IN THE

SUPREME COURT OF FLORIDA

ALFREDO C. CANSECO, Petitioner, v. STATE OF FLORIDA, Respondent.	Case No. SC09-1535 District Court Case No. 1D09-5263

INITIAL BRIEF OF PETITIONER

MICHAEL UFFERMAN
Michael Ufferman Law Firm, P.A.
2022-1 Raymond Diehl Road
Tallahassee, Florida 32308
(850) 386-2345/fax (850) 224-2340
FL Bar No. 114227

Counsel for Petitioner **CANSECO**

A. TABLE OF CONTENTS

Page

B. TABLE OF CITATIONS

Page

1. Cases

2. Other Authority

C. STATEMENT OF THE CASE AND STATEMENT OF THE FACTS.

This case presents the review of a certified question relating to a criminal postconviction proceeding. In 1995, Alfredo C. Canseco (hereinafter "Petitioner Canseco") – who is not a United States citizen – entered a no contest plea to one count of possession of a controlled substance. (R-1).[1] Petitioner Canseco was sentenced to two years of probation. (R-1). However, at the plea hearing, the trial court did not warn Petitioner Canseco that his no contest plea could result in deportation. (R-5).[2] Petitioner Canseco did not appeal the conviction or sentence. (R-2).

On October 23, 2008 – after the Court issued its opinion in *State v. Green*, 944 So. 2d 208, 219 (Fla. 2006), and within two years of that decision – Petitioner Canseco filed a motion for postconviction relief pursuant to Florida Rule of

---

[1] References to the First District Court of Appeal record (case number 1D09-5263) will be made by the designation "R" followed by the appropriate page number.

[2] "Where an evidentiary hearing has not been held, a movant's allegations in a motion for postconviction relief must be accepted as true except to the extent that the allegations are conclusively rebutted by the record." *Murphy v. State*, 638 So. 2d 975, 976 (Fla. 1st DCA 1994) (citing *Harich v. State*, 484 So. 2d 1239 (Fla. 1986)). In the instant case, the transcript of the plea colloquy is unavailable. (R-6). Petitioner Canseco specifically alleged in his postconviction motion that the trial court did not warn him that his no contest plea could result in deportation. (R-5). This allegation is not rebutted by the record.

Criminal Procedure 3.850. (R-1). Petitioner Canseco raised one claim in the motion – that his no contest plea was not knowingly, intelligently, and voluntarily entered because the trial court failed to inform him that his no contest plea could subject him to deportation (as required by Florida Rule of Criminal Procedure 3.172(c)(8)). (R-5-8).

On November 19, 2008, the postconviction court summarily denied Petitioner Canseco's postconviction motion. (R-16). In its order, the postconviction court stated that Petitioner Canseco's motion was untimely because an attachment to the postconviction motion demonstrated that Petitioner Canseco was advised in 2002 by the Immigration and Naturalization Service (hereinafter "INS") that he was subject to deportation. (R-16).[3] On appeal, the First District Court of Appeal affirmed the postconviction court's order and certified the following question:

> 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?

[3] The letter from INS is contained in the record at page 15.

Canseco v. State, 12 So. 3d 923, 923 (Fla. 1st DCA 2009).[4] On September 11, 2009, the Court accepted jurisdiction in order to answer this certified question.

[4] In a series of opinions, the Third District Court of Appeal certified the same question that was certified by the First District in the instant case. *See Sampedro v. State*, 10 So. 3d 1131, 1132 (Fla. 3d DCA 2009); *Morales v. State*, 988 So. 2d 705, 706 (Fla. 3d DCA 2008); *State v. Freijo*, 987 So. 2d 190, 191 (Fla. 3d DCA 2008). To the best of undersigned counsel's knowledge, this Court has

D. SUMMARY OF ARGUMENT.

Pursuant to the plain language of this Court's holding in *State v. Green*, 944 So. 2d 208 (Fla. 2006), defendants whose cases were already final on the date *Green* was issued had two years from the date of *Green* in which to file a postconviction motion raising a claim based on a trial court's failure to comply with Florida Rule of Criminal Procedure 3.172(c)(8). In *Green*, the Court stated:

> [D]efendants 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.

Green, 944 So. 2d at 219. Petitioner Canseco complied with this procedure and filed his postconviction motion within two years of the *Green* opinion. Accordingly, the postconviction court erred when it concluded that Petitioner Canseco's motion was untimely.

---

not accepted jurisdiction in any of these other cases.

E. ARGUMENT AND CITATIONS OF AUTHORITY.

Pursuant to the plain language of this Court's holding in *State v. Green*, 944 So. 2d 208 (Fla. 2006), defendants whose cases were already final on the date *Green* was issued had two years from the date of *Green* in which to file a postconviction motion raising a claim based on a trial court's failure to comply with Florida Rule of Criminal Procedure 3.172(c)(8).

1. Standard of Review.

Petitioner Canseco submits that the issue in this case is a pure question of law and therefore the standard of review is *de novo*. *See D'Angelo v. Fitzmaurice*, 863 So. 2d 311, 314 (Fla. 2003) ("The standard of review for the pure questions of law before us is *de novo*.").

