IN THE SUPREME COURT OF FLORIDA

ROBERT EY,

Petitioner,

v. **CASE NO. SC03-2161**
L.T. No. 2D03-2811

STATE OF FLORIDA,

Respondent.
_____/

ON PETITION FOR REVIEW FROM
THE SECOND DISTRICT COURT OF APPEAL
STATE OF FLORIDA

ANSWER BRIEF OF RESPONDENT

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PRELIMINARY STATEMENT

The record on appeal consists of one volume. The record in the summary appeal in case no. 2D03-2811 comprises pages one through 28. The exhibits furnished along with Ey's counseled initial brief are referred to as "Pet. Ex.", followed by the appropriate page number.

STATEMENT OF THE CASE AND FACTS

Plea-based judgment/finality, case no. CRC99-21195CFANO

On April 10, 2000, Robert Ey pled nolo contendere to felony petit theft in case no. CRC 99-21195CFANO and was placed on twelve months probation pursuant to his plea terms. (Pet. Exh. E, case docket, case no. CRC99-21195CFANO). He did not timely appeal his unconditional plea-based judgment.

Trial-based judgment/finality, case no. CRC00-9494CFANO

On June 22, 2000, Ey was charged in case no. CRC00-9494CFANO with three counts of dealing in stolen property. A fourth count alleged he was in possession of heroin. Ey was also charged with violating his probation by affidavit filed September 12, 2000.

After offense severance in case no. CRC00-9494CFANO, Ey proceeded to jury trial on count three, dealing in stolen property and was convicted as charged of that count. On November 28, 2001, Ey was adjudicated guilty and sentenced as a habitual offender to 30 years prison. (V 1 R 5) The Second District affirmed his trial-based judgment without written decision on March 26, 2003 in case no. 2D02-204. Ey v. State, 853 So. 2d 417 (Fla. 2d DCA 2003)[table].

Improper plea withdrawal/collateral applications

On June 20, 2000, Ey filed a pro se motion to withdraw his plea, which was dismissed, without prejudice, as facially insufficient by order rendered November 8, 2000. (Pet. Ex. E,

case docket, p. 10) On November 16, 2000, Ey filed a pro se motion for postconviction for relief which did not contain the required oath. The unsworn application was eventually dismissed without prejudice subsequent to Ey's pursuit of a writ of mandamus. (Pet. Ex. E, case printout, pgs. 6, 10)[1]

After his rule 3.850 time limit had expired, Ey endeavored to assail his plea-based judgment in case no. CRC99-21195CFANO collaterally via a pro se petition for writ of habeas corpus dated June 30, 2002. On July 17, 2002, the Second District denied this improper application without prejudice to any right Ey might have to seek a belated 3.850. Ey v. State, 829 So. 2d 212 (Fla. 2nd DCA 2002).

2002 postconviction attack, case no. CRC99-21195CFANO

Ey filed a pro se motion for postconviction relief dated August 1, 2002, under Florida Rule of Criminal Procedure 3.850 in case no. CRC99-21195CFANO. Ey claimed, inter alia, his trial counsel erroneously advised his "felonized [sic] misdemeanor," felony petit theft, could not be used as a predicate to invoke an enhanced penalty in a future case. (V 1 R 6) Ostensibly to show prejudice, he pointed to his trial-based habitual offender sentence in case no. CRC00-9494CFANO.[2] Id.

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[1] Accordingly, the mandamus petition was denied as moot. Ey v. State, 818 So. 2d 509 (Fla. 2d DCA 2002)[table].

[2] Ey also filed a pro se motion to correct illegal sentence dated January 15, 2002, under Florida Rule of Criminal Procedure 3.800(a) in case no. 99-21195CFANO. (Pet. Ex. D, case docket, p.

