IN THE SUPREME COURT FOR THE STATE OF FLORIDA

Case No. 94,568

ON APPEAL FROM THE
THIRD DISTRICT COURT OF APPEAL
CASE NO. 98-1040

GUSTAVO ROMERO,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

PETITIONER'S INITIAL BRIEF

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CERTIFICATE OF FONT SIZE

I HEREBY CERTIFY that Petitioner's Initial Brief has been prepared using 14 point proportionately spaced Times New Roman font and complies with Rule 9.210(a)(2), Fla.R.App.P.

By: _____
William M. Richardson, Jr.
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STATEMENT OF CASE

Gustavo Adolfo Romero ("Petitioner") was the defendant in a criminal case prosecuted in the 11th Judicial Circuit of Florida in and for Dade County, Florida, styled State of Florida v. Gustavo Romero, Case No. F 89-55. On December 6, 1989, Petitioner entered a plea of *nolo contendere* to the charge of possession of cocaine.

On March 6, 1998, Petitioner filed his Motion to Withdraw Plea, for Writ of *Coram Nobis* and for Relief from Conviction based upon the failure of the trial judge to advise him of the consequences his plea may have on his immigration status in direct violation of Rule 3.172(c)(viii), Fla.R.Crim.P., when he entered his 1989 plea. On March 23, 1998, the trial court denied Petitioner's motion. The Third District affirmed the trial court's decision explicitly relying on the authority of Peart v. State, 705 So.2d 1059 (Fla. 3d DCA), review granted, 722 So.2d 193 (Fla.1998), a decision presently before this Court for review. *See* Romero v. State, 720 So. 2d 1159 (Fla. 3d DCA 1998)(App. 4). On June 8, 1999, this Court took jurisdiction over this case.

In this Initial Brief, Mr. Romero will be referred to as "Petitioner." The State of Florida will be referred to as "State." Documents contained in the Record and in Petitioner's Appendix filed contemporaneously with Petitioner's Jurisdictional Brief will be referred to as "(R. __; App. _)."

STATEMENT OF FACTS

On December 6, 1989, Petitioner pleaded *nolo contendere* to the charge of possession of cocaine. (R. 17, 24 - 28, 31 - 32, 35; App. 1 at p. 1, Exhibits A - D). Petitioner entered the plea after being incarcerated for approximately 59 days and upon assurances that he would be sentenced to time served, released from custody and that adjudication of the crime would be withheld. (R. 17, 35; App. 1 at p. 1, Exhibits B - D). The trial judge accepted Petitioner's plea and sentenced him to time served, 59 days, and withheld adjudication. (R. 17, 35; App. 1 at p. 1, Exhibits B - D).

As evidenced by the transcript of the proceedings before the trial court, the trial judge never informed Petitioner that his plea could affect his immigration status as mandated by Rule 3.172(c)(viii), Fla.R.Crim.P. (R. 31 - 32; App. 1 at Exhibit C). It is undisputed that at the time Petitioner entered his plea, Petitioner was not advised that the plea could affect his immigration status at that time or in the future. (R. 35; App. 1 at Exhibit D). Had Petitioner been advised that his plea might have adversely affected his immigration status, Petitioner would not have entered the plea of *nolo contendere* and would have taken the case to trial on the merits. (R. 36; App. 1at Exhibit D).

More than nine years later, Petitioner discovered the devastating consequence his plea was to have on his immigration status in the United States. (R. 18 - 19, 35 -

36, 38; App. 1 at Exhibit E). Petitioner learned that his plea of *nolo contendere* equates to a conviction of a controlled substance offense according to Immigration and Naturalization Services ("INS") regulations and Petitioner became classifiable as a permanently excludable alien under 8 U.S.C. §212(2)(2)(A)(i)(II). (R. 18 - 19; App. 1). As a result of his classification as an excludable alien, Petitioner has been scheduled for an INS Deferred Inspection Review at which time his diversity visa may be withdrawn and he may be placed into custody for removal proceedings. (R. 18 - 19, 35 - 36, 38; App. 1at Exhibit E).

