IN THE SUPREME COURT OF THE STATE OF FLORIDA

CASE NO. SC05-687

STATE OF FLORIDA,

Petitioner,

vs.

OWRAN GREEN,

Respondent.

PETITIONER'S INITIAL BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

Petitioner was the prosecution and Respondent was the Defendant in the Criminal Division of the Circuit Court of the Fifteenth Judicial Circuit, in and for Broward County, Florida. Petitioner was the Appellee and Respondent was the Appellant 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 Petitioner may also be referred to as the State.

The small trial court record on appeal does not appear to be numbered. Petitioner has included a numbered appendix with the documents contained in the trial court record on appeal. References to that appendix will be preceded by "Petitioner's Appendix, p(p)."

All emphasis in this brief is supplied by Petitioner unless otherwise indicated.

STATEMENT OF THE CASE AND FACTS

On September 10, 2003, Green filed a Petition to Vacate and Set Aside Plea and Judgment of Conviction Pursuant to Rule 3.850, Florida Rules of Criminal Procedure (Petitioner's appendix p. 23). The petition alleged that Green pled guilty to a misdemeanor, had adjudication withheld, and successfully completed a sentence of sixty days incarceration and one year probation on the charges (Petitioner's appendix p. 1). The petition stated the trial court did not advise Green that he could be deported as a result of his plea (Petitioner's appendix pp. 1-2). Green alleged that as a result of the arrest and conviction, he had been rendered deportable from the United States. "As a result, the Defendant is thus irreversibly prejudiced and must move to set aside his plea of no contest to the charges set forth and described by this Petition." (Petitioner's appendix p. 2). The Petition also contained documents indicating Green's visa petition had been approved. However, his I-601 waiver had been denied because of the crimes to which he pled in this case as well as another crime committed in 1992 (Appellant's appendix pp. 30-32).

The State filed a Response to the Motion for Post-Conviction Relief (Petitioner's appendix p. 15). On October 14, 2003, the trial court denied Green's motion (Petitioner's

appendix p. 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" (Petitioner's appendix p. 11).

On or about February 13, 2003, Green filed a Motion to Set Aside Court 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 (Petitioner's appendix p. 8). The unsworn motion alleged that Green did not receive notice that his original motion had been denied until February of 2004. The trial court denied the order, but purportedly gave Green an extra 30 days to appeal from the date of the order denying the motion to vacate (Petitioner's appendix p. 3). Green subsequently filed a notice of appeal.

The Fourth District reversed for an evidentiary hearing, finding the petition and reply stated a facially valid claim because they showed a "legal possibility of deportation". See Green v. State, 895 So.2d 441, 444 (Fla. 4th DCA 2005). The Fourth District acknowledged conflict with cases from the Third District.[1] Judge Stone dissented, stating "I would follow those opinions that recognize that nothing less than

1 Kindelan v. State, 786 So.2d 599 (Fla. 3d DCA 2001); Curiel v. State, 795 So.2d 180 (Fla. 3d DCA 2001) and Saldana v. State, 786 So.2d 643 (Fla. 3d DCA 2001).

notice that the government is initiating a deportation proceeding is sufficient to constitute a 'threat of deportation.'" "It seems to me that to hold otherwise is to speculate that the government will initiate deportation proceedings." Id. at 445.

The State filed a Motion for Rehearing and Motion to Consider Pleading in Support of the State's Position, pointing out that the State had not been given an opportunity to file a response in accordance with Davis v. State, 660 So.2d 1161 (Fla. 4th DCA 1995). The Fourth District granted the Motion to Consider Pleading in Support of the State's Position, but denied the Motion for Rehearing. This Court accepted jurisdiction. See State v. Green, 910 So.2d 263 (Fla. 2005).

SUMMARY OF THE ARGUMENT

The Fourth District erred in finding Green's motion to be legally sufficient. The motion was deficient for several reasons. The motion fails to allege when he had notice of threat of deportation. It fails to allege that Green would not have entered the plea had he known that it might result in deportation and fails to comply with the pleading requirements of Rule 3.850(c).

