IN THE SUPREME COURT OF FLORIDA

ALFREDO CANSECO,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

Case No. SC09-1535

ON DISCRETIONARY REVIEW FROM THE
FIRST DISTRICT COURT OF APPEAL

RESPONDENT'S ANSWER BRIEF

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PRELIMINARY STATEMENT

This is a discretionary appeal in a criminal postconviction case that was summarily denied without an evidentiary hearing, based on jurisdiction arising from a certified question. Appellant raises one issue, which is contested.

Respondent, the State of Florida, the Appellee in the District Court of Appeal (DCA) and the prosecuting authority in the trial court, will be referenced in this brief as Respondent, the prosecution, or the State. Petitioner, ALFREDO C. CANSECO, the Appellant in the DCA and the defendant in the trial court, will be referenced in this brief as Petitioner or by proper name.

The record on appeal consists of one volume, which will be referenced as the Record on Appeal, followed by any appropriate page number. "IB" will designate Petitioner's Initial Brief, followed by any appropriate page number.

STATEMENT OF THE CASE AND FACTS

Defendant's statement omits facts critical to the issues presented and the applicable standards of appellate review. Because of these serious defects, mere supplementation without extensive explanation would not render the statement comprehensible. Accordingly, the State declines to accept it in its entirety, urges the court to reject it, and presents the following statement of the case and facts:

In November 9, 1995, Petitioner entered a plea of *nolo contendre* to the offense of possession of a controlled substance, to wit: cocaine. (R. 1, 34.) On that same date, the Circuit Court for the Second Judicial Circuit in and for Gadsden County, Florida entered a judgment of conviction against Petitioner and sentenced him to two years probation. (R. 1.) The clerk's worksheet from his plea hearing reflects that Petitioner was provided an interpreter. (R. 32.) Additionally, Petitioner's plea and acknowledgement of rights form reflects that he was provided counsel and informs Petitioner that "I understand that if I am not a United States citizen, a plea of guilty or no context could result in my deportation." (R. 33-34.) Petitioner did not appeal his conviction and sentence. (R. 2-3.)

Seven years later, on August 12, 2002, the United States Immigration and Naturalization Service ("INS") issued Petitioner a Notice to Appear in removal proceedings under Section 240 of the Immigration and Naturalization Act. (R. 30-31.) In the Notice to Appear, the INS informed Petitioner that he was a native and citizen of the nation of Mexico and that, on November 9, 1995, he was convicted of the above-mentioned offense and that,

under Sections 212(a)(6)(A)(i) and 212(a)(2)(A)(i)(II) of the Immigration and Nationality Act, Petitioner was subject to removal from the United States. (R. 31.)

Over six years later and over thirteen years after entering his plea, Petitioner filed a Motion for Post-Conviction Relief pursuant to Rule 3.850 of the Florida Rules of Criminal Procedure, contending that "[a]t the plea hearing, the Court did not inform [him] that he was subject to deportation as a result of his no contest plea . . . ." (R. 5.) Petitioner contended that his plea was, therefore, involuntary and sought to withdraw his plea. (R. 5, 8-9.) Petitioner also contended that he did not fully comprehend the written plea form that he signed, including the deportation warning. (R. 9.) Although the plea form did not have a place for an interpreter to sign (R. 33-34), and despite that the clerk's worksheet demonstrated that Petitioner had the aid of an interpreter (R. 32), Petitioner also contended that his claim was bolstered because the plea form was not signed by the interpreter. (R. 9, n.6.)

Petitioner did not sign the oath on his Rule 3.850 motion. (R. 11.) In a footnote, counsel offered the following:

> Undersigned counsel is still in the process of obtaining Defendant Canseco's oath (which has been difficult in light of the fact that Defendant Canseco was deported). Undersigned counsel will supplement the instant motion with Defendant Canseco's oath as soon as undersigned counsel receives it.

(R. 11, n. 8.) The record does not reflect any subsequent supplementation of Petitioner's motion.

