IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA, Petitioner, v. WILLIAM DAN PERRY, Respondent.	)))))))))	CASE NO. SC00-495

RESPONDENT'S CORRECTED ANSWER BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

Petitioner, the State of Florida, the Appellee in the First District Court of Appeal and the prosecuting authority in the trial court, will be referenced in this brief as “the State”. Respondent, William Dan Perry, the appellant in the First District Court of Appeal and the defendant in the trial court, will be referenced in this brief as “Respondent” or “Mr. Perry”.

References to the Petitioner’s Initial Brief on the Merits will be cited in parenthesis as “Pet. Brief” followed by a specific page or pages from the brief. References to the one volume record on appeal will be cited in parenthesis as the symbol “I” followed by a specific page or pages in the record.

CERTIFICATE OF FONT AND TYPE SIZE

Counsel certifies that this brief was typed using Courier New 12.

STATEMENT OF THE CASE AND FACTS

On April 16, 1959, Respondent and two other boys were "joyriding" on a motorcycle, a misdemeanor under Fla. Stat. 811.21 (Fla. Statues 1959).[1] (I. pp. 18-19). The boys were arrested and charged with felony grand larceny. (I. p. 19). Respondent, then aged nineteen and indigent, remained in jail for the next two weeks without access to counsel, family or friends. (I. p. 19). On April 30, 1959, Respondent was served with a written Information which charged him with felony grand larceny. (I. p. 19). While arguably sufficient to withstand a motion to dismiss, the Information clearly implied, incorrectly, that Respondent was guilty of felony grand larceny even if he was only "joyriding" and had no intent to ***permanently*** deprive the owner of possession. (I. pp. 3-6). Attached to the information was the sworn attestation of the prosecutor which stated "...that the allegations as set forth in this information are based upon facts that have been shown to be true, and which, if true, would constitute the offense herein charged." (I.p.5) In reliance upon this ***mis***information, and without the benefit of counsel to correct the error, Respondent pleaded guilty. (I. pp. 5, 19)

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[1] Pursuant to this Court's decision in Wood v. State, 750 So. 2d 592, 24 Fla. L. Weekly 5240 (Fla. 1999), the appellate court accepts the facts alleged in the petition for writ of error corum nobis as true, and determines the legal effect of those facts upon the previously entered judgment. Accordingly, for the purpose of this brief, the facts are stated as alleged in the Petition for Writ of Error Corum Nobis.

On November 9, 1998, Respondent filed a Petition for Writ of Error Corum Nobis in the circuit court. The petition sought *corum nobis* relief because Mr. Perry was not in custody at the time the petition was filed. Richardson v. State, 546 So.2d 1037, 1038-39 (Fla. 1989). The petition was not time barred because it was filed prior to this Court's decision in Wood v. State, 750 So. 2d 592, 24 Fla. L. Weekly 5240 (Fla. 1999).

The petition specifically alleged that prior to the entry of his guilty plea, the Respondent had been *mis*informed about an essential element of the offense, that he pleaded guilty in reliance upon that misinformation, that the trial court was unaware of *this fact*, and that had the trial court been made aware of *this fact*, it would not have accepted Respondent's guilty plea, and would not have entered a judgment against him. (I. pp. 9-13).

The petition further alleged that the conviction was obtained in violation of Respondent's right to counsel under Gideon v. Wainwright, 372 U.S. 335, 83 S. Ct. 792, 9 L. Ed. 2d 799 (1963), and Habich v. Cochran, 148 So. 2d 5 (Fla. 1962) (Reversing 1959 grand larceny conviction by guilty plea of an uncounselled minor)(I. pp. 9-13), and that he was seeking relief by writ of error *corum nobis* pursuant to Nickles v. State, 86 Fla. 208, 98 So. 502 (1923), and Gregersen v. State, 714 So. 2d 1195 (Fla. 4th DCA), review granted, 728 So. 2d 205 (Fla. 1998)

(Voluntariness of guilty plea is fact-intensive inquiry remediable by writ of error *corum nobis*). (I. p. 12).

The circuit court summarily denied the petition without a hearing, distinguishing Nickles v. State and Gregersen v. State, in part in reliance upon the decision of the Third District Court of Appeal in Peart v. State, 705 So.2d 1059 (3rd DCA 1998). (I. pp. 31-34).