Additionally, the motion failed to sufficiently allege that Green had been threatened with deportation and failed to show prejudice. The Fourth District's holding that a defendant's motion is facially sufficient if it shows a "legal possibility" of deportation, is vague, unworkable, and lacks deference to the concept of finality. It also fails to recognize that actual prejudice is required under this Court's decision in Peart, infra.

ARGUMENT

POINT I

THE FOURTH DISTRICT ERRED IN FINDING THAT GREEN FILED A FACIALLY SUFFICIENT MOTION FOR POST-CONVICTION RELIEF.

A. The Fourth District's finding that the Green's motion was facially sufficient was incorrect as Green's motion fails to allege when he had notice of a threat of deportation.

The Fourth District's opinion 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 also 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 begins on "the day a defendant gains (or should gain) knowledge of the threat." 756 So.2d at 46. It is not clear to us when defendant claims he actually learned of the threat of deportation, so his proof will have to make that date evident.

Green, 895 So.2d at 444-45.

In Alexis v. State, 845 So.2d 262, 262 (Fla. 2d DCA 2003), the court held:

> However, Alexis is not entitled to relief at this time because his motion is facially insufficient. In Peart v. State, 756 So.2d 42, 46 (Fla. 2000), the Florida Supreme Court held that defendants shall have two years to file pleadings alleging a rule 3.172(c)(8) violation as measured from when the defendant has or should have

> knowledge of the threat of deportation. Alexis does not allege in his motion when he had notice of the threat of deportation. We therefore affirm the decision of the trial court without prejudice to Alexis' filing a facially sufficient 3.850 motion.

A defendant is not entitled to an evidentiary hearing on a legally insufficient motion for post-conviction relief. See Johnson v. State, 904 So.2d 400, 403 (Fla. 2005). The defendant bears the burden of establishing a prima facie case based upon a legally valid claim. See Atwater v. State, 788 So.2d 223, 229 (Fla. 2001). The appellate court must examine each claim to determine if it is legally sufficient. Id.

This Court's opinion in Peart requires that the Rule 3.850 motion be filed within two years of when the defendant has or should have (whichever is earlier) knowledge of the threat of deportation based on the plea. Peart, 756 So.2d at 45. Green alleged that he entered his plea in 1993 (Petitioner's appendix, p. 23). He filed his Rule 3.850 in 2003 (Petitioner's appendix, pp. 23, 25). In addressing the two year time requirement of Peart, Green's motion simply alleges that he "recently" learned of "adverse immigration consequences" when he consulted an immigration attorney (Petitioner's appendix, p. 24). Green has failed to make a legally sufficient claim with respect to Peart's two year time limit. The vague term "recently" does not show an entitlement

to relief under Peart. The petition, even if taken as true, is facially insufficient. This Court should follow its precedent on legally sufficient motions, approve Alexis, disapprove Green, and find the trial court properly denied relief on a legally insufficient motion. Cf. Miralles v. State, 837 So.2d 1083, 1084 (Fla. 4th DCA 2003)(Rule 3.850 motion facially insufficient where defendant failed to allege when he discovered counsel's misadvice, as case law required such claims to be brought within two years of discovering attorney's misadvice).

B. The Fourth District erred 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.

As acknowledged in Green, to show prejudice under Peart the defendant must demonstrate 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. However, a review of Green's petition reveals no such allegation. Accordingly, the motion should have been denied as legally insufficient on this ground as well. See State v. Seraphin, 818 So.2d 485, 491 (Fla. 2002)(Peart requires showing that defendant would not have entered his plea had he known he could be deported). Cf. Poisel v. State, 876 So.2d 1262, 1262

(Fla. 4th DCA 2004)(denial of motion for post-conviction relief affirmed without prejudice where defendant failed to allege that he would not have entered plea but for counsel's incorrect advice); Rankin v. State, 861 So.2d 1222, 1224 (Fla. 2d DCA 2003)(where a defendant claims that his plea was involuntarily entered based misinformation, he must still allege that he would not have entered the plea had he been given the correct information); Harris v. State, 801 So.2d 973, 974 (Fla. 2d DCA 2001)(claim facially insufficient where defendant failed to allege that he would not have pleaded if he had been aware of the reasonable consequences of habit-ualization).

C. The Fourth District erred in finding Green's motion legally sufficient where the motion failed to comply with the pleading requirements of Rule 3.850(c).