On March 6,1998, immediately after Petitioner learned of his precarious immigration status, Petitioner filed his Motion to Set Aside Plea, Petition for Writ of *Coram Nobis* and Motion for Relief From Conviction with the trial court that originally accepted his plea. On March 9, 1998, Petitioner filed an Amended Motion to Set Aside Plea, Petition for Writ of *Coram Nobis* and Motion for Relief From Conviction that include argument on the recently decided opinion in Peart v. State, 705 So.2d 1059 (Fla. 3d DCA 1998)("Petition"). (R. 17 - 60; App. 1). In his Petition, Petitioner requested that the trial court side aside his plea, vacate his conviction and set his case for trial based upon the grounds that his plea was improperly entered in violation of the Florida Rules of Criminal Procedure. (R. 17 - 60; App. 1). Further, Petitioner requested an evidentiary hearing to establish that

Petitioner would have been acquitted of the charge against him had he taken the case to trial. (R. 21, 68 - 70; App. 1 at p. 5; App. 2).

On March 12, 1998, the trial court heard argument on Petitioner's Petition. The trial court did not take evidence on the issue of whether Petitioner would have been acquitted of the charges against him nor did it set the case for an evidentiary hearing. (R. 21, 68 - 70; App. 2). The trial court stated that it felt compelled to rule that Petitioner was not entitled to any relief under the authority of the Third District's recent ruling in Peart v. State, 705 So.2d 1059 (Fla. 3d DCA). (R. 64 - 70; App. 2). The trial court issued its ruling notwithstanding that it stated that it would have probably granted the petition two weeks prior and that the court was sympathetic to Petitioner's position. (R. 64 - 70; App. 2). On March 23, 1998, the trial court entered a written order denying Petitioner's Petition citing Peart. (R. 61; App. 3).

ISSUE PRESENTED ON APPEAL

WHETHER THE TRIAL COURT ERRED WHEN IT DENIED PETITIONER'S TIMELY FILED MOTION TO WITHDRAW PLEA, PETITION FOR WRIT OF *CORAM NOBIS* AND FOR RELIEF FROM CONVICTION WHEN PETITIONER'S PLEA OF *NOLO CONTENDERE* WAS ACCEPTED IN VIOLATION OF RULE 3.172(C)(VIII), FLA.R.CRIM.P., AND THE CONSEQUENCES OF THAT INVOLUNTARY PLEA HAVE CAUSED GREAT PREJUDICE TO PETITIONER.

SUMMARY OF ARGUMENT

I. THE TRIAL COURT ERRED BY DENYING PETITIONER'S MOTION TO WITHDRAW PLEA, PETITION FOR WRIT OF *CORAM NOBIS* AND FOR RELIEF FROM CONVICTION.

The trial court in this case undisputably failed to advise Petitioner of any potential consequences on his immigration status and accepting his plea of *nolo contendere* in direct violation Rule 3.172(c)(viii). Immediately upon learning that his plea placed his immigration status in jeopardy, Petitioner requested relief from the deficient plea of *nolo contendere* by filing a Motion to Set Aside Plea, Petition for Writ of *Coram Nobis* and for Relief from Conviction. Petitioner's Petition is the proper remedy to seek relief from the deficient plea. The Petition was timely filed and set forth all of the elements to demonstrate that he is entitled to relief from conviction pursuant to a Writ of *Coram Nobis*.

ARGUMENT

I. THE TRIAL COURT ERRED BY DENYING PETITIONER'S MOTION TO WITHDRAW PLEA, PETITION FOR WRIT OF *CORAM NOBIS* AND FOR RELIEF FROM CONVICTION.

At the time of Petitioner's plea colloquy on December 6, 1989, Rule 3.172(c)(viii), Fla.R.Crim.P. required the trial judge to advise a defendant entering a plea of guilty or *nolo contendere* that if he was not a United States citizen, the plea might subject him to deportation proceedings. Peart v. State, 705 So. 2d 1059, 1062 (Fla. 3d DCA 1998)(Rule 3.172(c)(viii) became effective on January 1, 1989). Rule 3.172(c)(viii), Fla.R.Crim.P., requires that each and every defendant be advised that his or her plea may have potential consequences on his or her immigration status. Perriello v.State, 684 So. 2d 258 (Fla. 4th DCA 1996). Notwithstanding the mandatory rule, the trial court in this case undisputably failed to advise Petitioner of any potential consequences on his immigration status.

