

AVOIDING DEPORTATION BY VACATING STATE COURT CONVICTIONS

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HE NEVER MADE IT HOME

It was tax season and Jim was working overtime again. As an accountant for the last eighteen years, Jim was used to this sort of thing this time of year. As he got into his car, after putting in a thirteen hour day, all Jim could think of was getting home to see his wife and three young children and climbing into bed for some much needed sleep. Unfortunately, Jim never made it home. In fact, he would never experience another day of freedom in this country.

Jim did not think he was speeding as he was driving home but, after being startled by the blue flashing lights in his rear view mirror, he looked down and to his surprise he was doing over twenty miles above the speed limit. The police officer was very polite, but Jim was so nervous that his hands trembled when he handed over his driver's license and registration. Any contact with police would remind Jim of the horrible experience he had in 1998 when, upon the advice of his lawyer, he pled no contest to insurance fraud. Jim's conviction involved defrauding his insurance company out of approximately twenty five thousand (\$25,000.00) dollars. He was sentenced to thirty days in the Dade County Jail as a special condition of two years probation and adjudication was withheld. After noticing his thick accent, the officer asked Jim where he was from. Jim replied that he was from Ireland but he had been in the United States since 1985. The officer asked if he was a citizen and Jim said that he was not but that he has had a green card since 1991.

Ever since the 9/11 disaster, Officer Jones' department required him to run a records check with the Department of Homeland Security ("DHS") whenever encountering a non-citizen. About five minutes after calling Jim's name into the DHS, Officer Jones was advised that Jim was an aggravated felon and should be placed into custody and turned over to immigration officials who were already dispatched to Officer Jones' police station.

*This is an updated, expanded version of an earlier article, published as Robert G. Amsel, "Avoiding Deportation by Vacating State Court Convictions," 78 FLA. B. J. 42 (2004).

Jim could not believe that he was being arrested for a speeding ticket. Officer Jones explained that it was not the speeding ticket, but rather a request by DHS to make the arrest. Later that night, Jim was picked up by Homeland Security agents and taken to the Krome Detention Center in Miami where he was held in mandatory detention. The immigration lawyer hired by his family told Jim more bad news. Because of his prior conviction, new legislation passed by Congress gave Jim no possibility of getting released on bond, and the immigration judge had no discretion but to deport him. Despite living in the United States for over eighteen years, having an eighteen year career as an accountant, holding a green card, owning a home, being married to a United States citizen for twelve years and having three United States citizen children, it appeared that absolutely nothing could be done for Jim. This was especially hard for Jim to accept since he paid restitution in full, successfully completed his probation and received a withhold of adjudication. After being held in custody for eight months at the Krome Detention Center, Jim was deported.

ONE STRIKE AND YOU'RE OUT

Thanks to sweeping and draconian immigration legislation recently passed by Congress, Jim's odyssey is not unique, and nightmare cases like this are occurring with greater frequency throughout the country. Convictions for certain felonies, which never before caused deportation or serious immigration problems, are now being used as justification to deport and exclude non-citizens regardless of their strong ties to the community. Because Jim was convicted after April 24, 1996, for insurance fraud with a loss of over ten thousand (\$10,000.00) dollars, an "aggravated felony," and was released from that sentence after October 8, 1998, he was subject to mandatory detention without possibility of release on bond (unless he fit into the narrow exception relating to cooperating witnesses) and to mandatory deportation.¹

VACATE THE CONVICTION

Increasingly, the only avenue of relief left for people in Jim's situation is to vacate the criminal conviction which triggers the new federal laws mandating detention and deportation. Florida Rule of Criminal

1. See Illegal Immigration Reform and Immigrant Responsibility Act (IIRAIRA) of 1996, 8 U.S.C. § 1101 (2006); 8 U.S.C. § 1226 (2006); Anti-Terrorism and Effective Death Penalty Act (AEDPA) of 1996, Pub. L. No. 104-132, § 440(d), 110 Stat. 1214, 1277 (1996); Immigration and National Technical Corrections Act of 1994, Pub. L. No. 103-416 § 321(b), 108 Stat. 4305, 4320 (1994).