Respondent appealed to the First District Court of Appeal. (I. p. 46). Although characterizing the issue of voluntariness of a guilty plea as involving a "question of law" and not a "question of fact," and certifying the question to this Court as such, the District Court reversed. Citing Nickles v. State and Gregersen v. State, the District Court determined that Respondent's challenge to the voluntariness of his plea was cognizable by writ of error *corum nobis*, and that under Wood v. State, the petition was not time-barred.

SUMMARY OF ARGUMENT

The Petitioner's Initial Brief on the Merits relies principally on the Third District Court of Appeal's decision in Peart v. State, 705 So. 2d 1059 (Fla. 3rd DCA 1998). On April 13, 2000, this Court quashed Peart. Peart v. State, ___ Fla. L. Weekly ___, 2000 Fla. LEXIS 741 (Apr. 13, 2000). Accordingly, this Court should answer the certified question in the affirmative in light of its decision in Peart v. State.

In the alternative, unlike the issue of "voluntariness" presented in the deportation cases, Respondent's petition alleges that at the time he entered his plea he was an uncounselled minor, that he was induced to change his plea as a result of a misrepresentation (albeit unintentional) by the prosecutor, and that he was in fact innocent of the offense of which he stands convicted. As in Nickles v. State, 86 Fla. 208, 98 So. 502 (1923), had the trial court been aware of the fact that Respondent had changed his pleas as a result of this misrepresentation, it would not have accepted Respondent's guilty plea and entered judgment against Respondent.

These allegations present a question of fact traditionally cognizable by *corum nobis*. Accordingly, even though the question certified characterizes the voluntariness of Respondent's plea as presenting a question of law, this Court should affirm the decision of the District Court of Appeal on the authority of this Court's decision in Nickles v. State.

ARGUMENT

The State concedes that Respondent is a noncustodial defendant, and that his petition, having been filed prior to this Court's decision in Wood v. State, is not time barred.

Moreover, the State does not dispute that Respondent's conviction was obtained in violation of his right to counsel as mandated by Gideon v. Wainwright, 372 U.S. 335, 83 S. Ct. 792, 9 L. Ed. 2d 799 (1963). Nor does the State dispute that at the time of the entry of his plea, Respondent was a minor whose petition alleges that he did not understand the essential elements of felony grand larceny. Cf. Habich v. Cochran, 148 So. 2d 5 (Fla. 1962) (Reversing 1959 grand larceny conviction by guilty plea of an uncounselled minor). The State also does not dispute that, taking the facts of Respondent's petition as true, Respondent is not guilty of the offense for which he stands convicted. Likewise, the State does not dispute that Respondent's petition sets forth facts challenging the voluntariness of this plea which, if true, would entitle him to *corum nobis* relief under Gregersen v. State, 714 So. 2d 1195 (Fla. 4th DCA), review granted, 728 So. 2d 205 (Fla. 1998).

Nonetheless, the State urges reversal of the decision of the District Court of Appeal on grounds that Gregersen v. State was wrongly decided (Pet. Brief, p. 11), and that challenges to the voluntariness of a plea are not cognizable by petition for writ of error *corum nobis*.

Citing Peart v. State, 705 So. 2d 1059 (Fla. 3d DCA 1998), the State argues that attacks on the voluntariness of a plea are not errors of fact, but are errors of law, and are therefore not correctable by *corum nobis*. (Pet. Brief, pp. 8-9). The State's arguments are unavailing for the following reasons.

I. STATE v. PEART HAS BEEN QUASHED

On April 13, 2000, this Court quashed Peart, holding that a writ of error *corum nobis* was the proper vehicle by which a noncustodial defendant may challenge the voluntariness of his plea based on a Rule 3.172(c)(8) violation. Peart v. State, ___ Fla. L. Weekly ___, 2000 Fla. LEXIS 741 (Apr. 13, 2000). Accordingly, the principal case relied upon by the State in its initial brief on the merits has been quashed, and is no longer controlling authority. This Court should answer the certified question in the affirmative, in light of its decision in Peart v. State.

II. RESPONDENT'S PETITION RAISES A QUESTION OF FACT TRADITIONALLY COGNIZABLE UNDER *CORUM NOBIS*

While holding that *corum nobis* was the proper vehicle by which a noncustodial defendant may challenge the voluntariness of his plea based on a Rule 3.172(c)(8) violation, the majority opinion in Peart v. State is silent on the issue of whether such a challenge presents a question of fact traditionally cognizable

by *corum nobis.* The concurring and dissenting opinions in Peart reach opposite conclusions on this question.