Petitioner's application for a Writ of *Coram Nobis* relief was properly bought to remedy the defective plea in this case.[1] Kalick v. State, 1999 WL512133 (Fla. 4th DCA July 21, 1999); McHugh v. State, 1999 WL 454484 (Fla. 4th DCA July 7,

[1] Petitioner moved in the alternative under the traditional Writ or *Coram Nobis* and under Rule 3.850, Fla.R.Crim.P.

1999).[2] A petition for a writ of *coram nobis* is an available remedy to correct the error alleged in this case. Gregersen v. State, 714 So.2d 1195 (Fla. 4th DCA), review granted, 728 So.2d 205 (Fla.1998).

Petitioner urges this Court to adopt the well- reasoned holding in Gregersen. In Gregersen, the Fourth District certified conflict with the Third District's holding in Peart on the issue of whether the trial court's failure to advise a defendant of the potential consequences on his immigration status is an error of fact addressable by *coram nobis* relief. *See also* Marriott v. State, 605 So. 2d 985 (Fla. 4th DCA 1992).

The error which Petitioner seeks to correct is an error of fact, to wit, whether the trial court could have accepted the plea as voluntarily entered when in fact the Petitioner did not voluntarily enter the plea because he was unaware of the potential consequences to his immigration status. As the Fourth District opines in Gregersen, such an involuntary entry of a plea is analogous to the factual scenario in Nickels v. State, 86 Fla. 208, 98 So. 2d 502 (Fla. 1923)(where a defendant entered a plea of

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[2] The Third District's repeated holdings denying relief from convictions older that two years out of its concern for defendants attempting to circumvent the time limitations imposed by Rule 3.850, Fla.R.Crim.P. by filing for writs of *coram nobis* or whether such relief is afforded to only those defendant in custody are rendered moot by this Court's decision in Wood v. State, No. 91,333 (Fla. May 27, 1999). *See e.g.* State v. Masip, 24 Fla.L.Weekly D988 (Fla. 3d DCA 1999); Peart v. State, 705 So. 2d 1059 (Fla. 3d DCA 1998)review granted, 722 So.2d 193 (Fla.1998).

guilty through fear of coercion and duress and that such a plea is challengeable by *coram nobis*).

In this case, Petitioner had been incarcerated for approximately 59 days and entered his plea on the understanding that he would be immediately released, sentenced to time served, and the adjudication withheld against him. In addition, contrary to a mandatory Rule of Criminal Procedure requiring that each defendant be advised of the potential consequences of the plea on a person' immigration status, the trial court undisputably failed to advise Petitioner of that fact. In 1989, there was no way for Petitioner to know, much less imagine, the consequences of the plea which he faces now.

When Petitioner eventually discovered the facts giving rise to his claim for relief from conviction, Petitioner immediately sought relief from the trial court where the error occurred. Petitioner therefore timely filed his request for post-conviction relief. Wood v. State, No. 91,333 (Fla. May 27, 1999)(A Petition for a Writ of *Coram Nobis*, prior to May 27, 1999, is not time barred by the two-year limitation period as set forth in Rule 3.850, Fla.R.Crim.P.); *contra* Eusse v. State, 717 So. 2d 1049, 1050 (Fla. 3d DCA 1998)(where the petitioner waited for more than two years after discovering the consequences on his immigration status before filing his petition for relief).

Further, the State cannot argue that Petitioner's request is barred by the doctrine of laches on the issue of whether Petitioner was in fact advised of the immigration consequences. A transcript of the plea colloquy in which Petitioner entered his plea of *nolo contendere* was available for the trial court's and this Court's review. *Contra* Gregersen, 714 So. 2d at 1196 (Fla. 4th DCA 1998)(where fact that transcript of plea colloquy was no longer available rendered petitioner's request barred by the doctrine of laches).

Petitioner's Petition set forth specific facts to meet all of the elements for relief from conviction pursuant to a Writ of *Coram Nobis*. Those facts conclusively showed that if the trial court had known of Petitioner's resolve to refuse to a plea had he known of the potential effects on his immigration status, the trial court would not have accepted the plea, or at least, should not have.