Procedure 3.850 (cc vehicle used in state a guilty or no contest applies to both custo

Rule 3 motions must be sworn to exceptions, defendan conviction.⁵ Theref or they would be d amend the petition s must be filed withi rendered, if no appe review, i.e., from the determination by a c preserve a defendan Title 28 U.S.C. § 22 the state conviction b 3.850 does not apply retroactive constituti counsel neglected to

Examples of fr include, but are not factual basis for acknowledgment of interest,¹¹ failure by t

2. See generally FLA.

3. Wood v. State, 750

4. See FLA. R. CRIM.

5. See 28 U.S.C. § 22

6. See Reed v. State, 1

7. Burr v. State, 518

States Supreme Court in *B*

696 So. 2d 1296, 1297 n.1

(Fla. 1st Dist. Ct. App. 1992

8. 28 U.S.C. § 2244(c

2254. See *infra* note 57.

9. See generally FLA.

10. FLA. R. CRIM. P. 3

1998); Farran v. State, 694

11. FLA. R. CRIM. P. 3

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12. FLA. R. CRIM. P. 3.

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Act (HIRAIRA) of 1996, 8 fective Death Penalty Act (1996); Immigration and 1(b), 108 Stat. 4305, 4320

Procedure 3.850 (commonly referred to as "Rule 3") is the exclusive vehicle used in state court to vacate a state court conviction resulting from a guilty or no contest plea or a finding of guilt following trial.² Rule 3.850 applies to both custodial and non-custodial defendants.³

Rule 3 motions need not be supported by supplemental affidavits but must be sworn to or affirmed by the defendant.⁴ Subject to limited exceptions, defendants have one opportunity for challenging a state court conviction.⁵ Therefore, all potential grounds to vacate should be included or they would be deemed waived. There is no filing fee and leave to amend the petition should be freely granted.⁶ Generally, a Rule 3 motion must be filed within two years of either thirty days after the conviction is rendered, if no appeal is taken, or at the conclusion of direct appellate review, i.e., from the latter of the issuance of an appellate mandate or final determination by a court of last resort from which review was sought.⁷ To preserve a defendant's ability to later seek federal habeas relief pursuant to Title 28 U.S.C. § 2254, a Rule 3 motion must be sought within one year of the state conviction becoming final.⁸ The two-year time limitation in Rule 3.850 does not apply to newly discovered evidence or a newly recognized, retroactive constitutional right or where the defendant can show retained counsel neglected to file the motion timely.⁹

Examples of frequently used substantive claims in Rule 3 motions include, but are not limited to: failure of the trial court to determine a factual basis for the plea;¹⁰ failure of the court to secure an acknowledgment of guilt or that the plea was in the defendant's best interest;¹¹ failure by the trial court to formally accept a guilty plea;¹² failure

2. See generally FLA. R. CRIM. P. 3.850.

3. Wood v. State, 750 So. 2d 592, 595 (Fla. 1999).

4. See FLA. R. CRIM. P. 3.987; Valle v. State, 705 So. 2d 1331, 1333 (Fla. 1997).

5. See 28 U.S.C. § 2244(b)(2) (1996); FLA. R. CRIM. P. 3.850(f).

6. See Reed v. State, 640 So. 2d 1094, 1098 (Fla. 1994).

7. Burr v. State, 518 So. 2d 903, 905 (Fla. 1987) (two years from denial of cert. by United States Supreme Court in *Burr v. Florida*, 487 U.S. 1201 (1988), *reh'g denied*; Demps v. State, 696 So. 2d 1296, 1297 n.1 (Fla. 3d Dist. Ct. App. 1997); Jones v. State, 602 So. 2d 606, 607-08 (Fla. 1st Dist. Ct. App. 1992).

8. 28 U.S.C. § 2244(d)(1) (1996). See section on time limits for seeking relief pursuant to § 2254. See *infra* note 57.

9. See generally FLA. R. CRIM. P. 3.850(b).

10. FLA. R. CRIM. P. 3.172(a); Small v. State, 710 So. 2d 1019, 1020 (Fla. 2d Dist. Ct. App. 1998); Farran v. State, 694 So. 2d 877, 878 (Fla. 2d Dist. Ct. App. 1997).