By order rendered September 5, 2002, the postconviction court summarily dismissed Ey's rule 3.850 motion as untimely. (Pet. Ex. A; Ex. E, case docket, p. 4) The order provides, in relevant part, as follows:

> a. On April 10, 2000, Defendant entered a plea of nolo contendere to the charge contained in the above referenced case number, and probation was ordered.
>
> b. Pursuant to the Florida Rules of Criminal Procedure, a rule 3.850 motion cannot be filed with the trial court more than two years after the judgment becomes final. Defendant has not complied with the time constrains set forth in the rule.
>
> c. The Court notes that the proper procedure when alleging counsel did not file a rule 3.850 motion within the two-year time constraint is to file a petition for writ of habeas corpus. See Medrano v. State, 748 So. 2d 986 (Fla. 1999).
>
> ORDERED AND/ADJUDGED that Defendant's Motion is DISMISSED as untimely.
>
> . . . .

(Pet. Ex. A)

Ey appealed the time-bar dismissal. On November 7, 2003, the Second District per curiam affirmed, with certified question, stating:

> Affirmed. See Alexander v. State, 830 So.2d 899 (Fla. 2d DCA 2002); Brown v. State, 827 So.2d 1054 (Fla. 2d DCA 2002); McGee v. State, 684 So.2d 241 (Fla. 2d DCA 1996). As this court did in Alexander,

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7) Although appealing the rule 3.800(a) denial rendered March 25, 2002, after rehearing was denied, Ey took a voluntary dismissal of the appeal in case no. 02-2251, on June 27, 2002. Ey v. State, 821 So. 2d 1065 (Fla. 2nd DCA 2002)table].

> 830 So.2d at 899-90, we certify the same question of great public importance, to wit:
>
> WHETHER ALLEGATIONS OF AFFIRMATIVE MISADVICE BY TRIAL COUNSEL ON THE SENTENCE ENHANCING CONSEQUENCES OF A DEFENDANT'S PLEA FOR FUTURE CRIMINAL BEHAVIOR IN AN OTHERWISE FACIALLY SUFFICIENT MOTION ARE COGNIZABLE AS AN INEFFECTIVE ASSISTANCE OF COUNSEL CLAIM.
>
> Affirmed; question certified.

Ey v. State, 870 So.2d 64, 65 (Fla. 2d DCA 2003).

2003 probation revocation and plea-based judgments/finality

By then, Ey had admitted violating his probation at a hearing held October 21, 2003, the same date he pled guilty to outstanding counts in case no. CRC00-9494CFANO. His probation was revoked and he was sentenced in case no. CRC99-21195CFANO to 25 months prison.

In case no. CRC00-9494CFANO, Ey was sentenced as a habitual offender to 94.3 months prison on count one, dealing in stolen property, and 60 months on count two, dealing in stolen property. A nonhabitual sentence of 60 months was imposed on count four, possession of heroin. All sentences ran concurrently to each other.[3] Ey did not timely appeal his 2003 admission-based judgment of revocation of probation or his 2003 plea-based judgment in case no. CRC00-9494CFANO.

Instant case

Upon Ey's petition for review following the Second District's affirmance with certified question in his summary

[3] Ey also pled guilty to a reduced charge of attempted burglary in case no. CRC7093CFANO. (Initial Brief at p. 1) He was sentenced to 15 years prison as a prison releasee reoffender in said case.

appeal, this Court secured responses from the parties addressing only whether Ey's rule 3.850 motion was timely under the reasoning of Bates v. States, 887 So. 2d 1214 (Fla. 2004). Because Ey's case is governed by rule 3.850 and not the window set forth in Wood v. State, 750 So. 2d 592 (Fla. 1999), the state concluded the rationale of Bates does not apply to bar Ey's rule 3.850 motion.

After this Honorable Court's decision in State v. Dickey, 928 So. 2d 1193 (Fla. 2006), became final, the Court ordered Ey to show cause why Dickey is not controlling in his case. The thrust of Ey's response was Dickey does not govern his case because the claimed affirmative misadvice of his trial counsel pertained to other offenses which had already occurred but not yet been formally charged at the time of his plea. In reply, the state maintained Ey's rule 3.850 motion was subject to dismissal as time-barred by rule 3.850's time limit. The same reasoning employed in Dickey applies, the state reasoned, to a claim of alleged misadvice such as Ey's as to the potential enhancing effect of a plea on a future case.

