IN THE SUPREME COURT OF THE STATE OF FLORIDA

CASE NO.: SC 05-687
Lower Tribunal No.: 4D04-1584

STATE OF FLORIDA,

Petitioner,

vs.

OWRAN GREEN,

Respondent.

RESPONDENT'S REPLY BRIEF ON JURISDICTION

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PRELIMINARY STATEMENT

Petitioner was the Prosecution and Respondent was the Defendant in the Seventeenth Judicial Circuit Court, 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 Respondent may also be referred to as the Defendant.

The symbol "A" will be used to denote the Appendix attached hereto.

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

STATEMENT OF THE CASE AND FACTS

The only relevant facts to a determination of this Court's discretionary jurisdiction under Article V, Section 3 (b)(3) of the Florida Constitution are those set forth in the appellate opinion sought to be reviewed and a copy of the Defendant's Petition and attachments included in the Appendix. A copy of the opinion and the Petition to Vacate filed pursuant to Rule 3.850, Florida Rules of Criminal Procedure is contained in the Appendix to this brief.

SUMMARY OF THE ARGUMENT

This Court should accept jurisdiction only on the issue which concerns the definition of "threat of deportation" because the opinion of the Fourth District Court of Appeal conflicts with the decision of the Third District Court of Appeal on this matter.

The Court should deny jurisdiction on the second point raised in Petitioner's brief, that is, whether a Petition to Vacate filed pursuant to Rule 3.850 Florida Rule of Criminal Procedure is legally insufficient when the Defendant fails to allege that he was within the two (2) year window for filing such a claim since the prosecution did not object below to this alleged insufficiency, nor did the Circuit Court ever address this issue in its Order denying the Petition. The Fourth District Court of Appeal never directly addressed this issue as a conflict, in opposition to the Second District Court of Appeal's decision in Alexis, supra.

ARGUMENT

POINT I

The Respondent agrees that the decision of the Fourth District Court of Appeal expressly and directly conflicts with decision of the Third District Court of Appeal.

As stated by the Petitioner, it is well settled that in order to establish conflict jurisdiction the decision sought to be reviewed must expressly and directly create conflict with decision of another District Court of Appeal or the Supreme Court on the same question of law. Article V, Section 3 (b)(3) Fla. Const.;

The Defendant believes that this Court does have jurisdiction to determine this question. In Green v. State, 2005 WL 156724 (Fla. 4th DCA, January 26, 2004), the Fourth District stated:

> Some decisions since Peart have held that nothing less than the initiation of the deportation proceeding would constitute sufficient prejudice by reason of a "threat of deportation". See Kindelan v. State, 786 So.2d 599 (Fla. 3rd DCA 2001) (holding that the denial of a request to adjust immigration status and a finding that movant was excludable is not a threat of deportation);

> Curiel v. State, 795 So.2d 180 (Fla. 3rd DCA 2001) (placing a detainer on the incarcerated movant was not a "threat of deportation"), Saldana v. State, 786 So.2d 643 (Fla. 3rd DCA 2001) (finding that notice of a detainer would be placed on the movant in an investigation into deportability initiated was not a threat of "actual deportation"). **We disagree with that reading and are therefore in conflict with these decisions on this issue.**

See Page 3, Petitioner's brief and Green v. State, 2005 WL 156724 - So.2d - 30 Fla. Law Weekly D279.

In expounding on this conflict, the Fourth District pointed to this Court's decision in Peart v. State, 756 So.2d 42 (Fla. 2000); and stated:

> To illustrate what constitutes the meaning of threat as used in that case Peart pointed to two (2) of our own decisions with obvious approval. Id. In Marriott v. State, 605 So.2d 985, 987 (Fla. 4th DCA 1992), we held that the legal possibility of deportation under Federal immigration law was a sufficient showing of prejudice. The fact that we were there dealing with the legal possibility of deportation, not the actual filing is clear from our opinion:

Green, supra. at Page 2 of that opinion.

The Respondent, however, does not agree with the Petitioner's position asserting that the Fourth District's opinion in Green, is in conflict with the Second District's opinion in Alexis, supra, which held the Petition legally insufficient when the Defendant failed to allege he was in the two (2) year window for filing such a claim. See Alexis v. State, 845 So.2d 262 (Fla. 2nd DCA 2003).

First, it will be for the trial Court, if and when a hearing is conducted, to determine whether a Petition filed by Green was facially sufficient or insufficient. Neither the State of Florida in its response to the Defendant's Petition nor the Circuit Court in its Order denying Defendant's Petition, addressed this issue.

The Fourth District's opinion in Green therefore, on this issue, is simply a restatement of Peart's obvious requirement that a Petitioner has two (2) years from the day the Defendant gains (or should gain) knowledge of the threat of deportation to file a Petition; Peart v. State, 756 So.2d at 46. If the Fourth District had found a direct conflict with the Alexis decision in this regard, it would have said so, as it did with regard to its definition of "threat of deportation" in the Green decision. Article V, Section 3 of the Florida Constitution requires an express and direct conflict with the decision of another District Court of Appeal for this Court to grant jurisdiction. The decision in Green on this second issue does not conflict with the decision in Alexis, supra. The Supreme Court has jurisdiction to resolve a conflict resulting only when one District Court of Appeal renders a decision wholly irreconcilable with that of another District Court of Appeal; Williams v. Duggan, 153 So.2d 726 (1963). That is not the case in this instant matter.

Based on the foregoing, Respondent submits that the Fourth District's decision in the instant case conflicts only with the Kindelan, Curiel and Saldana decisions of the Third District Court of Appeal and that if this Court grants discretionary conflict jurisdiction, the issue to be addressed should be limited only to the issue of what constitutes a "threat of deportation".

CONCLUSION

WHEREFORE based on the foregoing arguments and the authorities cited therein, Respondent respectfully requests that this Court grant Respondent's request for a discretionary review of the instant cause as to the one limited question addressed in this responsive brief on jurisdiction.

Respectfully submitted,

_____
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Respondent's Brief on Jurisdiction, has been furnished by United States mail this _____ day of June, 2005 to: James J. Carney, Assistant Attorney General, 1515 N. Flagler Drive, Suite 900, West Palm Beach, FL 33401.

Respectfully submitted,

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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 14 point Times New Roman Type.

_____
Michael B. Cohen, Esq.

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APPENDIX TO RESPONDENT'S BRIEF ON JURISDICTION

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