More specifically, Petitioner demonstrated that the trial court did not advise him of possible consequences to his immigration status. Petitioner attached the transcript of the plea colloquy that unquestionably demonstrates that Petitioner was not advised of the effect his plea may have on his immigration status in violation of Rule 3.718(c)(8), Fla.R.Crim.P. Petitioner also set forth factual evidence that he was not otherwise made aware of the effect that his plea would have on his immigration

status. Petitioner attached his sworn affidavit that he was never advised on the potential effect that his plea may have on his immigration status.

Petitioner also demonstrated that he would not have entered his plea if he had been advised of the potential effect the plea may have had on his immigration status. In a sworn affidavit, Petitioner clearly stated that he would have taken the case to trial if he had been aware of the precarious effect the plea would potentially have on his immigration status.

Petitioner also sufficiently demonstrated that he suffered prejudice from the trial court's violations of Rule 3.172(c)(8) by demonstrating that he would not have entered his plea had he been advised of the potential effect on his immigration status and that he is now facing adverse immigration proceedings directly as a result of the improperly entered plea. Petitioner attached a notice of Deferred Inspection to his Petition.[3] *See* State v. Luders, 731 So. 2d 163 (Fla. 4th DCA 1999)(specially concurring opinion at n. 1)(It should be sufficient that the petitioner suffers prejudice in that he would not have entered the plea had he known of the deportation

[3] Petitioner also requested an evidentiary hearing at which he could demonstrate to the trial court that he would have been acquitted of the charges against him had he taken the case to trial. The trial court, however, felt bound by the Third District's recent holding in Peart and held that Petitioner was not entitled to any relief. Although Petitioner was not afforded an evidentiary hearing on whether he would have been acquitted of the charges at issue, he sufficiently demonstrated prejudice by the devastating effect to his immigration status to establish his right to relief from conviction. *See* Luders, *supra*.

consequences and that he is now facing some type of deportation proceedings by INS. To require the trial court to determine whether a petitioner would have been acquitted of the charges at a hearing on his motion for relief takes the concept of prejudice too far and places an unworkable burden on the trial courts).

Most importantly, Petitioner demonstrated that he is entitled to relief because of the truly unfair consequences which face this particular individual. In this case, Petitioner was given the option to be released and have the court withhold adjudication of the crime after more than fifty days of incarceration, a particularly harsh penalty for possession of a small amount of cocaine. It is not difficult to understand Petitioner's decision. What makes the result particularly egregious in this case is that Petitioner eventually suffered the exact prejudice which Rule 3.172(c)(viii) was enacted to prevent. After more than nine years, Petitioner faces deportation because of his plea entered without his knowledge that it might affect his immigration status and contrary to the Rule of Criminal Procedure promulgated by this Court. Petitioner has suffered, and continues to face, a draconian penalty for his alleged possession of a small amount of cocaine more than nine years ago. Since that time, Petitioner has married and made numerous contributions to the community of Miami and to the state of Florida. Petitioner now faces permanent exclusion from the

United States as a result of an uninformed and therefore involuntary plea of *nolo contendere* after more that 50 days of incarceration.

Both the trial court in this case and the Third District in Peart explicitly recognized the unfairness of the result in defendants such as this Petitioner. It defies logic and all sense of justice to assert that there is no remedy for the prejudice he has suffered as held by the Third District in Peart and in this case. To affirm the Third District's opinion in Peart and to deny Petitioner's requested relief is clearly unfair. Therefore, Petitioner requests that this Court reverse the holding in this case and that he be afforded the opportunity to withdraw his plea of *nolo contendere*.

CONCLUSION

This case should be remanded to the trial court to vacate the constitutionally deficient plea entered in violation of Rule 3.172(c)(viii), Fla.R.Crim.P. Alternatively, the trial court should be directed to hold an evidentiary hearing on Petitioner's request for relief and afford him the opportunity to establish the requisite elements of grounds for his relief.

Respectfully submitted,

By: _____

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Petitioner's Amended Initial Brief has been sent via United States Mail service to Michael J. Neimand, Esq, Office of the Attorney General, Criminal Appeals Division, 444 Brickell Avenue, Suite 950, Miami, Florida 33131 on this 2nd day of July, 1999.

_____

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