IN THE SUPREME COURT OF FLORIDA

WILLIAM STEWART STEELE,

Petitioner,

v.

CASE NO. 92,950

TERRENCE E. KEHOE,

Respondent.
_____/

ON DISCRETIONARY REVIEW OF DECISION OF FIFTH DISTRICT COURT OF APPEAL

ANSWER BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

In this brief, the Petitioner, WILLIAM STEWART STEELE, will be referred to as "Mr. Steele." The Respondent, TERRENCE E. KEHOE, will be referred to as "Mr. Kehoe."

The record on appeal will be referred to as "R" followed by the appropriate volume and page number.

Mr. Steele's appendix will be referred to as "App.". His initial brief on the merits will be referred to as "IB".

PROLOGUE

Mr. Steele's lawsuit, and this appeal, are really part of his continuing efforts to attack his first degree murder conviction. See Steele v. State, 609 So.2d 50 (Fla. 5th DCA 1992); Steele v. State, 654 So.2d 1175 (Fla. 5th DCA 1995); Steele v. Dauksch, 662 So.2d 343 (Fla. 1995); Steele v. Black, 668 So.2d 626 (Fla. 5th DCA 1996); Steele v. State, 671 So.2d 800 (Fla. 5th DCA 1996); Steele v. Singletary, 5th DCA #96-583 (habeas corpus denied 3/28/96); Steele v. State, 5th DCA #98-308 (habeas corpus denied 3/19/98). The only (apparent) avenue left is to attack his appellate lawyer, Mr. Kehoe, under some convoluted malpractice claim (Count I, R1/6), while adding a second claim (Count II, R1/7), which really sets forth what Mr. Steele seeks -another avenue of attack on his conviction. This point is seen again in Mr. Steele's initial brief, where he devotes one page to the correctness of the Fifth District's decision affirming the dismissal due to the insufficiency of the complaint (IB 1), and ten pages to his right to file a post-conviction motion (IB 2-11). Mr. Steele's lawsuit must be recognized for what it is, and the dismissal affirmed.

STATEMENT OF THE CASE AND FACTS

A.

TRIAL LEVEL

On January 5, 1996, Mr. Steele filed a civil complaint against Mr. Kehoe (R1/1-39). Count One asserted a convoluted professional malpractice claim (R1/6), while Count Two sought an order allowing him to file an untimely motion for post-conviction relief (R1/7). The complaint alleged that Mr. Steele was convicted of murder in the first degree in the Orange County Circuit Court, and sentenced to life in prison with a 25 year mandatory minimum (R1/1-2). Although it is not expressly stated, Mr. Kehoe was not trial counsel. The complaint alleges that Mr. Steele's mother retained Mr. Kehoe's services to represent Mr. Steele on the appeal of the murder conviction (R1/2). Exhibit O to the complaint contains the written contract for legal services, signed by Mr. Kehoe, Mr. Steele, and Mr. Steele's mother, stating that Mr. Kehoe would provide the following legal services to Mr. Steele: "Representation in Steele v. State, Florida Fifth District Court of Appeal, Case No. 91-1796, and, if possible, representation to the Florida Supreme Court" (R1/37-39). The complaint acknowledges the Fifth District affirmed that conviction (R1/2). No portion of the complaint attacks Mr. Kehoe's efforts at the Fifth District Court of Appeal level.

The complaint then alleges that sometime in late 1992, Mr. Kehoe visited Mr. Steele at the Orange County Jail and offered, free of charge, to prepare a motion for post-conviction relief in the murder case (R1/2).[1/] Mr. Steele asserted that Mr. Kehoe had fraudulently and

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[1/] Mr. Kehoe recognizes that this case is before this Court on a motion to dismiss a complaint, and therefore the facts must be taken in the light most favorable to Mr. Steele. Because the motion to dismiss was granted, no answer has ever been

deceitfully misrepresented the fact that he would prepare the Rule 3.850 motion; and that Mr. Kehoe neglected to protect Mr. Steele's interests (R1/5). Count One of the complaint incorporated Mr. Steele's factual recitation and sought compensatory damages, punitive damages, any equitable awards and attorney's fees (R1/6). Count Two incorporated the factual assertions, and sought an order permitting Mr. Steele to file a belated Rule 3.850 motion, and other appropriate relief (R1/7).

On January 30, 1996, Mr. Kehoe filed a motion to dismiss, asserting that Mr. Steele's complaint was insufficient to state a cause of action (R1/42-54). The motion to dismiss was heard on May 23, 1996, with Mr. Steele participating by telephone (R1/111-12). On June 28, 1996, the trial court entered an order granting the motion to dismiss (R1/148-49). The trial court ruled that Mr. Steele could not prove his actual innocence or that the underlying conviction had been set aside. Additionally, the trial court ruled that the agreement which Mr. Steele alleged that existed for the filing of 3.850 motion could not be created via parol evidence (R1/148). Mr. Steele filed a motion for rehearing (R1/123-36). The trial court entered an order denying the motion for rehearing on July 25, 1996 (R1/150). Mr. Steele appealed that order to the Fifth District Court of Appeal by notice dated August 7, 1996 (R1/151-54).

