IN THE SUPREME COURT OF THE STATE OF FLORIDA

CASE NO.: SC05-687

STATE OF FLORIDA,

Petitioner,

vs.

OWRAN GREEN,

Respondent.

Respondent's Reply Brief on the Merits

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PRELIMINARY STATEMENT

Respondent was the Defendant and the Petitioner was the Prosecution in the Criminal Division of the Circuit Court of the Seventeenth Judicial Circuit in and for Broward County, Florida. The Respondent was the Appellant and the Petitioner was the Appellee in the Fourth District Court of Appeal. In this brief, the parties shall be referred to as they appear before this Honorable Court except that the Respondent may also be referred to as the Defendant or Green and the Petitioner may also be referred to as the State.

The Trial Court record on appeal was originally not numbered. The Respondent has adopted the Petitioners numbered Appendix, with the documents contained in the Trial Court record on appeal. Reference to the Appendix will be preceded by the letter R, followed by the page number.

STATEMENT OF THE CASE AND FACTS

On September 10, 2003, the Respondent filed a Petition to Vacate and Set Aside Plea and Judgment of Conviction, Pursuant to Rule 3.850, Florida Rules of Criminal Procedure, (R-23). The Petition alleged that on May 25, 1993, the Defendant was convicted after his plea to a misdemeanor charge of assault and battery, (which was originally filed as felony aggravated assault), (R-20). The Petition further alleged that the Defendant had adjudication withheld and that he was sentenced to sixty days and one year probation, respectively on the assault and battery charges. The Petition further alleged that the Defendant successfully completed the service of his sentence. The Petition alleged that at the time the Defendant pled no contest to the instant charges that the Trial Court failed to advise him of the adverse immigration consequences of the Defendant's plea, (R-23) and that as a result of the Defendant's conviction, the Defendant has been rendered deportable from the United States, irreversibly prejudicing the Defendant and requiring him to move to vacate and set aside his plea of no contest to the charges set forth and described in the Petition, (R-24).

In a footnote, the Petition alleged that the Defendant did not learn about his adverse immigration consequences until "he recently consulted an immigration attorney", (R-24). Attached to the Petition was an

acknowledgement and waiver of rights form, which did not contain any advisement regarding immigration warnings and a Notice of Approval of Relative Immigrant Petition, indicating that the Defendant's I-130 Petition, (hereinafter "Relative Immigrant Petition"), had been approved but his I-601 Waiver,(hereinafter "212 (h) waiver"), had been denied, as a result of his plea of no contest in this case, (R-30-33).

The State filed a response to the Defendant's Motion for post-conviction relief, (R-15) and their response asserted that the Defendant's allegations concerning deportation were legally insufficient to support a claim upon which relief could be granted citing, Vicarian v. State, 810 So.2d 1055 (Fla. 4th DCA, 2002), (which held that the failure of the Defendant to produce evidence that he was being deported and that deportation was based on a conviction in this matter, required summary denial of the Motion). Further that the Defendant had failed to allege that the Department of Homeland Security had begun deportation proceedings in this matter against the Defendant, claiming that the 212 (h) Waiver, attached to the Defendant's Petition demonstrated that the Defendant could apply for a waiver and that he was not under imminent threat of deportation as required by law. Finally, the State's Reply alleged that the Defendant was not only excludable because of his assault and battery conviction but also because of a second 1992 arrest

for solicitation of prostitution. Therefore, the State's Reply reasoned that the Defendant was excludable, notwithstanding the judgment and sentence in this matter, citing State v. Oakley, 715 So.2d 956 (Fla. 4th DCA, 1998). The State did not assert in its Reply that the Defendant's Petition was otherwise facially insufficient. On October 14, 2003, the Trial Court denied Green's Motion, (R-14). On October 21, 2003 Green filed an unsworn "Defendant's Reply to the State's Response to Defendant's Motion for Post-Conviction Relief", (R-11). The Reply alleged that the Department of Homeland Security would begin deportation proceedings against Green in this matter because his 212 (h) Waiver had been denied, alleging therefore, that the Defendant was under imminent threat of deportation. The Defense further intended to produce an expert who would testify not only to this matter, but also who would testify that the Defendant was rendered inadmissible from the United States because of his conviction on the criminal grounds alleged.

The Defense further submitted that its expert would testify that the second conviction for solicitation of prostitution was in and of itself not a removable offense because it fell within the petty offense exception for admissibility, citing section 212 (A) (ii) of the Immigration and Nationality Act.