On April 12, 2006, this Court accepted jurisdiction, appointed counsel for Ey, and dispensed with oral argument. In the initial merits brief filed by Ey's counsel, it is asserted Ey informed his counsel prior to pleading no contest in case no. 99-21195 he informed his counsel, inter alia, "he was under investigation for alleged crimes previously committed." (Initial

Brief at p. 3). Although Ey in his summary appeal made that assertion in his pro se motion for rehearing (V 1 R 58), Ey's rule 3.850 motion did not specifically allege he told his counsel prior to his plea he was under investigation for alleged crimes previously committed. The reference to the rule 3.850 attack cited, R 14, does not support this statement. Ey in his pro se rule 3.850 motion related alleged conversations with his counsel about seeking plea withdrawal. According to Ey, a few days later, he was arrested on an unrelated offense in case no. 00-7093CFANO which originated prior to the plea in case no. CRC99-21195CFANO. (V 1 R 14) Ey did not, however, claim in his rule 3.850 attack he had told his attorney prior to his plea in case no. CRC99-21195CFANO he was under investigation for unrelated offenses and also such were later charged, whether in case no. CRC00-9494CFANO, CRC00-7093CFAN0, or otherwise.

In addition, the statement of facts contained in the Initial brief frames as fact allegations in Ey's rule 3.850 motion and/or assertions on appeal. Laid out therein are representations as to what he told his counsel and the advice of his counsel; Ey does not identify such as his allegations. (Initial Brief at p. 3) Although recognizing factual statements are accepted to the extent not refuted by the record, see e.g., Peede v. State, 748 So. 2d 253 (Fla. 1999), on collateral review, the state does not concede any factual assertions of Ey with regard to the plea discussions.

SUMMARY OF THE ARGUMENT

Ey's motion for postconviction relief was untimely filed, and he is not entitled to reset his rule 3.850 time limit based on his claim of affirmative misadvice of counsel on future sentence-enhancing consequences of his plea, which is not a cognizable claim of ineffective assistance of counsel. Although Ey endeavors to bring his case outside this Court's Dickey decision by asserting his claim does not pertain to a future crime, Ey's rule 3.850 motion did not assert he told his counsel prior to his plea he was already under investigation for an uncharged crime. Foreclosed from raising an assertion not specifically pled in his rule 3.850 attack, Ey is left with the rationale of Dickey: a claim of misadvice of future sentence-enhancing potential does not meet Strickland's requirements for a valid claim of ineffective assistance of counsel.

Even if preserved, arguendo, Ey's claim of purported erroneous advice about the plea's potential enhancing effect on another case does not meet Strickland's deficiency prong. An attorney's alleged erroneous advice a plea will not adversely impact a future prosecution, whether for an offense under investigation at the time of the plea or a crime later committed, does not constitute deficient performance with regard to the plea-based judgment of conviction and sentence.

Additionally, Ey is not entitled to review of his stale claims of proposed omission of counsel not implicating a claim of affirmative misadvice of counsel regarding future enhancing consequences. Moreover, this Court should decline to undertake substantive review of Ey's claims on which there has been no adjudication on the merits to review.

ARGUMENT

ISSUE I

THE POSTCONVICTION COURT PROPERLY DENIED AS UNTIMELY EY'S RULE 3.850 MOTION CLAIMING HIS COUNSEL MISADVISED HIM THE PLEA COULD NOT BE USED TO ENHANCE A FUTURE SENTENCE. (restated)

In pro se rule 3.850 motion filed more than two years after his plea-based judgment of conviction and sentence for felony petit theft became final, Ey claimed his attorney incorrectly advised him "a felonized [sic] misdemeanor could not be used as a predicate or prior to invoke a[n] enhanced penalty act on a subsequent case since it was already enhanced..." (V 1 R 6) The purported misadvice, according to Ey, prejudiced him because his plea-based judgment was used to sentence him on his subsequent trial-based conviction to twice the statutory maximum under Florida's habitual offender statute. (V 1 R 5, 6) Had he known the plea-based conviction would be used in such manner in the later case, Ey claimed he would have elected to proceed to trial. (V 1 R 6)

Ostensibly to avoid the preclusive effect of rule 3.850's two-year bar, Ey claimed in a supporting memorandum he did not know his counsel provided the alleged misadvice until August 30, 2000, the date the state filed a notice of enhanced penalty in subsequent case no. CRC00-9494CFANO. (V 1 R 22-23) The rule 3.850 motion was properly dismissed as untimely filed outside rule 3.850's time limit. Ey is not entitled to reset the hands

of time on his rule 3.850 clock to a later date on which he claims to have learned of alleged affirmative misadvice as to enhancing consequences of the plea on a future sentence. Such a claim is not a cognizable claim of ineffective assistance of counsel.

