

0d5

IN THE SUPREME COURT FOR THE STATE OF FLORIDA

FILED

Case No. 94,568

SID J. WHITE

JAN 8 1999

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

CLERK, SUPREME COURT
By _____
Chief Deputy Clerk

GUSTAVO ROMERO,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

PETITIONER'S AMENDED BRIEF ON JURISDICTION

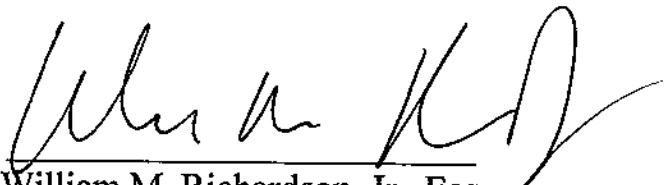
Law Offices of William M. Richardson, Jr. Esq.
Suite 218
7 N.W. 2nd Street
Miami, Florida 33128
Telephone (305) 374 - 5494
Facsimile (305) 374 - 5498
Attorneys for Petitioner

TABLE OF CONTENTS

Certificate of Font Size	iii
Table of Authorities	iv
Statement of Case	1
Statement of Facts	2 - 5
Statement on Jurisdiction	6
Summary of Argument	6
Argument	7
Conclusion	10
Certificate of Service	11

CERTIFICATE OF FONT SIZE

I HEREBY CERTIFY that this Petitioner's Amended Brief on Jurisdiction 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., Esq.

FLA. BAR NO. 0993778

CASES AND AUTHORITIES CITED

Cases

	Page
<u>Gregersen v. State</u> , 714 So. 2d 1195, 11196 (Fla. 4 th DCA 1998)	8
<u>Jollie v. State</u> , 405 So.2d 418 (Fla.1981)	7
<u>Malcom v. State</u> , 605 So. 2d 945 (Fla. 3 rd DCA 1992)	8
<u>Pearl v. State</u> , 705 So. 2d 1509 (Fla. 3 rd DCA 1998), 1, 4, 5, 6, 7, 9, 10 <u>review granted</u> , Nos.92,629, 92,652, 92,653 (Fla. Sept 14, 1998).	
<u>State v. Lackman</u> , 719 So. 2d 964 (Fla. 4 th DCA Oct 14, 1998)	7
<u>State v. Evans</u> , 705 So. 2d 631(Fla. 3 rd DCA 1998)	8

Other Authorities

8 U.S.C. §212(2)(2)(A)(i)(II)	4
Art. V, § 3(b)(3), Fla. Const.	1, 5, 7, 10
Rule 3.172(c)(viii), Fla.R.Crim.P.	1, 3
Rule 3.850, Fla.R.Crim.P.	8

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 documented and undisputed failure of the trial judge to advise him of the consequences his plea may have on his immigration status in direct violation of 3.172(c)(viii), Fla.R.Crim.P. On March 23, 1998, the trial court denied Petitioner’s motion. Petitioner appealed the trial court’s ruling to the Third District Court of Appeal. On November 18, 1998, the Third District issued its order affirming the trial court’s decision explicitly relying on the authority of Peart v. State, 705 So. 2d 1059 (Fla. 3rd DCA 1998), review granted, No. 92,629, 92,652, 92,653 (Fla. Sept. 14, 1998), a case that was then and now presently before this Court for review.

Petitioner now seeks review before this Court and files this Jurisdictional Brief to: (1) set forth the basis for this Court to exercise its discretionary jurisdiction over this case under Art. V, § 3(b)(3), Fla. Const., and (2) request that he be allowed to

fully brief the legal and factual issues of his case in order to demonstrate the error of the trial court's ruling and obtain the relief he requests.

In this Brief on Jurisdiction, Mr. Romero will be referred to as "Petitioner." The State of Florida will be referred to as "State." Documents contained in Petitioner's Appendix filed contemporaneously with Petitioner's Jurisdictional Brief will be referred to as "App. _."

STATEMENT FACTS

On December 6, 1989, Petitioner pleaded *nolo contendere* to the charge of possession of cocaine. Petitioner entered the plea after being incarcerated for approximately 59 days and upon assurance that Petitioner would be sentenced to time served and that adjudication of the crime would be withheld. The trial judge accepted Petitioner's plea and sentenced him to time served, 59 days, and withheld adjudication.