On February 13, 2003, the Respondent filed a Motion to Set Aside the Court's Order Denying Defendant's Petition to Vacate and Set Aside Plea and Judgment of Conviction, Pursuant to Rule 3.850, Florida Rules of Criminal Procedure (R-8). The Motion alleged that Green had not received notice that his original motion had been denied until February 2004. The Trial Court denied the Order but gave Green an extra thirty (30) days to appeal from the date of the Order denying the Motion to Vacate (R-3). Green subsequently filed a Notice of Appeal.

The Fourth District Court of Appeal reversed for an evidentiary hearing, finding the Respondent's Petition stated a facially valid claim because it showed a legal possibility of deportation existed against Green; see Green v. State, 895 So.2d 441, 444 (Fla. 4th DCA, 2005). The Fourth District certified conflict with cases from the Third District, including Kindelan v. State, 786 So.2d 599 (Fla. 3rd DCA, 2001); Curiel v. State, 795 So.2d 180 (Fla. 3rd DCA, 2001); and Saldana v. State, 786 So.2d 643 (Fla. 3rd DCA, 2001).

The State filed a Motion for Re-Hearing and Motion to Consider Pleading in Support of the State's Position. The Fourth District granted the Motion to Consider Plea in Support of the State's Position but denied the Motion for Re-Hearing.

The Supreme Court accepted jurisdiction, see State v. Green, 910 So.2d 263 (Fla. 2005).

SUMMARY OF THE ARGUMENT

The Fourth District did not err in finding Green's Motion to be legally sufficient. Although Green's Motion failed to allege that he had notice of the threat of deportation and that he would not have entered the plea had he known that it might result in deportation and further that it failed to comply with some of the pleading requirements of Rule 3.850 (c), the State waived any complaint it could have with regard to these alleged failings in view of the fact that it did not raise any of these issues below in the Trial Court. The Trial Court ordered the State Attorney's Office to file a Response to the Defendant's Reply within thirty (30) days of it's Order of February 24, 2005 or show cause why the Motion should be summarily denied. The State did not respond to this Court Order in the Trial Court.

Although Green's Motion failed to allege that Green had been threatened with deportation and resultant prejudice, once again, the State failed to raise this defect in the Trial Court and waived same.

The Fourth District's holding that the Defendant had demonstrated a legal possibility of deportation, is in fact, a workable and acceptable rule of law, satisfying the actual prejudice standard, defined by the Peart decision, 756 So.2d 42 (Fla. 2000).

ARGUMENT

POINT I

A. THE FOURTH DISTRICT DID NOT ERR IN FINDING THAT GREEN FILED A FACIALLY SUFFICIENT MOTION FOR POST-CONVICTION RELIEF.

In Peart v. State, 756 So.2d 42, 46 (Fla. 2000), the Florida Supreme Court held that the Defendant shall have two years to file pleadings alleging a Rule 3.172 (C)(8) violation as measured from the time the Defendant has or should have knowledge of the threat of deportation.

In point I of its brief, the State claims that Green failed to file a facially sufficient Motion because Green's Petition failed to allege when he had notice of a threat of deportation, (see Brief of State at page 6). In fact, the Fourth District's opinion addresses this issue and states:

"We add that at the evidentiary hearing, Defendant will have to offer evidence that the present conviction made him eligible for deportation. He will necessarily have to show precisely when he learned of the threat of deportation as required by Peart. Defendant had only a two year window to file for relief under Rule 3.172 (C) (8). Peart held that the two year time limit should begin "on the day the Defendant gains (or should gain) knowledge of the threat", 756 So. 2d at 46. It is not clear to us when the Defendant claims he actually learned of the threat of deportation so as his proof, will have to make that date evident, Green, 895 So.2d at 444-445."

The State is correct in stating that Green would not be entitled to an evidentiary hearing on a legally insufficient Motion for Post-Conviction

relief. In this case, although Green's Petition did not state in the body of the pleading itself the date when Green first learned of the" threat of deportation", footnote 1, (R-24) of the Petition alleged that Green did not learn about the adverse immigration consequences of his plea until he "recently consulted an immigration attorney". Attached to his Petition was a Notice of Approval of Relative Immigrant Visa Petition, which indicated that his 212 (h) Waiver had been denied on July 9, 2003. The filing date of Green's Petition to Vacate was September 10, 2003, approximately two months after his waiver had been denied. Nonetheless, the Respondent agrees that he did not set forth the date that he first learned of the "threat of deportation" in the body of Green's Petition to vacate his conviction.