By Order rendered November 19, 2008, the Circuit Court summarily denied

Petitioner's motion, finding:

> (1) the defendant did not sign a verification oath; (2) even if it had been properly signed the defendant's attachment to his motion demonstrates that the defendant was advised in 2002 by the Immigration and Naturalization Service that he was subject to deportation and yet he waited six years to file the instant motion; (3) the clerk of court's worksheet indicates that the defendant was sworn and examined by the judge before the defendant entered his no contest plea with the assistance of an interpreter; (4) he was represented by an attorney at the time of his plea; and, (5) the plea form demonstrates he was on notice that he was subject to being deported (see attached). The defendant's motion is without merit.

(R. 16-34.) Petitioner appealed to the First District Court of Appeal. (R. 35.)

On July 17, 2009, the First District issued the following per curiam opinion:

> We affirm but certify the same issue as certified in *State v. Freijo*, 987 So. 2d 190 (Fla. 3d DCA 2008), as being one of great public importance.
>
> > WHETHER A DEFENDANT MAY OBTAIN THE BENEFIT OF A NEW TWO-YEAR WINDOW PERIOD UNDER *STATE V. GREEN*, 944 So. 2d 208 (Fla. 2006), IF THE CLAIMANT RECEIVED ACTUAL NOTICE OF A DEPORTATION PROCEEDING MORE THAN TWO YEARS BEFORE THE MOTION TO WITHDRAW PLEA?

(Resp. Appx. A.) The First District issued its mandate on August 4, 2009.

On September 11, 2009, this Court issued an Amended Order accepting jurisdiction over this case. *See Canseco v. State*, 15 So. 3d 580 (Fla. 2009) (Table).

STATEMENT OF THE ISSUE

WHETHER A DEFENDANT MAY OBTAIN THE BENEFIT OF A NEW TWO-YEAR WINDOW PERIOD UNDER *STATE V. GREEN*, 944 So. 2d 208 (FLA. 2006), IF THE CLAIMANT RECEIVED ACTUAL NOTICE OF A DEPORTATION PROCEEDINGS MORE THAN TWO YEARS BEFORE THE MOTION TO WITHDRAW [HIS OR HER] PLEA? (Restated)

SUMMARY OF ARGUMENT

Petitioner claims that the two-year window in *Green* provides him with another two years to file a postconviction claim that he was not aware his plea subjected him to deportation, despite the fact that Petitioner received actual notice of the threat of deportation over six years prior. Petitioner makes this assertion based on "unambiguous . . . plain and ordinary language," which Petitioner actually excised and selectively quoted from *Green*. Furthermore, Petitioner ignores that the prophylactic rule in *Green* was expressly provided "in the interest of fairness," not to provide windfalls to litigants such as Petitioner, who knew of the threat of deportation and chose to let their claims lapse. Additionally, Petitioner ignores that, in the absence of *Green*'s prophylactic measure, this Court would have extinguished claims that had not yet ripened under its prior rule in *Peart*, which held such claims must be filed within two years of when a litigant knew or should have known of the threat of deportation. In essence, based on the context of the passage in the sentence from which it was excised, the context of the case in which it appears, and the context of that case as related to its predecessor, Petitioner is plainly incorrect in contending that he is entitled to take a second bite from an apple that has long ago ripened and rotted away.

Furthermore, Petitioner entirely fails to bring to this Court's attention that the reason that a transcript of his plea hearing is unavailable is due to his own dilatory actions. Had Petitioner actually raised this claim when it ripened under *Peart*, it would have been brought

within ten years of his plea and the court reporter would have been required to retain the original notes of the plea hearing. However, by delaying his claim for over thirteen years, the plea hearing that could have conclusively refuted Petitioner's claim is no longer available. Because Petitioner's own dilatory actions have damaged the State's ability to respond to his claim, his claim should be barred by the equitable doctrine of laches.