It is undisputed that at the time Petitioner entered his plea, Petitioner was not aware that the plea could affect his immigration status at that time or in the future. As evidenced by the transcript of the proceedings before the trial court, the trial judge never advised Petitioner that his plea could affect his immigration status as mandated by Rule 3.172(c)(viii), Fla.R.Crim.P. 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. Further, Petitioner contends in his motion and is prepared to set forth evidence at an evidentiary hearing, that Petitioner would have been acquitted of the charge against him.

More than nine years later, Petitioner discovered the devastating consequence his plea was to have on his immigration status in the United States. Petitioner learned

that his plea of *nolo contendere* equates to a conviction of a controlled substance offense according to INS regulations and Petitioner is now classified as an excludable alien entered under 8 U.S.C. §212(2)(2)(A)(i)(II).

As a result of his classification as an excludable alien, Petitioner has been scheduled for an Immigration and Naturalization Services' (INS) Deferred Inspection Review at which time his diversity visa may be withdrawn and he may be placed into custody for removal proceedings should the relief he seeks from this Court not be granted.

On March 9, 1998, immediately after Petitioner learned of his precarious immigration status, Petitioner filed his Amended 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. In Petitioner's motion, 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.

On March 12, 1998, the trial court heard argument on Petitioner's motion at which time 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. 3rd DCA 1998) review granted, Nos.92,629, 92,652,

92,653 (Fal. Sept 14, 1998). 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. On March 23, 1998, the trial court entered a written order denying Petitioner's motion citing Peart.

Petitioner timely filed his Notice of Appeal to the Third District Court of Appeal on March 26, 1998. Subsequently, on September 14, 1998, this Court accepted jurisdiction to review the Peart case. On November 18, 1998, the Third District affirmed the trial court's denial of Petitioner's request relief citing the Peart decision and expressly stated that its holding was on the authority of Peart decision. *See App. 1.*

STATEMENT ON JURISDICTION

THIS COURT HAS JURISDICTION OVER THIS CASE PURSUANT TO ART. V,
§ 3(B)(3), FLA. CONST.

SUMMARY OF ARGUMENT

The Third District Court of Appeals affirmed the decision below explicitly based upon its decision in Peart v. State, 705 So. 2d 1509 review granted, Nos. 92,629, 92,652, 92,653 (Fal. Sept 14, 1998). Prior to the Third District's opinion in this case, this Court accepted jurisdiction of Peart and it is presently pending review. Therefore, this Court has discretionary jurisdiction to review the merits of Petitioner's case under Art. V, § 3(b)(3), Fla. Const. Petitioner requests that this Court accept jurisdiction over his case and afford him the opportunity to fully brief the issues presented because these issues are of great urgency of Petitioner and this Court's resolution of these issues will establish both fundamental procedure and substantive rights to many people of the state of Florida.

ARGUMENT

The Third District's opinion explicitly relies on its own decision in Peart. This Court has accepted jurisdiction of that case and it is presently pending review. Therefore, this Court may properly exercise its discretionary jurisdiction to review the merits of Petitioner's case under Art. V, § 3(b)(3), Fla. Const. See Jollie v. State, 405 So.2d 418 (Fla.1981).¹

For the following reasons, Petitioner requests that this Court accept jurisdiction over his case and afford him the opportunity to fully brief and argue the issues raised by his appeal. Not only are those issues of great and immediate importance to Petitioner, but resolution of the issues will establish both fundamental procedural and substantive rights to many people of the state of Florida. Petitioner should be afforded the opportunity to have his arguments set forth to this Court for review prior to this Court's determination of Peart. Petitioner, therefore, requests the opportunity to demonstrate to this Court that the Peart decision was erroneously decided and contrary to applicable law as it applies to Petitioner on the following grounds.

¹ The Third District specifically requested that this Court review its decision and rules as set forth in Peart. Additionally, the Fourth District has certified conflict and requested that this Court resolve the issues presented by Petitioner's case. See Gergensen v. State, 714 So. 2d 1195 (Fla. 4th DCA Aug. 5, 1998) and State v. Lackman, 719 So. 2d 964 (Fla. 4th DCA Oct 14, 1998).

