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**FILED**

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JUN 10 1998

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Chief Deputy Clerk

IN THE SUPREME COURT OF FLORIDA

CASE NO. 92,652

JORGE PRIETO,

Petitioner,

-vs-

THE STATE OF FLORIDA,

Respondent.

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ON PETITION FOR DISCRETIONARY REVIEW

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BRIEF OF RESPONDENT ON THE MERITS

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## INTRODUCTION

The Respondent, the **STATE OF FLORIDA**, was the Appellee below. The Petitioner, **JORGE PRIETO**, was the Appellant below. The parties will be referred to as the State and the Petitioner. The symbol "R" will designate the record on appeal, the symbol "T" will designate the transcript of proceedings and the symbol "A" will designate the Appendix to this brief.

**STATEMENT OF THE CASE AND FACTS**

The State accepts the Petitioner's statement of the case and facts as a substantially accurate account of the proceedings below.

QUESTION PRESENTED

SHOULD A DEFENDANT BE REQUIRED TO  
ASSERT AND PROVE A PROBABILITY OF  
ACQUITTAL AT TRIAL TO SECURE RELIEF  
FROM AN INVOLUNTARY PLEA RESULTING  
FROM THE TRIAL COURT'S FAILURE TO  
ADVISE THE DEFENDANT OF ADVERSE  
IMMIGRATION CONSEQUENCES?

### **SUMMARY OF THE ARGUMENT**

When a defendant is in custody, he can file a timely motion for post conviction relief alleging his plea was involuntary because he was not told of the deportation consequences of his plea. However, the mere fact that the record supports the claim is insufficient to grant relief. The defendant must show prejudice in the form that he would have been acquitted of the charge had he gone to trial.

## ARGUMENT

A DEFENDANT SHOULD BE REQUIRED TO ASSERT AND PROVE A PROBABILITY OF ACQUITTAL AT TRIAL TO SECURE RELIEF FROM AN INVOLUNTARY PLEA RESULTING FROM THE TRIAL COURT'S FAILURE TO ADVISE THE DEFENDANT OF ADVERSE IMMIGRATION CONSEQUENCES.

Florida Rule of Criminal Procedure 3.172(c)(8) requires trial judges to inform all defendants of the possibility of deportation when accepting guilty or nolo pleas. However, Florida Rule of Criminal Procedure 3.172(I) also provides that "[f]ailure to follow any of the procedures in this rule shall not render a plea void absent a showing of prejudice." (emphasis added). Furthermore in *Wuornos v. State*, 676 So. 2d 966 (Fla. 1996), this Court specifically approved of the following portion of the First District's opinion in *Fuller v. State*, 578 So. 2d 887, 889 (Fla. 1st DCA 1991), *quashed on other grounds*, 595 So. 2d 20 (Fla. 1992):

In the absence of an allegation of prejudice or manifest injustice to the defendant, the trial court's failure to adhere to rule 3.172 is an insufficient basis for reversal.

*Id.*; see also *State v. Fox*, 659 So. 2d 1324, 1326 (Fla. 3d DCA 1995), *rev. denied*, 668 So. 2d 602 (Fla. 1996) (citing *Willkerson v. State*, 401 So. 2d 1110, 1112 (Fla. 1981); *State v. Will*, 645 So. 2d 91, 93 (Fla. 3d DCA 1994); *Suarez v. State*, 616 So. 2d 1067, 1068 (Fla. 3d DCA 1993). Also, "it is the defendant's burden to establish prejudice or manifest injustice. '[I]t is not sufficient



to simply make bald assertions.'" *Fox*, 659 So. 2d at 1327 (quoting *State v. Caudle*, 504 So. 2d 419, 421 (Fla. 5th DCA 1987)).

In order to properly allege prejudice in this context, a defendant must claim that had he been informed of the possibility of deportation, he would have rejected the plea offer and gone to trial. Additionally, and more importantly, he must claim that had he gone to trial, he would have most probably been acquitted. The reason this is a necessary allegation is that the defendant would have faced the same deportation consequences if he had been convicted following a trial even if the court withheld adjudication after trial.

The State submits that this reasoning is sound and that this portion of the Third District's opinion fully comports with prejudice requirement as set forth in Florida Rule of Criminal Procedure 3.172(I). This reasoning, as stated by the Third District should be adopted by this Court as its own.

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;
- 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.

(A. 11-13).

The Third District's decision is further supported by this Court's opinion in *Williams v. State*, 316 So. 2d 267 (Fla. 1975), wherein this Court recognized that while Rule 3.170 provides

guidelines for withdrawing a plea before sentence, there is no rule setting forth requirements for the withdrawal of a plea after sentencing. This Court then adopted the standards enunciated by the American Bar Association for a plea withdrawal after a sentence, holding that a defendant should be allowed to withdraw a guilty plea when the defendant proves the withdrawal is necessary to correct manifest injustice. This Court also placed the burden on the defendant to prove a manifest injustice.

This standard is in accord with federal law which also requires the defendant to establish manifest injustice in order to have a plea vacated. Where a defendant has moved to withdraw a plea after sentencing, he must assert that he was innocent of the charges in order to met his initial burden of alleging manifest injustice, before the court will consider the motion to withdraw the plea. *United States v. Campbell*, 778 F. 2d 764 (11th Cir. 1985) (the trial court did not abuse its discretion in denying alien defendant's motion to withdraw her guilty plea when she learned that one of the consequences of the guilty plea was deportation, where the defendant did not assert that she was innocent of the charges). See also *Calderon v. Thompson*, 118 S. Ct. 1489 (1998) (miscarriage of justice exception to the rule against recalling mandate to revisit the merits of a denial of habeas corpus relief to state prisoner is concerned with actual innocence as compared to legal innocence, and to be credible, claim of actual

innocence must be based on reliable evidence not presented at trial).

Thus, the Third District's decision that a defendant must prove that had he declined the plea offer and gone to trial, he most probably would have been acquitted is based on sound logical and legal foundation. As such, the decision should be affirmed.

**CONCLUSION**

Based on the foregoing, Petitioner requests this Court affirm in total the decision of the District Court.

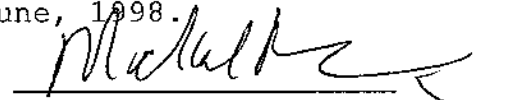
Respectfully submitted,  
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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true and correct copy of the foregoing **RESPONDENT'S BRIEF ON THE MERITS** was furnished by mail to **JULIE M. LEVITT**, Attorney for Petitioner, 1320 N.W. 14th Street, Miami, Florida 33125 on this 11 day of June, 1998.



**MICHAEL J. NEIMAND**  
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