ARGUMENT

ISSUE: WHETHER A DEFENDANT MAY OBTAIN THE BENEFIT OF A NEW TWO-YEAR WINDOW PERIOD UNDER *STATE V. GREEN*, 944 SO. 2D 208 (FLA. 2006), IF THE CLAIMANT RECEIVED ACTUAL NOTICE OF A DEPORTATION PROCEEDINGS MORE THAN TWO YEARS BEFORE THE MOTION TO WITHDRAW [HIS OR HER] PLEA? (RESTATED)

A. Standard of Review.

Issues presenting a pure question of law are reviewed *de novo*. *See Armstrong v. Harris*, 773 So. 2d 7, 11 (Fla. 2000). Under the *de novo* standard of review, the appellate court pays no deference to the trial court's ruling; rather, the appellate court makes its own determination of the legal issue. *See Health Options, Inc. v. Agency for Health Care Admin.,* 889 So. 2d 849, 851 (Fla. 1st DCA 2004). Under the *de novo* standard of review, an appellate court freely considers the matter anew as if no decision had been rendered below. However, a trial court's factual findings on which its decision of law is based will be sustained and given deference by the appellate court if supported by competent substantial evidence. *See, e.g., Dillbeck v. State*, 882 So. 2d 969, 972-973 (Fla. 2004)(addressing a mixed question of law and fact).

B. Petitioner Received Actual Notice of a Deportation Proceeding More Than Two Years Before Filing a Motion to Withdraw His Plea And Is Not Entitled to Resurrect His or Her Claim Based on State v. Green*, 944 So. 2d 208 (Fla. 2006).*

The gravamen of Petitioner's argument is that he is entitled to resurrect his claim to withdraw his plea based on not being informed of deportation consequences, under the two-year window created in *State v. Green*, 944 So. 2d 208 (Fla. 2006). Petitioner makes this claim even though

he received actual notice of deportation proceedings well more than two years before raising it here. The grounds for this assertion are Petitioner's partial and selective quotation of one sentence of *Green*, which Petitioner excises---not only from the entire sentence in which it appears---but also from the context of the case and its history. However, when viewed in context, this Court's window in *Green* does not apply to a defendant, such as Petitioner, who received actual notice of deportation proceedings, but allowed that claim to expire by not moving to withdraw his plea within two years of receiving actual notice of such proceedings. Indeed, the purpose of *Green*'s two-year window was to provide a prophylactic remedy to a defendant whose claim had not ripened under *Peart*, but would have been extinguished under *Green*. *Green* did not resurrect a claim long ago ripened and expired.

In *Peart v. State*, 756 So. 2d 42 (Fla. 2000), this Court sought to harmonize and unify application of the two-year time limitation for post-conviction motions under Rule 3.850 of the Florida Rules of Criminal Procedure and violation of Rule 3.172(c)(8) of the Florida Rules of Criminal Procedure.[1] This Court held that the 3.850 two-year "limitation

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[1] Rule 3.850(b) of the Florida Rules of Criminal Procedure, provides, in relevant part:

> A motion to vacate a sentence that exceeds the limits provided by law may be filed at any time. No other motion shall be filed or considered pursuant to this rule if filed more than 2 years after the judgment and sentence become final in a noncapital case . . .

FLA. R. CRIM. P. 3.850(b).

period runs from when the defendant has or should have known of the threat of deportation based on the plea." *Id.* at 46 (underline added). Indeed, this Court held in *Peart* that "in order for a defendant to establish a prima facie case for relief, the defendant must be threatened with deportation resulting from the plea." *Id*. (underline added).[2] Therefore, this Court held in *Peart* that defendants "who gained knowledge of the threat of deportation prior to" the date *Peart* was announced "shall have two years from" the date of *Peart*'s announcement "to file a rule 3.850 motion alleging their claims for relief" and that all other defendants "who subsequently discover threats of deportation shall have two years from the

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Rule 3.172(c)(8) of the Florida Rules of Criminal Procedure, provides, in relevant part:

> **(c) Determination of Voluntariness.** Except when a defendant is not present for a plea, pursuant to the provisions of rule 3.180(d), the trial judge should, when determining voluntariness, place the defendant under oath and shall address the defendant personally and shall determine that he or she understands:
> . . .
> (8) that if he or she pleads guilty or nolo contendre the trial judge must inform him or her that, if he or she is not a United States citizen, the plea may subject him or her to deportation pursuant to the laws and regulations governing the United States Immigration and Nationalization Service. It shall not be necessary for the trial judge to inquire as to whether the defendant is a United States citizen, as this admonition shall be given to all defendants in all cases.