In order to state a claim for ineffective assistance of counsel, a defendant is required to show that, considering all the circumstances, counsel's performance fell below an objective standard of reasonableness. Strickland v. Washington, 466 U.S. 668, 688-94, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). The defendant must also prove "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Strickland, 466 U.S. at 694. The Strickland test applies to claims that counsel provided ineffective assistance in the plea context. Hill v. Lockhart, 474 U.S. 52, 56, 106 S. Ct. 366, 88 L. Ed. 2d 203 (1985). In order to satisfy the second prong of the test, a "defendant must show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." Id. at 59.

In Dickey, this Court concluded a claim that counsel affirmatively misadvised a defendant about the collateral effect of future sentence-enhancing potential does not meet Strickland's requirements for a valid claim of ineffective assistance of counsel. Dickey, 928 So. 2d at 1198. A majority

of the Court concluded claims a defendant entered a plea based on wrong advice about a potential sentence enhancement for a future crime fail to meet the Strickland test, either because such claims do not demonstrate deficient performance in the case at issue or because, as a matter of law, any deficient performance could not have prejudiced the defendant in that case. Id.

As in Dickey, Ey's claim of affirmative misadvice of counsel on the sentence-enhancing consequences of his plea is not a cognizable claim of ineffective assistance of counsel. Ey argues his trial counsel rendered ineffective assistance by affirmatively misadvising him his plea in case no. CRC99-2195CFANO could not be used to enhance a sentence for a crime his counsel knew Ey had already allegedly committed. (Initial Brief at p. 16) Although he endeavors to bring his case outside this Court's Dickey decision by asserting his claim does not pertain to a future crime, Ey's rule 3.850 motion did not allege he told his counsel prior to his plea he was already under investigation for an uncharged crime. Such a contention constitutes a new claim of ineffective assistance of counsel which is not preserved and thus is not properly before this Court. See Doyle v. State, 526 So. 2d 909, 911 (Fla. 1988) (finding postconviction claim raised for the first time on appeal was procedurally barred).

Foreclosed from raising an assertion not specifically pled in a properly sworn rule 3.850 attack within two years after his plea-based conviction became final, Ey is left with the rationale of Dickey. A claim of misadvice of sentence-enhancing potential such as presented in his rule 3.850 motion on a future sentence does not meet Strickland's requirements for a valid claim of ineffective assistance of counsel.

Even if, arguendo, Ey's present contention as to proposed affirmative misadvice is deemed properly preserved, such is not a cognizable claim of ineffective assistance which would reset a rule 3.850 movant's time limit. A claim counsel has misadvised a defendant as to future sentencing consequences of a plea while he has a pending investigation for an uncharged crime committed does not establish deficiency in counsel's performance with regard to the offense which is the actual subject of the plea and/or sentence thereon. In Ey's case, any wrong advice about the potential for future sentence enhancement would not impact the voluntariness of the plea to felony petit theft. Nor would the claimed misadvice impact his probationary sentence.

Due process requires a defendant be informed of all the direct consequences of a guilty plea. Brady v. United States, 397 U.S. 742, 749, 90 S.Ct. 1463, 25 L. Ed. 2d 747 (1970). Any lack of knowledge a plea-based conviction could later be used to enhance a future sentence does not violate due process. The possible future enhancing effects of a guilty plea are

collateral consequences of the plea. See Major v. State, 814 So. 2d 424 (Fla. 2002). As a collateral consequence, "neither the trial court nor counsel has a duty to advise a defendant the defendant's plea in a pending case may have sentence-enhancing consequences on a sentence imposed for a crime committed in the future." Id. at 431.

