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IN THE SUPREME COURT OF FLORIDA

TALLAHASSEE, FLORIDA

CASE NO: 72,316

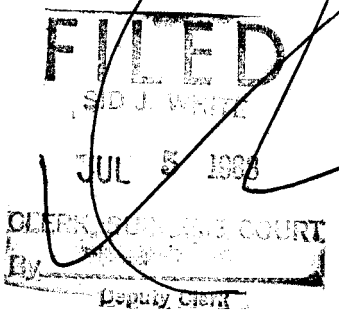
HOWARD M. ZEIDWIG, ESQUIRE
and HOWARD M. ZEIDWIG, P.A.,

Petitioners,

vs.

JOSEPH WARD,

Respondent.
_____/



RESPONDENT'S BRIEF ON THE MERITS

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PREFACE

Petitioners were the Defendants in the trial court and Appellees in the appellate court; Respondent was the Plaintiff in the trial court and Appellant in the appellate court. In this brief, the parties will be referred to either by their proper names or as they appeared in the trial court. All emphasis in this brief is supplied by Plaintiff/Petitioner, unless otherwise indicate. The symbol "R" will denote the Record-on-Appeal.

STATEMENT OF THE CASE AND FACTS

Plaintiff accepts Defendants' Statement of the Case and Facts to the extent that it presents a statement of the case. Plaintiff presents his own Statement of the Facts as follows:

Joseph Ward was a police officer with the City of Fort Lauderdale, Florida (R2). He was contacted by an old acquaintance concerning the possibility of his piloting an aircraft to South America in return for substantial sums of money (R2). Recognizing that this might involve illegal drug importation, Ward reported the call to his superiors (R2). This led to an arrangement whereby Ward was to work with the Federal Drug Enforcement Agency (DEA) in its investigation of suspected drug suppliers (R2). Ward was flown to Connecticut, conferred with David Hoyt, the DEA agent in charge of the investigation, and was used in an undercover capacity to record conversations with his contact (R2).

Because his department did not want him to participate in the investigation on its time, Ward worked on the case on his own

time and at his own expense (R2-3). By September 21, 1978, Ward had developed sufficient information to prompt him to place a 24 minute long-distance telephone call to Hoyt to discuss the known facts, including the identifying number of the plane to be used, names of key participants, the general area of Georgia where the plane would land, and the relative time of the flight (R3).

Two weeks later, the plane crashed off the coast of South America (R3). Since the Alabama DEA office had an informant working as a co-pilot in the illegal operation, several arrests ensued. Ward was one of the people arrested as a suspect (R3).

Ward retained Howard M. Zeidwig, Esq., the Defendant herein, to represent him in his criminal defense (R3). When it became apparent that Hoyt would not confirm Ward's assertions that on September 21, 1978, he had supplied specific information as to the developing operation, Ward brought tape recordings to Zeidwig's office which he had made to document his investigation, and which included a recording of the September 21, 1978 conversation (R3). Zeidwig protested that the tapes were illegal and refused to listen to them, asserting that to do *so* would constitute a felony (R3).

At his trial in March, 1979, Ward's defense was that he was working in an undercover capacity (R4). This was rebutted by Hoyt, who testified that during the September 21, 1978 conversation, Ward had never mentioned his involvement in Alabama, any of the participants in the drug deal, or any other specific information (R4). Ward was found to be guilty as

charged (R4). This conviction was reversed. UNITED STATES v. MEACHAM, 626 F.2d 503 (5th Cir. **1980).**

The case was retried in March, **1981** (R4). At this time, Ward informed Zeidwig that he still had the tapes and inquired as to whether there was some way to introduce them (R4). Zeidwig responded by threatening to withdraw and advising Ward that his bail would be revoked if he were caught with the tapes since his possession of them constituted a separate crime (R4). Zeidwig strongly urged Ward to dispose of the tapes (R4). Since he feared lack of representation at the retrial and Zeidwig had convinced him that the tapes were inadmissible and constituted a separate felony, Ward destroyed the tapes (R4).

At the retrial, the defense and rebuttal by Hoyt were the same and the credibility contest was again decided against Ward, with him again being found guilty as charged (R5). This conviction was not successfully appealed (R5). Zeidwig then informed Ward that due to his inability to pay the remainder of his fees, he would no longer be able to represent him (R5). Ward retained Timothy J. Hmielewski, Esq., and filed suit against Zeidwig for legal malpractice (R5). Specifically, the Complaint filed in May, **1984,** alleged representation falling below the standard of practice in that Zeidwig failed to adequately investigate the facts supporting the defense, particularly by refusing to listen to the tape of the September 21, **1978** telephone conversation; failed to adequately research; failed to render competent advice to his client; and failed to properly

evaluate and appreciate the evidentiary significance of the tapes in terms of Ward's defense **(R7-8).**

During the pendency of this action, the United States District Court for the Southern District of Alabama entered an Order denying Ward's motion to vacate, modify or set aside his sentence pursuant to **28** U.S.C. **$2255** based on ineffective assistance of counsel at trial **(R27-39).** In this Order, the federal court determined that Ward had failed to show either deficient performance or sufficient prejudice to warrant reversal of his conviction or that the justice of his conviction was rendered unreliable by a breakdown in the adversarial process due to deficiencies in counsel's assistance.

The Defendants, Howard M. Zeidwig, Esquire and Howard M. Zeidwig, P.A., answered the Complaint herein denying its material allegations, and raising numerous affirmative defenses, including statute of limitations, res judicata as to Ward's guilt or innocence, illegality of the tapes, collateral estoppel and estoppel by judgment in conjunction with the federal habeas corpus proceeding, and the suspension of Ward's civil rights due to his conviction as a bar to his right to bring this action **(R75-80).** Zeidwig also filed a Motion for Summary Judgment stating that the Complaint centered on the existence of tape recordings not admitted during Ward's trial which Ward asserted would have changed the outcome of the trial **(R118-19).** Zeidwig asserted that the issues as to the tapes were fully litigated and were res judicata, that Zeidwig's decision not to use the tapes was a tactical one for which Zeidwig was immune from liability,

that the non-existence of the tapes would now require Ward to rely on inadmissible hearsay testimony to prove his case, and that the issue of proximate cause was a question of law to be determined by the court based on the transcript of the criminal trial.