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 has been filed, and if so, how many; and if a previous motion or motions have been filed, the reasons or reasons the claim or claims in the present motion were not raised in the former motion or motions. Green's motion failed to comply with these requirements of Rule 3.850(c).

In Richards v. State, 813 So.2d 1016 (Fla. 4th DCA 2002), the trial court denied the motion for post-conviction relief, finding it untimely. This Fourth District found the motion timely under Peart, but nevertheless affirmed without prejudice because the motion failed to include all the information required by Rule 3.850(c). See also Woods v. State, 740 So.2d 600 (Fla. 4th DCA 1999)(affirming denial of motion for post conviction relief, without prejudice, because it failed to comply with Rule 3.850(c)); Groover v. State, 703 So.2d 1035, 1038 (Fla. 1997)(dismissal without prejudice is proper action when amended motion failed to include oath required by Rule 3.850(c)) and McBride v. State, 524 So.2d 1113 (Fla. 4th DCA 1988)(trial court's ruling will be upheld if right for any reason). The Fourth District erred by not affirming the trial court's denial as Green's motion was legally insufficient under Rule 3.850(c).

D. The Fourth District erred in finding Green's Motion legally sufficient where Green failed to sufficiently allege that he had been threatened with deportation and failed to show prejudice.

Initially, Petitioner notes that the Fourth District's opinion relied heavily on the allegations in the Defendant's reply in the trial court in reaching the conclusion that Respondent had satisfied Peart. For example, the Fourth

District states:

> In reply, he asserted (and in fact offered expert testimony) that as a result of 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 this 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 has 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.

Rule 3.850(d) does not authorize the filing of a reply to the State's response. See Evans v. State, 764 So.2d 822, 823 (Fla. 4th DCA 2000). Accordingly, the trial court was not required to consider the reply (which was filed *after* the trial court had ruled)(Petitioner's appendix pp. 13, 14). Id. See also Lurie v. Auto Owner's Insurance Co, 605 So.2d 1023, 1025 (Fla. 1st DCA 1992)(replies to responses not authorized by the rules of procedure are routinely ignored or *sua sponte* stricken); Hartford Insurance Company of the Southeast v. Blackmore, 651 So.2d 1220, 1220 (Fla. 4th DCA 1995)(striking reply to response as unauthorized). Cf. St. Regis Paper Co.

v. Hill, 198 So.2d 365 (Fla. 1st DCA 1967)(issue raised for first time in reply brief would not be considered on appeal).

Even if the reply were to be considered a rehearing, which the trial court was under no obligation to do, the trial court was not be required to consider new allegations. See Price Wise Buying Group v. Nuzum, 343 So.2d 115, 117 (Fla. 1st DCA 1977)(court could not consider matters raised for the first time in motion for rehearing). See also Reid v. State, 745 So.2d 363, 364 (Fla. 4th DCA 1999)(motion for rehearing that was, in reality, amended motion for post-conviction relief filed after court had already denied initial motion would be denied as successive).

Moreover, regardless of how the pleading is characterized, it would be improper for the trial court (and this Court) to consider the allegations in the reply as part of the Rule 3.850 motion as the reply was unsworn. See Daniels v. State, 450 So.2d 601, 602 (Fla. 4th DCA 1984)(trial court properly disregarded the unsworn supplemental factual allegations in defendant's accompanying memorandum); Groover, 703 So.2d at 1038 (amended Rule 3.850 motion properly denied where it was not sworn) and Rule 3.850(c)(motion must be under oath). See also Leon Shaffer Golnick Advertising v. Cedar, 423 So.2d 1015, 1017 (Fla. 4th DCA 1982)(an attorney’s unsworn

representations are not evidence and appellate court cannot consider them). Accordingly, any allegations in the unsworn reply should not be considered.

Petitioner also notes the Fourth District's suggestion that the reply presents expert testimony that Respondent would be deported appears to be incorrect. The allegation regarding the expert's testimony is qualified by the phrase "it is expected" ("it is expected that the Defendant's expert's testimony will testify that:" (Petitioner's appendix p. 12). Such qualifying language renders the allegation regarding the expert's testimony meaningless. Additionally, the reply does not indicate that an expert was expected to testify that Green would ultimately be deported. Rather, it indicates that the expert was expected to testify that Green was "rendered inadmissible." (Petitioner's appendix, p. 12)[2].

