IN THE CIRCUIT COURT
FOR THE SEVENTH JUDICIAL CIRCUIT OF FLORIDA

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APPEAL NO.: 07-13-CAAP

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TIMOTHY MEEHAN

Appellant-Petitioner,

v.

STATE OF FLORIDA

Appellee-Respondent.

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A DIRECT APPEAL FROM THE COUNTY COURT, SEVENTH JUDICIAL CIRCUIT, VOLUSIA COUNTY, FLORIDA OF A DENIAL OF A MOTION TO VACATE AND SET ASIDE A JUDGMENT AND SENTENCE UNDER RULE 3.850, FLORIDA RULES OF CRIMINAL PROCEDURE

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BRIEF OF APPELLANT

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STATEMENT OF THE CASE AND OF THE FACTS[1]

Meehan was charged by citation June 1, 2001 in Case Number 01-42680MMAES with three misdemeanor criminal offenses, (1) driving under the influence ("DUI") in violation of Florida Statutes, § 316.193(1)(A), (2) resisting arrest without violence, in violation of Florida Statutes, § 843.02, and (3) failure to sign or accept a summons, in violation of Florida Statutes, § 318.14(3). He also was charged with three civil traffic infractions, (1) careless driving, in violation of Florida Statutes, § 316.1925, (2) unlawful speed, in violation of Florida Statutes, § 316.183, and (3) failure to yield to a traffic control device (stop light), in violation of Florida Statutes, § 316.075.

Meehan was originally sentenced on March 7, 2002 by the Honorable Freddie J. Worthen, County Court Judge, Seventh Judicial Circuit, Volusia County, on the DUI charge to twelve months probation, with the special condition that he complete thirty days in-patient treatment at Stuart Marchman, plus payment of a fine and costs, perform 50 hours community service and complete the advanced alcohol safety course. The court dismissed the balance of the

[1] The statement of the case and course of proceedings is taken from the 3.850 motion. In reviewing a trial court's summary denial of postconviction relief without an evidentiary hearing, the appellate court must accept all allegations in the motion as true to the extent they are not conclusively rebutted by the record. Rule 3.850(d) and Rule 3.851(f)(5)(B), Florida Rules of Criminal Procedure; *Rutherford v. State*, 926 So. 2d 1100 (Fla. 2006), cert. denied, 126 S. Ct. 1191, 163 L. Ed. 2d 1145 (2006).

charges.

A violation of probation proceeding was commenced which resulted in a motion for modification of probation requested by probation on April 13, 2005, by which the terms and conditions of the sentence of probation were modified with respect to the required completion of the Alcohol Safety Education Class. Meehan's probationary sentence was modified on April 18, 2005 and notice of successful completion of the modified term of probation was submitted December 16, 2005.

Meehan did not appeal the judgment and sentence. The judgment and sentence became final upon the issuance of the order modifying the term and conditions of probation on April 18, 2005. This motion was filed within two years of Meehan discovering, through the exercise of due diligence, the evidence which established that he had entered into his plea agreement on the basis of unreasonably mistaken advice of counsel about the collateral consequences of his plea, that is, that in fact under Florida law a conviction for a fourth DUI results in a lifetime driver's license revocation, without the possibility of a hardship license after five years revocation, contrary to the advice of his counsel at the time of the plea, who had advised him that he could apply for a hardship license within five years of his revocation for this offense.

Meehan was represented during the plea, sentencing and modification of probation by retained counsel, Robert E. Eddington.

Mr. Eddington advised Meehan that he would suffer a lifetime revocation of his driver's license as a result of this DUI conviction, because this would be his fourth DUI conviction,[2] however, Mr. Eddington also advised Meehan that he could qualify for a hardship driver's license within three to five years following his conviction if he enrolled and completed Florida's state supervised program for multiple offenders.[3]

Meehan relied upon this advice in making his decision to plead no contest.[4] Had Meehan been advised that his conviction would result in a total and complete lifetime driver's license revocation, with no opportunity to ever receive a hardship license, he would not have pled no contest, but would have taken the case to trial. His counsel's advice about the availability of a hardship

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[2] That Mr. Eddington knew that this was Meehan's fourth DUI conviction is established by the record of the plea dialogue, in which Mr. Eddington advises the court of this fact. [See transcript of plea colloquy in the Appendix attached hereto and by this reference made a part hereof, at p. 3 thereof.]

[3] That Mr. Eddington has advised Meehan of the availability after five years of a hardship license despite his fourth DUI conviction and permanent revocation is demonstrated by his letter to the undersigned counsel, dated October 9, 2006, a true and correct copy of which was annexed to the 3.850 motion and which is also hereunto annexed for the Court's convenience.

[4] The facts of the case taken in the light most favorable to the State, as reflected in the arresting officer's report, are that the arresting officer observed Meehan speeding, he followed him, observed him swerve outside his driving lane and run a red light before stopping. Meehan refused to perform any field sobriety tests and refused a breath test. In sum, this was a triable case from the defense point of view.

driver's license was a material inducement to Meehan to enter the no contest plea, and but for this advice Meehan would have persisted in his plea of not guilty.