In opposition to the Motion for Summary Judgment, Ward filed his deposition, the deposition of Timothy J. Hmielewski, and the affidavits of Donald Θ. Schultz, Gene Dodge and Jerry Pickett (R157-64,165-67,168-69,170-245,246-523).

Schultz swore in his affidavit that in early 1978, Ward had informed him of his involvement in a drug investigation with a DEA agent in Hartford (R157-64). In early September, Ward had indicated that he had not been in contact with the DEA because he had little information to pass on but in late September, Ward advised the witness that things were quickly taking shape and he had contacted the agent in Connecticut. At this point, Ward also informed Schultz of the fact that he had recorded most of his phone conversations pertaining to the investigation and asked Schultz to listen to the most recent tapes of a conversation with the DEA agent. Schultz listened to the tape and remembers that two people involved were a father and son and that a subject named Van Veenderhall was mentioned. The call had been answered by a female voice stating that Ward had reached the DEA. Ward asked for the agent, was told to hold, and then a man's voice came on the line, obviously being the agent to whom Ward had placed the call. Schultz also remembered mention of a plane in Texas, its numbers, specific names which Schultz could not

recall, and a discussion about Georgia. The agent instructed Ward to call him if he obtained any more information as to names and when and where the plane was to land.

After Ward's arrest, Schultz agreed to testify in his defense. Ward was very confident that the tapes would show that he had been working with the DEA but asked Schultz to contact his attorney, Zeidwig, to make an appointment to see him. Schultz did call and informed Zeidwig that he heard the tapes, knew Ward had been working with the DEA, and was willing to so testify. Zeidwig stated that he would set up an appointment and contact the witness but he never did. After the second indictment, Schultz went to Zeidwig's office and spoke with him about the situation but Zeidwig became very excited at the mere mention of the tapes, told him to forget the word "tape", that he did not want to hear that word again, that the tapes were illegal, inadmissible, and no longer existed since he had told Ward to destroy them. Zeidwig said he would contact the witness as to testifying but he never did.

Dodge attested in his affidavit that he had been restricted during his trial testimony by not being able to discuss the tapes since Zeidwig had instructed him not to mention them (R165-67). From conversations with Ward, Dodge knew that he was working undercover on a major drug operation. In late September, **1978**, Ward told him that he had recently spoken with Hoyt and allowed Dodge to listen to the tapes. The tape reflected Ward's voice indicating the date as being September 21, **1978**, a call being placed, a female voice answering, Ward being put on hold, and

then a person coming on stating that he was Agent Hoyt. The parties to the conversation exchanged first name greetings and the tone was very informal. After some small talk, Ward discussed the investigation, specifically mentioning the name Van Veenderhall, and informed Hoyt that his department did not know he was still working on the investigation. Ward stated that there was a marijuana deal to Colombia, he mentioned a DC-3 aircraft and its call letters, stated the names Meechan, Gilroy and Metzger, and a possible pilot named Travis Paul. Ward indicated his uncertainty as to exact dates and locations of the landing. Hoyt gave the impression that he did not want any information until Ward could tell him exact dates and places. Ward mentioned Georgia as the state of the landing but was uncertain as to the precise site.

Several months later, Dodge accompanied Ward to Zeidwig's office. Ward brought the September 21st tape and other tapes. At the office, they met Jerry Pickett. The four of them discussed the case. When Ward indicated that he had the tapes to play for Zeidwig, Zeidwig stated that he wanted nothing to do with the tapes, they were illegal and inadmissible and each represented five years in jail, and he refused to listen to them. Zeidwig told Ward to destroy the tapes and then left the office. Ward played ten minutes of the September 21st tape. It was apparent that Pickett had heard it previously and he indicated that he had been present when it was made. Zeidwig returned and there was no further discussion about the tape. When preparing for his testimony at the second trial, Dodge discussed with

Zeidwig the possibility of using the tapes to discredit Hoyt's testimony and be sure that the jury got the truth. Zeidwig again insisted that the tapes could not be introduced as evidence and each tape represented five years in jail.

Pickett swore in his affidavit that he had been present at Ward's home on September 21, **1978** when Ward placed a call to the DEA office in Connecticut **(R168-69).** Pickett reiterated the accuracy of his prior trial testimony but asserted that Zeidwig had instructed him not to mention the tapes because they were illegal and inadmissible. After the conversation with Hoyt, Pickett had listened to the tape. Ward had mentioned the call letters of the plane and several people involved, including the names Metzger, Travis Paul, Meechan and Gilroy. There was some discussion of their possible connection with Van Veenderhall. On the tape, Hoyt made it clear that he was only interested in hearing from Ward again if he had more specific information as to when and where the plane would land. Ward had mentioned that it would probably be in Georgia but he was unsure of the precise site or date.

Sometime later, Pickett met Ward and Dodge in Zeidwig's office. Ward indicated that he had the tapes with him and he began to set them up to be played. Zeidwig became upset, and loudly protested that the tapes were inadmissible and it would be a felony to listen to them. Zeidwig told Ward to get rid of the tapes and left the office because he did not want to hear the tapes under any circumstances. Ward started to play the tapes and it was obvious that Dodge had heard the September 21, **1978**

tape earlier. After several minutes, Ward stopped the recorder and Zeidwig returned.

When in Alabama preparing for the first trial, Pickett was on an elevator with Ward and Zeidwig when Ward again asked if there was any way to use the tapes because he still had them with him and knew they would prove his innocence. Zeidwig insisted he did not want to hear anything about the tapes and told Ward that he would be arrested and given five years for possessing each tape if he were stopped and frisked. Zeidwig again told Ward to destroy the tapes. Pickett was aware of Ward's participation in a drug case with the DEA prior to his arrest.