Similar reasoning applies to potential consequences of a plea on a future sentence for a crime that was committed prior to the plea. Any enhancing consequence of the plea is not immediate given there is no pending prosecution nor existing conviction for such other crime.

In Ey's case, the subsequent enhancement on his sentence for dealing in stolen property was not an immediate result directly from the plea to felony petit theft. Precondition to the enhancement was a separate successful prosecution for the other crime and also the decision in such separate criminal proceeding to adjudicate and sentence Ey as a habitual felony offender. That Ey was charged with crimes occurring before the plea and sentenced as a habitual felony offender in the subsequent case does not mean such outcome was a required consequence of Ey's former plea to felony petit theft.

Nonetheless, this Court need not reach this issue because Ey's case does not implicate a preserved claim of misadvice of counsel as to future enhancing consequences of a plea on a future sentence for a previously committed crime. Ey did not

allege he told his counsel he was under investigation for a crime committed before the plea.

The certified question presented by the Second District asks whether allegations of affirmative misadvice by trial counsel on the sentence enhancing consequences of a defendant's plea for future criminal behavior in an otherwise facially sufficient are cognizable as an ineffective assistance of counsel claim. Based on Ey's rule 3.850 allegations, it is proper to construe his stale attack as raising a claim counsel rendered misadvice as to the plea's enhancing potential on a sentence for a future crime.

Even if, arguendo, his claim is deemed as alleging counsel misadvised him as to enhancing consequences on a sentencing for a crime under pending investigation but not yet charged, this Court should conclude jurisdiction was improvidently granted. Such construct would not present the circumstance presented by the certified question. In so observing, the state also maintains Ey's claim of affirmative misadvice is facially and legally insufficient to meet both prongs of Strickland. Ey in his rule 3.850 motion did not specifically claim he told his counsel before entering his plea he was under pending investigation for a crime allegedly committed previously. Because Ey did not assert he revealed a pending investigation to counsel before entry of the plea, he is unable to show any

deficiency in counsel's advice relative to his exposure for any such pending or anticipated charge.

Further, Ey's present contention does not meet Strickland's prejudice prong. His self-serving claim he would not have entered his plea but for the claimed misadvice does not suffice to show he would not have entered his plea. The alleged harm necessarily entails the conclusion that at the time of the plea, he directly faced a separate prosecution for a crime that had been committed. Just as an allegation of misadvice as to the enhancing consequence of a plea on a sentence for a new crime cannot satisfy the prejudice prong, Ey cannot prove actual prejudice even on his present contention. Cf., Bates, 887 So. 2d at 221, concurring opinion of Justice Wells ("The cause of prejudice to Bates is a separate and independent new crime for which he was convicted after the plea was entered. Therefore, Bates cannot plead and prove prejudice, which is necessary for Bates to be entitled to relief.) Ey's potential exposure at the time he pled to a future prosecution after the plea became final was speculative and his later habitual sentencing does not constitute actual prejudice in the plea case. Accordingly, contrary to Ey's contention, he is not entitled to an evidentiary hearing on his facially and legally insufficient claim of misadvice of counsel. His claim does not meet both Strickland's prongs however construed. Thus, such cannot be

employed to restart Ey's time limit for bringing a properly filed rule 3.850 attack.

ISSUE II

EY'S CLAIMS OF PROPOSED INEFFECTIVE ASSISTANCE OF COUNSEL WHICH DO NOT RAISE PRESERVED ALLEGATIONS OF AFFIRMATIVE MISADVICE AS TO ENHANCING CONSEQUENCES OF THE PLEA ON A FUTURE SENTENCE ARE PROPERLY DENIED AS UNTIMELY FILED. (RESTATED)

Ey argues in his remaining issues proposed instances of ineffective assistance of counsel which do not implicate preserved claims of affirmative misadvice as to future enhancing consequences of a crime that had been previously alleged to have been committed. In his second issue, he presses his rule 3.850 claim counsel purportedly misadvised him his plea could not be used to enhance another sentence because the petit theft charge was already enhanced. The factual underpinnings for his claim could have been ascertained by the time of the plea with due diligence and in any case, before two years elapsed after his plea became final.