During the plea colloquy Meehan's counsel advised the court that this was Meehan's fourth DUI conviction, but nothing was said during the plea colloquy concerning the suspension or revocation of Meehan's driver's license, neither by the court nor counsel. *See* the Transcript of the change of plea and sentencing, March 7, 2002, in the attached Appendix.

In fact, under Florida law, after a fourth DUI conviction at any time, the revocation of driving privileges is permanent, and Florida has no provision for a hardship driver's license at any time thereafter. Hardship licenses had been granted after a five year wait until July 1, 1998.[5]

Meehan did not learn that his counsel's advice was incorrect until he began the process to obtain a hardship license. Following

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[5] Meehan was no longer eligible due to a prior change in the law. That change was made by section 8 of Chapter 98-223, Laws of Florida, effective July 1, 1998 which provided:

The department shall forthwith revoke the license or driving privilege of any person upon receiving a record of such person's conviction of any of the following offenses:

(1) (a) . . . [A] fourth violation of s. 316.193 or former s. 316.1931. *For such cases, the revocation of the driver's license or driving privilege shall be permanent*. (Emphasis original).

See Florida Dept. of Highway Safety and Motor Vehicles v. Critchfield, 842 So.2d 782, 783-784 (Fla. 2003).

the advice of his counsel, Meehan waited until he had completed three years of the revocation period to seek a license. Meehan, who had moved to New Hampshire after the sentencing in this case, began the process to apply for a New Hampshire driver's license in 2005, three years after his sentencing and revocation of license in this case, March 2002, based on his understanding of his counsel's advice that he would qualify for a hardship license under Florida law within three to five years of the Florida revocation.[6] *See* the New Hampshire Notice of Hearing on his application for license, dated May 10, 2005, a copy of which was annexed to the 3.850 motion and another copy of which is in the attached Appendix fort the Court's convenience.

Indeed, Meehan completed the New Hampshire process before being advised by New Hampshire authorities that his Florida driver's license revocation was *permanent* under Florida law and that Florida law did not permit a hardship license after three to five years or after any period of time.[7]

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[6] Meehan was aware of the Florida Driver License Compact Act, Florida Statutes, § 322.43 *et seq*, part of the interstate compact which has been entered into by both Florida and New Hampshire, *see* New Hampshire Revised Statutes, § 263.77. Meehan understood that moving to New Hampshire would not relieve him of the Florida license revocation, but that New Hampshire would apply the Florida revocation procedures and time limits.

[7] During the New Hampshire process Meehan was in regular contact with his former counsel, Mr. Eddington, who continued to represent him in connection with the New Hampshire matter because it was discovered in the process of the New Hampshire application that probation had not documented Meehan's satisfactory

Meehan then sought counsel for advice on remedies available under these circumstances and was advised by the undersigned that he could file the instant motion under Rule 3.850, Florida Rules of Criminal Procedure, so long as it was filed within two years of his discovery of the mistaken advice by Mr. Eddington.

Meehan's 3.850 motion was denied by the County Court by order dated January 17, 2007. Meehan filed a timely motion for rehearing which was denied by order dated February 12, 2007. This appeal followed in a timely manner thereafter.

By separate motion, Meehan has requested this honorable Court grant Meehan oral argument on this appeal.

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completion of all of the terms and conditions of the Florida probation, which resulted in the order modifying probation in 2005 referred to above. Clearly Mr. Eddington was acting under the assumption that Meehan could qualify for a hardship license.

STANDARD OF REVIEW

To uphold the trial court's summary denial of claims raised in a motion for post-conviction relief, the claims must be either facially invalid or conclusively refuted by the record. *Blackwood v. State*, 946 So. 2d 960 (Fla. 2006).

SUMMARY OF ARGUMENT

Meehan received ineffective assistance of counsel from his trial level counsel, Mr. Eddington, in that Mr. Eddington wrongly advised Meehan that Meehan could qualify for a hardship driver's license after a three to five year suspension period, even though Meehan's license would otherwise be permanently revoked as a consequence of pleading guilty to a fourth DUI, when in fact under then binding Florida law, Meehan could never qualify for a hardship license once his driver's license was permanently revoked following his fourth DUI conviction.

Whether Mr. Eddington had a duty to advise Meehan on the driver's license consequence or not, when he did so, Meehan was entitled to reasonably rely upon the advice, which he did. In fact, the advice that he would be able to qualify for a hardship license within three to five years was a material inducement to Meehan to plead guilty. Had he not been so advised, he would instead have pled not guilty and insisted on taking the case to trial.

Although this motion was not filed within two years of the guilty plea and original sentencing, it is timely because it has been filed within two years of Meehan's discovery of the fact that he was permanently disqualified from obtaining any driver's license, and through the exercise of due diligence, Meehan could not have discovered the fact earlier.

ARGUMENT

I. Meehan Received Ineffective Assistance of Counsel That Entitles Him to Withdraw His Plea.

Merits Argument

The defendant-appellant, Timothy Meehan, filed a Rule 3.850 motion claiming ineffective assistance of trial counsel in misadvising him that if he pled guilty to this fourth DUI offense, although his license would be revoked, he would qualify for a hardship driver's license after a three to five year suspension. The motion was summarily denied without an evidentiary hearing. Meehan timely moved for rehearing, and rehearing was denied. This appeal followed.