Timothy J. Hmielewski, Ward's prior attorney in this case, testified during his deposition that he had spoken to Zeidwig concerning his failure to use the tapes and Zeidwig had stated that the tapes were inadmissible (R216-18). While Zeidwig had denied instructing Ward to destroy the tapes, he admitted telling Ward that it was in his best interest if no one found out about the tapes and that each tape represented a felony (R218-19). Zeidwig had refused to listen to the tapes (R220). Hmielewski believed the tapes were admissible in federal court and did not constitute felonies (R222).

During his deposition, Ward testified that at the time of his second trial in Alabama, he had destroyed all the tapes which he had made concerning the conspiracy (R299). Ward testified that Zeidwig had told him to destroy the tapes because they constituted felonies and had further informed Ward that he must

do what he was told if Zeidwig was to continue to represent him (R306).

One of the conversations which Ward had taped was with Hoyt on September 21, 1978 (R349). Pickett was present when Ward placed this call during which Ward gave Hoyt detailed information including names of participants, N number and location of the plane to be used, and the plan to fly out of the country, and return to Georgia (R385-96). Immediately after the conversation, Ward played the tape for Pickett (R408).

When Ward first informed Zeidwig of the tapes, Zeidwig was excited at the prospect of a good defense and requested the tapes (R457). However, when Ward delivered the tapes to Zeidwig's office, Zeidwig told him that he should not have made the tapes, that they were illegal and inadmissible (R475). Ward had told Zeidwig generally what was on the tapes (R457,479-80,502). When Ward discussed the propriety of the tapes due to his status as a police officer involved in an investigation, Zeidwig took the position that Ward was a suspect, not a police officer and, therefore, the tapes were illegal and inadmissible (R483). Zeidwig never listened to the tapes (R485-86,501). Ward and Zeidwig discussed the use of the tapes before the first and second trials and, each time, Zeidwig instructed Ward to get rid of them (R490-94,502).

At the federal habeas corpus hearing concerning ineffective assistance of counsel, Schultz testified as an expert on police procedures (R592-93). In April, 1978, Ward had informed him of his participation in a drug investigation (R597,620). In

September, 1978, Ward told him that the investigation was coming alive and that he had taped all conversations in the case (R597,600). Schultz heard the tape of the conversation with Hoyt in late September, 1978 (R601). During this conversation, Ward mentioned names, a plane, and the plane's number, as well as Georgia and Texas (R602,621). Prior to Ward's first trial, Schultz had called Zeidwig and told him that Ward was working with the DEA, that he had heard the tapes, and that he would testify (R612-13). Zeidwig never called him back (R613). After the first trial, Schultz again called Zeidwig, went to his office, and reiterated his information, suggesting that he should be used as a witness (R613). Zeidwig became semi-violent when Schultz mentioned the tapes, said they were illegal and inadmissible, and never called Schultz for the trial (R614).

Dodge, who testified at Ward's two criminal trials, knew that Ward was working undercover with the DEA in April, 1978 (R658-59). In late September 1978, he asked Ward if he could listen to his tapes of the investigation (R660). Ward played a tape of a conversation with Hoyt of the DEA in Connecticut (R660-61). During this conversation, Ward mentioned names, type of plane, and its destination (R661-63,670). Dodge and Ward subsequently took these tapes to Zeidwig's office but Zeidwig refused to listen, stating that the tapes were illegal and each time they were played represented a five-year felony (R663-64). Before Dodge testified, Zeidwig directed him not to mention the tapes because they were illegal (R664). Zeidwig had instructed Ward to destroy the tapes while they were in his office, prior to

the first trial, and during the second trial (R665). Dodge specifically questioned Zeidwig as to the possibility of using the tapes during Ward's second trial and Zeidwig refused to use them, stating that Ward should destroy them (R665).

Ward's testimony confirmed that Pickett had been present when the September 21, 1978 conversation with Hoyt was taped and that he had played it for Pickett immediately thereafter (R704). He reiterated that Zeidwig had refused to listen to the tapes when Ward brought them to his office, saying they were illegal and inadmissible and that each represented a five-year felony (R706). Each time Ward mentioned the tapes, Zeidwig became more upset (R707-09).

Three attorneys, Raymond Sandstrom, Neil Hanley, and Richard Dowell Horne assessed Zeidwig's representation of Ward on criminal charges as constituting ineffective assistance of counsel (R645,674,716). Sandstrom testified that as an attorney, Zeidwig should have researched the legality and admissibility of the tapes since the tapes were important and an attorney has a duty to investigate the facts, understand the charges, and research the law (R644-45). If Zeidwig did not listen to the tapes or research the law, this was a serious omission constituting ineffective assistance of counsel (R644-45).

Hanley agreed that without listening to the tapes and doing some research, Zeidwig could not render effective assistance (R679,692). Hanley pointed out that since Ward had admitted all his activities in connection with the transaction, his only possible defense was that he had been operating undercover

(R675). He emphasized that even if there was a possibility that the tapes would be found illegal, this should have been balanced against their substantial value to the criminal defense (R690). Even if Zeidwig knew what was on the tapes, he should have used them in order to employ every piece of evidence (R693).

Consistent with this, Horne agreed that Zeidwig should have reviewed the tapes and researched the law (R725,733). The conversation of September 21, 1978 was the focus of the case and the tape could have substantiated Ward's testimony in this regard and given credibility to him while destroying Hoyt's credibility (R721-23). Horne pointed out that even assuming, for the sake of argument, that the tapes were illegal in Florida, they were admissible in federal court and in Alabama (R723).

The trial court granted summary judgment in favor of Zeidwig (R560-62). The court's decision was based on its finding that there was identity of the parties in interest and the facts in the petition for writ of habeas corpus and the present case, making the prior proceeding res judicata of all issues and facts involved therein; that collateral estoppel applied as to the findings made in the habeas corpus proceeding; that Zeidwig's decisions as to which evidence to introduce were tactical and did not form the basis for legal malpractice; that Ward would be unable to prove the content of the tapes because of their erasure and the witnesses' inability to testify as to their date or accuracy; and that the only testimony offered to prove the content of the tapes was hearsay.