The Fourth District's opinion also states that the transcript of the plea colloquy indicates that the plea judge failed to give any immigration warnings before taking the plea. Green, 895 So.2d at 442, n. 1. That statement appears to be erroneous as no transcript was part of the record of

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2 The unsworn reply does make a bare allegation that the Department of Homeland Security will begin deportation proceedings because Respondent's I-601 waiver has been denied, however, the reply does not allege any expert was expected to testify regarding that allegation.

this proceeding (see cover page to record on appeal in Petitioner's appendix). Green entered his plea in May of 1993 (Petitioner's appendix pp. 23, 29). An attachment to the motion for post-conviction relief indicates that the transcript is not available due to passage of time (Petitioner's appendix p. 27).

It also appears that the Fourth District may have erred in concluding that it had jurisdiction to reverse the trial court's decision. The trial court denied relief on October 14, 2003 (Petitioner's appendix, p.14). On or about February 13, 2004, Green filed an unsworn Motion to Set Aside Court 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 (Petitioner's appendix p. 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* the order, but purportedly gave Green an extra 30 days to appeal. Green subsequently notice of appeal.

Green relied on Hall v. State Dept. of Health and Rehabilitative Services, 487 So.2d 1147 (Fla. 1st DCA 1986), a civil case, in support of his Motion to Set Aside (Petitioner's appendix, p. 4). That reliance was misplaced.

Green was seeking a belated appeal from the denial of a motion for post-conviction relief and should have filed a sworn petition for belated appeal in the appellate court pursuant to Fla. R. App. P. 9.141(c). See Brigham v. State, 769 So.2d 1100 (Fla. 1st DCA 2000). Moreover, the trial court *denied* the Motion to Set Aside. Accordingly, the Fourth District erred in finding it had jurisdiction to reverse the trial court's order.

In Green, the Fourth District found that contrary to the holding of cases from the Third District (see footnote one and Judge Stone's dissent), a facially sufficient claim for relief for the failure to follow Rule 3.172(c)(8), did not require an allegation that the defendant had received notice that the government was instituting deportation proceedings. Rather, the Fourth District merely required that there be a "legal possibility" of deportation. Id. at 444.

In support of its "legal possibility" standard, the majority in Green states that this Court in Peart v. State, 756 So.2d 42 (Fla. 2000), cited two of the Fourth District's cases, Marriott v. State, 605 So.2d 985 (Fla. 4th DCA 1992) and Spencer v. State, 608 So.2d 551 (Fla. 4th DCA 1992), with "obvious approval." Green, 895 So.2d at 443-444. While this Court did cite the above referenced cases, Petitioner

disagrees with any suggestion that this Court cited those cases with "obvious approval" of Green's "legal possibility" standard. Additionally, Petitioner notes it does not appear that Spencer supports the Green majority. In that case the defendant had already been found deportable by the INS and that decision was affirmed on appeal. Spencer, 608 So.2d 551. See also generally, Farquharson v. U.S. Atty. Gen., 246 F.3d 1317, 1320 (11th Cir. 2001)(case where decision by immigration judge that defendant was deportable was affirmed on appeal).

In Marriott v. State, 605 So.2d 985 (Fla. 4th DCA 1992), the Fourth District did not discuss whether deportation proceedings had been instituted against the defendant. It simply stated:

> Furthermore, it is undisputed that appellant's entry of a nolo contendere plea subjected him to the possibility of deportation. We hold that the threat of deportation was sufficient for a showing of prejudice as required under Simmons v. State, 489 So.2d 43 (Fla. 4th DCA 1986).

While it is true that this Court cited Marriott in Peart and in fact approved Marriott, the specific meaning of the terms "threat of deportation" and "prejudice" was not an issue before this Court in Peart. The issues in Peart were:

> (1) whether a writ of error coram nobis was the proper vehicle for the noncustodial defendants to raise a violation of rule 3.172(c)(8); (2) whether the two-year

> limitation in rule 3.850 applies to writs alleging a rule 3.172(c)(8) violation and, if so, at what point does the limitation begin to run; and (3) whether defendants attempting to prove such an error must prove, among other things, that had they gone to trial, they probably would have been acquitted.

