

NOT FINAL UNTIL TIME EXPIRES
TO FILE REHEARING MOTION
AND, IF FILED, DISPOSED OF.

IN THE DISTRICT COURT OF APPEAL
OF FLORIDA

THIRD DISTRICT

JULY TERM, A.D. 2001

ROGER BERNARD THOMAS,

**

Appellant,

**

CASE NO. 3D01-2121

**

vs.

**

THE STATE OF FLORIDA,

**

LOWER TRIBUNAL
CASE NO. 96-35347

Appellee.

**

Opinion filed September 12, 2001.

An Appeal under Fla.R.App.P. 9.141(b)(2) from the Circuit
Court of Dade County, Lawrence Schwartz, Judge.

Roger Bernard Thomas, in proper person.

Robert A. Butterworth, Attorney General, and Katherine
Fernandez Rundle, State Attorney and Jeremiah Van Hecke, Assistant
State Attorney, for appellee.

Before SCHWARTZ, C.J., and GERSTEN, and FLETCHER, JJ.

FLETCHER, Judge.

Roger Thomas appeals the trial court's denial of his motion for
post-conviction relief. We conclude that the trial court erred when
it found Thomas' motion to be untimely filed and declined to consider
it on the merits.

Florida Rule of Criminal Procedure 3.850(b) states that no

post-conviction relief "motion shall be filed or considered pursuant to this rule if filed more than 2 years after the judgment and sentence become final in a noncapital case." The record indicates that Thomas appealed his final judgment of conviction and sentence, and that this court affirmed on September 1, 1999, with the mandate issuing on September 17, 1999. As the two-year limitation period within which to file a post-conviction motion does not begin to run until the appellate court issues its mandate on the direct appeal, Cabrera v. State, 721 So. 2d 1190 (Fla. 2d DCA 1998),¹ and as this court issued its mandate in September, 1999, Thomas has until September, 2001 to file a post-conviction relief motion. Thus his motion filed on October 16, 2000 was timely, and the trial court should have reviewed the substantive claims therein.

Accordingly, we reverse and remand for the trial court to consider Thomas's post-conviction relief motion on its merits.

Reversed and remanded.

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If a defendant files a petition for supreme court review of the result of his direct appeal, the time period for filing a motion for post-conviction relief does not begin to run until the petition has been determined. Gaskin v. State, 737 So. 2d 509 (Fla. 1999); Barkett v. State, 728 So. 2d 792 (Fla. 1st DCA 1999).