IN THE SUPREME COURT OF FLORIDA

CASE NO. 92,652

DCA NOS. 96-2432 & 96-961
(consolidated, and decided *en banc* with *Peart v. State*, 97-2229)

JORGE PRIETO,

Petitioner,

v.

THE STATE OF FLORIDA,

Respondent.

ON PETITION FOR DISCRETIONARY REVIEW
(CERTIFIED CONFLICT)

PETITIONER'S REPLY BRIEF ON THE MERITS

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INTRODUCTION

Petitioner, Jorge Prieto, was the Defendant in the trial court and the Appellant before the District Court of Appeal of Florida, Third District. The Respondent, the State of Florida, was the prosecution in the trial court, and the Appellee before the Third District Court of Appeal. The parties are referred to in this brief as Petitioner and Respondent or by proper name where appropriate.

STATEMENT OF THE CASE AND FACTS

Petitioner relies on the Statement of the Case and Facts as relayed in his initial Brief on the Merits.

QUESTION PRESENTED

WHETHER THERE IS NEITHER LOGICAL NOR LEGAL SUPPORT FOR THE HOLDING OF THE THIRD DISTRICT COURT OF APPEAL BELOW THAT A DEFENDANT SEEKING TO WITHDRAW A PLEA ON THE BASIS THAT THE TRIAL COURT FAILED TO ADVISE HIM OR HER THAT THE PLEA COULD RESULT IN DEPORTATION MUST PROVE NOT ONLY FAILURE TO ADVISE AND THE INSTITUTION OF ACTUAL DEPORTATION PROCEEDINGS AS PREVIOUS CASES HAVE HELD, BUT ALSO THAT HE OR SHE PROBABLY WOULD HAVE BEEN ACQUITTED HAD HE OE SHE GONE TO TRIAL?

SUMMARY OF ARGUMENT

The State has offered no logical support for its argument that a defendant seeking to withdraw his plea on the basis that he was not advised of the deportation consequences thereof, should be required to prove as part of the "prejudice or manifest injustice" calculus that he is actually innocent of the charges against him. This requirement is not applied in other circumstances where a defendant seeks to withdraw his plea on the basis that he was not advised of the consequences thereof, nor is there any basis for adding it in this situation. Rather, what the analysis turns on is that the failure to advise the defendant of the consequences of the plea undermines the voluntariness of the plea. Accordingly, that is a sufficient basis alone upon which to justify withdrawal. The Third District in not so holding, and its decision cannot stand.

ARGUMENT

THERE IS NEITHER LOGICAL NOR LEGAL SUPPORT FOR THE HOLDING OF THE THIRD DISTRICT COURT OF APPEAL BELOW THAT A DEFENDANT SEEKING TO WITHDRAW A PLEA ON THE BASIS THAT THE TRIAL COURT FAILED TO ADVISE HIM OR HER THAT THE PLEA COULD RESULT IN DEPORTATION MUST PROVE NOT ONLY FAILURE TO ADVISE AND THE INSTITUTION OF ACTUAL DEPORTATION PROCEEDINGS AS PREVIOUS CASES HAVE HELD, BUT ALSO THAT HE OR SHE PROBABLY WOULD HAVE BEEN ACQUITTED HAD HE OE SHE GONE TO TRIAL.

In its Answer Brief, the State asserts that the Third's District's holding that a defendant must prove actual innocence before he or she may be allowed to withdraw his or her plea is correct. The State makes no attempt to address the arguments presented in Petitioner's initial Brief on the Merits that the Third District's ruling cannot be squared with logic.

Further, and equally significant, the State has overlooked that in no other context regarding motions to withdraw pleas under Florida law is the "prejudice or manifest injustice" requirement interpreted by either this Court or the lower courts to mean that a defendant must prove actual innocence. A perfect illustration is the way our courts have dealt with the circumstance where a trial court in taking a guilty plea from a defendant fails to inform that defendant that he will be subjected to an habitual offender sentence. In that situation, the defendant so sentenced without warning is permitted to withdraw his plea; prejudice is apparent and he need make no further showing, and especially there is no