Ey concedes that to the extent the enhancement occurred on the basis of a crime committed after the plea, Dickey would control. However, he endeavors to remove his case from Dickey by reaping from his present contention counsel knew Ey had allegedly committed other crimes not yet charged. Such contention is not preserved for review. While he faulted counsel for allegedly telling him a misdemeanor which was

treated as a felony could not be used to invoke an enhanced penalty on a subsequent case because it was already enhanced, Ey did not assert counsel rendered this advice with awareness Ey had allegedly committed other crimes not yet charged. The present argument in Ey's second issue is thus not properly before this Court.

Further and alternatively, for the same reasons presented herein with respect to Ey's first framed issue, the affirmance of the time-bar ruling is proper. The present contention of Ey does not satisfy both Strickland's prongs, and such does not qualify as a cognizable claim of ineffective assistance which would operate to trigger a later start date on his rule 3.850 limitations period.

In Ey's third issue, he raises his stale rule 3.850 claim his counsel was remiss for advising him voluntary intoxication was not a legal defense to the theft charge in his case. This claim was a known claim and/or ascertainable by Ey when he entered his plea. Not involving a claim of affirmative advice as to a future case, Ey's claim is properly denied as untimely brought more than two years after his conviction became final.

In Ey's fourth issue, he endeavors to avoid the preclusive effect of the time bar on his rule 3.850 motion by claiming the date he learned of the enhancing effect of plea on the future case controls his rule 3.850 start date. Ey did not, however, claim in his rule 3.850 motion he was unaware he was under

investigation for other crimes allegedly committed prior to the plea. Nor on appeal does he suggest any such ignorance.

Even under his present contention, Ey does not dispute he had pre-plea awareness of exposure to a future prosecution. Moreover, the habitual notice of the state in the subsequent case occurred the same year as the plea. Under these circumstances, Ey could have, with due diligence, ascertained the accuracy of counsel's advice regarding the plea's enhancing potential and brought his rule 3.850 attack within two years after his plea became final. Thus, the trigger date for his time limitations period is governed by finality of judgment, and not the lodging of a habitual notice in his subsequent case.

Ey laments he took steps to challenge his plea within two years of the plea. (Initial Brief at p. 32) Claiming his trial counsel did not file a timely motion to withdraw plea, Ey contends he filed his own pro se motion to withdraw his plea. This facially insufficient motion was dismissed without prejudice. Ey claims he did not receive the order thereon until July 14, 2002. However, he lays out no steps taken which would support the conclusion he exercised due diligence in ascertaining the status of his pro se motion to withdraw his plea.

Moreover, any lack of service on his pro se motion to withdraw his plea would not have excused him from lodging a timely rule 3.850 attack which was properly sworn. Regardless

of the timing of receipt of the nonprejudicial dismissal of his pro se motion to withdraw his plea, Ey's own allegations reflect he had actual notice, as evidenced by his assertion his attorney told him it was dismissed as unauthorized. (V 1 R 15) At any rate, any delay in notice of the order on the pro se plea withdrawal request would not have prevented Ey from inquiring into the status of his pleading before the time limitation period expired and then filing a timely sworn rule 3.850 attack which comported with Florida's filing requirements. He did not do so. His ensuing rule 3.850 motion was not properly sworn in accordance with rule 3.850 and was dismissed for lack of the required oath. Notwithstanding any complaint of delay in such ruling, it behooved Ey to file a proper postconviction motion comporting with rule 3.850 in a timely manner.

Ey points out extensions of deadlines have been permitted where good cause is shown. (Initial Brief at p. 32) In State v. Boyd, 846 So. 2d 458 (Fla. 2003), this Court applied Florida Rule of Criminal Procedure 3.050 to allow an extension of time for filing for postconviction relief under rule 3.850 "for good cause shown." Id., 846 So. 2d at 460. The Boyd Court declined to engage in a due process analysis, instead applying rule 3.050. In its holding, however, the Court emphasized an extension of time under rule 3.050 is not designed to indefinitely expand the two-year deadline, but only to afford a

defendant a short period of extra time to file the motion where good cause is shown.