SUMMARY OF AP MENT

Defendants urge this Court to change well-settled law in Florida requiring mutuality in the application of collateral estoppel. The only justification presented is alleged judicial economy. That policy argument utterly fails because abandoning the mutuality requirement, either in the defensive or offensive context, and regardless of whether the trial court is given an opportunity to retain mutuality, will increase litigation. No party in any proceeding will be able to predict when and against whom in the future any adverse findings in a present case will be revisited upon them to their detriment. The fires of litigation will be fueled by the understandable concerns of attorneys regarding possible legal malpractice if they fail to litigate every issue in every case to the hilt. Moreover, the determination of whether mutuality should apply in a given case will add to the litigation load, especially on the appellate level. Finally, the interests of justice do not require any change in Florida's adherence to the mutuality requirement.

Defendants argue that if mutuality is not applied here, the ultimate outcome of and factual findings made in the federal habeas proceeding mandate that collateral estoppel be applied here. This argument is without merit because of the difference in the standard of proof, the elements of proof, and the issues being litigated in an ineffective assistance case and a legal malpractice case.

Defendants are not exonerated under the "error-in-judgment'' rule, because Zeidwig did not make a tactical decision not to

introduce the tape recordings. Rather, he flatly refused to investigate the defense proposed by Plaintiff based on his erroneous assumption that the tape recordings were made illegally.

Defendants' argument that Plaintiff is unable to prove his case because of the hearsay rule is incorrect because Plaintiff's case would not require him to prove the truth of the matters asserted in the tapes, but only the existence of the tapes. This would support his position in the malpractice case, which Defendants apparently agree comes down to a credibility issue between Plaintiff and Agent Hoyt.

ARGUMENT

POINT I

THE MUTUALITY OF PARTIES REQUIREMENT SHOULD NOT BE ABANDONED WHEN THE DOCTRINE OF COLLATERAL ESTOPPEL IS USED IN A DEFENSIVE CONTEXT.

A. Policy Considerations Do Not Support the Abrogation of the Mutuality of Parties Requirement.

Defendants request that this Court recede from its recent holding in TRUCKING EMPLOYEES OF NORTH JERSEY WELFARE FUND, INC. v. ROMANO, **450** So.2d **843** (Fla. **1984),** by holding that in a case such as this, where collateral estoppel is asserted defensively, there should be no requirement of mutuality of parties. Plaintiff asserts that none of the authorities cited by Defendants require a departure from what is well-settled law in

Florida, and that the policy considerations weigh against any such departure.

In their argument under Point I A. of their brief, Defendants have limited themselves to a request that the mutuality requirement be discarded in the defensive context, although the Fourth District's certified question is not so limited. Further, this Court's decision four years ago in ROMANO was also not limited to offensive collateral estoppel, as Defendants suggest. The same federal cases presented by Defendants here were considered and rejected by this Court in ROMANO. Even though a question has been certified by a District Court of Appeal under Fla.R.App.P. 9.030(a)(2)(A)(V), review is still discretionary, and this Court is not required to decide the question. Plaintiff respectfully maintains that this Court should decline to review this case, since it has *so* recently decided the same issue in light of the same United States Supreme Court decisions. ROMANO, supra.

Defendants' argument is essentially grounded on the assertion that discarding mutuality would serve the cause of judicial economy. A review of the authorities cited by Defendants, as well as other cases, indicates that wherever this issue has been discussed, its resolution always comes down to a judgment call regarding judicial economy considerations. Plaintiff maintains that, regardless of whether collateral estoppel is used offensively or defensively, discarding the mutuality requirement creates a damaging new principal which will underlie all litigation. That is, anytime an issue is raised in

any case, a party had better litigate it to the hilt because someday, somewhere, an adverse determination of that issue could be used against him.

This new fact of life in litigation would do the opposite of effecting judicial economy. In F. JAMES, Civil Procedure (1965), the author reviews the arguments for and against the mutuality requirement, and presents the following as considerations in favor of retaining it:

> Proponents of a narrow view, on the other hand, stress the ways in which a broader view will increase the risks of litigation to the parties who may be bound by adverse findings in favor of persons beyond the scope of the present action, including, perhaps, some whose identity is not known, presenting claims that cannot now be foreseen. This greater risk, so runs the argument, will force the party to litigate to the utmost those claims which he chooses to litigate at all. This, in turn, may actually increase rather than cut down litigation by swelling the importance of every contested case. Moreover, it is unfair to a litigant to impose on him such open-ended unforeseeable risks. A party is therefore entitled to his day in court on each issue against each potential adversary.

Id. §11.31 at 596 (emphasis in original) (footnote omitted).

In their brief, Defendants explain that the United States Supreme Court abandoned defensive mutuality in BLONDER-TONGUE LABORATORIES, INC. v. UNIVERSITY OF ILLINOIS FOUNDATION, 402 U.S. 313, 91 S.Ct. 1434, 28 L.Ed. 2d 788 (1971). Defendants buttress their argument for the abandonment of mutuality in the defensive context by stressing that in the later case of PARKLANE HOSIERY CO., INC. v. SHORE, 439 U.S. 322, 99 S.Ct. 645, 58 L.Ed. 2d 552 (1979), the Court in a more guarded manner also held that

mutuality is not required in the offensive context, but urged the lower federal courts to still require mutuality in certain cases based on ad hoc determinations relevant to each individual case. Thus, since it serves their purposes in the instant case, Defendants appear to be arguing that defensive mutuality should be abandoned completely, and attempt to establish the reasonableness of that position by not arguing for the abandonment of mutuality in the offensive context.

