IN THE SUPREME COURT OF FLORIDA

WILLIAM STEWART STEELE,

Petitioner,

v. CASE NO. 92,950

TERRENCE E. KEHOE,

Respondent.

_____/

BRIEF OF AMICUS CURIAE

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STATEMENT OF THE CASE AND FACTS

Counsel for amicus curiae cannot accept the Statement of the Case and Facts provided by the Petitioner and can only assume that Respondent's facts accurately depict what transpired in the courts below.

SUMMARY OF ARGUMENT

The certified question should be answered in the negative, and the decision below must be quashed as there is no legal basis to utilize rule 3.850 procedure as a remedy in a civil malpractice case. The two year procedural bar must be enforced regardless of whether Steele had private counsel or simply proceeded *pro se*. There is no constitutional right to counsel to mount collateral attacks, nor does any alleged deficiency of counsel overcome the two-prong review standard of cause and actual prejudice that could excuse a clear procedural default. As this Court observed in *Witt, infra,* the need for finality outweighs any interest in permitting potentially infinite claims attacking collateral counsel's performance. Steele has other remedies in law and equity, and indeed is currently now seeking relief in federal court, essentially mooting this proceeding.

ARGUMENT

THIS COURT SHOULD ANSWER THE CERTIFIED QUESTION IN THE NEGATIVE AND QUASH THE DECISION IN *STEELE V. KEHOE*, 23 Fla. L. WEEKLY D771 (FLA. 5TH DCA MARCH 20, 1998); TO RULE OTHERWISE WOULD ELIMINATE THE TWO YEAR TIME LIMIT OF RULE 3.850.

On March 20, 1998, the Fifth District Court of Appeal issued its decision in *Steele v. Kehoe*, 23 Fla. L. Weekly D771 (Fla. 5th DCA Mar. 20, 1998), affirming the dismissal of Steele's malpractice claims concerning privately retained counsel Kehoe's alleged failure to file a timely 3.850 motion. The decision certified the following question to this Court inviting the action found barred by *Lambrix, infra*:

> Under the facts of this case, is it appropriate to order a belated hearing in order to determine whether the attorney was in fact retained to file a post-conviction motion and, if so, to determine the validity of the issues that Defendant asserts should have been raised in such motion?

This question should be answered in the negative and the portion of the decision concerning rule 3.850 should be quashed. To rule otherwise would vitiate the purpose of the rule and the time limit for filing of rule 3.850.

Use of the 3.850 rule procedure, as suggested by the district court, is unwarranted in this civil malpractice suit because Steele has and has exercised a variety of other state[1] and federal

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[1] Indeed, executive clemency provides an added safeguard, specifically that should a "convicted offender" make a valid claim that but for some "external forces", he would not have been convicted and sentenced to prison or, that equity mandates a change in his conviction and/or sentence, relief via this extraordinary means would be forthcoming. See, *Herrera v. Collins*, 506 US 390, 411-12 (1993) (...Clemency is deeply rooted in our Anglo-American tradition of law, and is the historic remedy for preventing

remedies. Steele is currently seeking federal habeas corpus review. *Steele v. Singletary*, Case No. 97-481-CIV-ORL-19 (inherent in the federal litigation is a presumed acknowledgment that he has exhausted all available state court remedies, and moreover should he make a colorable claim that he is factually innocent of the crime for which he stands convicted, no lack of redress in the state courts will bar his claim). Steele has also filed a state habeas petition in the Fifth District claiming Kehoe was ineffective in collateral representation, but that court denied relief. *Steele v. State*, Case No. 98-308 (Fla. 5th DCA Mar. 19, 1998). In spite of the fact that the district court has already, recently, addressed the underlying issue of whether counsel rendered effective assistance of counsel in the habeas, the district court, presumably another panel of that court, is now, dissatisfied with what has been a long accepted standard for malpractice litigation, attempting to reinvent the wheel by creating a postconviction pandora's box, which if opened will not stop at Mr. Steele's case but will impact all 3.850 litigants who

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miscarriages of justice where judicial process has been exhausted.) In *Herrera*, the United States Supreme Court entertained whether Texas had denied a defendant an opportunity to air his factual innocence claim eight years after the time for filing a motion for new trial had passed. " In light of the historical availability of new trials, our own amendments to Rule 33, and the contemporary practice in the States, we cannot say that Texas' refusal to entertain petitioner's newly discovered evidence eight years after his conviction transgresses a principle of fundamental fairness "Rooted in the traditions and conscious of our people." (Cite omitted) This is not to say, however, that petitioner is left without a forum to raise his actual innocence claim. For under Texas law, petitioner may file a request for executive clemency." 505 U.S. at 411.

have failed to timely file a postconviction motion no matter the reason.