The State however, never raised this alleged defect in the Trial court, even though the Circuit Court Judge ordered the State to file a Response to the Defendant's Reply to the State's Response within thirty (30) days of its order dated February 24, 2004, or show cause why the Motion should be summarily denied, (R-3).

Except in cases of fundamental error, an Appellate Court will not consider an issue unless it was presented to the lower Court; State v. Jones, 377 So.2d 1163 (Fla. 1979); State v. Barber, 301 So.2d 7 (Fla. 1974); Silver v. State, 188 So.2d 300 (Fla. 1966); Dukes v. State, 3 So.2d 754, 148 Fl 109

(1941). Furthermore, in order for an argument to be cognizable on appeal, it must be the specific contention asserted as legal ground for the objection, exception or motion below. Hager v. State, 83 Fl. 41, 90 So 812, 813, (1922); Kelly v. State, 55 Fl. 51, 45 So 990 (1908); Camp v. Hall, 39 Fl. 535, 22 So 792 (1897); Black v. State, 367 So.2d 656 (Fla. 3rd DCA 1979).

It is clear, therefore, that the State waived any argument it might have before this Court by failing to raise the issue concerning Green's alleged failure to assert when he was threatened with deportation and resultant prejudice because of it's failure to raise this issue before the Trial Court.

Even, arguendo, if Green's Petition is facially insufficient, this Court should order an evidentiary hearing below, permitting the Defendant to file a facially sufficient 3.850 Motion after the issuance of this Court's Mandate, see Alexis v. State, 845 So.2d 262, (Fla. 2nd DCA 2003).

POINT II

B. THE FOURTH DISTRICT DID NOT ERR IN FINDING GREEN'S MOTION LEGALLY SUFFICIENT WHERE GREEN FAILED TO ALLEGE THAT HE WOULD NOT HAVE ENTERED THE PLEA HAD HE KNOWN THAT IT MIGHT RESULT IN DEPORTATION.

Respondent agrees that to show prejudice under Peart, the Defendant must demonstrate and allege that had he known of the deportation consequences, he would not have entered the plea; Green, 895 So.2d at 444; Peart, 756 So.2d at 47. It is true that a review of Green's Petition reveals no such allegation. However, the State never raised these allegations in the Trial Court below and therefore waived the legal insufficiency of this ground as well. State v. Jones, supra, State v. Barber, supra; Silver v. State, supra; Dukes v. State, supra; Hager v. State, supra; Kelly v. State, supra; Camp v. Hall, supra; Black v. State, supra.

This Court should thus grant an evidentiary hearing and permit Green to amend his Petition without prejudice so he may file a proper 3.850 Motion which alleges that Green would not have entered the plea had he known of the deportation consequences of his plea; see Poisal v. State, 876

So.2d 1262, (Fla. 4th DCA 2004); Rohan v. State, 695 So.2d 864, (Fla. 4th DCA 1997); Days v. State, 637 So.2d 66 (Fla. 1st DCA 1994).

POINT III

C. THE FOURTH DISTRICT DID NOT ERR IN FINDING THAT GREEN'S MOTION WAS LEGALY SUFFICIENT DESPITE THE FACT THAT GREEN'S MOTION FAILED TO COMPLY WITH THE PLEADING REQUIREMENTS OF RULE 3.850(c).

The Respondent agrees, as asserted by the State, that Rule 3.850(c) requires among other things, that a Motion for Post-Conviction Relief include whether there was an appeal from the Judgment and Sentence and the disposition thereof, whether a previous Post-Conviction Motion had been filed and if so, how many; and if a previous Motion or Motions have been filed; the reason or reasons the claim or claims in the present Motion were not raised in the formal Motion or Motions.

The State asserts that Green's Motion failed to comply with these requirements set forth in Rule 3.850 (c). Once again, the State failed to raise this argument in the Trial Court below and hence, the State waived this argument before this Court; see State v. Jones, supra, State v. Barber, supra; Silver v. State, supra; Dukes v. State, supra; Hager v. State, supra; Kelly v. State, supra; Camp v. Hall, Supra; Black v. State, supra.