2. Argument.

The certified question in this case concerns the effect that this Court's opinion in *State v. Green*, 944 So. 2d 208 (Fla. 2006), had on the postconviction defendants whose cases were already final at the time that *Green* was issued. For the reasons expressed below, Petitioner Canseco submits that pursuant to the plain language of this Court's holding in *Green*, defendants whose cases were already final on the date *Green* was issued had two years from the date of *Green* in which to file a postconviction motion raising a claim based on a trial court's failure to

comply with Florida Rule of Criminal Procedure 3.172(c)(8).[5] In *Green*, the Court recognized that there was substantial confusion regarding the triggering event for starting the postconviction statute of limitations for a rule 3.172(c)(8) claim. *See, e.g., Kindelan v. State*, 786 So. 2d 599 (Fla. 3d 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. 3d DCA 2001) (stating that placing a detainer on the incarcerated movant was not a "threat of deportation"); *Saldana v. State*, 786 So. 2d 643 (Fla. 3d DCA 2001) (finding that notice that a detainer would be placed on the movant and an investigation into deportability initiated was not a threat of "actual deportation"). In *Green*, the Court receded from its previous holding in *Peart v. State*, 756 So. 2d 42 (Fla. 2000),[6] and

---

[5] Florida Rule of Criminal Procedure 3.172(c)(8) states that a trial court "shall address the defendant personally and shall determine that he or she understands":

> that if he or she pleads guilty or *nolo contendere*, 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 Naturalization Service.

"Since 1988, the law in Florida requires that the trial judge must specifically advise a defendant that she or he may face deportation as a consequence of the plea." *Gutierrez v. State*, 935 So. 2d 546, 547 (Fla. 3d DCA 2006).

[6] In *Peart*, the Court held that the two-year limitations period under rule 3.850 begins to run "when the defendant has or should have knowledge of the threat

held that for all future rule 3.172(c)(8) claims, the motion must be filed within two years of the judgment and sentence becoming final.[7] However, the Court created a two-year window for all defendants whose convictions were already final:

> Our holding in this case reduces the time in which a defendant must bring a claim based on an alleged violation of rule 3.172(c)(8). 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*.

Green, 944 So. 2d at 219 (emphasis added). Petitioner Canseco properly filed his postconviction motion within the *Green* two-year window. (R-1). Pursuant to the plain language of *Green* (i.e., "defendants whose cases are already final will have two years from the date of this opinion in which to file a motion"), Petitioner Canseco submits that his motion was timely filed.

In essence, the Court in *Green* created a new rule of procedure that applies to rule 3.172(c)(8) claims. In *Brown v. State*, 715 So. 2d 241, 243 (Fla. 1998), the Court stated that "[o]ur courts have long recognized that the rules of construction applicable to statutes also apply to the construction of rules." The Court added that

---

of deportation based on the plea." *Peart*, 756 So. 2d at 46.

[7] In *Green*, the Court stated that a defendant pursuing a rule 3.172(c)(8) postconviction motion must allege the following: (1) the trial court failed to explain on the record that the defendant is subject to deportation as a result of the plea; (2) had the defendant known of the possible deportation consequence, he/she would not have entered the plea; and (3) the plea does render the defendant subject to being removed from the country. *See Green*, 944 So. 2d at 219.

"when the language to be construed is unambiguous, it must be accorded its plain and ordinary meaning." *Id.*[8] The language in this Court's opinion in *Green* is unambiguous:

> [D]efendants 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.

Green, 944 So. 2d at 219. Therefore, this language must be accorded its plain and ordinary meaning (i.e., defendants whose cases were already final at the time of *Green* had two years to file a rule 3.172(c)(8) postconviction claim).[9] Petitioner Canseco's case was "already final" when *Green* was decided. Petitioner Canseco complied with the procedure set forth in *Green* (i.e., he filed his postconviction motion within two years of the date of the *Green* opinion and his motion comported with the standards adopted in *Green*). Accordingly, the postconviction court erred when it concluded that Petitioner Canseco's motion was untimely.

---

[8] *See also Banks v. State*, 887 So. 2d 1191, 1194 (Fla. 2004) ("Therefore, *under the plain language of our decision in Heggs* [*v. State*, 759 So. 2d 620 (Fla. 2000)], relief must be denied.") (emphasis added).

[9] Assuming *arguendo* that this Court's holding in *Green* was ambiguous, any ambiguity should be resolved in favor of Petitioner Canseco. *See, e.g., Lewis v. State*, 574 So. 2d 245 (Fla. 2d DCA 1991) (applying rules of lenity and strict construction to resolve ambiguity in sentencing guidelines in favor of defendant).

F. CONCLUSION.

Petitioner Canseco respectfully requests that the First District's decision in *Canseco* be quashed and that this case be remanded with directions that the postconviction court consider the merits of Petitioner Canseco's postconviction motion. All appropriate relief is respectfully requested.

G. CERTIFICATE OF SERVICE

I HEREBY CERTIFY a true and correct copy of the foregoing instrument has been furnished to:

Assistant Attorney General Giselle Denise Lylen
PL01, The Capitol
Tallahassee, Florida 32399-1050

by U.S. mail delivery this 5th day of November, 2009.

Respectfully submitted,

/s/ Michael Ufferman

MICHAEL UFFERMAN
Michael Ufferman Law Firm, P.A.
2022-1 Raymond Diehl Road
Tallahassee, Florida 32308
(850) 386-2345/fax (850) 224-2340
FL Bar No. 114227

Counsel for Petitioner **CANSECO**

H. CERTIFICATE OF COMPLIANCE

Undersigned counsel hereby certifies pursuant to Florida Rule of Appellate Procedure 9.210(a)(2) that the Initial Brief of Petitioner complies with the type-font limitation.

/s/ Michael Ufferman
MICHAEL UFFERMAN
Michael Ufferman Law Firm, P.A.
2022-1 Raymond Diehl Road
Tallahassee, Florida 32308
(850) 386-2345/fax (850) 224-2340
FL Bar No. 114227

Counsel for Petitioner **CANSECO**