The district court unjustifiably has confused two independent methods of redress involving counsel, specifically a right to charge malpractice for redress in civil matters and where a right to counsel exists, the right to challenge in criminal matters the effectiveness of counsel's representation. In the instant circumstances, there is no constitutional right to counsel to mount collateral attacks, either in state or federal court, ergo, there is no right to challenge counsel's representation in postconviction. *Lambrix v. State*, 698 So. 2d 247, 248 (Fla. 1996); *State v. Weeks*, 166 So. 2d 892, 896 (Fla. 1964); *Pennsylvania v. Finley*, 481 U.S. 551 (1987); *Coleman v. Thompson*, 501 U.S. 722, 752 (1991); *Johnson v. Singletary*, 938 F.2d 1166, 1175 (11th Cir. 1991). "Consequently, a [Defendant] cannot claim constitutionally ineffective assistance of counsel in such proceedings." *Coleman, supra; Johnson, supra*. In *Lambrix*, at 248, this Court specifically held that "claims of ineffective assistance of post conviction counsel do not present a valid basis for relief."

Rule 3.850(a) sets forth those grounds which may be raised in a motion for postconviction relief. The grounds listed concern the attack on a Defendant's judgment and sentence, and do not provide for an attack on collateral proceedings. As this Court held in *Witt v. State*, 387 So.2d 922, 927 (Fla. 1980), the purpose of rule 3.850 is to provide a method of reviewing a "conviction." *Witt* prohibits the use of rule 3.850 for claims that arise after a

Defendant's conviction becomes final. Rule 3.850 "is intended to remedy issues involving counsel `prior to and during trial,' rather than after the conviction and the imposition of the [sentence]."[2]

The majority decision is erroneously concerned with "due process" rights. In Florida, a due process right is implicated in a postconviction proceeding *only if* the motion itself presents an apparently substantial meritorious claim or claims for relief and if the hearing on the motion is potentially so complex to suggest the need for counsel. *Graham v. State*, 372 So. 2d 1363 (Fla. 1979); *Weeks*, at 897. "Because no due process right to counsel arises until after the civil post-conviction proceeding is commenced and it is determined to meet the *Weeks/Graham* test for merit and complexity, it is inconceivable that a constitutional due process remedy exists for privately retained counsel's failure to file the motion." *Steele*, at D774 (Griffin, C.J., dissenting).

The State requests this Court answer the certified question in the negative and quash the opinion of the Fifth District to the extent it discusses applying redress via rule 3.850 to an otherwise ordinary malpractice suit which fails to assert any basis for relief other than to claim that counsel was requested to file a postconviction motion without asserting that prejudice ensued

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[2] That rule 3.850 makes no reference to challenging collateral proceedings is not surprising. If ineffective assistance of collateral counsel is a valid claim a criminal case would never be final. A defendant could claim his first collateral counsel was ineffective using a second attorney, and if unsuccessful, then claim second collateral counsel was ineffective using a third attorney. This could go on indefinitely, particularly for someone like Steele who received a life sentence. The two year bar would be eliminated.

sufficient to warrant malpractice relief. While the Fifth District certified the question in an attempt to limit the decision to this case only, as observed by the dissent, "the rule announced by the majority can[not] be confined to this limited circumstance." *Steele*, at D 774. In fact, it would apply to any and all cases where a Defendant was represented in collateral proceedings. This concept does violence to all current procedural bars in collateral proceedings and cannot be countenanced by this Court.

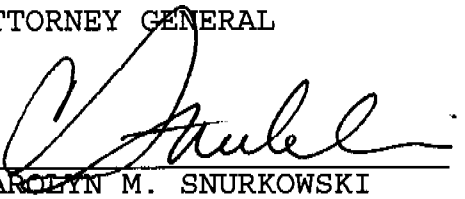
The State would concur with the dissent's views and would urge that any attempt to intertwine the principles discussed herein would destroy rule 3.850 and two bodies of caselaw premised on well-reasoned views as to the resolution of malpractice suits by convicted person and the issues addressed in a timely and properly filed motion for postconviction collateral motion.

CONCLUSION

Based on the arguments and authorities presented herein, the State of Florida requests this honorable court answer the certified question in the negative, affirm the dismissal of the malpractice action and quash the opinion of the Fifth district to the extent it discusses rule 3.850.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing Brief as *Amicus Curiae* has been furnished by U.S. Mail to Steven G. Mason, attorney for Respondent, 1643 Hillcrest Street, Orlando, Florida 32803, and William Stewart Steele, #346856, Madison Correctional Institution, P.O. Box 692, Madison, Florida 32341-0692, this 25th day of June, 1998.

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Supreme Court of Florida

FRIDAY, JUNE 12, 1998

WILLIAM STEWART STEELE,

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TERRENCE E. KEHOE,

Respondent.

CASE NO. 92,950

Motion for Leave to File Brief as Amicus Curiae is hereby granted and the State of Florida is allowed to file a brief only as Amicus Curiae on behalf of the respondent.

A True Copy

TEST:

Sid J. White
Clerk Supreme Court

KB
cc: Ms. Bonnie Jean Parrish
Mr. Steven G. Mason
Mr. William Stewart Steele