11. FLA. R. CRIM. P. 3.172(d); Stinson v. State, 448 So. 2d 1240, 1241 (Fla. 5th Dist. Ct. App. 1984).

12. FLA. R. CRIM. P. 3.172(f); Demartine v. State, 647 So. 2d 900, 900-01 (Fla. 4th Dist. Ct. App. 1994).

to advise of the significance and consequences of an HVO sentence;¹³ a signed, detailed written waiver of rights cannot substitute for a record colloquy between the judge and the defendant;¹⁴ breach of a plea agreement;¹⁵ ineffective assistance of counsel;¹⁶ failure by counsel to conduct a diligent factual and legal investigation;¹⁷ failure by counsel to pursue a viable motion to suppress;¹⁸ failure by counsel to investigate or present a viable defense;¹⁹ misadvice by counsel regarding the amount of time the defendant will serve;²⁰ and failure to advise of a plea offer which the defendant would have accepted.²¹ In order to establish prejudice when a defendant seeks to withdraw his guilty plea based upon ineffective assistance of counsel, he must not only assert that he otherwise would not have pled guilty and would have insisted on going to trial, but also that if he had gone to trial, he would have had a viable defense that probably would have prevailed.²²

Quite often, individuals are threatened with deportation more than two years after their conviction became final, which presumably would preclude relief under Rule 3.850. Ironically, a substantive claim in a Rule 3 motion which may be, and often is, filed after the two year time period is the allegation that the trial court failed to advise the defendant of the possible deportation consequences of the plea, in violation of Florida Rule of Criminal Procedure 3.172(c)(8). This rule requires a trial judge to inform a defendant who pleads guilty or no contest, that if he is not a United States Citizen, the plea may subject him to deportation pursuant to the laws and regulations governing the United States Immigration and Naturalization Service (Now, the Department of Homeland Security).²³ This requirement became effective January 1, 1989.²⁴

In the leading case on this subject, *Peart v. State*, the Supreme Court of Florida held that: (1) a 3.850 motion is the appropriate pleading for defendants in and out of custody; (2) for a defendant alleging a failure of

13. See, e.g., *State v. Wilson*, 658 So. 2d 521, 522 (Fla. 1995).

14. *Koenig v. State*, 597 So. 2d 256, 258 (Fla. 1992).

15. See *Buffa v. State*, 641 So. 2d 474, 475 (Fla. 3d Dist. Ct. App. 1994).

16. *Strickland v. Washington*, 466 U.S. 668, 668 (1984).

17. See *Havard v. State*, 489 So. 2d 875, 875 (Fla. 1st Dist. Ct. App. 1986).

18. *Williams v. State*, 717 So. 2d 1066, 1066 (Fla. 2d Dist. Ct. App. 1998).

19. *Collier v. State*, 729 So. 2d 954, 954 (Fla. 1st Dist. Ct. App. 1998).

20. *State v. Leroux*, 689 So. 2d 235, 235 (Fla. 1996).

21. *Cottle v. State*, 733 So. 2d 963, 964 (Fla. 1999).

22. *Hill v. Lockhart*, 474 U.S. 52, 57-59 (1985); *Siegel v. State*, 586 So. 2d 1341, 1342 (Fla. 5th Dist. Ct. App. 1991); *Diaz v. State*, 534 So. 2d 817, 817 (Fla. 3d Dist. Ct. App. 1988).

23. FLA. R. CRIM. P. 3.172(C)(8).

24. See In Re: Amendment to Fla. R. Crim. P., 536 So.2d 992, 993 (Fla. 1998).

the trial judge to establish that he or she learned of the deportation consequences of the plea (as in *Peart*), he has two years to file a Rule 3 motion. If the government actually files a motion within two years from the same time consequences of the conviction become final.³⁰ The motion must include a warning, that the defendant was advised and that under the circumstances of being removed from the United States the defendant filing out of court to prove that he or she understood the consequences of the plea within a one year period.³² Defendant must file their motion. A motion must become final.³³ A defendant who has won at trial, but the immigration consequences of the plea demonstrate: (1) that the defendant is not a citizen; (2) that he or she had he known of the consequences of the plea, he would not have entered the plea.

25. *Peart v. State*, 756 So. 2d 42, 42 (Fla. 1999).

26. *Alfaro v. State*, 828 So. 2d 1066, 1066 (Fla. 1998).

27. *State v. Green*, 31 Fla. L. Wek. 31, 31 (1998).

28. *Peart*, 756 So. 2d 42.

29. *Green*, 31 Fla. L. Wek. 31, 31 (1998).