In comparison with the deportation cases like Peart and Gregersen, Respondent's challenge to the voluntariness of his plea presents a far more compelling basis upon which to conclude that his petition presents an *error of fact* consistent with the more traditional use of *corum nobis.*

First, the facts set forth in Respondent's petition, taken as true, establish that he is innocent of the offense for which he stands convicted. His guilty plea was premised on an affirmative, albeit likely unintentional, misrepresentation by the State about an essential element of the offense.[2] Had the trial court been aware of this fact, it would not have accepted Respondent's guilty plea, and would not have entered judgment and sentence against him.

This was precisely the circumstance presented in Nickles v. State, where, as here, the defendant professed his guilt as a result of a representation made to him (the threat of mob

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[2] The written Information, which was the only information provided to the Respondent about the elements of the offense to which he was asked to plead, clearly implied that Respondent was guilty of felony grand larceny even though he was only joyriding, and had no intent to permanently deprive the owner of possession. (I. p. 3) With no counsel of his own to explain otherwise, it was not unreasonable for Respondent, then a minor, to rely upon the sworn attestation of the prosecutor that the facts alleged in the Information, *sans* the correct *mens rea*, constituted the offense of felony grand larceny. (I. p. 5).

violence), which fact was totally unknown to the trial court and which, had it been made known, would have prevented acceptance of the plea.

Moreover, as in Nickles, and unlike the deportation cases, the question of voluntariness in this case goes directly to the issue of guilt/innocence.[3]

The State's attempt to distinguish the facts of this case from Nickles is unpersuasive. In its brief, the State asserts that the relevant fact that was unknown to the trial court was the Respondent's contention that he was only "joyriding" and intended to return the motorcycle. (Pet. Brief, p. 12) The State then argues that this fact would not have prevented entry of the judgment against Respondent because there was sufficient circumstantial evidence for a jury to conclude otherwise. (Id.)

This argument misses the point of Nickles entirely. By this argument, Nickles would not have been entitled to relief either. Nickels' claim of a threat of mob violence, standing alone, would not prevent the entry of judgment against him for rape, as there likely was sufficient evidence for a jury to conclude that he was

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[3] The dissent in Peart states that it rejects Gregersen "because I do not believe this issue of 'voluntariness' is similar to the issue which was before this Court in [Nickles]...." Peart, Wells, J., concurring in part and dissenting in part. By contrast, the issue of voluntariness presented in this case is the same as the issue that was before the Court in Nickles: a change in plea induced by and in reaction to a representation to the defendant, which, had it been made known to the trial court, would have prevented the trial court from accepting the plea.

nonetheless guilty. It was not the fact that the trial court was unaware that there had been a threat of mob violence, however, that entitled Nickles to *corum nobis* relief. What entitled Nickles to *corum nobis* relief was the fact that the trial court was unaware that Nickles was changing his plea as a result of and in reaction to the threat of the mob violence.

Similarly, the critical fact unknown to the trial court at the time it accepted Respondent's plea was not his contention that he was only "joyriding"; it was the fact that Respondent had been misinformed about the intent element of the offense of felony grand larceny, and that he was entering his guilty plea as a direct result of and in reaction to that misinformation. As in Nickles; the critical fact, unknown to the trial court, resulted in a truly involuntary plea by a defendant who had otherwise professed his innocence. It is this circumstance that is wholly lacking in the deportation cases, and is why even the dissent in Peart should find that Respondent has raised a question of fact remediable by *corum nobis*.

CONCLUSION

Although the question certified characterizes the voluntariness of Respondent's plea as presenting a question of law, this Court should affirm the decision of the District Court of Appeal on the ground that his Petition for Writ of Error Corum Nobis raises questions of fact traditionally cognizable by *corum nobis*.

In the alternative, this Court should answer the certified question in the affirmative in light of this Court's decision in Peart v. State, ____ Fla. L. Weekly ____, 2000 Fla. LEXIS 741 (Apr. 13, 2000).

Respectfully submitted this ____ day of April, 2000.

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing **Respondent's Answer Brief on the Merits** has been served by U.S. Mail, postage prepaid and addressed as follows:

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