The Court should therefore grant an evidentiary hearing, permitting Green prior thereto to amend his Petition to include the required language of Florida Rule of Criminal Procedure 3.850 (c). If the Court denies Green's Petition as facially insufficient on this basis, it should be without prejudice to amend; see Thomas v. State, 686 So.2d 6989, (Fla. 4th DCA 1996) and Richards v. State, 813 So.2d 1016, (Fla. 4th DCA 2002).

POINT IV

D. THE FOURTH DISTRICT DID NOT ERR IN FINDING GREEN'S MOTION LEGALLY SUFFICIENT WHERE GREEN ALLEGEDLY FAILED TO ALLEGE THAT HE HAD BEEN THREATENED WITH DEPORTATION AND RESULTANT PREDJUDICE.

Green's Petition failed to allege that he had been threatened with deportation resulting in prejudice. However, the State failed to raise this alleged defect before the Trial Court, although ordered to do so, (R-3). The State, therefore, waived this argument; see State v. Jones, supra, State v. Barber, supra; Silver v. State, supra; Dukes v. State, supra; Hager v. State, supra; Kelly v. State, supra; Camp v. Hall, supra; Black v. State, supra.

Thus, if Green's Petition and Reply are held to be facially insufficient upon remand, the Court should permit an evidentiary hearing and prior thereto, permit Green to amend his Petition and Reply as a sworn pleading; see Glinton v. State, 850 So.2d 609 (Fla. 2nd DCA 2003); Alexis v. State, 845 So.2d 262 (Fla. 2nd DCA 2003; DeSouza v. State, 802 So.2d 402 (Fla. 4th DCA 2002); Francis v. State, 802 So.2d 402 (Fla. 4th DCA 2001); Mendez v. State, 805 So.2d 905 (Fla. 2nd DCA 2001); Perez v. Moore, 767

So.2d 1170 (Fla. 2000); Spence v. State, 804 So.2d 365 (Fla. 4th DCA 2001) and Gonzalez v. State, 787 So.2d 172 (Fla. 4th DCA 2001).

In commenting on the Reply filed by Green in the Trial Court, the Fourth District in the Green decision stated as follows:

"In reply, he asserted (and in fact offered expert testimony) that as a result made by statutory changes made by Congress after September 11, 2001, the new Department of Homeland Security, would now, as a matter of course, ultimately deport him because of his single conviction. He contends that the denial of the application demonstrates the sufficiency of the threat of deportation. We agree… In fact, he has done more than allege a mere possibility. He had suggested proof that he will now actually be deported as a direct result of a plea that he never would have made if he had known the legal consequences. Green, 895 So.2d at 444.

While it is true Rule 3.850 (d) does not authorize the filing of a Reply to the State's Response, neither does it prohibit the filing of a Reply. Replies are filed in many cases as a matter of course. Regardless of whether a Reply can be characterized as an Addendum to the Petition to Vacate or a Motion for Re-Hearing, the State's main complaint is that the reply was unsworn. An unsworn Motion can be cured; see Love v. State, 814 So.2d 475 (Fla. 4th DCA 2002); Hoover v. State, 703 So.2d 1035, (Fla. 1997), (Failure to meet oath requirement of 3.850, Motion, warrants dismissal of Motion without prejudice; Estime v. State, 826 So.2d 524, (Fla. 4th DCA 2002), (case dismissed without prejudice to file a sworn legally sufficient Motion for

Post-Conviction Relief filed pursuant to Florida Rule of Criminal Procedure 3.850).

The Respondent disagrees with the State's assertion that the Reply did not indicate that an expert was expected to testify that Green would ultimately be deported. First, a sworn Reply will remedy any alleged legal defect. Moreover, a close reading of the Reply demonstrates that Green's expert will testify that Green was rendered both deportable and inadmissible due to the commission of his crimes.

"In fact, the Department of Homeland Security will begin deportation proceedings because the I-601 Waiver has been denied. Therefore, the Defendant is under imminent threat of deportation as required by law and has standing to move for post-conviction relief at this time. The defense intends to produce an expert at the hearing in this matter who can <u>further</u> expound on this issue. It is expected that the Defendant's expert will testify that (1) that the Defendant is rendered inadmissible from the United States, pursuant to section 212(a)(2)(A) of the Immigration and Nationality Act."(R-11, 12)[1] (emphasis added).

