.

Andrew Moses Evans pled nolo contendere to the charge of carrying a concealed weapon in 1990. He received credit for two

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[1] Ross' plea predates the adoption of Florida Rule of Criminal Procedure 3.172(c)(8). Compare infra slip op. at 7 with State v. Sallato, 519 So. 2d 605 (Fla. 1988)(affirmative misadvise about deportation consequences grounds for Rule 3.850 postconviction relief).

days he served in jail and a withhold of adjudication. Evans was a citizen of Jamaica and a legal permanent resident. In 1996, Evans filed a petition for coram nobis relief asserting that his plea was involuntary because he was not advised of the immigration consequences, and he would not have entered the plea had he known. Evans was facing deportation. The trial court granted the petition and vacated the judgment and sentence. The state appeals that order.

In 1994, Jorge Prieto pled guilty to attempted murder. However, pursuant to a plea agreement, Prieto received a twenty-year sentence and agreed to testify truthfully against a codefendant. Additionally, the state agreed to nolle prosequi a capital murder charge against Prieto. Under the plea agreement, if the state did not feel Prieto testified satisfactorily, the state could seek an increased sentence of life imprisonment on the attempted murder count and could refile the capital murder charge seeking the death penalty. Prieto filed a motion for post-conviction relief pursuant to Florida Rule of Criminal Procedure 3.850 to set aside the plea as defense counsel had not informed him of deportation consequences, and the INS had commenced deportation proceedings against him. During the hearing on the motion, Prieto sought leave to amend his motion to assert that the trial court had also failed to inform him of the deportation consequences of the plea. The court did not rule on the request to amend and denied the motion. The court granted

the state's motion to enhance Prieto's sentence and refile the capital murder charge based on the finding that Prieto did not testify satisfactorily. Prieto has lived in the United States since childhood, but is not a citizen. Prieto appeals.

This court consolidated these appeals for consideration en banc and rehearing en banc.

## II. Appropriate Relief

Florida Rule of Criminal Procedure 3.172(c)(8) requires the trial judge to inform defendants pleading guilty or nolo contendere that if defendant

> is not a United States citizen, the plea may subject him or her to deportation pursuant to the laws and regulations governing the United States Immigration and Naturalization Service. It shall not be necessary for the trial judge to inquire as to whether the defendant is a United States citizen, as this admonition shall be given to all defendants in all cases.

This provision became effective January 1, 1989. See In Re Amendment to Florida Rules of Criminal Procedure, 536 So. 2d 992 (Fla. 1988). Prior to this date, there was no affirmative duty to advise a defendant of deportation consequences. See State v. Ginebra, 511 So. 2d 960 (Fla. 1987). A criminal defendant may seek to set aside a plea for failure of the court to inform him of the deportation consequences of the plea if the defendant can show prejudice. Fla. R. Crim. P. 3.172(i).

The pivotal issue before us is whether a petition for writ of error coram nobis is the proper vehicle for challenging a

conviction based on the court's failure to follow Rule 3.172(c)(8). At the outset, it must be noted that

> the function of a writ of error coram nobis is to correct fundamental errors of fact, and that the writ is not available to correct errors of law. In order to be legally sufficient, the petition for writ of error coram nobis must, therefore, allege specific facts of such a vital nature that had they been known to the trial court, they conclusively would have prevented the entry of the judgment and sentence attacked; the petition must also assert the evidence upon which the alleged facts can be proved and the source of such evidence. The facts upon which the petition is based must have been unknown to the trial court, the defendant, and defense counsel at the time of trial; and it must appear that the defendant and his/her counsel could not have known such facts by the use of due diligence.

Malcolm v. State, 605 So. 2d 945, 947 (Fla. 3d DCA 1992)(emphasis added); Hallman v. State, 371 So. 2d 482 (Fla. 1979). The petitioner must have no other remedy available. Russ v. State, 95 So. 2d 594 (Fla. 1957).

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. State v. Garcia, 571 So. 2d 38 (Fla. 3d DCA 1990). Moreover, these petitions for relief do not assert claims "of such a vital nature that had they been known to the trial court, they *conclusively* would have prevented the entry of the judgment." Hallman, 371 So. 2d at 485. Coram nobis relief, therefore, is not the appropriate remedy. The proper remedy for the defendants to

pursue is, instead, a motion for post-conviction relief pursuant to Rule 3.850. Tolbert v. State, 698 So. 2d 1288 (Fla. 2d DCA 1997); Scott v. State, 423 So. 2d 978 (Fla. 1st DCA 1982). As articulated in Richardson v. State, 546 So. 2d 1037 (Fla. 1989), Rule 3.850 has supplanted the writ of error coram nobis.