Plaintiff maintains that on the central issue of judicial economy, there is no real difference regardless of whether the context is defensive or offensive. Even if mutuality is abandoned only in the defensive context, and even if it is further limited by the requirement that mutuality would still apply depending upon the circumstances of the case based on the discussion in the PARKLANE case, the result is the same. As long as there is even the possibility that down the road at an unforeseen time, in an unforeseen case against an unforeseen opponent, some finding made in a prior case can come back to haunt a litigant like Marley's Ghost, there is a decided incentive to litigate every issue to the hilt. In fact, rather than serving the cause of judicial economy, the fear of later claims of legal malpractice for having failed to adequately protect a client in a prior case would surely fan the flames of litigation. It is said that medical costs have risen because doctors have felt constrained to practice defensive medicine. The prospect of similar defensive practice by lawyers surely

cannot serve the cause of economy in the legal world any more than defensive practice does in the medical world.

The very factor which at first blush makes the abandonment argument more appealing, that is, ~~ad hoc~~ determination in each case of whether the litigant in the prior case had a fair opportunity to be heard, makes it utterly unpredictable whether in any given case collateral estoppel would apply, and increases the uncertainty of litigants in present cases regarding future consequences. Of course, if mutuality is discarded entirely, the situation is even worse. Regardless, leaving room for the trial court to retain mutuality based on the circumstances of an individual case itself increases the burden of litigation to make that decision.

Under the present state of the law, res judicata and collateral estoppel determinations are among the most mind-bending which appear at appellate opinions. If Defendants' argument prevails here, added to the determination of whether or not collateral estoppel applies at all would be the further question of whether it should apply, that is, the determination of whether the party against whom estoppel is sought had a fair chance to litigate in the prior proceeding. This determination would involve a myriad of considerations, and the ultimate determinations among cases would be impossible to reconcile since the determinations would be ~~ad hoc~~. Of course, the result would be an added litigation burden at the trial level, and perhaps most of all on the appellate level. The United States Supreme court in BLONDER-TOUNGUE, a patent case, acknowledged the added burden, as follows:

> Determining whether a patentee has had a full and fair chance to litigate the validity of his patent in an earlier case is of necessity not a simple matter. In addition to the considerations of choice of forum and incentive to litigate mentioned above, certain other factors immediately emerge. For example, if the issue is nonobviousness, appropriate inquiries would be whether the first validity determination purported to employ the standards announced in Graham v. John Deere Co., supra; whether the opinions files by the District Court and the reviewing court, if any, indicate that the prior case was one of those relatively rare instances where the courts wholly failed to grasp the technical subject matter and issues in suit; and whether without fault of his own the patentee was deprived of crucial evidence or witnesses in the first litigation. But as so often is the case, no one set of facts, no one collection of words or phrases, will provide an automatic formula for proper rulings on estoppel pleas. In the end, decision will necessarily rest on the trial court's sense of justice and equity.

402 U.S. at **333-334.**

Plaintiff maintains that this Court's rejection of the judicial economy argument in the ROMANO case applies here as well. In ROMANO, this Court stated:

> Petitioner urges judicial economy as a major rationale for changing the evidentiary rule and abrogating the doctrine of mutuality of parties. However, petitioner acknowledges that the determination of whether the facts are indeed identical and defendant had a fair opportunity and reasonable inducement to defend the action must be left to the discretion of the trial judge in the civil suit. This creates fertile ground for appeal; any savings to the trial court would be at the expense of the district courts of appeal. Robbing Peter to pay Paul is poor economy, judicial or otherwise.

450 So.2d at **845-846.**

Adding to the difficulty created if Defendants' argument prevails is the undeniable chemistry at work in each individual trial which would both compound the determination of whether mutuality should apply and create injustice in many cases if it does not. The text writer addressed these considerations as follows:

> There is sometimes an additional reason for confining the effects of a judgment to the parties to the action. In some types of cases the result of trial is all too apt to turn on -- or at least to be influenced by -- the personalities of the parties and their lawyers. It is doubtful whether a party gets full justice if he is bound in future cases by a judgment in favor of one adversary who may have created a peculiarly favorable impression. And when the possibility of this sort of thing is foreseeable and the order of trial is subject to manipulation by the party likely to benefit from it, then the danger of injustice is twice compounded.
>
> Moreover it can scarcely be denied that the jury system, for all its virtues, does sometimes act capriciously in terms of its theoretical function. The verdict which illicitly compromises issues of liability and damages is a frequent example. While such verdicts may be defensible as giving needed flexibility to the law, they pose a quandary where equivocal implicit findings are to be used in other actions. If a compromise verdict for one plaintiff is taken as establishing defendant's liability to another plaintiff, then that other will reap the benefit of full damages when no tribunal has ever made a proper finding of liability.

F. JAMES, supra, (511.31 at 596.

Balanced against Defendants' position is the relative predictability of current law. While collateral estoppel issues are often difficult, they would become immeasurably more so for everyone in the legal system if mutuality is discarded, or even

dented. At least now a party knows who might benefit from issue preclusion in the future -- the other parties and their privies. It simply cannot be predicted with any degree of confidence that Defendants' argument would result in a lessening of the load on either litigants or judges. At the conclusion of the ROMANO opinion, this Court stated that it was not convinced that the burden created by current law justifies a change in the status quo which risks prejudice and is not necessary to serve the ends of justice. 450 So.2d at 846.

Moreover, an important distinction between the BLONDER-TONGUE case and the instant case is that in BLONDER-TONGUE, the Court made it clear that the issue in the prior patent litigation and in the patent litigation before it involved resolution of precisely the same issue. As will be discussed more fully below, that is not the case here. Closer to the instant case is the Michigan case cited by Defendants, KNOBLAUCH v. KENYON, 415 N.W. 2d 286 (Mich. App. 1987), where the Michigan Court of Appeals allowed an attorney to assert defensively in a legal malpractice action his client's loss in a prior ineffective assistance of counsel determination. However, KNOBLAUCH is distinguishable as well. First, the Michigan Court stated that under Michigan law the plaintiff's burden to establish ineffective assistance of counsel is less stringent than the standard which he must meet to prove substandard representation in the malpractice case. Id. at 289.