Claims that trial counsel, as opposed to the court, misadvised defendants about collateral consequences of a plea have been considered in Rule 3.850 proceedings. *See Miralles v. State,* 837 So.2d 1083 (Fla. 4th DCA 2003) (defendant misadvised about collateral consequence of entering plea relating to the defendant's ability to obtain a future occupational license from the state). *See also Wonderlick v. State,* 651 So.2d 822 (Fla. 4th DCA 1995) (direct appeal affirmed without prejudice to file 3.850 motion where parties operated under misapprehension of the law as to revocation of defendant's driver's license).

There is a conflict among the district courts of appeal whether a revocation of a driver's license is a direct or collateral consequence of a criminal plea. Meehan acknowledges

that this District has followed the First District in holding that a driver's license revocation is a collateral and not a direct consequence of a criminal plea. *See Sullens v. State,* 889 So.2d 912 (Fla. 5th DCA 2004), following *State v. Bolware,* 28 Fla. L. Weekly D2493, --- So.2d ----, 2003 WL 22460271 (Fla. 1st DCA Oct. 31, 2003), *review granted,* 924 So.2d 806 (Fla.2006), and *State v. Caswell,* 28 Fla. L. Weekly D2492, --- So.2d ----, 2003 WL 22460275 (Fla. 1st DCA Oct. 31, 2003), *review pending,* S.Ct. Case No. SC04-14.

It is our position that a mandatory, lifetime revocation of a driver's license is a direct consequence and not a collateral consequence of a plea to a fourth DUI under Florida law. We recognize, however, that until the Supreme Court rules on *Bolware* and or *Caswell*, this Court is bound by the Fifth DCA's position in *Sullens* on the question whether the court - as opposed to counsel - is required to advice a defendant on the driver's license revocation as a direct consequence of his plea.

However, irrespective whether advice concerning a driver's license revocation is collateral or direct, *Sullens, Bolware* and *Caswell* are distinguishable because in those cases, the defendants were not affirmatively misadvised by their own counsel. As in the *Miralles* case, where there is *affirmative misadvice* as to a material and immediate consequence of a plea, even if "collateral," the defendant has stated a facially sufficient claim based on that

misadvice. *Johnson v. State*, 933 So.2d 1203 (Fla. 5th DCA 2006).

Timeliness of Motion

It is Meehan's position that his judgment and sentence did not become final for purposes of commencing the time limit for filing this 3.850 motion, until the court entered its order modifying the sentence of probation in 2005. However, we candidly acknowledge that we are unable to find any authority, pro or con on this point.

Nevertheless, under established principles relating to newly discovered evidence, this motion is timely because it is being filed within two years of Meehan discovering the basis for the claim and under the circumstances Meehan exercised reasonable due diligence in discovering the claim when he did so. Meehan can not be faulted for following the advice of his counsel in waiting to apply for a hardship license until three years after his license was suspended in this case. Meehan acted with due diligence in seeking reinstatement of his driving privilege and thereafter acted in a timely manner to present this claim to the court.

Within two years of learning that his counsel's advice was mistaken, that there was no possibility of a hardship license after a three to five year suspension, Meehan initiated this action, therefore this motion is timely under Rule 3.850(b)(1). Rule 3.850(b)(1) provides for an exception to the two-year limitations period for a motion to vacate, set aside, or correct a sentence which allege that "the facts upon which the claim is predicated

were unknown to the movant or his attorney and could not have been ascertained by the exercise of due diligence." That is what Meehan alleges.

The two-year period for filing a motion for postconviction relief based upon the exception for unknown facts commences at the time the newly discovered facts are discovered or could have been reasonably discovered. *Graddy v. State*, 685 So. 2d 1313 (Fla. 2nd DCA 1996). A comparable example of the application of this rule is found in *Hall v. State*, 891 So.2d 1066 (Fla. 2nd DCA 2004). In *Hall* the defendant's claim was that he had been misadvised about the loss of gain time credits, but the motion was filed more than two years after the guilty plea. The Court of Appeals held that the motion was timely, because it was filed within two years of Hall's discovery of the gain time forfeiture.

> [Hall's] judgment and sentence became final on November 8, 1995. Under rule 3.850, Hall had until November 8, 1997, to file a motion for postconviction relief. He filed this motion on October 14, 2002.
>
> In his motion, Hall alleged that it was not until he received an incentive gain time credit report [from the Department of Corrections] on October 8, 2002, that he discovered that he had not received any basic gain time credits. He maintains that counsel assured him that he would receive these credits if he accepted the State's

plea offer.

Hall v. State, 891 So.2d 1066, 1067 (Fla. 2nd DCA 2004).

Although Hall's motion was seven years after his guilty plea, the Court of Appeal found it timely, because it was filed within two years of Hall's being informed by the DOC that he would not receive the gain time credits his counsel had led him to believe he would receive. This is exactly like the situation for Meehan. Meehan was advised by his counsel that he could qualify for a hardship license in three to five years. Meehan waited three years and sought such a license. He was then informed by the department of motor vehicles that his license revocation was truly permanent. Although he learned this from the department of motor vehicles more than two years after his sentence was final, he moved to vacate the plea within two years of learning about the misadvice.