First, what Petitioner seeks is relief based upon an error of fact because the trial court accepted the plea without knowledge of a pertinent and material fact, to wit, Petitioner would not have entered the plea had he known of any possible consequences to his immigration status. Therefore, the relief Petitioner seeks is available to him. See Gregersen v. State, 714 So. 2d 1195, 11196 (Fla. 4th DCA 1998). Second, Petitioner is under the control and custody of INS pursuant to the scheduled Deferred Inspection and risks being placed in custody for the purpose of deportation. Although Petitioner is not in custody in the traditional sense of the word, he is under the authority and control of INS and will be placed “in custody” to be deported, a consequence which bears a direct relationship to the conviction at issue in this appeal. See State v. Evans, 705 So. 2d 631 at fn.2 (Fla. 3rd DCA 1998)(a defendant is “in custody” when the conviction at issue bears some relationship to his current confinement or unable to qualify for early release). Third, petitions for writs of *coram nobis* are not governed by the two-year time limitation imposed by Rule 3.850. See Malcom v. State, 605 So. 2d 945 (Fla. 3rd DCA 1992).

Lastly, and most importantly, Petitioner requests the opportunity to demonstrate to this Court that a denial of his request for relief from conviction is

clearly unfair.² Since the date of his release from incarceration, Petitioner has made contributions to the United States by forming a family and living a productive life. Now, Petitioner faces the harshest of penalties, exclusion from the United States, a draconian penalty for a possession of a small amount of cocaine ten years ago. Such a result is especially unfair in light of the fact that Petitioner elected not fight the cocaine possession charge based upon a promise of release from incarceration and a withhold of adjudication of guilt against him and without the knowledge that his plea could affect his immigration status at that time or in the future. If Petitioner's improperly accepted plea is enforced and his appeal to this Court denied, Petitioner will be permanently excluded from the United States. Such a result in this case is harsh and fundamentally unfair.

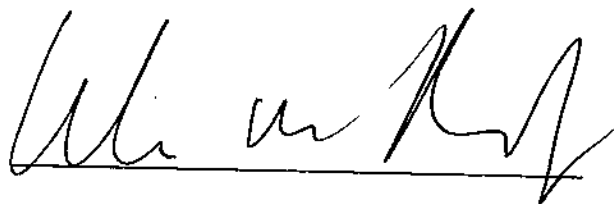
² Petitioner is both factually and procedurally similarly situated to Appellant Jose Jiminez in the cases consolidated under Peart. Both the Third District Court of Appeal and the trial court in this case expressed dissatisfaction with the unfairness of the holding in Peart to individuals such as Jiminez and Petitioner.

CONCLUSION

This Court may properly invoke its discretionary jurisdiction over this case pursuant to Art. V, § 3(b)(3), Fla. Const. As set forth above, Petitioner's case should be fully briefed and considered prior to this Court's decision on potentially dispositive issues as set forth in the Peart cases. Therefore, Petitioner respectfully requests that this Court take discretionary jurisdiction over his case and afford him the opportunity to meaningfully argue his case before this Court.

Respectfully submitted,

By:

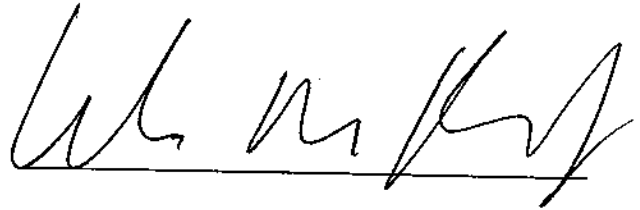


William M. Richardson, Jr., Esq.
FLA. BAR NO. 0993778

Law Offices of William M. Richardson, Jr. Esq.
Attorneys for Petitioner Gustavo Romero
Suite 218
7 N.W. 2nd Street
Miami, Florida 33128
Telephone (305) 374 - 5494
Facsimile (305) 374 - 5498

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 the Office of the Attorney General, Criminal Appeals Division, 444 Brickell Avenue, Suite 950, Miami, Florida 33131 and to the Office of Attorney General, Criminal Appeals Division, PL01 The Capitol, Tallahassee, Florida 32399-1050 on this 5th day of January, 1999.

A handwritten signature in black ink, appearing to read 'William M. Richardson, Jr.', written over a horizontal line.