30. FLA. R. CRIM. PRO. 3.172(C)(8).

31. *Green*, 31 Fla. L. Wek. 31, 31 (1998).

32. *Id.*

33. *Id.* at S697.

34. *State v. Seraphin*, 81 So. 2d 1066, 1066 (Fla. 1998).

35. *Id.* at 487-90; see also

an HVO sentence;¹³ a substitute for a record¹⁴ breach of a plea failure by counsel to failure by counsel to counsel to investigate or regarding the amount of of a plea offer which establish prejudice when used upon ineffective otherwise would not trial, but also that if defense that probably

deportation more than h presumably would ntive claim in a Rule wo year time period is the defendant of the ation of Florida Rule uires a trial judge to t, that if he is not a eportation pursuant to tes Immigration and omeland Security).²³

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the trial judge to advise of deportation consequences, if the defendant learned of the deportation threat before April 13, 2000 (the publication date of *Peart*), he has two years from that date to file a Rule 3 motion; and (3) all others have two years from learning of a deportation threat within which to file a Rule 3 motion.²⁵ The receipt of a notice to appear from the federal government actually placing an individual in deportation proceedings as a result of the conviction was generally considered the deportation threat triggering the two year time limit.²⁶ However, the Supreme Court of Florida in *State v. Green*²⁷ recently ruled that a defendant need only establish that he or she is subject to deportation because of the plea and not, as the Court held in *Peart*,²⁸ that he or she has been specifically threatened with deportation. The Court held that a defendant must file the motion within two years from the date of judgment and sentence becomes final²⁹—the same time constraints as other post-conviction motions under Rule 3.850.³⁰ The motion must allege, in addition to the lack of deportation warning, that the defendant would not have entered the plea if properly advised and that under current law, the plea renders the defendant subject to being removed from the country at some point in the future.³¹ A defendant filing outside the two year limitation period must allege and prove 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.³² Defendants whose cases are final as of the date of the *Green* opinion, October 26, 2006, have two years from that date within which to file their motion. All others have two years from the date their cases become final.³³ Additionally, a defendant need not show that he would have won at trial, but must show “prejudice” from the failure to advise of the immigration consequences.³⁴ To show prejudice, a defendant must demonstrate: (1) that he did not know that the conviction would result in deportation; (2) that he is “subject” to deportation because of the plea; and (3) had he known of the possible deportation consequences, he would not have entered the plea.³⁵

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886 So. 2d 1341, 1342 (Fla.

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3 (Fla. 1998).

25. *Peart v. State*, 756 So. 2d 42, 46 (Fla. 2000).

26. *Alfaro v. State*, 828 So. 2d 1056, 1057 (Fla. 3d Dist. Ct. App. 2002).

27. *State v. Green*, 31 Fla. L. Weekly S693 (2006).

28. *Peart*, 756 So. 2d 42.

29. *Green*, 31 Fla. L. Weekly at S697.

30. FLA. R. CRIM. PRO. 3.850 (2006).

31. *Green*, 31 Fla. L. Weekly at S696.

32. *Id.*

33. *Id.* at S697.

34. *State v. Seraphin*, 818 So. 2d 485, 487 (Fla. 2002).

35. *Id.* at 487-90; see also *Green*, 31 Fla. L. Weekly S693.

A judge advising a defendant that the plea "could affect your status in the United States" is not sufficient as the judge must specifically warn of "deportation."³⁶ Quite often a defendant signs a waiver of rights form prior to entering a plea which contains a warning regarding the deportation consequences of the plea. This type of form cannot substitute for a trial court's failure to orally advise of the deportation consequences.³⁷ A trial judge confirming with the defendant that he went over the form with his attorney still cannot substitute for the lack of oral warning by the trial Judge.³⁸ However, where the trial court confirms that the defendant read the form and understood the form, the trial court's failure to orally warn of the deportation consequences is excused.³⁹

If a defendant is deported prior to the hearing on the Rule 3.850 motion, the issue is not moot because a defendant could be excluded from the United States by immigration authorities in the future.⁴⁰ If the trial court advises the defendant of deportation consequences, but the defendant was under the mistaken belief that he was a United States citizen, the "mistake" was not caused by the court but rather was in the mind of the defendant and, therefore, the requisite prejudice is not established and no relief is available.⁴¹ If the trial court failed to advise the defendant of deportation consequences and the defendant mistakenly believed he was a United States citizen and is later threatened with deportation, an evidentiary hearing will be necessary for the defendant to prove that had the requisite warnings been given, he would not have entered a plea.⁴² The conviction under attack must be the sole basis for the threat of deportation. If there is a separate conviction or another reason cited as a basis for deportation, prejudice has not been demonstrated and there is no relief.⁴³