We are unpersuaded by the defendants' argument that the request for relief is timely if brought when the defendants learn of impending deportation proceedings. These claims are not founded on newly discovered evidence and, therefore, do not fall under the Rule 3.850(b)(1) exclusion. The motion must be brought within two years "after judgment and sentence become final." Fla. R. Crim. P. 3.850(b).

We note that post-conviction relief is available for defendants who are placed on probation, such as Peart and Ross. State v. Boylea, 520 So. 2d 562 (Fla. 1988)(court-ordered probation constitutes custody for 3.850 purposes). Hence, as to defendants Peart and Ross, the availability of 3.850 relief renders coram nobis an improper remedy because defendants had other relief available.

Because defendants Jimenez and Evans were never in custody after conviction, but were released based on "time served" and they were not sentenced to serve any probation or placed on community control, Rule 3.850 relief to raise Rule 3.172(c)(8) violations was never available to them. It is this Court's view that the law does not presently provide non-custodial defendants

relief.[2] Contra Vonia v. State, 680 So. 2d 438 (Fla. 2d DCA), review denied, 672 So. 2d 544 (Fla. 1996)(petition for "all writs" coram nobis relief available to afford defendants out of custody same relief available to defendants in custody); Weir v. State, 319 So. 2d 80 (Fla. 2d DCA 1975)(same).

We recognize that as to non-custodial defendants this may be a harsh and unfair result. However, there is no present mechanism that provides relief under these circumstances, and it is beyond this Court's authority to alter the procedural rules to provide this relief. We believe that persons not in custody should be allowed post-conviction relief for failure of a trial court to advise them of the deportation consequences of their pleas as required by Rule 3.172(c)(8). We recognize that Rule 3.850 does not presently provide these defendants with a remedy. In view of our present holding denying coram nobis relief on these cases, we respectfully suggest that the Florida Supreme Court consider whether a rule should be adopted to address the issue of post-conviction relief for persons not in custody, either as a general proposition or as relates specifically to the issue of immigration consequences.

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[2] As a general note, the problem facing these defendants stems from recent congressional immigration law amendments. This problem must be addressed by Congress; our court lacks jurisdiction to correct it. The immigration consequences of a felony conviction have become increasingly harsh. A person who has lived in this country with his or her family for many years may consider deportation to be a far more draconian punishment than a brief period of incarceration.

## III. Prieto's Rule 3.850 Motion

As a final issue, we turn to Prieto's appeal from the denial of his 3.850 motion. The court erred in denying the motion and in granting the state's motion to increase sentence. Prieto filed his motion pro se. The record demonstrates that at the hearing counsel moved to amend the motion to assert the court's failure to warn of deportation consequences. Leave to amend a 3.850 motion should be freely granted. Reed v. State, 640 So. 2d 1094, 1098 (Fla. 1994); Nava v. State, 659 So. 2d 1314 (Fla. 4th DCA 1995). Therefore, we reverse the order denying Prieto's 3.850 motion and remand with leave for Prieto to amend his motion.

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;[3]

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[3] In applying this requirement to Prieto's case, when the court considers whether Prieto had "actual knowledge of immigration consequences" the court should consider Prieto's acknowledgment in his Initial Brief to this court, as reflected in his motion for post-conviction relief, that his counsel "misinformed him that he would not be deported as a result of the plea[.]" Initial Brief, at p. 2.

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.

Upon accepting a plea, it is very important that trial judges comply with Rule 3.172(c)(8) and advise all defendants in all cases that "the plea may subject him or her to deportation." Fla. R. Crim. P. 3.172(c)(8). It is equally important for the prosecutor and defense counsel to immediately advise the court of any inadvertent failures to so advise, so that this may be corrected immediately.

Based on the foregoing reasoning, we recede from Beckles, and its progeny and certify conflict with Marriott v. State, 605 So. 2d 985 (Fla. 4th DCA 1992), and Wood v. State, 698 So. 2d 293 (Fla. 1st DCA 1997), review granted, No. 91,333 (Fla. Jan. 12, 1998). We affirm the denial of relief in Peart, Jimenez, and Ross, reverse the order granting coram nobis in Evans, and reverse the order in Prieto denying the post-conviction relief motion with instructions to permit Prieto to amend the motion in a manner consistent with this opinion.

Conflict certified; affirmed in part; reversed in part and remanded.