FLA. R. CRIM. P. 3.172(c)(8) (2000) (bold in original).

[2] In *Peart*, this Court reasoned, "[s]ince the day the defendant gains (or should gain) knowledge of the threat of deportation is the first day the defendant can actually articulate a prima facie case, it stands to reason that the day the defendant learns of the threat should likewise start the running of the two-year limitation period." 756 So. 2d at 46.

date of such discovery to file their claims for relief." *Id.*

In subsequent years, judges encountered difficulty applying the *Peart* standard. *See Pena v. State*, 980 So. 2d 542, 544 (Fla. 4th DCA 2008) (citing *Green*, 944 So. 2d at 210 ("[O]ur review has alerted us to larger problems applying *Peart* fairly, efficiently, and with adequate regard for finality.")). Accordingly, in *State v. Green*, 944 So. 2d 208 (Fla. 2006), after examining the divergent results created by *Peart*'s "knew or should have known" of the "threat of deportation" standard, this Court receded from *Peart*. *Id.* at 213-18. Rather, in *Green*, this Court determined that the two-year limitations period for Rule 3.850 motions would commence "when the judgment and sentence become final unless the defendant could not, with the exercise of due diligence, have ascertained within the two-year period that he or she was subject to deportation." *Id.* at 218. "Further, the defendant must establish only that he or she is subject to deportation because of the plea, not as we held in *Peart*, that he or she has been specifically threatened with deportation." *Id.* This Court determined that "[t]hese changes govern in any case in which the trial court accepts a plea of guilty or no contest on or after the date of this decision." *Id.*

In *Green*'s conclusion, this Court recognized that is holding "reduces the time in which a defendant must bring a claim based on an alleged violation of rule 3.172(c)(8)." *Green*, 944 So. 2d at 219. "Therefore, in the interest of fairness, defendants whose cases are already final will have two years from the date of this opinion in which to file a motion comporting with the standards adopted today." *Id.* (underline added).

The State suggests that the correct reasoning for resolution of this case was initially set forth by the Fourth District in *Pena v. State*, 980 So. 2d 542 (Fla. 4th DCA 2008). After examining the history of this Court's decisions, the Fourth District in *Pena*, properly rejected a similar claim. *Id.* at 545-46. The *Pena* court correctly recognized that this argument "infers that *Green* must be read so liberally as to require a court to consider, on the merits, any and every motion so long as it is filed within two years of *Green*." *Id.* at 545. The *Pena* court properly found this plainly untenable and recognized that a "'fair' interpretation" of *Green*, and the "logical and rational way" to interpret this Court's decision would be to "prevent the 'unfair' consequence that would befall a defendant, if *Green* were to apply to cases already final for more than two years prior to the *Green* opinion." *Id.* at 546. The *Pena* court properly recognized that *Green* was meant to help a litigant who "may not have had a cognizable claim under *Peart* (if there had not been any removal proceedings instituted) but then had the claim extinguished under *Green* because the conviction and plea were final for more than two years." *Id.*

The *Pena* court provided the following example:

> [H]ad a defendant entered a plea in 1991, that conviction would have become final in 1993, if no appeal were taken. If the federal government did not begin removal proceedings until 2007, that defendant would not have had a cognizable claim under *Peart*, until 2007, as there was never a "threat" of deportation until 2007. Were *Green* to apply, in the absence of the exception, this defendant could never have brought a claim under *Peart* and then would have been denied any chance at relief under *Green*. Clearly, to us, the supreme court envisioned such a situation and tried to provide a prophylactic remedy by allowing this hypothetical defendant to bring, for the first time, a motion

> under *Green*, because the defendant could not have filed such a claim before, under *Peart*.

Id. at 546 n.3 (underline added).

The *Pena* court's understanding of the prophylactic remedy created in *Green*—-to avoid extinguishing claims that had not yet ripened--is entirely fair, and could only be what this Court intended in *Green.* Indeed, the Third District came to the same conclusion in *State v. Freijo*, 987 So. 2d 190 (Fla. 3d DCA 2008).