In ruling in Hall's favor, the Court of Appeals cited *Spradley v. State,* 868 So.2d 632 (Fla. 2md DCA 2004). In *Spradley* the court confronted another similar situation. Spradley alleged that his counsel misadvised him that he would receive credit for previously earned gain time upon sentencing for a violation of probation. Spradley sought to withdraw his plea, claiming that had he known that he would not receive the previously earned gain time, he would not have pleaded guilty to violating his probation. The trial court, though, denied Spradley's motion as untimely because it was filed outside of the two-year period for filing a motion for

postconviction relief. The Court of Appeals concluded that Spradley could not have known about the Department of Corrections' (DOC) forfeiture of gain time at the sentencing if he had not been advised of the possibility of forfeiture by counsel or the trial court. Like Hall, Spradley did not discover that his gain time had been forfeited until he filed administrative grievances with the DOC. Once the DOC responded and informed him of the forfeiture, the couurt held that Spradley had two years to file a rule 3.850 motion based on this newly discovered information. *See Spradley,* 868 So.2d at 633; *Anderson v. State,* 862 So.2d 924 (Fla. 2nd DCA 2003); *Graddy v. State,* 685 So.2d 1313, 1314 (Fla. 2nd DCA 1996).

Under the holdings of *Hall* and *Spradley*, Meehan's 3.850 motion is timely, because it has been filed within two years of Meehan being informed by the department of motor vehicles that his license is permanently revoked with no possibility of obtaining a hardship license.

Reasonable, Good Faith Reliance on Advice of Counsel Satisfies Due Diligence

The thrust of the motion is that Meehan's guilty plea was materially induced by *misadvice of counsel*. The Court has not disputed this proposition, nor is it reasonably disputable, because Meehan attached to the motion a recent letter from his trial counsel who persists in the same misadvice. As recently as October of this past year as the motion was being prepared, Meehan's trial counsel's advice was that Meehan would be better served by seeking

a hardship license. That is the very same misadvice that led to the plea.

We repeat this point not for the purpose of embarrassing Mr. Eddington, the trial counsel. Rather, we repeat this fact to show that Mr. Meehan acted in *reasonable reliance on the advice of counsel* - advice which has proved terribly wrong - and in so doing Mr. Meehan exercised due diligence in not sooner inquiring about obtaining a hardship license and in not sooner discovering that such a hardship license in fact is unobtainable despite his trial counsel's advice to the contrary. Indeed, Mr. Meehan followed his trial counsel's advice to the letter, waiting the three years his trial counsel told him was required before his supposed eligibility for a hardship license would mature. Based on the advice of his trial counsel, *he could not obtain a hardship license any sooner than three years after his conviction*.

A client who relies upon the advice of his counsel, at least until he learns that he can no longer reasonably rely upon that advice, has by definition acted with due diligence. Surely the law could not require and does not require a person to do a futile act, and according to the advice of his counsel, it would have been futile to seek a hardship license sooner than three years after sentencing and loss of his license. *Swayze v. United* States, 785 F.2d 715 (9th Cir. 1986) (good faith reliance on advice of counsel satisfied due diligence requirement in charge of negligent

preparation of tax returns, convictions reversed); See also Bevis Longstreth, *Reliance on Advice of Counsel as a Defense to Securities Law Violations,* 37 Bus.Law 1185, 1197 (1982); *Feit v. Leasco Data Processing Equipment Corp.,* 332 F.Supp. 544, 582-83 (E.D.N.Y.1971) (finding that defendants adequately established due diligence defense incorporating reliance on advice of counsel), cited in *In re Salomon Inc Securities Litigation*, 1994 WL 265917, 11 (S.D.N.Y.,1994).

Due diligence is the flip side of the coin of negligence. To act with due diligence is to act with such a standard of care as to not be negligent. *SEC v. Spectrum, Ltd.*, 489 F.2d 535, 541 (2d Cir. 1973); *SEC v. Pearson*, 426 F.2d 1339, 1343 (10th Cir. 1970); *SEC v. Texas Gulf Sulphur Co.*, 401 F.2d 833,854-55, 866-68 (2nd Cir. 1968). By definition, obtaining advice of apparently qualified counsel after counsel is made aware of all the operative facts, satisfies due diligence. A person who seeks proper advice of counsel before taking action, and insures that the counsel is made aware of the operative facts, cannot be said to then act negligently in following his counsel's advice. If it is not negligence, it is due diligence. That is, the client has exercised the diligence that is due under the circumstances of having first sought and obtained the advice of apparently competent counsel before acting.

The inquiry at issue is a question of law, not a matter of

fact. There was no dispute about or non-disclosure of operative fact. Mr. Eddington is on record during the change of plea informing the court of Mr. Meehan's prior record of DUIs, which together with the fact of the conviction to result from the plea Mr. Eddington was counseling Mr. Meehan on, were all the facts necessary to reach the legal conclusion about the effect of the new plea and conviction on the license. Whether a hardship license would be obtainable after three to five years, as Mr. Eddington wrongly told Mr. Meehan, or never, was a *legal* question, and Mr. Meehan exercised due diligence in seeking the advice of a lawyer to discover the answer to that *purely legal question*. There is no dispute that Mr. Meehan sought that advice, that the advice was given after counsel was made aware by disclosure from Mr. Meehan of all the operative facts, and then that Mr. Meehan relied and acted upon the advice of his counsel. This is the epitome of due diligence.