requirement that he show actual innocence of the underlying charge. This Court and every district court of appeal has so held. *Ashley v. State*, 614 So. 2d 486 (Fla. 1993). *Accord State v. Jefferson*, 665 So. 2d 1057 (Fla. 1996); *Saling v. State*, 705 So. 2d 937 (Fla. 2d DCA 1997) (defendant would be permitted to withdraw his plea where he was not told that habitualization would prevent him from participating in early release programs); *Hills v. State*, 671 So. 2d 223 (Fla. 1st DCA 1996) (defendant would be permitted to withdraw plea where he was not told that habitualization would prevent him from receiving basic gain time); *Davis v. State*, 23 Fla. L. Weekly D1468 (Fla. 4th DCA June 17, 1998) (collecting cases); *Bryant v. State*,1998 WL 372381 (Fla. 2d DCA June 12, 1998); *Davis v. State*, 700 So. 2d 93 (Fla. 2d DCA 1997); *Watson v. State*, 700 So. 2d 742 (Fla. 2d DCA 1997); *Gilmore v. State*, 696 So. 2d 890 (Fla. 2d DCA 1997) (defendant would be allowed to withdraw plea where he was not told that habitualization would affect his ability to receive early release even though he *was* told that he was being habitualized and he was told the statutory maximum he was facing); *Horton v. State*, 682 So. 2d 647 (Fla. 1st DCA 1996) (defendant would be permitted to withdraw plea where he was not told habitualization would affect his ability to earn gain time); *Ferguson v. State*, 677 So. 2d 968, 969 n.3 (Fla. 3d DCA 1996); *Brown v. State*, 670 So. 2d 1113 (Fla. 4th DCA 1996), *receded from on other grounds, Williams v. State*, 691 So. 2d 484 (Fla. 4th DCA

1997) (holding error must be preserved by way of motion to withdraw plea in trial court); *Drumwright v. State*, 661 So. 2d 972 (Fla. 5th DCA 1995).

What is further of critical significance in this context is that the courts have held that a defendant should be permitted to withdraw the plea even though if he pleads again after being given full advisement, *he again can be habitualized*. That is to say, it is irrelevant that the result would be the same after he was given full information; he still is entitled to withdraw the plea. *State v. Wilson*, 658 So. 2d 521 (Fla. 1995). In light of this, there is no justification for the Third District's position that a defendant must prove actual innocence because otherwise the result would be the same after trial (i.e., deportation again would ensue).

There are additional examples of the fact that Florida does not interpret the "prejudice or manifest injustice" requirement to mean a showing of actual innocence. In each of the following examples, it is critical to note that no showing of actual innocence is needed even though the result surely will be the same after trial or informed re-plea following withdrawal of the original plea:

1) where a defendant is not informed of the applicable statutory minimum and maximum sentences, *Byrd v. State*, 643 So. 2d 1209 (Fla. 1st DCA 1994);

2) where a trial court judge refuses to sentence in accord

with the plea bargain,, *Goins v. State*, 672 So. 2d 30 (Fla. 1996);

3) where a defendant is mistakenly told that he will not receive a mandatory minimum term or is not informed that he could receive such a sentence but does receive such a sentence, *State v. Battle*, 661 So. 2d 38 (Fla. 2d DCA 1995); *Saliga v. State*, 632 So. 2d 715 (Fla. 2d DCA 1994); *Ortiz v. State*, 622 So. 2d 131 (Fla.3d DCA 1993);

4) where a defendant is promised incorrectly how much time he will serve on his sentence, *Jones v. State*, 602 So. 2d 694 (Fla. 2d DCA 1992), *rev. dism.*, 613 So. 2d 5 (Fla. 1993); *Bell v. State*, 602 So. 2d 693 (Fla. 2d DCA 1992).

What underlies all of these cases is the recognition that allowing an unwitting plea to stand strikes at the very heart of the knowingness, intelligence, and voluntariness of the plea. The constitutions of the State of Florida and the United States do not permit uninformed, involuntary pleas to stand, and the instant case cannot be an exception.

The result urged by the State and proposed by the Third District below - that a defendant must prove his actual innocence before he can be allowed to withdraw a plea -- is not in accord with Florida law, would be unworkable in practice as described in Petitioner's initial Brief on the Merits, and lacks logical foundation. Accordingly, Petitioner respectfully requests that the Court quash the decision of the Third District and remand this case

to the trial court with instructions to allow Mr. Prieto to withdraw his plea on the basis that he already has sufficiently pled prejudice by showing the institution of deportation proceedings against him.

CONCLUSION

Based on the foregoing arguments and authorities, Petitioner respectfully requests that this Court quash the decision of the Third District Court of Appeal in the instant case.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was delivered by mail to Assistant Attorney General Michael Neimand, Office of the Attorney General, 444 Brickell Avenue, Suite 950, Miami, Florida 33131, this 28th day of July 1998.

Suzanne M. Trejo

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Assistant Public Defender