After examining this Court's decisions in *Peart* and *Green*, the Third District properly recognized that this Court's objective in *Green* was "to **discourage** further delay" and there "is no indication that the Court sought to revive claims . . . that were already unquestionably time-barred." *Friejo*, 987 So. 2d at 194 (bold in original). Rather, the Third District properly recognized that the purpose of *Green* was to create an objective standard, in lieu of the subjective standard of *Peart*. *See id.* However, the Third District also recognized that *Green* had no application to litigants who "were and are already time-barred because there was no doubt regarding their awareness of the deportation prejudice occasioned by their pleas." *Id.*

Furthermore, the Third District also properly recognized in *Friejo* that litigants, such as Petitioner, who received actual notice of deportation proceedings more than two years before *Green*, cannot plead applicability of the *Green* two-year window. This is because litigants such as Petitioner cannot allege and prove that they could not have ascertained the immigration consequences of the plea through the exercise of due diligence

within the two-year period. The Third District explained:

> In the same paragraphs of the conclusion in *Green* in which the Florida Supreme Court announced the new two-year window, the Court specified in that it was requiring motions to withdraw a plea, on the basis that the defendant was not advised of the potential immigration consequences of his or her plea, must be filed within the rule's two-year limitations period, commencing when the judgment and sentence become final, **unless the defendant alleges and proves that he or she could not have ascertained the immigration consequences of the plea with the exercise of due diligence within the two-year period**. *Id.* at 219. The Court did not revive previously adjudicated or unadjudicated claims that were time barred at the issuance of the opinion in *Green*. Freijo's motion was, therefore, time-barred when the *Green* opinion was issued . . . . As a result, no unfairness has occurred in this case, and he cannot "file a motion comporting with the standards adopted" in *Green*. *Id.*

Freijo, 987 So. 2d at 194 (bold in original).[3] Yet, Defendant, eschews this understanding of *Green* in its precedential context and express intention to avoid delay and create a "fair" result, and instead—-under the auspices of "plain language" of a judicial opinion—-asserts that *Green* must be read so liberally as to allow a defendant, under two-year window in *Green,* to resurrect a claim that both ripened and expired under *Peart*.

First, Petitioner's contention that resurrection of his claim is commanded by the "unambiguous" plain language of *Green* simply ignores the

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[3] The rationale of *Pena* and *Freijo* have properly been repeatedly applied. *See Canseco v. State*, 12 So. 3d 923 (Fla. 1st DCA), *rev. granted*, 15 So. 3d 580 (Fla. 2009); *Lopez v. State*, 12 So. 3d 849 (Fla. 3d DCA 2009); *Sampedro v. State*, 10 So. 3d 1131 (Fla. 3d DCA 2009); *Sabnani v. State*, 5 So. 3d 808 (Fla. 3d DCA 2009); *Valdez v. State*, 1 So. 3d 1167 (Fla. 3d DCA 2009); *Morales v. State*, 988 So. 2d 705 (Fla. 3d DCA 2008); *State v. De Armas*, 988 So. 2d 156 (Fla. 3d DCA 2008); *see also SanPedro v. State*, 2 So. 3d 1124 (Fla. 3d DCA Feb. 20, 2009) (citation per curiam affirmance); *Haza-Martin v. State*, 990 So. 2d 623 (Fla. 3d DCA Sept. 3, 2008) (same); *Ramirez v. State*, 990 So. 2d 622 (Fla. 3d DCA Sept. 3 2008) (same).

language of *Green* itself. Indeed, Petitioner's own argument excises those portions of the language that eviscerate his argument. (IB. 8.) In the sentence before the one Petitioner relies upon, this Court expressly recognized that its holding in *Green* "reduces the time in which a defendant must bring" a Rule 3.172(c)(8) claim. *Green*, 944 So. 2d at 219. This Court then recognized, "Therefore, in the interest of fairness, defendants whose cases are already final will have two years from the date of this opinion in which to file a motion comporting with the standards adopted today." *Id.* (underline added). Petitioner's argument entirely ignores that the word, "therefore" makes the sentence he relies upon dependent on the one before it, which recognizes *Green*'s effect of possibly reducing a litigant's time to file such a claim. In fact, in reciting the holding in *Green*, Petitioner did not see fit to include the underlined portions set out above. (IB. 8.)