Further, there is an important procedural distinction between KNOBLAUCH and the instant case. The KNOBLAUCH opinion

indicated that ineffective assistance of counsel was raised as an issue in a motion for new trial immediately following the criminal conviction, and was appealed along with the conviction. That is impossible in Florida practice. For the most part, ineffective assistance of counsel issues here must be raised in later, collateral proceedings. Further, if that issue is raised in a federal habeas proceeding, the earliest that can occur is after trial, appeal from judgment and sentence, denial of a motion to vacate pursuant to Fla.R.Crim.P. 3.850, and appeal from an adverse determination in that proceeding. Since the Rule 3.850 proceeding is a collateral attack on the judgment and sentence, the presumptions against the defendant in the trial and appellate courts are extremely strong; the burden at the trial and appellate levels is greater than that apparently met by the criminal defendant/plaintiff in KNOBLAUCH. Of course, the burdens are even stronger when the case reaches the federal habeas stage. Although the instant case involves a federal habeas following a federal conviction, the same reasoning applies. A Florida plaintiff faces a much heavier burden in the habeas proceeding than he does in the later civil suit, unlike the plaintiff in KNOBLAUCH. Thus, the analysis in that case does not apply here.

While it is certainly impressive to array United States Supreme Court decisions in one's favor, the establishment of evidentiary and procedural rules in the federal courts is the prerogative of that Court; the establishment of such rules in Florida is the prerogative of this Court. Of course, this Court

has already acknowledged BLONDER-TONGUE and PARKLANE in ROMANO, 450 So.2d 845, and chose not to adopt their holdings. Nothing in that opinion limited that rejection to offensive, rather than defensive estoppel. Abrogating or altering the mutuality requirement in either the offensive or defensive context will neither effect judicial economy nor serve the ends of justice. Whether it is termed Pandora's box or a can of worms, Plaintiff urges this Court not to open it in Florida.

B. Plaintiff Should Not be Collaterally Estopped from Litigating His Malpractice Action

Under this section of their brief, Defendants argue that Plaintiff should be collaterally estopped in the malpractice action, either based on the ultimate conclusion reached in the federal habeas corpus proceeding, or at least based on the specific findings of fact made there. Of course, Defendants' argument here assumes that mutuality does not apply.

Defendants' argument should be rejected because there is a substantial difference in the standard of proof between the habeas proceeding and this negligence action which necessarily destroys any possibility of identity of issues. The findings of fact made in the habeas proceeding were based on the standard of proof set out in the order therein as having been dictated by the United States Supreme Court in STRICKLAND v. WASHINGTON, 104 S.Ct. 2052 (1984). In STRICKLAND, the United States Supreme Court laid out the standards to be applied in an ineffective

assistance of counsel petition for writ of habeas corpus stating that counsel is "strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment" 104 S.Ct. at 2066. The Order in the instant habeas proceeding quotes this standard, clearly indicating that this was the federal court's guiding force in reaching its factual determinations.

The STRICKLAND presumption does not exist in this civil malpractice case. Here, Defendants are not entitled to the protection of a strong presumption that adequate assistance was rendered and that all significant decisions were made in the exercise of reasonable professional judgment. Here, the parties stand as neutrals before the court and jury. Whether a jury in this civil proceeding would reach the same conclusion in the absence of the strong presumption mandated by the Supreme Court in STRICKLAND as to the habeas proceeding is questionable.

The habeas proceeding requires proof of inadequate assistance of counsel by overcoming the strong presumption set out in STRICKLAND, plus proof that this inadequate assistance resulted in an unconstitutional proceeding and result. This malpractice action merely requires proof that absent the negligence of counsel there would have been a reasonable doubt resulting in acquittal. This is clearly not the STRICKLAND standard and not the standard described in the federal order which denied Plaintiff's Petition for Writ of Habeas Corpus. Since no legal presumption exists in this civil suit, there can

be no identity of issues fully litigated and determined therefore, collateral estoppel is inapplicable.

On this issue, and in an analogous situation, the decision in RUMMEL v. ESTELLE, 498 F.Supp. 793 (W.D. Tex. 1980), is relevant. There, the court incorporated the following observations:

> "When a defense counsel fails to investigate his client's only possible defense, although requested to do so by him and fails to subpoena witnesses in support of the defense, it can hardly be said that the defendant has had the effective assistance of counsel." Gomez v. Beto, 462 F.2d 596, 597 (5th Cir. 1972). See also, Caraway v. Beto, 421 F.2d 636 (5th Cir. 1970); Bell v. Georgia, 554 F.2d 1360, 1361 (5th Cir. 1977); Friedman v. United States, 588 F.2d 1010, 1016-17 (5th Cir. 1979). This court need not "indulge in nice calculations as to the amount of prejudice" arising from ineffective assistance. Brown v. Blackburn, 625 F.2d 35 at 36 (5th Cir. 1980), quoting Glasser v. United States, 315 U.S. 60, 76, 62 S.Ct. 457, 467, 86 L.Ed. 680 (1942). Suffice it to say that in this factual setting, the court can only find that the total failure of Rummel's lawyer to contact any potential witnesses and to even attempt to investigate the case, prejudiced Rummel enough to require a new trial. Brown v. Blackburn, supra. See generally, Davis v. Alabama, 596 F.2d at 1221-1223. (Footnote omitted.)

Id. at 797. See also DAVIS v. ALABAMA, 596 F.2d 1214 (5th Cir. 1979), vacated as moot, 446 U.S. 903 (1980); UNITED STATES v. HEARST, 466 F.Supp. 1068 (N.D. Cal. 1978). Interestingly, a footnote in RUMMEL specifically distinguished between the court's finding of ineffective assistance of counsel and possible malpractice, as follows:

> This court's findings and rationale pertain only to the constitutional guarantees of

> effective assistance of counsel, and are not meant to address the issues that would be presented by a civil suit for damages for malpractice.

