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

REPLY BRIEF OF PETITIONER

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C. 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).

For all of the reasons set forth in the Initial Brief, Petitioner Canseco continues to submit that 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:

> 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 filed his postconviction motion within two years of the *Green* opinion. Accordingly, Petitioner Canseco's postconviction motion was timely filed.

In its Answer Brief, the State relies on: (1) the doctrine of laches, (2) the "clerk worksheet [which] demonstrates that [Petitioner Canseco] received the aid of

an interpreter [and] he was represented by counsel at the plea," and (3) a written plea form signed by Petitioner Canseco. Answer Brief at 17-20. For the reasons expressed below, Petitioner Canseco submits that none of these matters can be resolved without an evidentiary hearing.

Regarding laches, in *State v. De Armas*, 988 So. 2d 156, 158 (Fla. 3d DCA 2008), the Third District Court of Appeal explained that the doctrine of laches must be proved by the State at an evidentiary hearing:

> The State also argues that it should be allowed to prove that the doctrine of laches bars De Armas's claim. The doctrine is a recognized defense in a post-conviction matter where, as here, reconstructing the 1992 plea colloquy or trying a fifteen year-old felony charge are each impracticable. *If it asserts this defense, however, the State will have to prove unreasonable delay by De Armas in filing his motion to vacate the plea. The evidentiary hearing on remand will permit the State the opportunity to prove the elements of laches and any other available defense*.

(Emphasis added). Petitioner Canseco Pursuant to *De Armas*, the State's laches argument can only be considered following an evidentiary hearing.

Regarding the "clerk worksheet," Petitioner Canseco notes that this document is insufficient to refute a postconviction claim. *See Clark v. State*, 851 So. 2d 826, 827 (Fla. 1st DCA 2003) ("However, the 'Time Served Calculator' and accompanying annotations, attached to the trial court's order were merely clerk's notes and are insufficient to conclusively refute the appellant's [postconviction]

claim."). Moreover, although the "clerk worksheet" states that an interpreter was present during the plea proceeding and that Petitioner Canseco was represented by counsel at the time of the plea, there is nothing in the record establishing that the trial court, counsel, or the interpreter informed Petitioner Canseco regarding the deportation consequences of his no contest plea.

Finally, regarding the written plea form, Petitioner Canseco specifically alleged in his postconviction motion that he did not fully comprehend the written plea form that he signed in 1995. *See Peede v. State*, 748 So. 2d 253, 257 (Fla. 1999) (stating that where the trial court did not hold an evidentiary hearing, the defendant's allegations must be accepted as true to the extent they are unrefuted by the record). In his postconviction motion, Petitioner Canseco explained that he came to the United States in 1989. (R-9). When Petitioner Canseco came to this country, he was not fluent in English (his native language was Spanish). (R-9).[1] Hence, in 1995, Petitioner Canseco did not properly understand the deportation warning contained on the written plea form (a written plea form that was prepared in *English*). (R-33). A similar argument was addressed by the Fourth District Court of Appeal in *Perriello v. State*, 684 So. 2d 258 (Fla. 4th DCA 1996). In

[1] Petitioner Canseco's claim is further bolstered by the fact that an interpreter was required to appear at the plea proceeding. (R-32). The plea form is in English (not Spanish) and the plea form was not signed by the interpreter. (R-33).

Perriello, the defendant raised a rule 3.172(c)(8) postconviction claim. In response to the defendant's claim, the State argued that the error was harmless because the defendant had signed a written plea form that contained the proper warning. *See id*. at 259-60. The Fourth District rejected this argument, stating:

> The state argues that the failure of the trial judge to comply with rule 3.172(c)(8) is harmless in this case because appellant signed a written plea agreement that expressly warned of possible immigration consequences from a conviction. Although defendant signed the plea agreement containing the deportation warning, initialing every page, the deportation warning was one short paragraph in a seven page document. We also note that trial counsel testified that he read the entire plea agreement to the defendant in the holding cell adjoining the courtroom just prior to the plea. Counsel further testified that when the defendant was read the agreement, he never indicated that he was not a United States citizen.
>
> In *Koenig v. State*, 597 So. 2d 256 (Fla. 1992), the supreme court vacated a plea where the plea colloquy was deficient, even though the defendant had signed a detailed written waiver of his rights. There, the defendant had signed a detailed waiver form before his hearing and, in response to the trial judge's inquiry, stated that he had discussed the waiver with his attorney. *Id.* There was nothing in the record, however, to demonstrate that the defendant in *Koenig* understood the form he had signed or what his attorney told him about it.
>
> In this case, the record reflects that defendant is a 45 year old immigrant who came to the United States at the age of 12. *He testified at the evidentiary hearing that he had a tenth grade education and that his English language comprehension was not very good at the time of the plea*. As in *Koenig*, defendant initialed every page and signed the plea agreement. *There is no record evidence, however, showing that defendant understood the contents of the form*, or that he understood that he might be subjected to deportation as a result of his plea.
>
> The language of rule 3.172(c) is mandatory. The rule does not

> permit a written plea agreement to substitute for an on-the-record plea colloquy. Neither the signing of the waiver form, nor the reading of the written plea agreement to the defendant by his trial counsel, can alone satisfy the rule's requirement that the trial judge actually ascertain in open court that defendant understands the possible consequences of a conviction on his resident alien status. It follows that defendant be permitted to withdraw his plea and proceed to trial.

Id. at 259-60 (emphasis added).[2]

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[2] Likewise, in *Benelhocine v. State*, 787 So. 2d 38 (Fla. 2d DCA 2001), the Second District Court of Appeal rejected the State's argument that a written plea form was sufficient to satisfy the requirements of rule 3.172(c)(8): "The fact that the preprinted plea form advised Benelhocine of the possibility of deportation is insufficient to satisfy rule 3.172(c)(8)." *Benelhocine*, 787 So. 2d at 39-40. Notably, in *Green*, the Court cited to the holding in *Benelhocine*:

> Further, one court has held that inclusion of the immigration warning on a preprinted plea form signed by the defendant is an insufficient basis for denial of relief on this claim. *Alexis v. State*, 845 So. 2d 262, 262 (Fla. 2d DCA 2003); *Benelhocine v. State*, 787 So. 2d 38, 39-40 (Fla. 2d DCA 2001).

Green, 944 So. 2d at 216. The Court did not disapprove of the holding in *Benelhocine* or in any way indicate that the holding was incorrect. *See also Hen Lin Lu v. State*, 683 So. 2d 1110, 1112 (Fla. 4th DCA 1996) ("The problem in this case derives from the absence of a transcript of the plea colloquy. There is nothing in this record to demonstrate that appellant's signature on the plea form signifies an intelligent and voluntary waiver of his rights as opposed to a perfunctory, uninformed surrender. Under [*State v.*] *Blackwell*[, 661 So. 2d 282 (Fla. 1995),] and *Koenig*, a trial court cannot rely on a preprinted form in accepting a plea without confirming on the record that a defendant has read and understood it. We therefore reverse and remand for an evidentiary hearing or for the attachment of additional record excerpts (such as a transcript of the plea conference) that conclusively disprove appellant's claim that the trial court did not properly advise him concerning the potential of deportation as a result of the plea.").

Accordingly, for all of the reasons set forth above and contained in the Initial Brief, the postconviction court erred when it concluded that Petitioner Canseco's motion was untimely. Petitioner Canseco's case should be remanded with directions that the postconviction court consider the merits of Petitioner Canseco's postconviction motion and conduct an evidentiary hearing.

D. 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.

E. CERTIFICATE OF SERVICE

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

AAG[3] Trisha Meggs Pate and AAG Joshua R. Heller
PL01, The Capitol
Tallahassee, Florida 32399-1050

by U.S. mail delivery this 14th day of December, 2009.

Respectfully submitted,

/s/ Michael Ufferman

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F. CERTIFICATE OF COMPLIANCE

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

/s/ Michael Ufferman
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