For pleas taken prior to January 1, 1989, the effective date of Rule 3.172(c)(8), a defendant who received no deportation warning may get relief only if he was given positive misadvice by his counsel that there

36. *Fernandez v. State*, 780 So. 2d 336, 336 (Fla. 3d Dist. Ct. App. 2001); *Labady v. State*, 783 So. 2d 275, 277 (Fla. 3d Dist. Ct. App. 2001).

37. *Benelhocine v. State*, 787 So. 2d 38, 39-40 (Fla. 2d Dist. Ct. App. 2001).

38. *Joseph v. State*, 787 So. 2d 933, 934 (Fla. 2d Dist. Ct. App. 2001); *Perriello v. State*, 684 So. 2d 258, 260 (Fla. 4th Dist. Ct. App. 1996).

39. *Joseph*, 782 So. 2d at 895; *Peart v. State*, 754 So. 2d 723, 724 (Fla. 4th Dist. Ct. App. 1999).

40. *Seraphin v. State*, 785 So. 2d 609, 609 (Fla. 4th Dist. Ct. App. 2001).

41. *State v. Seraphin*, 818 So. 2d 485, 488-89 (Fla. 2002).

42. *Id.* at 489, 491.

43. *Pena v. State*, 837 So. 2d 495, 496 (Fla. 1st Dist. Ct. App.); *see Prieto v. State*, 824 So. 2d 924, 925 (Fla. 3d Dist. Ct. App. 2002).

would be no deportation relief. A trial judge advising a defendant of the consequences of a plea limitation begins when the defendant is given misadvice. If the defendant can ultimately obtain relief from the consequences of his conviction, the trial judge's failure to warn of the consequences has been excused.⁴⁴ Misadvice is not a defense to a plea inquiry during a plea hearing. A trial judge advising a defendant anything to the effect that it is ineffective to file a pretrial intervention motion has not been eligible for the plea.⁴⁵

A state court judge advising a defendant of the consequences of a plea does not constitute misadvice if the defendant still must be informed of the consequences of the plea.⁴⁶ For example, a state court judge advising a defendant of a deportation warning does not constitute misadvice if the source of the deportation warning is the defendant's conviction where a defendant could obtain relief from his conviction if he pleads to a sentence of probation.⁴⁷

After filing a plea, a defendant is entitled to an evidentiary hearing if the trial judge denies the motion, file the motion, or the trial judge denies the motion unless the motion, file the motion, or the trial judge denies the motion. A defendant is entitled to an evidentiary hearing if the trial judge denies the motion unless the motion, file the motion, or the trial judge denies the motion. A defendant is entitled to an evidentiary hearing if the trial judge denies the motion unless the motion, file the motion, or the trial judge denies the motion.⁴⁸ If the court denies the motion, the trial judge may be required to supplement or amend the record.⁴⁹

44. *Ghanavati v. State*, 818 So. 2d 485, 488-89 (Fla. 2002).

45. *Bermudez v. State*, 818 So. 2d 485, 488-89 (Fla. 2002).

46. *Alguno v. State*, 892 So. 2d 258, 260 (Fla. 4th Dist. Ct. App. 1996).

47. *Id.*

48. *State v. Leroux*, 689 So. 2d 258, 260 (Fla. 4th Dist. Ct. App. 1996).

49. *Julien v. State*, 917 So. 2d 258, 260 (Fla. 4th Dist. Ct. App. 1996).

50. *State v. Seraphin*, 818 So. 2d 485, 488-89 (Fla. 2002).

51. *State v. Luders*, 768 So. 2d 258, 260 (Fla. 4th Dist. Ct. App. 1996).

52. *Saint-Fleur v. State*, 818 So. 2d 485, 488-89 (Fla. 2002).

53. *FLA. R. CRIM. P.* 3.850(c)(8).

54. *Harich v. State*, 484 So. 2d 258, 260 (Fla. 4th Dist. Ct. App. 1996).