Second, Petitioner's argument completely ignores that the express purpose for the prophylactic remedy created in *Green* was this Court's "interest in fairness." *Id.* Indeed, Petitioner also excises this portion of the sentence and then claims the "unambiguous . . . plain and ordinary meaning" dictates the results he seeks. (IB. 8.) However, Petitioner's selective "plain meaning" allows a litigant a second-bite-at-the-apple to bring forth a long ago ripened and expired claim in diametric opposition to the State's interest in finality of convictions. This cannot be the "fair" result that was either expressed or intended by this Court in *Green*. Rather, this Court's "interest in fairness" indicates that the *Green* remedy

was properly intended to apply to litigants with unripe or recently ripened claims under *Peart* which would have otherwise been extinguished by *Green*.[4]

Therefore, under a proper analysis of this Court's decisions in *Peart* and *Green*, Petitioner's claim is grossly untimely. Petitioner pled *nolo contendre* to possession of cocaine in 1995. (R. 1.) On August 12, 2002, the INS issued Petitioner a Notice to Appear alerting him to removal proceedings under section 240 of the Immigration and Nationality Act, from which Petitioner knew or should have known that he was threatened with deportation. (R. 30-31.)[5] Therefore, under *Peart*, Petitioner had until

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[4] Petitioner also makes the egregious assertion that the rule of lenity should apply to a judicial decision, specifically *Green*, relying on a case involving sentencing guidelines. (IB. 8 n.9.) This argument is, to say the least, unpersuasive. The rule of lenity "is applicable where the language of a criminal statute is susceptible to differing interpretations, thus allowing for construction in favor of the accused." *The Florida Bar v. St. Louis*, 967 So. 2d 108, 122 (Fla. 2007) (underline added). Indeed, in codifying the rule of lenity, the Florida Legislature has specifically provided, "The provisions of this code and offenses defined by other statutes shall be strictly construed; when the language is susceptible of differing constructions, it shall be construed most favorably to the accused." § 775.021(1), FLA. STAT. (2008) (underline added). The Criminal Punishment Code and its predecessor Guidelines are statutory creations. *See, e.g.,* §§ 921.0012-921.0027, FLA. STAT. (2008). Petitioner offers no support in Florida law for the proposition that the rule of lenity is applicable to a judicial decision.

[5] *See Green v. State*, 895 So. 2d 411 (Fla. 4th DCA 2005) ("We readily admit that the actual commencement of proceedings by the INS eliminates any speculation about the actuality of being deported."), *overruled on other grounds*, 944 So. 2d 208 (Fla. 2006); *Gutierrez v. State*, 935 So. 2d 546 (Fla. 3d DCA 2006) (recognizing the "usual test" for "threat of deportation" under *Peart* to be "an INS Notice to Appear"); *Alfaro v. State*, 828 So. 2d 1056, 1058 (Fla. 3d DCA 2002) (receipt of notice to appear before immigration judge triggered *Peart* two-year limitation period); *Martinez v. State*, 842 So. 2d 900, 901 (Fla. 2d DCA 2003) (concluding that

August 12, 2004 to file the instant motion, but chose not to do so. Rather, Petitioner waited more than six years after he was threatened with deportation and more than four years after the time allotted to him by *Peart* expired to file a motion for post-conviction relief. *Green*'s prophylactic remedy created for "fairness" does not resurrect Petitioner's long expired claim. The certified question is properly answered in the negative and Petitioner's claim is time-barred.

C. Even if the Certified Question Were to Be Answered in the Affirmative, Petitioner is Still Not Entitled to Relief Under the Doctrine of Laches Because the Reason a Plea Transcript is Unavailable is Petitioner's Dilatory Failure to Timely Bring This Claim.

In his Initial Brief, Petitioner asserts that his allegation must be considered as conclusive because "the transcript of [his] plea colloquy is unavailable." (IB. 1, n.2.) What Petitioner fails to mention is that the reason the transcript of his plea colloquy is unavailable is because of his own dilatory actions in failing to bring this claim when it was ripe under *Peart*. Because Petitioner's own dilatory actions in failing to bring this claim when it ripened are the reason his plea transcript are unavailable, his claim is barred by the equitable doctrine of laches.