Id. at 44-45.

This Court found that such motions should now be filed pursuant to Rule 3.850; that the two year period ran from when the defendant has or should have knowledge of the threat of deportation; and that defendants need not prove likely acquittal at trial, rather a defendant must show prejudice. Id. at 45, 48. In finding that a defendant need not prove likely acquittal, this Court did not adopt the "legal possibility" standard in Green. As stated previously, whether deportation proceedings had been instituted in Marriott is not discernable from the opinion. Moreover, in addition to citing Marriott in deciding that proving a likelihood of acquittal was not required, Peart also cited to a number of cases in which the "threat of deportation" and "prejudice" was that INS had actually taken action against the defendant. Id. at 47-48, citing Spencer, Perriello v. State, 684 So.2d 258, 259-60 (Fla. 4th DCA 1996) and De Abreu v. State, 593 So.2d 233 (Fla. 1st DCA 1991).

In short, this Court's opinion in Peart did not approve

the "legal possibility" standard and reject a requirement that deportation proceedings must be instituted for there to be a valid claim. In fact, this Court's opinion lends support to the State's position that deportation proceedings must be commenced for a defendant to have a valid claim. Justice Anstead filed a concurring opinion in which two other justices concurred. 756 So.2d at 48. That opinion "fully concur[ed]" with the majority opinion. Id. The opinion went on to disagree with the three justice dissent as to what was necessary to show the required prejudice:

> Specifically, the dissent adheres to the view that actual deportation, as opposed to the initiation of deportation proceedings, ought to constitute the **requisite** prejudice.

In support of its "legal possibility" theory and in rejecting Judge Stone's dissent, the Green majority states:

> There is a standard meaning of *threaten* revealing the true intendment. In addition to expressing an intention to inflict harm, the dictionary definitions for threaten include these: to be a source of danger, to menace; to give signs or warning of, to portend; to indicate danger or harm. See AMERICAN HERITAGE DICTIONARY (3rd ed.) 1868 (emphasis in original).

The first sentence in the above quoted paragraph seems to be contradicted by the second. The second sentence shows there

is not a standard meaning of "threaten" that supports the "legal possibility" standard.

The first definition of "threat" in the American Heritage Dictionary (3d Ed. 1992) is "1. An expression of an intention to inflict pain, injury, evil, or punishment." Similarly, the first definition of "threat" in Black's Law Dictionary (5th Ed. 1979) is "A communicated intent to inflict physical or other harm on any person or property."

Moreover, 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. See also Seraphin, 818 So.2d at 488 ("This Court has not interpreted Peart as establishing that the threat of deportation itself constitutes prejudice."). Nothing in Green's motion demonstrates prejudice. It is pure speculation that after ten years of inaction, the government will institute deportation proceedings. See Maharaj v. State, 778 So.2d 944, 951 (Fla. 2000)("Postconviction relief cannot be based on speculation or possibility.")3.

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3 As previously stated, Respondent's unsworn reply should not be considered by this Court. Even if the allegations in the reply were sworn and the reply stated his expert would testify that Green will be deported, Appellant submits such an allegation should not be considered. The allegation amounts to predicting the future. It is simply not knowable that deportation proceedings will actually be instituted. Should a

The Fourth District's vague and speculative "legal possibility" standard is unworkable. For example, in Green, the majority attempted to distinguish its earlier decision of Wigley v. State, 851 So.2d 784 (Fla. 4th DCA 2003). Green, 895 So.2d at 444, fn. 3. In Wigley, the defendant became a naturalized citizen subsequent to entering a plea to the charge at issue. The United States later sought to revoke her naturalization based on the plea. The Fourth District affirmed the denial of relief, finding the "threat of deportation" was insufficient. Id. at 785.

The Green majority attempted to distinguish Wigley by stating that unless the INS was successful in revoking Wigley's naturalization, she was not under threat of deportation. However, applying the term "legal possibility" as used in the opinion, it is certainly legally possible that Wigley could be deported because it is legally possible that the federal government could be successful in revoking his citizenship and it is legally possible the government could institute deportation proceedings.