Indeed it turns the concept of due diligence on its head to conclude that a client has failed to exercise due diligence in discovering the legal consequence of an action taken in a court of law, action taken solely on the advice of counsel, when the client first sought and paid for legal advice on what the consequence of that plea would be, then exactly followed the advice of counsel, advice that he in good faith relied upon. This is not a novel concept in the law. It is well settled that good faith reliance

upon advice of counsel is a complete defense, for example, even to a felony criminal charge.[8] *See C.E. Carlson, Inc. v. S.E.C.,* 859 F.2d 1429, 1436 (10th Cir.1988) (stating that, where full disclosure is made to a professional expert, issuer is entitled to rely on such expert's opinion) (citing *S.E.C. v. Goldfield Deep Mines Co. of Nevada,* 758 F.2d 459, 467 (9th Cir.1985) and *S.E.C. v.*

[8] Counsel is aware, of course, that this is not presently a federal habeas under 28 U.S.C. § 2254, but nevertheless, by way of example, would cite the use of good faith advice of counsel to defeat *negligence* tax claims, *Thompson v. United States,* 223 F.3d 1206 (10th Cir.2000) (taxpayer reliance on professional advice is a defense to the negligence addition to tax under Title 26, U.S.C. § 6653), and the Supreme Court of the United States has even held that such beliefs do not even have to meet a test of reasonableness even when the issue is more than negligence but actual wilfulness, *Cheek v. United States*, 498 U.S. 192, 111 S. Ct. 604 (1991). The point is that if criminal wilfulness or civil negligence is defeated by even an unreasonable reliance on professional advice, then certainly due diligence, which is a far lesser standard, is satisfied by reasonable reliance on advice of counsel. Contrast this, however, with patent infringement cases, in which the infringer is on actual notice of the patent being infringed, to rely upon advice of counsel as a legal defense, the advice must be competent. In *Comark Communications, Inc. v. Harris Corporation,* 156 F.3d 1182, 1190 (Fed.Cir.1998), the Court of Appeals for the Federal Circuit declared: "As a general matter, a potential infringer with actual notice of another's patent has an affirmative duty of care that usually requires the potential infringer to obtain competent legal advice before engaging in any activity that could infringe another's patent rights." After noting that other circumstances and considerations also could be probative on the issue of willfulness, the same court went on to observe that "[I]t is well settled that an important factor in determining whether willful infringement has been shown is whether or not the infringer obtained the opinion of counsel . . . However, the legal opinion must be ''competent'' or it is of little value in showing the good faith belief of the infringer." This approach is readily distinguishable from Meehan's case, because Meehan was not on actual notice that his counsel's advice was in conflict with any existing legal burden.

Savoy Industries, 665 F.2d 1310, 1314 n. 28 (D.C.Cir.1981)).

This rule lies at the heart of the defense of corporate actions, for example. Corporate managers and directors are permitted under the law to rely upon the advice of professionals in carrying out their fiduciary duties, and good faith reliance upon such advice satisfies the director or manager's due diligence obligations as a fiduciary. A corporate director has a fiduciary duty to the company's shareholders to "perform the duties of a director . . . in good faith, in a manner such director believes to be in the best interests of the corporation and its shareholders and with such care, including reasonable inquiry, as an ordinarily prudent person in a like position would use under similar circumstances." (Corp.Code, § 309, subd. (a); see *Lee v. Interinsurance Exchange*, 50 Cal.App.4th 694, 711 (1996); *Everest Investors 8 v. McNeil Partners*, 114 Cal.App.4th 411, 431; (2003), *Katz v. Chevron Corp.,* 22 Cal.App.4th 1352, 1366. (1994)). The director's performance of those duties is subject to the "business judgment" rule, which creates a rebuttable presumption that, in carrying out his or her duties, the director's actions are grounded in good faith and sound business judgment. The business judgment rule recognizes that a director frequently makes decisions that create a certain amount of risk to the corporation and that those "to whom the management of a business organization has been entrusted, and not the courts, are best able to judge whether a

particular act or transaction is helpful to the conduct of the organization's affairs or expedient for the attainment of its purposes. [Citations.]" (*Lee,* at p. 711; see also *Everest Investors 8,* at p. 431; *Katz,* at p. 1366 ["'''A hallmark of the business judgment rule is that a court will not substitute its judgment for that of the board if the latter's decision can be "attributed to any rational business purpose." [Citation.]'' "].) , cited in *Padgett v. McGee,* 2004 WL 1098986, 6 (Cal.App. 2 Dist. 2004). Such reliance satisfies due diligence requirements:

> *They argue correctly that good faith reliance on the advice of counsel, without any further inquiry, is ordinarily presumed to be an appropriate and protected exercise of business judgment*. (See § 309, subd. (b) ["In performing the duties of a director, a director shall be entitled to rely on information, opinion, reports or statements, including financial statements and other financial data . . . prepared or presented by: . . . (2) Counsel, independent accountants or other persons as to matters which the director believes to be within such person's professional or expert competence."]; see also *Katz v. Chevron Corp., supra,* 22 Cal.App.4th at pp. 1368-1369 ["A prima facie showing of good faith and reasonable investigation is established" when a majority of disinterested directors relies "on advice of investment

bankers and legal counsel"]; *F.D.I.C. v. Castetter* (9th Cir.1999) 184 F.3d 1040, 1042.