498 F.Supp. at 798 n.4.

FREEMAN v. RUBIN, 318 So.2d 540, 543 (Fla. 3d DCA 19751, and, in particular, the statement in that case that "a habeas corpus proceeding is...res judicata of all issues of law and facts involved therein," does not change the result here. First, that statement is dicta rather than the holding of the case. Secondly, the decision cites to CRANE v. HAYES, 253 So.2d 435 (Fla. 19711, as the authority for the statement. CRANE was a child custody case involving sequential habeas corpus proceedings to obtain custody. Most importantly, CRANE had the required identity of the parties, issues, and standard of proof in its various habeas corpus proceedings. Those all-important identities are lacking here. In addition, CRANE revolved around special considerations relevant to child custody situations which have no bearing here. For example, the court determined that when child custody is involved, a habeas corpus action, while retaining its form as a special proceeding, takes on the nature of an equitable proceeding. Thus, CRANE does not support the broad statement made in FREEMAN.

Moreover, in FREEMAN, the petitioner was granted habeas corpus. The findings on which that petition was granted were then deemed conclusive in the petitioner's ensuing malpractice action. In the instant case, the Plaintiff's petition was denied. The Defendants, however, suggest that the findings on

which that petition was denied are conclusive, controlling, and will foreclose Plaintiff's resort to any other legal remedies, including this action in negligence based on the Defendants' alleged malpractice. FREEMAN provides a faulty premise for this suggestion since the court's actions in FREEMAN were to further the petitioner's cause, not to give preclusive effect to the habeas corpus order. Of course, FREEMAN was decided several years before this Court decided ROMANO.

Finally, while Defendants acknowledge at page 21 of their brief that the standard of proof and elements of proof in a habeas proceeding and a legal malpractice case differ, they urge this Court to disregard the differences, relying on three cases. Among them is McCORD v. BAILEY, **636** F.2d **606** (D.C. Cir. 1980), which holds that the legal standard for ineffective assistance of counsel in a coram nobis proceeding and in a subsequent legal malpractice proceeding were equivalent. This position, however, has not been adopted in Florida and is unsound. The better position was included in RUMMEL v. ESTELLE, supra, where the court recognized that a distinction exists between findings and rationales relevant to a proceeding dealing with the constitutional guarantee to effective assistance of counsel and a civil suit for damages due to legal malpractice.

Contrary to Defendants' assertion, the distinction between a habeas proceeding and a civil malpractice suit involves more than a difference in theory or elements of proof. Clearly, the theory and proof are different, but also there is a difference in the relief being sought and, very importantly, the standard of proof

as explained above. Neither the factual findings nor ultimate outcome in the habeas case should collaterally estop Plaintiff in the present lawsuit.

C. The Defendants Are Not Immune from Liability under the "Error-in-Judgment" Rule.

Defendants argue that if this Court determines that the mutuality of parties requirement should be abandoned, either across-the-board or in this particular case, the findings of fact entered by the federal habeas court preclude Plaintiff's claim and entitle Defendants to summary judgment. Of course, Plaintiff disagrees.

The elements of a legal malpractice cause of action are: (1) the attorney's employment, (2) his neglect of a reasonable duty; and (3) that such neglect resulted in and was the proximate cause of loss to the client. KYLE v. McFADDEN, 443 So.2d 497 (1st DCA 1984); DRAWDY v. SAPP, 365 So.2d 461 (Fla. 1st DCA 1978); WEINER v. MORENO, 271 So.2d 217 (Fla. 3d DCA 1973). There is no issue as to the attorney's employment in this case. However, the facts relevant to neglect of a reasonable duty by the attorney and the damages resulting from this neglect are in dispute.

As to the Defendants' duty, the issues center on the reasonableness of the Defendants' decision not to introduce the tape recordings. The Defendants claim that that decision was a

tactical one for which they are immune from liability. In support of this position, the Defendants assert that Zeidwig knew of the tapes and had discussed their content in detail with Plaintiff and other persons but had made a tactical decision not to use them (R34-35). Plaintiff's position is significantly different. The testimony, depositions, and affidavits of Plaintiff, Hmielewski, Schultz, Dodge, and Pickett consistently show that Zeidwig never reached the tactical decision stage since he had erroneously concluded that the tapes were illegal under Florida law and inadmissible and had, therefore, refused to listen to them and risk being prosecuted for a felony. Zeidwig never got to the point of deciding whether the evidence should be used since he was operating under the belief that it could not be used because it had been illegally obtained. In fact, certain of the federal court's findings, omitted by Defendants at pages 4 and 5 of their brief, support Plaintiff on this issue. (See Petitioners' Appendix at 9-11, findings numbered 11, 13, 14).

It is Plaintiff's position that the tape recordings were legally obtained and admissible. Minimal research as to the admissibility of the tapes herein would have revealed §934.03(2)(c), Fla. Stat., which provides:

> (c) It is lawful under this chapter for a law enforcement officer or a person acting under the direction of a law enforcement officer to intercept a wire or oral communication when such person is a party to the communication or one of the parties to the communication has given prior consent to such interception and the purpose of such interception is to obtain evidence of a criminal act.

Although there was a possibility that Plaintiff's status as a law enforcement officer might have been questioned, the value of the tapes as the basis of his defense far outweighed this possibility. Without the tapes, Plaintiff's defense was reduced to a credibility contest between Plaintiff, as a defendant in a criminal proceeding, and Hoyt, an agent of the DEA. The tapes would have enhanced the credibility of the Plaintiff to the detriment of Hoyt's testimony.

In any event, any violation of Florida law would have been irrelevant in the federal proceeding since federal law governs the admissibility of tapes in federal criminal cases and, under federal law, Plaintiff could lawfully record conversations to which he was a party so long as the purpose of the recording was not to commit a crime. UNITED STATES v. BUTERA, 677 F.2d 1376 (11th Cir. 1982), cert. denied, 459 U.S. 1108 (1983); UNITED STATES v. HORTON 601 F.2d 319 (7th Cir. 1979); cert. denied, 444 U.S. 937 (1979); UNITED STATES v. NELLIGAN, 573 F.2d 251 (5th Cir. 1978); 18 U.S.C. §2511(2)(d). Thus, federal law would not have prohibited admission of the tapes and a more restrictive state law would not affect this admissibility in the federal forum. UNITED STATES v. BUTERA, supra; UNITED STATES v. HORTON, supra.

