IN THE SUPREME COURT OF THE STATE OF FLORIDA

CASE NO. SC05-687

STATE OF FLORIDA,

Petitioner,

vs.

OWRAN GREEN,

Respondent.

PETITIONER'S REPLY 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 Seventeenth 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 defendant will be referred to as "Respondent" or "Appellee." The State will be referred to as "Petitioner" or "Appellant."

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

Petitioner relies on the statement of the case and facts in the initial brief.

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). Respondent's waiver argument overlooks the basic legal principal that a trial court's ruling will be upheld if right for any reason.

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.

Respondent apparently concedes that he did not specifically allege when he first learned of the threat of deportation (answer brief p. 16). Nevertheless, Respondent claims Petitioner's argument is waived because it was not raised in the trial court. That argument might have some merit if the State had lost in the trial court. However, the State was successful in the trial court. The trial judge denied the motion for post-conviction relief. Accordingly, the Fourth District was required to affirm if there was any basis for doing so. See Vandergriff v. Vandergriff, 456 So. 2d 464, 466 (Fla. 1984)(trial court decisions are presumptively valid and should be affirmed, if correct, regardless of whether the reasons advanced are erroneous) and McBride v. State, 524 So.2d 1113 (Fla. 4th DCA 1988)(trial court's ruling will be upheld if right for any reason). See also Atwater v. State, 788 So.2d 223, 229 (Fla. 2001)(an

appellate court must examine each claim to determine if it is legally sufficient).

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 by Respondent, he failed to allege that he would not have entered the plea had he know of the deportation consequences (answer brief p. 18). Accordingly, the Fourth District erred in reversing the trial court. See Vandergriff, 456 So. 2d at 466 (trial court's ruling will be upheld if right for any reason). See also Atwater, 788 So.2d at 229 (an appellate court must examine each claim to determine if it is legally sufficient).

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).

As Respondent agrees that the motion was facially insufficient under Rule 3.850(c)(answer brief p. 20), the Fourth District erred in reversing the trial court. See Vandergriff, 456 So. 2d at 466 (trial court's ruling will be upheld if right for any reason). See also Atwater, 788 So.2d at 229 (an appellate court must examine each claim to determine if it is legally sufficient).

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.

Respondent disputes Petitioner's claim that the Fourth District opinion incorrectly suggested the unsworn reply presented expert testimony that Respondent would be deported (answer brief p. 24). 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. Moreover, the unsworn reply does not indicate that an expert would 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). Being "rendered inadmissible" does not mean that person will be deported. See also In the Matter of E,1 I. & .N Dec. 505 (1943); In Matter of B, 5 I. & N. Dec. 538 (1953); and 8 U.S.C. §1101(43)(F)(simple assault and simple battery, where the sentence is less than a year imprisonment, are not deportable offenses).

Respondent next agrees with Appellee that the Fourth

District's opinion erroneously states that a transcript of the plea colloquy indicates that Green was not advised of possible immigration consequences (answer brief p. 24). However, Respondent goes on to claim that since the Waiver of Rights Form contained no mention of immigration consequences, it is clear nothing was mentioned during the plea hearing. Although not determinative of the issues before this Court, Petitioner strongly disagrees with Respondent's claim. The substance of the Waiver of Rights Form in no way proves what was discussed during the plea colloquy.

Respondent also argues that this Court's use of the phrase "has or should have knowledge of the threat of deportation" makes it clear that this Court did not intend to preclude defendants against whom deportation proceeding had not been instituted from seeking relief (answer brief p. 27). Petitioner disagrees. The "has or should have knowledge" phrase is common terminology in the area of legal limitation periods. It is simply used to prevent defendants from circumventing limitation periods through willful ignorance. That phrase in no way suggests a lower requirement for bringing the motion in question.

Respondent agrees that the precise meaning of the term "threat of deportation" was not an issue decided by this Court

in Peart v. State, 756 So.2d 42, 46 (Fla. 2000) (answer brief pp. 26, 27). Cf. Florida Dept. of Children and Families v. Sun-Sentinel, Inc., 865 So.2d 1278, 1284 fn. 8 (Fla. 2004). However, Respondent goes on to state that (answer brief p. 29):

> By [Peart] defining the period in which the Defendant must file his Motion to Vacate 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 based upon a violation [of] Rule 3.172(c)(8).

Petitioner strongly disagrees with this statement. Peart held that the two year period "runs from when the defendant has or should have knowledge of the threat of deportation based on the plea." Id. at 46. As acknowledged by Respondent (answer brief pp. 26, 27), Peart did not define "threat of deportation." It did not hold that "threat of deportation" meant that a defendant "may be deported."

Contrary to the suggestion in Respondent's brief (answer brief, p. 33), Petitioner cited State v. Seraphin, 818 So. 2d 485 (Fla. 2002)(and Rule 3.172(i)), for the proposition that a defendant must show *actual* prejudice to be entitled to withdraw a plea. The Fourth District's "legal possibility" standard ignores the requirement of actual prejudice.

Respondent contends these cases should be decided on a case-by-case basis and that his claim is not speculative because "Although the Government has not instituted deportation proceedings in the ten years since Green pled, the State's argument fails to realize times have changed since September 11, 2001" (answer brief, p. 35). That "argument" proves the State's point. It has been over ten years since Respondent pled and nearly five years since "times have changed." It is pure conjecture that deportation proceedings will ever be instituted against Respondent.

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 also Gatson v. State, 911 So. 2d 257 (Fla. 3d DCA 2005) and cases cited therein (certifying conflict with Green).

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 Reply 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 February, 2006.

_____

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