Padgett v. McGee, 2004 WL 1098986, 7 (Cal.App. 2 Dist. 2004) (emphasis supplied)

It is not just corporate directors and managers, but trustees of public trusts are entitled to rely upon advice of counsel and such reliance alone is deemed sufficient due diligence to be a complete defense to actions alleging abuse of fiduciary duty or violation of law:

> "[T]rustees upheld their fiduciary duties . . . in good-faith reliance on the opinion of constitutionality rendered by the attorney general. Accordingly, we determine that the ETF Defendants did not breach their fiduciary duties by implementing Act 27 without first obtaining a court determination that the statute was constitutionally valid."

Wisconsin Retired Teachers Ass'n, Inc. v. Employe Trust Funds Bd,. 207 Wis.2d 1, 558 N.W.2d 83 (Wis.1997).

Meehan more than satisfied the due diligence standard of Rule 3.850(b)(1), therefore his motion is timely.

Green Is Inapplicable, But if it Applied it Supports Meehan's Position

With all due respect, the lower Court's reliance upon *State v.*

Green, 944 So.2d 208 (Fla. 2006) *in denying relief* is misplaced. (See Court's January 17, 2007 Order at p. 3) Indeed, assuming as the Court does that *Green* governs the application of Rule 3.850(b)(1) in this quasi writ of error coram nobis case, then Meehan prevails, because the newly enunciated standard in *Green* only applies prospectively. The Court expressly stated that defendants would have two years from the date of the *Green* decision (October 26, 2006) to file their petitions under its standard.

> 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. In cases now pending in the trial and appellate courts on this issue, courts should apply the criteria set out herein. If relief is denied in a case now pending because the defendant has not alleged or established that he or she is subject to or threatened with deportation, the defendant should be allowed to refile in compliance with the standards set out in this case within sixty days of affirmance, denial, or dismissal. All other defendants have two years from the date their cases become final in which to seek relief

under our holding today.

State v. Green, 944 So.2d 208, 219 (Fla. 2006).

That is, under the *Green* standard, Meehan would have two years from the date of the *Green* decision to comply with its mandate, to take affirmative steps to discover the information which would be the basis of his claim.

If *Green* applies, then *Meehan* cannot be time barred. Under *Green*, Meehan gets *an additional two years* to meet the *Green* standard.

But the better answer is that *Green* does not apply. There is nothing in the *Green* decision to suggest in any way that the Court was attempting to recast the due diligence standard of Rule 3.850(b)(1) generally as opposed to its application in the *Peart* [9] context, and surely if the Court had such a broad purpose in mind, it would have said so, or at least suggested as much, or the opinion would have contained some hint in that direction. But instead there is nothing in *Green* to suggest any additional restriction upon the application of the newly discovered evidence exception outside the narrow scope of the *Peart* context. *Peart* and its progeny is *sui generis* and *Green*'s holding is confined to the particular principle at issue there.

The *Peart* concern is a very particularized concern,

[9] *Peart v. State*, 756 So.2d 42 (Fla. 2000).

articulated by the Court in *Green* as follows:

> Further, when a motion alleging a rule 3.172(c)(8) violation is untimely, the defendant must satisfy the requirement in rule 3.850(b)(1) by alleging and proving that the fact that the plea subjected the defendant to deportation could not have been ascertained during the two-year period with the exercise of due diligence. It will not be enough to allege that the defendant learned of the possibility of deportation only upon the commencement of deportation proceedings after the two-year limitations period has expired. The requirement of due diligence compels the defendant to allege and prove that affirmative steps were taken in an attempt to discover the effect of the plea on his or her residency status.

State v. Green, 944 So.2d 208, 218 (Fla. 2006).

Green deals with a failure of the trial *judge* to comply with Rule 3.172(c)(8) and properly advise the defendant during the plea colloquy of the deportation consequences of a criminal conviction. *Green* does *not involve affirmative misadvice* by the trial lawyer of the collateral consequence of the plea on the immigration status of the client.

That context has to be understood to make sense out of the

Green directive that the defendant now must allege that he took affirmative steps to discover the effect of the plea on his residency status. Because, you see, if the lawyer had advised the defendant on the effect of the plea on his residency status - misadvice or otherwise - then the defendant would already have satisfied the *Green* standard.

That is Meehan's situation. He did not sit back idly waiting for the authorities to seek him out with the information he now presents to the court. If he had, then he would be in the position of the defendants the Supreme Court is now restricting under *Green*. Those who seek no immigration advice and are then surprised when the ICE[10] serves them with an order of removal are too late under *Green* if this occurs more than two years after the plea (and additionally, more than two years after *Green* based on its prospectivity holding).[11] But persons such as Meehan, who sought and obtained advice about the collateral effect of their plea are protected. They have already met the standard enunciated in *Green*. It isn't Meehan's fault that the lawyer he turned to to give him the advice gave him wrong advice.

So even if *Green* applied, which we doubt, and even if the

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[10] "ICE" is the Immigration and Customs Enforcement, the successor in interest to "INS," or Immigration and Naturalization Service.

[11] Order of removal is the new term for what previously was known as an order of deportation.