It is one thing to state, as did the Court in DILLARD SMITH CONSTRUCTION CO. v. GREENE, 337 So.2d 841, 843 (Fla. 1st DCA 1976), upon which Defendants rely, that a lawyer does not guarantee the efficacy of his advice. However, unlike in the GREENE case, here Zeidwig's advice was downright wrong, and

eviscerated Plaintiff's defense. Zeidwig did not make a tactical decision not to introduce the tape recordings. Rather, he flatly refused to investigate his client's defense both factually and legally. This constituted the basis for malpractice. See RUMMEL v. ESTELLE, supra. See also DAVIS v. ALABAMA, 596 F.2d 1214 (5th Cir. 1979), vacated as moot, 446 U.S. 903 (1980); UNITED STATES v. HEARST, 466 F.Supp. 1068 (N.D. Cal. 1978). At the very least, the circumstances surrounding Zeidwig's refusal to use the tape created substantial issues of material fact which could not properly have been resolved on summary judgment.

POINT II

FINAL SUMMARY JUDGMENT WAS NOT WARRANTED BY ANY ALLEGED INABILITY ON THE PART OF PLAINTIFF TO PROVE HIS CASE.

Apparently independent of their argument regarding the application of collateral estoppel, Defendants argue alternatively that they were entitled to the entry of final summary judgment because, under applicable evidentiary rules, Plaintiff could not have proven his case. Defendants' argument is without merit because, by insisting that Plaintiff would have been required to prove the contents of the tape recording in order to sustain his claim, Defendants misperceive the issue here. In fact, Defendants' argument confirms the fact that the result at trial hinged on a credibility issue between Plaintiff and Agent Hoyt.

Plaintiff would not have been checkmated by a hearsay argument in this case. Rather, he would be able to demonstrate the existence of the tape recordings by the direct testimony of parties to the taped conversation as well as subsequent listeners. The hearsay rule would only be applicable if Plaintiff attempted to prove the truth of the contents of the tapes. See §90.801, Fla. Stat. This is not what Plaintiff is attempting to do. He would merely be trying to prove the fact that the words were spoken in the conversation between him and Agent Hoyt.

Obviously, the best evidence of the conversation would be the tape recordings but, since Plaintiff destroyed them pursuant to the Defendant's instruction, testimony is the best available form of evidence and, therefore, satisfies the best evidence rule. See S90.954, ~~Fla~~. ~~Stat~~. Plaintiff was a party to the conversations and can testify to what he said and what he was told, not to prove the truth of those matters but to prove that certain things were said. At least there is a factual issue as to the significance of these words, not their truth or falsity but what significance they would have had had these tape recordings been introduced before either of those two prior trial juries. It would certainly be inequitable now to allow the Defendants to argue that the best evidence is no longer available when it was the Defendants' advice which caused the unavailability.

As a result of Zeidwig's malfeasance, the trial pitted Plaintiff's word against that of Agent Hoyt. Ward could testify

as to his conversation with Hoyt. Even if, as the Defendants suggest, the other witnesses were limited to testifying only as to the existence of a tape recording of the conversation with Hoyt, as opposed to its contents, this would lend further support to Plaintiff's testimony in the credibility battle with Hoyt. Any problem with the memory of these witnesses as to precisely when they heard the recording would go to the weight or credibility of their testimony, not its admissibility. Factual issues might arise as to the date of the taped conversation and when it was heard, but this would not render the testimony inadmissible or result in Plaintiff being unable to prove his case. Thus, this case is totally unlike DUGGAN v. STATE, 189 So.2d 890 (Fla. 1st DCA 1966), upon which Defendants rely, for in that case the issue was the content of the tapes, unlike here.

Under well-settled standards, Defendants were not entitled to summary judgment on the basis argued here. A party moving for summary judgment has the burden of demonstrating that there is no genuine issue as to any material fact. HOLL v. TALCOTT, 191 So.2d 40 (Fla. 1966). Summary judgment is designed to meet a situation where the salient facts are clearly not in issue, and the controversy is purely one of law to be decided on undisputed facts. YOST v. MIAMI TRANSIT CO., 66 So.2d 214 (Fla. 1953); HARRIS v. LEWIS STATE BANK, 436 So.2d 338 (Fla. 4th DCA 1983). If there are issues of fact and the slightest doubt remains, summary judgment cannot be granted. HARRISON v. McCOURTNEY, 148 So.2d 53 (Fla. 1962). Moreover, even where the facts are undisputed, issues as to the inferences to be drawn from those

facts may preclude summary judgment. SCHMIDT v. BOWL AMERICA FLORIDA, INC. **358** So.2d **1385** (Fla. 4th DCA **1978).** In sum, if the evidence raises even the slightest doubt on any issue of material fact, if it is conflicting, or if it will permit different reasonable inferences, it should be submitted to the trier of fact. WILLIAMS v. LAKE CITY, 62 So.2d **732** (Fla. 1960). Based on these principles, Defendants' critique of the testimony of other witnesses whom Plaintiff could have called does not establish their entitlement to summary judgment.

CONCLUSION

Based on the foregoing Argument, Respondent respectfully requests that this Court either decline to exercise its discretionary review, or to answer the certified question in the affirmative.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY a true copy of the foregoing was furnished by mail this 27th day of JUNE, 1988, to: MELANIE G. MAY, ESQ., 1080 S.E. 3d Avenue, Ft. Lauderdale, FL 33316; REX CONRAD, ESQ., P. O. Box 14723, Ft. Lauderdale, FL 33302; and HOWARD ZEIDWIG, ESQ., 633 S.E. 3rd Avenue, Suite 4-F, Ft. Lauderdale, FL 33301.

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