If the Fourth District is stating that it was not "legally possible" for Wigley to be deported because certain

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defendant deportable based on multiple convictions be entitled to relief if he alleges an expert will testify that his other qualifying convictions will be set aside? Such crystal ball

legal machinations must first occur, the same could be said in this case. As used in that sense, it is not legally possible for Green to be deported prior to the institution of deportation proceedings. In fact, as used in that sense, it is not "legally possible" for a defendant to be deported until the successful conclusion of the deportation proceedings, including the government's overcoming any defenses raised by the defendant.

See, e.g., Bellvue v. State, 794 So.2d 730 (Fla. 3d DCA 2001 and 8 CFR §1240.11(a)(2) (2005).

In distinguishing Wigley, the Green majority stated, "We agreed with the trial court's finding that it was improper to *presume* that the INS will prevail in its attempt to revoke citizenship." Id. If it is speculative to presume that the INS will diligently pursue and prevail in the denaturalization proceeding, why is it not also speculative to presume that the federal government will institute deportation proceedings against Green (and prevail) when it had failed to do so for over ten years? In fact, this case arguably involves more speculation than Wigley. In Wigley the defendant had been targeted by the government, which had begun proceedings against her. Here, Green has not been targeted even after

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gazing should not be considered a legitimate allegation.

allegedly being eligible for deportation for ten years.

State v. Oakley, 715 So.2d 956, 957 (Fla. 4th DCA 1998) was cited in the same footnote as Spencer in Peart. Id. at 48, FN6. In Oakley, the defendant alleged she would automatically be deported due to her conviction. The Fourth District found the defendant failed to show actual prejudice because she was also deportable based on a previous conviction. The Fourth District's opinion in Oakley would seem to be contrary to holding in Green. Under the "legal possibility" standard it is certainly possible that the defendant could receive a pardon for his earlier conviction or have it otherwise set aside. See Payne v. State, 890 So.2d 284 (Fla. 5th DCA 2004).

The Oakley opinion correctly considered the requirement of genuine prejudice in accordance with Rule 3.172(i). Green erroneously found a defendant is entitled to relief without a showing of actual prejudice.

Green's speculative "legal possibility" standard also lacks deference to the concept of finality. As stated in United States v. Timmreck, 441 U.S. 780, 99 S.Ct. 2085, 60 L.Ed.2d 634 (1979):

> Every inroad on the concept of finality undermines confidence in the integrity of our procedures; and, by increasing the volume of judicial work, inevitably delays and impairs the orderly administration of justice. The impact is

> greatest when new grounds for setting aside guilty pleas are approved because the vast majority of criminal convictions result from such pleas. Moreover, the concern that unfair procedures may have resulted in the conviction of an innocent defendant is only rarely raised by a petition to set aside a guilty plea. Id. at 784, 99 S.Ct. 2085 (quoting United States v. Smith, 440 F.2d 521, 528-29 (7th Cir.1971) (Stevens, J., dissenting)).

This Court should adopt the workable "bright-line" rule in Judge Stone's dissent. It strikes a reasonable balance between a defendant's need for relief, respect for finality, and the requirement that a defendant show actual prejudice. See Peart,

(Anstead, J., concurring)(the initiation of deportation proceedings ought to constitute the requisite prejudice); Rodriguez v. State, 789 So.2d 548 (Fla. 3d DCA 2001) and Alfaro v. State, 828 So.2d 1056 (Fla. 3d DCA 2002). See also Mendez v. State, 805 So.2d 905 (Fla. 2d DCA 2001)(motion facially insufficient where it alleged defendant was "in danger of deportation.").

CONCLUSION

WHEREFORE, based on the foregoing arguments and the authorities cited therein, Petitioner respectfully requests this Court disapprove Green, adopt Judge Stone's dissent, and approve the holdings of the Third District with which Green acknowledged conflict.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing "Petitioner's Initial Brief on the Merits" has been furnished to: Michael B. Cohen, Pinnacle Corporate Park, 500 West Cypress Creek Rd. #300, Fort Lauderdale, FL 33309, this ___ day of November, 2005.

_____

James J. Carney

CERTIFICATE OF TYPE SIZE AND STYLE

In accordance with Fla. R. App. P. 9.210, the undersigned hereby certifies that the instant brief has been prepared with 12 point Courier New Type.

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James J. Carney