The Respondent agrees with the States assertion that the Fourth District's opinion mistakenly states that the <u>transcript</u> of the plea colloquy indicates that the plea judge failed to give any immigration warnings before taking the plea, <u>Green</u>, 895 So.2d at 442. This error, however, was harmless.

[1] Once the plea was made, Green became inadmissible. His waiver application under section 212(h) was not approvable pursuant to 8 CFR 212.7(d) and therefore, the waiver application and his residency application had to be denied by the United States Customs and Immigration Service. Having been convicted of two crimes involving moral turpitude, FS 784.011 and FS 784.03, not of a single scheme, as interpreted under immigration law, any time after admission, Green became deportable, with no relief available. Alternatively, not having a legal status in the U.S., Green became deportable, with no relief available.

There was no transcript of the Change of Plea Hearing because of the passage of time; see Exhibits attached to the Petition to Vacate, (R-27) indicating that in general, after ten years, transcripts are not available. Moreover, the Acknowledgement and Waiver of Rights Form signed by Green on May 25, 1993, (R-28-29), contained no advisement of deportation warnings.

It is clear from these attachments, that even though the transcript was unavailable, Green was never advised of the immigration consequences of his plea. Green is therefore eligible to seek relief through the filing of his post-conviction Petition.

The State next asserts that the Fourth District may have erred in concluding that it had jurisdiction to reverse the Trial Court's decision. [2] This jurisdictional argument raised for the first time before this Court in Petitioner's Brief on the Merits, was not raised in the Trial Court or before the Fourth District. Assuming arguendo, however, that the Petitioner has not waived this argument due to his failure to raise this issue below, it does appear that Green would have been entitled to file a belated appeal from the denial of his Motion for Post-Conviction Relief by filing a sworn Petition for

[2] On October 14, 2003, the Trial Court denied relief, (R-14). On February 13, 2004, Green filed an unsworn Motion to set aside the Court Order denying the Defendant's Petition to Vacate and Set Aside Plea of Judgment and Conviction, pursuant to Rule 3.850, Florida Rule of Criminal Procedure, (R-8). The Motion alleged that Green did not receive notice that his original Motion had been denied until February of 2004. The Trial Court denied this Order but gave Green an extra thirty (30) days to appeal. Green subsequently filed a Notice of Appeal.

a belated appeal, pursuant to Florida Rule of Appellate Procedure 9.141 (c). In view of the late date that this argument has been raised by the State, the Respondent requests that this Court hear the merits of Respondent's argument and thereafter permit the Respondent, to file a sworn Petition for Belated Appeal with the Fourth District Court of Appeal nunc pro tunc after remanding this case to the Fourth District based upon the Defendant's lack of notice in this case, see Deresta v. State, 860 So.2d 1052 (Fla. 5th DCA, 2003).

The State claims that Green is not entitled to vacate his plea because he failed to establish a prime facie case for relief because he could not prove that he was threatened with deportation. Citing Peart v. State, 756 So.2d 42 (Fla. 2000), the State equates "threatened with deportation" with the institution of deportation proceedings. Nowhere in Peart does the Supreme Court define "threat of deportation" or hold that being in deportation proceedings is a prerequisite of a successful Motion to Vacate a Plea for a violation of Fla R. Crim. P. 3.172 (c) (8). Peart derives the "threat of deportation" requirement from Marriott v State, 605 So.2d 987 (Fla. 4th DCA 1992), which holds that it is the possibility of deportation which creates a showing of prejudice to support a Motion to Vacate a plea.

The Peart Court, does however, define the time for bringing such a motion as within two years from when the Defendant "has or should have knowledge of the threat of deportation", 765 So.2d at 46. By defining the time to bring the motion as within two years from when a Defendant "has or should have knowledge", it is clear the Court did not intend to preclude Defendants who are not yet in deportation proceedings from bringing such a motion. Plainly, a Defendant may gain such knowledge long before deportation proceedings begin.

A careful reading of Peart, discloses that the Supreme Court did not intend to equate "threat of deportation" with the institution of deportation proceedings.

The Peart Court considered a consolidation of five appeals from the Third District Court of Appeal. There is no indication in the Supreme Court's decision itself as to what posture the five Defendants were in before the Immigration Service. The Court did not think it relevant to their discussion and did not use the opportunity to define "threat of deportation".