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would be no deportation consequences of the plea.⁴⁴ Misadvice by trial counsel that the plea would not cause deportation is not a basis for relief if the trial judge advises the defendant to the contrary.⁴⁵ The two year time limitation begins when a defendant discovers that his counsel's affirmative misadvice was erroneous.⁴⁶ Counsel's affirmative misadvice on whether the defendant can ultimately become a citizen and/or on other collateral consequences has been held to be a legally cognizable ground for post conviction relief.⁴⁷ Misadvice by trial counsel is not cured by a trial court's inquiry during a plea colloquy regarding whether anyone promised the defendant anything to induce the defendant to plead.⁴⁸ One court has held that it is ineffective assistance of counsel to fail to discuss the option of a pretrial intervention program where the defendant would otherwise have been eligible for the program.⁴⁹

A state court judge's failure to advise a defendant of the deportation consequences does not create a "*per se*" rule requiring vacating the plea. A defendant still must show prejudice by pleading and proving that had he been informed of the deportation consequences, he would not have entered the plea.⁵⁰ For example, a defendant would not be prejudiced by the lack of a deportation warning where he was advised by his counsel or some outside source of the deportation consequences of the plea.⁵¹ Another example where a defendant could not possibly be prejudiced by the trial court's failure to warn him of the deportation consequences is where a defendant pleads to a sentence of life in prison.⁵²

After filing a Rule 3 motion, the court must decide whether an evidentiary hearing is necessary. An evidentiary hearing should be granted unless the motion, files, and record in the case conclusively show that the defendant is entitled to no relief.⁵³ Any sworn factual assertion of the defendant must be accepted as true unless conclusively rebutted by the record.⁵⁴ If the court denies an evidentiary hearing, a defendant may move to supplement or amend his motion or seek rehearing within fifteen days of

p. 2001); Labady v. State,

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ee Prieto v. State, 824 So.

44. Ghanavati v. State, 820 So. 2d 989, 990-91 (Fla. 4th Dist. Ct. App. 2002).

45. Bermudez v. State, 603 So. 2d 657, 658 (Fla. 3d Dist. Ct. App. 1992).

46. Alguno v. State, 892 So. 2d 1200, 1201 (Fla. 4th Dist. Ct. App. 2005).

47. *Id.*

48. State v. Leroux, 689 So. 2d 235, 237-38 (Fla. 1996).

49. Julien v. State, 917 So. 2d 213, 215 (Fla. 4th Dist. Ct. App. 2005).

50. State v. Seraphin, 818 So. 2d 485, 490 (Fla. 2002).

51. State v. Luders, 768 So. 2d 440, 441 (Fla. 2000).

52. Saint-Fleur v. State, 840 So. 2d 261 (Fla. 3d Dist. Ct. App. 2002).

53. FLA. R. CRIM P. 3.850(d).

54. Harich v. State, 484 So. 2d 1239, 1241 (Fla. 1986).

the date of service of the denial order.⁵⁵ If the court grants an evidentiary hearing, discovery may be possible.⁵⁶ If the court denies the motion after an evidentiary hearing, a defendant may seek re-hearing and/or an appeal.⁵⁷ If the court grants the motion after an evidentiary hearing, the state may appeal but a defendant may then seek release on recognizance or bail.⁵⁸ There is no fee for a defendant appealing a denial of a Rule 3 motion and the notice of appeal must be filed within thirty days of the court's filing of a signed, written order with clerk.⁵⁹

VACATING A STATE COURT CONVICTION IN FEDERAL COURT

Generally, a person in state custody may seek relief from the federal court pursuant to Title 28 U.S.C. § 2254 on the grounds that he is in custody in violation of the Constitution, laws or treaties, of the United States. It is important to note that federal courts consider deportation a collateral consequence of a plea and, therefore, failure to advise of deportation consequences offers no relief.⁶⁰ In order to preserve the right to later seek federal post conviction relief, a defendant must exhaust all available state court remedies by appealing any denial of the Rule 3 motion to the appropriate Florida district court of appeal and even possibly seeking review in the Florida Supreme Court.⁶¹ Prior to the 1996 Anti-Terrorism and Effective Death Penalty Act ("AEDPA"), there was no statutory time limit for seeking federal habeas corpus relief from a state court conviction.⁶² AEDPA, which took effect on April 24, 1996, established a one year limit for filing a § 2254 habeas corpus petition attacking a state court conviction.⁶³ The one year time limit is tolled during the pendency of state court post conviction proceedings.⁶⁴ The one year time limit runs from the latest of: (A) the date on which the state judgment became final by the conclusion of direct review or the expiration of the time for seeking such review; (B) the date on which the impediment to filing an application

55. FLA. R. CRIM. P. 3.850(g).

56. *Davis v. State*, 624 So. 2d 282, 284 (Fla. 3d Dist. Ct. App. 1993).