William M. Richardson, Jr., Esq.
FLA. BAR NO. 0993778

LAW OFFICES OF
WILLIAM M. RICHARDSON, JR.
1200 14TH STREET, SUITE 7-D
MIAMI BEACH, FLORIDA 33139

DIRECT LINE (305) 458 - 9111

FILED

SID J. WHITE

DEC 31 1998

CLERK, SUPREME COURT

By _____
Chief Deputy Clerk

December 27, 1998

Clerk of the Florida Supreme Court
Supreme Court Building
500 South Duval Street
Tallahassee, Florida 32399-1927

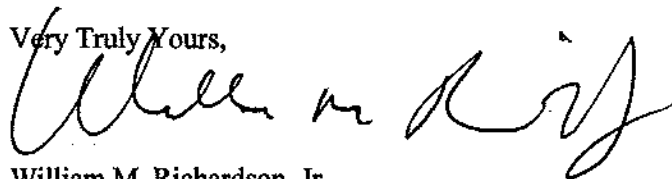
*Re: Gustavo Romero v. State of Florida
Petitioner's Brief on Jurisdiction*

Dear Clerk:

Enclosed is Petitioner's Brief on Jurisdiction and Appendix in the referenced case. Enclosed are the original, the requisite copies and an additional copies to be date stamped and returned in the enclosed self addressed postage paid envelope. If there are any questions or further requirements regarding the enclosed, please do not hesitate to contact me directly so that I may ensure that these documents are properly filed with the Court.

Thank you for you attention to this matter.

Very Truly Yours,



William M. Richardson, Jr.

IN THE SUPREME COURT FOR THE STATE OF FLORIDA

0-5

Case No. 94,568

FILED

SID J. WHITE

JAN 8 1999

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

CLERK, SUPREME COURT

By _____
Chief Deputy Clerk

GUSTAVO ROMERO,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

**PETITIONER'S AMENDED
APPENDIX TO BRIEF ON JURISDICTION**

Law Offices of William M. Richardson, Jr. Esq.
Suite 218
7 N.W. 2nd Street
Miami, Florida 33128
Telephone (305) 374 - 5494
Facsimile (305) 374 - 5498
Attorneys for Petitioner

TABLE OF CONTENTS

Opinion of the Third District Court of November 18, 1998	1
--	---

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

IN THE DISTRICT COURT OF APPEAL
OF FLORIDA
THIRD DISTRICT
JULY TERM, A.D. 1998

GUSTAVO ROMERO,	**	
Appellant,	**	
vs.	**	CASE NO. 98-1040
THE STATE OF FLORIDA,	**	LOWER
Appellee.	**	TRIBUNAL NO. 89-55

Opinion filed November 18, 1998.

An Appeal from the Circuit Court for Dade County, Ronald Dresnick, Judge.

William M. Richardson, Jr.; Irving J. Gonzalez, for appellant.

Robert A. Butterworth, Attorney General and Mark Rosenblatt, Assistant Attorney General, for appellee.

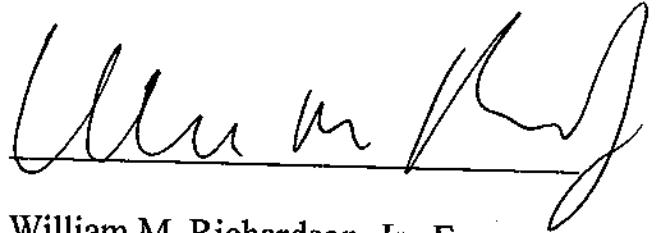
Before SCHWARTZ, C.J., and GODERICH and SORONDO, JJ.

PER CURIAM.

Affirmed on the authority of Peart v. State, 705 So. 2d 1059 (Fla. 3d DCA 1998), review granted, Nos. 92,629, 92,652, 92,653 (Fla. Sept. 14, 1998).

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Petitioner's Amended Appendix to Initial Brief has been sent via United States Mail service to the Office of the Attorney General, Criminal Appeals Division, 444 Brickell Avenue, Suite 950, Miami, Florida 33131 and to the Office of Attorney General, Criminal Appeals Division, PL01 The Capitol, Tallahassee, Florida 32399-1050 on this 5th day of January, 1999.

A handwritten signature in black ink, appearing to read "William M. Richardson, Jr.", written over a horizontal line.

William M. Richardson, Jr., Esq.
FLA. BAR NO. 0993778