The doctrine of laches is properly used as a defense by the State in a

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motion filed "quickly" after INS notice to appear in deportation proceedings, but nine years after plea, "cannot be ruled untimely on its face" under *Peart*); *State v. Lindo*, 863 So. 2d 1237, 1239 (Fla. 4th DCA 2003) (recognizing notice to appear from INS as basis of knowledge of threat of deportation); *Martinez v. State*, 842 So. 2d 900 (Fla. 2d DCA 2003) (same).

postconviction relief proceeding when delay in bringing a claim for collateral relief has been unreasonable and the State has been prejudiced in responding to the claim. *See Anderson v. Singletary*, 688 So. 2d 462 (Fla. 1997). Laches is a recognized defense in postconviction actions where the movant has engaged in inordinate and prejudicial delay. *Anderson*, 688 So. 2d at 463; *Xiques v. Dugger*, 571 So. 2d 3, 4 (Fla. 2d DCA 1990); *Smith v. State*, 506 So. 2d 69, 70 (Fla. 1st DCA 1987). The First District has found a motion for postconviction relief barred by laches when the defendant, who had entered a *nolo contendre* plea, escaped after two years in custody and remained at large for almost seven years, and where counsel and the judge who had accepted the plea had died while the defendant was at large. *Frazier v. State*, 447 So. 2d 959 (Fla. 1st DCA 1984).

Petitioner pled *nolo contendre* and was convicted and adjudicated in 1995. (R.1.) In August 2002, Petitioner received a Notice to Appear from the INS. (R. 30-31.) Accordingly, no later than 2002, Petitioner knew or should have known that he was being threatened with deportation and this claim was ripe under *Peart*.

As this Court recognized in *Green*, "[d]elayed filing hampers adjudication because transcripts of plea colloquies that would demonstrate whether defendants were advised of immigration consequences often become unavailable over time." *Green*, 944 So. 2d at 215. Additionally, "[w]hen a transcript was not previously prepared, court reporters are required to retain original notes or electronic records no longer than ten years in

felony cases . . . ." *Id.* (citing FLA. R. JUD. ADMIN. 2.430(f)). Had Petitioner raised this claim when it ripened under *Peart*, the court reporter would have been required to have retained Petitioner's then-seven-year-old plea transcript. However, here, because Petitioner has raised this claim thirteen years after his plea colloquy, the court reporter is no longer required to retain the original notes.

Although Petitioner's own dilatory actions are the reason procuring a transcript of his plea colloquy is impossible, Petitioner asserts he is entitled to the benefit of having his allegations be deemed conclusive. This result is entirely inequitable.

Indeed, Petitioner's attempt to take advantage of his own dilatory actions is particularly egregious in light of the fact that his clerk worksheet demonstrates that he received the aid of an interpreter (R. 32), he was represented by counsel at the plea (R. 33-34), and his plea form specifically provides, "I understand that if I am not a United States citizen, a plea of guilty or no contest could result in my deportation." (R. 34.)

While laches is an affirmative defense that requires evidence by the party asserting it, the State would respectfully suggest that, in the face of a rule that demonstrates that Petitioner's delay made his plea transcript unavailable, proof that he received an interpreter, was represented, and was informed of the exact information about which he claims he was not informed, the State has demonstrated that Petitioner's claim is barred by laches. Accordingly, even if the certified question is

answered in the affirmative, Petitioner's claim should be summarily denied.

CONCLUSION

Based on the foregoing, the State respectfully submits the certified question should be answered in the negative, the decision of the First District Court of Appeal reported at 12 So. 3d 923 should be approved, and the order denying post-conviction relief entered in the trial court should be affirmed.

CERTIFICATE OF SERVICE

I certify that a copy hereof has been furnished to the following by U.S. MAIL on November 18, 2009: Michael Ufferman, Esq., Michael Ufferman Law Firm, P.A., 2022-1 Raymond Deihl Road, Tallahassee, Florida 32308.

CERTIFICATE OF COMPLIANCE

I certify that this brief was computer generated using Courier New 12 point font.

Respectfully submitted and certified,
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