57. FLA. R. CRIM. P. 3.850(g).

58. FLA. R. APP. P. 9.140(h)(2).

59. FLA. R. APP. P. 9.140(b)(3).

60. *United States v. Morse*, 36 F.3d 1970, 1072 (11th Cir. 1994).

61. *See O'Sullivan v. Boerckel*, 526 U.S. 838, 847-48 (1999); *Tucker v. Dept. of Corrections*, 301 F.3d 1281, 1284 (11th Cir. 2002).

62. *United States v. Smith*, 331 U.S. 469, 475 (1947); *see* 28 U.S.C. § 2254 (1996).

63. An excellent primer is Janice L. Bergmann, AEDPA's Statute of Limitations. *See* Janice Bergmann, *Appellate Advocacy: AEDPA's Statute of Limitations*, THE CHAMPION (1998), available at http://www.nacdl.org/_852566CF0070A126.nsf/0/9D93C5BF9F0FE5A4852566E9006D4381?Open.

64. *Id.*

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65. 28 U.S.C. § 2244(d)

66. *See, e.g., Davis v.*
1074 (1999); *Henderson v.*
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67. *Green v. State*, 895

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rom a state court
1996, established a
ion attacking a state
ring the pendency of
year time limit runs
nent became final by
the time for seeking
filing an application

created by state action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing such actions; (C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or (D) the date on which the factual predicate of the claim or claims presented could have been discovered through exercise of due diligence.⁶⁵ It is suggested that attorneys carefully monitor the time limits for filing 2254 petitions for writs of habeas corpus to ensure timely filings. The time limits in 28 U.S.C. § 2244(d)(1) are not jurisdictional and thus are subject to equitable tolling.⁶⁶

BE CAREFUL WHAT YOU ASK FOR

As the old saying goes, "be careful what you ask for, you might get it." If you convince a state court judge to vacate the plea, your client goes back to square one with respect to the criminal charge and the state attorney's office is free to re-prosecute. Thus, after granting a Rule 3 motion, a court can take your client into custody and require him to post bond. If the state chooses to re-prosecute, defendants who choose not to go to trial, often seek pre-trial diversion or pleas to charges having no detrimental immigration consequences.

A HAPPY ENDING

For those of you who were disappointed with Jim's story, here is an alternative ending. While in custody at the Krome Detention Center, Jim's family hired a good criminal defense attorney to review Jim's state conviction. The plea colloquy was transcribed and showed that instead of advising Jim that he could be deported as a result of the plea, the trial judge only warned that the plea could have "negative immigration consequences." The trial court's failure to specifically advise Jim about deportation caused the court to grant Jim's motion.⁶⁷ In light of Jim's completion of his jail and probationary sentence and payment of restitution, the state exercised its discretion and decided not to re-prosecute him for the insurance fraud offense. Jim was released from DHS custody, subsequently obtained his US citizenship and expunged his criminal record.

(3).

99); Tucker v. Dept. of

.C. § 2254 (1996).
of Limitations. See Janice
, THE CHAMPION (1998),
93C5BF9F0FE5A4852566

65. 28 U.S.C. § 2244(d)(1)(A)-(D) (1996).

66. See, e.g., Davis v. Johnson, 158 F.3d 806, 810 (5th Cir. 1998), cert. denied, 526 U.S. 1074 (1999); Henderson v. Johnson, 1 F. Supp. 2d 650, 654 (N.D. Tx. 1998) (non-exhaustive list of facts to consider for determining equitable tolling).

67. Green v. State, 895 So. 2d 441, 444-45 (Fla. 4th Dist. Ct. App. 2005).

Thanks to good lawyering by Jim's criminal defense attorney, Jim and his family lived happily ever after.