It would appear, however, from the Third District's opinion in Peart v. State, 705 So.2d 1059 (Fla. 3rd DCA 1998), that not all of the five Defendants were actually in deportation proceedings. While Defendants Peart and Prieto had deportation proceedings pending against them, Defendant

Jimenez had simply been notified that INS was "initiating deportation proceedings". Defendant Evans was "facing deportation" and Defendant Ross had merely been "informed' that he would be deported, 705 So.2d at 1061. The Supreme Court did not distinguish between the various Defendants (and their respective positions before the Immigration Service) in reaching its decision.

The Supreme Court, as previously stated, derived the threat of deportation requirement from Marriott v. State, 605 So.2d 985 (Fla. 4th DCA 1992). While it is clear that the Marriott decision did not specifically discuss what posture the Defendant was in before the Immigration Service, it is clear that Court did not require the institution of deportation proceedings, only the possibility of deportation.

It is respectfully submitted that this Court should not lose sight of the interest Peart and Rule 3.172 (c) (8) sought to protect. In pleading guilty or no contest, a Defendant need be informed of the consequences of his plea. The threat of deportation is a consequence of such gravity that the Defendant must be apprised of that possibility in order to knowingly and intelligently waive his right and enter a plea. If he is not so informed than the plea is defective. Here, Green is well along the path to being deported as a consequence of his plea of which he was never informed. In this case,

Green is facing deportation, as was Defendant Evans in the Peart decision. Here, deportation is not merely a possibility, but a near certainty, since Green's waiver has been denied.

That the Court in Peart did not intend that its decision be limited to cases where proceedings have actually been commenced finds further support in its discussion of when the time period begins to run. The Peart Court answered this issue stating that the time period begins to run "when the Defendant has or should have knowledge of the threat of deportation based on the plea", 756 So.2d at 46. By defining the period in which the Defendant must file his Motion to Vacate Plea as two years from the time the Defendant knew or should have known he may be deported as a result of his plea, the Court demonstrated that it did not consider the institution of deportation proceedings as the sin qua non of a Motion to Vacate Plea based upon a violation Rule 3.172 (c) (8). As previously stated, a Defendant may gain knowledge of the threat of deportation long before the United States Government institutes deportation proceedings against him. The Supreme Court provided that one can file a Motion to Vacate a Plea under rule 3.172 (c) (8) when one knows or should have known of the threat of deportation. Since a Defendant may learn of the threat of deportation before deportation proceedings are actually commenced, it follows that the Court could not

have intended that the institution of such proceedings be a prerequisite to the bringing of a motion under Rule 3.172 (c) (8).

If the Supreme Court intended the institution of deportation proceedings to be an element of a motion under Rule 3.172 (c) (8), it simply could have provided that the two year period begins to run when deportation proceedings commenced. It did not. Instead, it held that a Defendant may file such a Motion within two years from when the Defendant knew or should have known of the threat of deportation. Under Peart the time for bringing this Motion is not defined by the institution of deportation proceedings.[3]

The State asserts that nothing in Green's Motion demonstrates prejudice and that it is pure speculation that after ten years of inaction the Government will institute deportation proceedings. Respondent, however, takes exception to this position. Based upon the facts at bar, Green will be deported. Green's expert should be given an opportunity to explain this position at a hearing.

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[3] In Peart v. State, supra, Justice Anstead in his concurring opinion, stated:

"In the instant case, the consequences of the alleged involuntary pleas include the potential initiation of immigration proceedings against the Defendants because of their criminal convictions, which in turn, were predicated upon an alleged uninformed plea. Such consequences, given their significance, would appear to constitute the requisites showing of prejudice"… Thus, it is the exposure to deportation proceedings, not some probability of success at Trial that constitutes the requisite manifest injustice or prejudice arising from a uniformed and involuntary plea…Naturally, the specific facts of a given case will dictate whether the manifest injustice or prejudice has been established." (emphasis added)