Supreme Court had not expressly made *Green* prospective only and not allowed a new two year window to follow *Green*, *Green* supports relief for Meehan, not denial.

***MacFarland v. State* is Not on Point**

The lower Court cited *MacFarland v. State*, 929 So.2d 549 (Fla. 5th DCA 2006) (Order, page 4), apparently for the boilerplate proposition that Mr. Meehan has not demonstrated that the fact could not have been discovered within the two year filing period. The Court does not explain or discuss *MacFarland*. Indeed *MacFarland* does not support the exact point it is cited for - that Meehan failed to demonstrate that he could not have established the fact *within the two year filing period*, because *MacFarland* itself opened the window period beyond the two year filing period and found that on its particular facts the defendant had failed to show why he had not filed on a date which was *outside the two year filing period*. In *MacFarland* the defendant was convicted in 1992. N o appeal was filed. The two year window closed in 1994. The Court of Appeals was willing to extend the window on the facts of the case to *July 1997*, three years after and outside the two year filing window, based on newly discoverable evidence. The problem was that MacFarland did not file within that later two year period:

> In the instant case, the lower court correctly determined that MacFarland's claim was untimely. The evidence he

> relied upon was not new at all. Both MacFarland and Wright testified that they knew at the time the crimes were committed that Wright committed the crimes. The problem for MacFarland was that he could not compel Wright to incriminate himself. However, the lower court noted that the statute of limitations on those crimes barred the State from prosecuting Wright after four years from the date of the crimes. § 775.15(2)(a), Fla. Stat. (1991). As the crimes were committed in July 1991, the statute expired in July 1995. MacFarland could have obtained Wright's testimony within two years of July 1995 through the use of due diligence because he had regular contact with Wright's mother. However, MacFarland failed to present evidence of diligent efforts to obtain Wright's testimony during that time. Instead, Wright contacted MacFarland in 2002 or 2003 and offered his affidavit.

MacFarland v. State, 929 So.2d 549, 551 (Fla. 5th DCA 2006).

Constructive Notice of Statutory Law Does Not Defeat a Claim of Lack of Actual Knowledge for Newly Discovered Evidence under Rule 3.850

The lower Court also concluded - without citation of authority - that Meehan is deemed as a legal fiction to be under constructive notice of the statute which prohibited his obtaining a hardship license, therefore he cannot meet the requirement of Rule

3.850(b)(1) that the fact he relies upon was unknown to him at the time of the plea. (Order, pages 4-5) This is a self-defeating proposition in the sense that if it were so, then no motion for post-conviction relief could ever be posited upon a claim of mistake of law or misadvice of counsel. The analogous cases Meehan cited in the context of misadvice of gain time demonstrate this. Gain time is a matter of statute, clearly under this Court's reasoning a defendant is under constructive notice what the law provides in the way of gain time, yet many cases have permitted belated claims of relief based on misadvice of gain time consequences when the defendant prisoner sometimes years later discovers that his gain time is being calculated contrary to how the defense counsel explained it. *See e.g. Hall v. State*, 891 So.2d 1066 (Fla. 2nd DCA 2004). This Court is bound by the holding in *Hall* on this point.

Affirmative Misadvice States a Cause of Action When the Misadvice Relates to a Driver's License Collateral Consequence

The lower Court seems to say at page 5 of its Order that affirmative misadvice of the collateral consequence that Meehan would not be able to obtain a driver's license, because it is a collateral consequence, does not support a claim under Rule 3.850, citing *State v. Dickey*, 928 So.2d 1193 (Fla. 2006). *Dickey* is simply not on point. The issue in *Dickey* was erroneous advice about the potential for use of a conviction to enhance the sentence

for a future crime.

> Having fully considered the issue, we answer the certified question in the negative. We conclude that allegations of affirmative misadvice by trial counsel on the sentence-enhancing consequences of a defendant's plea for future criminal behavior in an otherwise facially sufficient motion are *not* cognizable as an ineffective assistance of counsel claim. A majority of this Court concludes that claims that a defendant entered a plea based on wrong advice about a potential sentence enhancement for a *future* crime fail to meet the *Strickland* test, either because such claims do not demonstrate deficient performance in the case at issue or because, as a matter of law, any deficient performance could not have prejudiced the defendant in that case. Therefore, we hold that wrong advice about the consequences for a crime not yet committed cannot constitute ineffective assistance of counsel.

State v. Dickey, 928 So.2d 1193, 1198 (Fla. 2006).

This is not the issue in Meehan's 3.850 and *Dickey* has no application to Meehan's case. Justice Cantero in a special concurring opinion took pains to point out that this holding was limited to the particular issue of this case, and did not reverse or limit the cases which have held in other contexts that

affirmative misadvice regarding even collateral consequences may state a claim for 3.850 purposes:

> We have held that defense counsel has no duty to advise defendants about a plea's collateral consequences, and therefore failure to do so does not constitute ineffective assistance. *See Major v. State*, 814 So.2d 424, 426-27 (Fla.2002). It is nevertheless true that in certain cases involving particular collateral consequences, when counsel have chosen to give such advice, courts have recognized claims of ineffective assistance when it was erroneous. *See, e.g., State v. Leroux*, 689 So.2d 235, 238 (Fla.1996) (reversing for evidentiary hearing on claim that counsel wrongly advised defendant about the actual amount of time to be served on a negotiated sentence); *Joyner v. State*, 795 So.2d 267, 268 (Fla. 1st DCA 2001) (reversing where the defendant alleged that counsel wrongly advised him that he would not lose his right to vote because of a youthful offender conviction). I do not quarrel with those decisions.