Similarly, in Davis v. State, 887 So. 2d 1286 (Fla. 2004), this Court applied rule 3.050 to allow an extension for filing a motion under rule 3.800(b), housing also a time limitation. In reaching this conclusion, the Court in Davis court found availing the analysis in McGuire v. State, 779 So. 2d 571 (Fla. 2d DCA 2001), authored by Chief Judge Altenbernd, in which this Court reasoned rule 3.050 authorizes the trial court to extend the sixty-day time period of rule 3.800(b) if the court acts within the sixty-day period to extend the time and there is a showing of good cause.

Unlike the instant case, both Boyd and Davis involved a request to extend a time period that had not yet run. Ey has sought to avoid the preclusive effect of the time limit of rule 3.850 after it had expired. Ey did not file a motion for extension of time within his rule 3.850 limitations period, and neither Boyd nor Davis compels any conclusion 3.850's time limit can be expanded via 3.050 after the rule 3.850 time limit has expired.

In support of a request for a later start date on his limitations period, Ey employs State v. Green, 944 So. 2d 208 (Fla. 2006), in which this Court receded from its statement in Peart v. State, 756 So. 2d 42 (Fla. 2000), that to establish prejudice arising from a trial court's failure to advise a

defendant of deportation consequences of a plea, a defendant "must be threatened with deportation resulting from the plea." Id. at 46. The Court held that "[h]enceforth, it is the fact that the plea subjects the defendant to deportation, rather than a specific threat of deportation, that establishes prejudice." 944 So. 2d at 218. The Court agreed in the interests of fairness to give defendants adversely affected two years from the issuance of Green to file their postconviction attack. Id.

In contrast, here, Ey does not allege and show he is impacted by any change in this Court's jurisprudence governing the time for bringing a timely rule 3.850 challenge to his plea. Moreover, similar to the consequence of potential future deportation, the alleged facts undergirding Ey's claim of proposed omission of counsel regarding the potential enhancing consequence of the plea on a future case were ascertainable with diligence within two years after his plea became final.

Finally, Ey claims entitlement to a probe on his rule 3.850 on the premise his assistant public defender agreed to file a timely rule 3.850 motion and did not do so. This case does not implicate a claim retained counsel agreed and failed to file a timely postconviction motion upon timely request of the defendant in the plea case. Ey is faulting his appointed trial counsel for not pursuing a postconviction attack. However, his trial counsel was not appointed for a collateral attack on his plea case.

But, if and to the extent Ey is alleging he retained counsel to pursue a timely attack on the plea-based judgment and he did not do so, this Court has afforded a procedure for a movant such as Ey to seek permission to file a belated postconviction motion via rule 3.850(g). See Williams v. State, 777 So. 2d 947, 950 (Fla. 2000). Ey is not entitled to a hearing in this proceeding on any complaint of omission of retained postconviction counsel. Such is not the subject of the certified question and is not properly before this Court.

"[O]nce the Court grants jurisdiction, it may, in its discretion, address other issues properly raised and argued before the Court." See State v. T.G., 800 So. 2d 204, 210 n. 4 (Fla. 2001). In Ey's case, this Court should decline to undertake substantive review of his rule 3.850 claims. There is no ruling on the merits to review. Not meeting a recognized exception to rule 3.850's time limit and failing to raise a cognizable claim which would govern his limitations period, Ey is not entitled to substantive review of his untimely rule 3.850 on any ground therein.

CONCLUSION

Respondent respectfully requests this Court conclude jurisdiction was improvidently granted or alternatively, answer the certified question in the negative and approve the decision of the Second District.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY a true and correct copy of the foregoing has been furnished by U.S. mail to Hunter W. Carroll, Esq., of Carlton and Carroll, Attorneys at Law, P.A., 6015 111th Street East, Bradenton, FL. 34202 this 16th day of July, 2007.

CERTIFICATE OF FONT COMPLIANCE

I HEREBY CERTIFY the size and style of type used in this brief is 12-point Courier New, in compliance with Fla. R. App. P. 9.210(a)(2).

Respectfully submitted,

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