Many cases support the Green holding and give deference to case by case decision making; see Alguno v. State, 892 So.2d 1200 (Fla. 4th DCA 2005), (Where Defendant's application for naturalization was denied, based on the misadvise of his counsel concerning the effects of the alien's guilty plea to a drug offense, a crime of moral turpitude, and an aggravated felony under immigration laws. Receipt of a Notice from the Immigration and Naturalization Service denying Petition was sufficient to show prejudice. No Notice to Appear had been filed in this action). See also Pikwrah v. State, 829 So.2d 402, (Fla. 2nd DCA 2002), (Pikwrah would not have entered the plea if the Trial Court would have informed him deportation was a possible consequence of his plea. Here, there was no notice to appear filed. Accordingly, Pikwrah established that the Trial Court's failed to advise him of the possibility that his no contest plea could result in his deportation. The Court reversed and remanded with instructions to permit Pikwrah to withdraw his plea and proceed to Trial); Chagoya v. State 817 So.2d 1039, (Fla. 2nd DCA 2002), (The Defendant learned of the possibility of deportation when he received a letter from the Immigration and Naturalization Service. The Defendant stated that if he had been aware of the possibility of deportation, he would have contested the charge. The Notice informed him that he was subject to possible deportation based upon

his conviction of dealing in stolen property. The Court permitted Chagoya to withdraw his 1993 plea and to proceed to Trial on the charge. The Court in Chagoya, stated that to show prejudice, Chagoya had to establish among other things, that had he known of the possible consequences, he would not have entered the plea; citing ,Peart, 756 So.2d at 47. Based upon the evidence, the Court held that Chagoya should have been permitted to withdraw his plea); Joseph v. State, 782 So.2d 895 (Fla. 2nd DCA 2001), (The Defendant alleged only that he was "awaiting deportation" as a result of uninformed pleas without the benefit of immigration warnings. The Court required an evidentiary hearing and reversed and remanded this case to the Trial Court for this purpose).

In all of these cases, these Courts of Appeal followed what they understood to be the majority holding in Peart.

The State rejects Green's holding that "the Peart decision cited", two Fourth DCA opinions; "Spencer v. State", 608 So.2d 551 (Fla. 4th DCA 1992) and "Marriott v. State", 605 So.2d 985 (Fla. 4th DCA 1992) with obvious approval. If Spencer does not support the Green decision, the Respondent asserts that the Marriott case certainly does. First, this Court in fact, approved Marriott in the Peart decision. Although the State asserts that it is not discernable from the Marriott opinion whether deportation

proceedings had been instituted, for reasons that will become apparent later in this section of the brief, that argument is irrelevant, since Marriott was convicted of a serious drug offense.[4]

The State next claims that Green's interpretation of the term "threat" ignores an additional requirement of Peart and Rule 3.172 (i), that the Defendant must show actual prejudice citing State v. Seraphin, 818 So.2d 485 (Fla. 2002). The State refers to footnote 6 of that decision for it's assertion that (The Supreme Court) "has not interpreted Peart as establishing that threat of deportation itself constitutes prejudice".

This conclusion however, is incorrect. A closer reading of footnote 6 in the Seraphin decision demonstrates that the Court required both "the threat of deportation" and a "meaningful failure to warn a Defendant of the immigration consequences of his plea as constituting the requisite prejudice, citing State v. Luders, 786 S0.2d 440 (Fla. 2000). The Court, in Seraphin, states:

[4] Although the Court in Marriott does not specifically say whether or not deportation proceedings were instituted, the language of the decision leads the reader to the inescapable conclusion that they were not. "Furthermore, it is undisputed that Appellant's entry of a nolo contendre plea subjected him to the possibility of deportation, (emphasis added) , we hold that that threat of deportation was sufficient for a showing of prejudice as required under Simmons v. State, 489 So.2d 43, (Fla. 4th DCA 1986). Appellant's entire family resides in the United States; he has no relatives remaining in his native Jamaica. He made it known that he would not have entered the nolo contendre plea had he known of these consequences", see Marriott, 605 So.2d 985.

"Luders was not prejudiced by the Trial Court's failure to advise him of the immigration consequences of entering his plea because Luders's defense counsel advised him thereof and he decided to accept the risk. Because Luders was not prejudiced by the Trial Court's error, he was not entitled to relief"; Seraphin v. State, 818 So.2d 485 at 488, fn 6.

Respondent disagrees with the State's assertion that nothing in Green's Motion demonstrates prejudice. Even though the Government has not yet instituted deportation proceedings against him, the fact that Green's section 212 (h) Waiver has been denied, leaves Green in a perilous position. Green's expert should be given an opportunity to explain why Green will be deported and whether there is any other possible waiver from deportation available in Green's case; this is not crystal ball gazing.

Finally, citing Green's analysis of the Wigley decision, supra, the State asserts Green's "legal possibility" standard is unworkable. Wigley, however, recognized that a United States citizen had to be denaturalized before he could legally be threatened with deportation.