State v. Dickey, 928 So.2d 1193, 1200 (Fla. 2006).

Instead of *Dickey*, this Court is bound in Meehan's case by the Fifth District Court of Appeals decision in *Johnson v. State*, 933 So.2d 1203 (Fla. 5th DCA 2006), which the Court acknowledged was

distinguishable only by the fact that the claim in *Johnson* appeared to have been brought within two years of the conviction becoming final. (Order, page 5, a copy of which is in the attached Appendix for the Court's convenience).

Further Authority in Support of Meehan's Position

Meehan did not learn that his counsel's advice was incorrect until he began the process to obtain a hardship license. Following the advice of his counsel, Meehan waited until he had completed three years of the revocation period to seek a license. Meehan, who had moved to New Hampshire after the sentencing in this case, began the process to apply for a New Hampshire driver's license in 2005, three years after his sentencing and revocation of license in this case, March 2002, based on his understanding of his counsel's advice that he would qualify for a hardship license under Florida law within three to five years of the Florida revocation. *See* the New Hampshire Notice of Hearing on his application for license, dated May 10, 2005, in the attached appendix. Indeed, Meehan completed the New Hampshire process before being advised by New Hampshire authorities that his Florida driver's license revocation was *permanent* under Florida law and that Florida law did not permit a hardship license after three to five years or after any period of time.

Within two years of learning that his counsel's advice was mistaken, that there was no possibility of a hardship license after

a three to five year suspension, Meehan initiated this action, therefore this motion is timely under Rule 3.850(b)(1). Rule 3.850(b)(1) provides for an exception to the two-year limitations period for a motion to vacate, set aside, or correct a sentence which allege that "the facts upon which the claim is predicated were unknown to the movant or his attorney and could not have been ascertained by the exercise of due diligence." That is what Meehan alleges.

Meehan's case is analogous to that of *State v. Johnson,* 615 So.2d 179, 180-181 (Fla. 3rd DCA 1993). Johnson's attorney had informed him that the plea and subsequent withholding of adjudication by the trial court would not jeopardize his employment as a certified correctional officer. A sentence was entered on the plea on April 10, 1989. Two years and approximately four months later, the defendant was notified by the State of its intent to revoke his certification as a correctional officer.

The trial court granted Johnson's belated 3.850 motion and the State appealed arguing that it had been untimely. The State's primary contention, as grounds for reversing the order setting aside the plea, was that there was no due diligence by the defendant to learn the consequences of the plea.

In upholding the trial court's order granting the 3.850 motion, the District Court of Appeal made the same argument that Meehan has made above: that the defendant satisfied due diligence

by his reliance on the advice of his attorney.

Meehan's case is comparable to that of *Galindez v. State,* 909 So.2d 597, 597-598 (Fla. 2nd DCA 2005). Galindez sought review of an order denying as untimely his 3.850 motion. In the motion, Galindez claimed he received ineffective assistance of counsel based on misadvice with respect to statutory gain time. The circuit court ruled that the motion was untimely because it was not filed within two years from December 15, 2001, the date the judgment became final. The Court of Appeals reversed the trial court's denial of the 3.850 motion.

In the motion, Galindez alleges that his counsel failed to inform him that despite inclusion in the judgment of a provision concerning gain time, the Department of Corrections (DOC) could forfeit gain time based on his violation of probation. *See* § 944.28, Fla. Stat. (2004). Galindez attached to his motion his request to DOC for a computation of his sentence including gain time and the DOC's response, which was dated April 23, 2002. The order of the circuit court denying Galindez's rule 3.850 motion states that the motion was filed on April 5, 2004.

The Court held that under virtually identical circumstances, it had twice held that the triggering event for the two-year period in which to file a rule 3.850 motion is not the date of the judgment in the criminal proceeding in which the prisoner pleaded, but the date on which the DOC informed the prisoner of the gain

time forfeiture and that the DOC determination of gain time constituted newly discovered information within the meaning of rule 3.850(b)(1). *Hall v. State,* 891 So.2d 1066 (Fla. 2d DCA 2004); *Spradley v. State,* 868 So.2d 632 (Fla. 2d DCA 2004). Galindez's motion was filed on April 5, 2004, within two years of April 23, 2002, the undisputed date that DOC informed him of his gain time forfeiture. The motion was held to have been timely.

CONCLUSION

Accordingly, based on the record before this Court, Meehan is entitled to withdraw his plea, or in the alternative, this matter should be remanded to the county court for an evidentiary hearing.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been furnished to the Office of the State Attorney, 251 North Ridgewood Avenue, Daytona Beach, Florida, 32114 by U.S. Postal Service, postage prepaid, this ___ day of May, 2007.

_____

William Mallory Kent

APPENDIX

1. **Plea Transcript**

2. **Eddington Letter**

3. **New Hampshire Notice**

4. **Order Denying 3.850**

5. **Order Denying Rehearing on 3.850**