The State alleges that under the "legal possibility" standard, it is possible that Green could receive a pardon for his earlier conviction or have it otherwise set aside, (State's Brief at 21)[5]. The State's argument misses the mark. Green had only one real hope to avoid the consequences of

[5] The grant or denial of an section 212 (h) Waiver is a discretionary decision. It is possible that the Government could change it's position. This is highly unlikely, however in light of the regulation cited infra.

deportation, the granting of his section 212 (h) Waiver. This waiver was denied.

Although the Government has not instituted deportation proceedings in the ten years since Green pled, the State's argument fails to recognize that times have changed since September 11, 2001. Green's section 212 (h) Waiver Petition sought relief on the basis of 8 USC Section 212 (h) (1) (B). That provision grants relief:

"In the case of an immigrant who is the spouse, parent, son, or daughter of a citizen of the United States, or an alien lawfully admitted for permanent residence, if it is established to the satisfaction of the Attorney General, that the alien's denial of admission would result in extreme hardship to the United States citizen, lawful resident spouse, parent, son, or daughter of such alien;"

Green's discretionary application was denied. Since Green had been convicted of a violent and dangerous crime, assault and battery, (a reduced charge from aggravated assault with a weapon); his conduct was covered by the regulations found in 8 CFR section 212.7 (d). That regulation states in pertinent part:

"The Attorney General, in general, will not favorably exercise discretion under 212 (h)2 of the Act (8 USC 1182 (h) (2)) to consent to an application or re-application for a visa or admission to the United States or adjustment of status with respect to immigrant aliens who are inadmissible under section 212 (a) (2) of the Act in cases involving violent or dangerous crimes, except in extraordinary circumstances, such as those involving national security or foreign policy considerations, or cases which an alien clearly demonstrates that the denial of the application for adjustment of status or an immigrant visa or admission as an immigrant would result in exceptional and extremely

unusual hardship. Moreover, depending on the gravity of the alien's underlying offense, a showing of extraordinary circumstances might still be sufficient to warrant a favorable exercise of discretion under section 212 (h) 2 of the Act.", emphasis added.

"This regulation sends a strong signal therefore, to adjudicators and immigration Judges that discretionary waivers should almost never be granted in a case of violent crime"[6]; Kramer Immigration Consequences of Criminal Activity at pages, 153-155. [7]

Other criminal Defendants convicted of certain offenses are never entitled to a waiver. Legal residents or alien Defendants, for instance, convicted of controlled substance violations with the exceptions of those convicted of simple possession of marijuana of 30 grams or less are never eligible for a waiver and would be ultimately deported, after an uninformed plea; (see INA Section 237(a) (2) (B)). Similarly, any alien or legal resident convicted of a crime of domestic violence, after September 30, 1996, excepting domestic violence victims, would likewise never be eligible for a waiver after an unimformed plea and ultimately be subject to deportation; see INA Section 237 (a) (2) (E).

[6] This provision does not define violent or dangerous crimes

[7] The Court should note that 8CFR section 212.7D was amended approximately one month after the Green waiver denial, making it even less likely that Green, or Defendants in his position would be likely to receive a waiver. He is thus, clearly "threatened with deportation".

In view of these certainties, the State's bright line test is not the answer. For Defendants such as these, deportation is inevitable. For Defendants such as Green, the "potential threat" or "legal possibility" of deportation is real, and absent a complete reversal of discretion, inevitable as well.

CONCLUSION

For the foregoing reasons, the judgment of the Fourth District Court of Appeals in Green should be affirmed, while disapproving the holdings of the Third District with which Green acknowledged conflict.

CERTIFCATE OF SERVICE

I HEREBY CERTIFY a true and accurate copy of this foregoing Motion was mailed via U.S. Mail on this ____ day of _____, 2005 to: James J. Carney, Assistant Attorney General, 1515 North Flagler Drive, Suite 900, West Palm Beach, FL 33401.

CERTIFICATE OF TYPE SIZE AND STYLE

In accordance with Fla. R. App. P.,9.219, the undersigned hereby certifies that the instant brief has been prepared with 14 point Times New Roman.

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IN THE SUPREME COURT OF THE STATE OF FLORIDA

CASE NO.: SC05-687

STATE OF FLORIDA,

Petitioner,

vs.

OWRAN GREEN,

Respondent.

Appendix to
Respondent's Initial Brief on the Merits

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