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filed in the trial court. Mr. Kehoe has, and continues to, categorically deny the factual assertions that he ever met with Mr. Steele at the Orange County Jail to discuss an agreement to handle the Rule 3.850 proceeding, and, most importantly, that he ever agreed or volunteered to prepare and file a Rule 3.850 in Mr. Steele's murder case. For example, correspondence attached to the complaint reflects that Mr. Steele was incarcerated in Polk City and Punta Gorda in late 1992, not Orange County (R1/9-14). Numerous other "facts" asserted by Mr. Steele in his complaint, incidental or tangential to the primary claim, are also incorrect.

B.

FIFTH DISTRICT

On March 20, 1998, the Fifth District issued an opinion affirming the trial court's order of dismissal. Steele v. Kehoe, ___ So.2d ___ (Fla. 5th DCA 3/20/98) [23 Fla. L. Weekly D771]. Judge Harris recognized the rule that a criminal defendant cannot sue his attorney for malpractice prior to exoneration. 23 Fla. L. Weekly at D772. However, Mr. Steele's state court efforts to exonerate himself were now extinguished. Judge Harris recognized that this Court's decision in Lambrix v. State, 698 So.2d 247 (Fla. 1996), stated that the defendant has no right to counsel in post-conviction matters, and therefore cannot claim ineffective assistance in such a proceeding. Id. Judge Harris stated that absent Lambrix the court would remand the case to the trial court with instructions to transfer it to the criminal division for a hearing on whether or not Mr. Kehoe rendered ineffective assistance, and if so, to hold a belated hearing on the claims in Mr. Steele's 3.850 motion. The court certified the following question:

> 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 THE DEFENDANT ASSERTS SHOULD HAVE BEEN RAISED IN SUCH MOTION?

Id.

In his statement of the case, Mr. Steele asserts:

> . . . the Appellate Court rendered its opinion affirming the Trial Court's dismissal, issuing alternative relief of an evidentiary hearing on Respondent's extent of representation of the Rule 3.850 proceeding, and, if found to have been so representing, to reach the merits of a motion for post-conviction relief outside the two year limitation, . . .(IB ix; emphasis added.).

The Fifth District did not issue any alternative relief in the form of ordering an evidentiary hearing. The Fifth District affirmed the dismissal, and recognized that it could do nothing concerning an evidentiary hearing. That was the reason for its certification. As the case now stands, Mr. Steele is not entitled to any evidentiary hearing.

Judge Sharp concurred with Judge Harris' opinion. However, she authored a specially concurring opinion in which she asserted that Mr. Steele could seek habeas corpus relief. Id. at D773-74.[2]/

In dissent, Chief Judge Griffin asserted that because no due process right to counsel arises until after the civil post-conviction proceeding is commenced and it is determined to meet the test for merit and complexity, it is inconceivable that a constitutional due process remedy exists for privately retained counsel's failure to file a post-conviction motion. Id. at D774. Judge Griffin also disagreed that there was a habeas corpus remedy. Id. Lastly, Judge Griffin stated that the rationale for requiring a criminal defendant to exonerate himself before pursuing a legal malpractice claim was predicated on cases involving trials and appeals, not motions for post-conviction relief. Id.

On May 27, 1997, Mr. Steele filed a motion for rehearing. That motion was denied by order dated April 22, 1998.

On April 28, 1998, Mr. Steele filed a notice of appeal, which this Court has treated as a notice to invoke the discretionary jurisdiction of the Fifth District. On May 8, 1998, this Court entered an order postponing its decision on jurisdiction, and ordering briefing on the

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[2]/ As set forth above, supra, p. 1, the Fifth District has twice denied Mr. Steele's habeas corpus petitions, the last time only a day before it issued the Steele v. Kehoe opinion.

merits.

* * *

This case is here on the issue of the sufficiency of the complaint. In the statement of the case in his initial brief, however, Mr. Steele relies on factual assertions not in his civil complaint. For example, he refers to an exhibit found at R1/70 (IB viii). That was an exhibit improperly filed by Mr. Steele before the motion to dismiss hearing. It cannot be considered in determining the sufficiency of Mr. Steele's complaint. Similarly, Mr. Steele cites exhibits which were attached to his motion for rehearing at the Fifth District Court of Appeal (IB viii). Those exhibits similarly must be disregarded, because they are not part of the initial complaint.

Mr. Steele attached to his motion for rehearing to the Fifth District, and again in the appendix to this Court, a letter from a Bar grievance committee to Mr. Kehoe (IB ix; App., Exh. F). While it is improper for Mr. Steele to even include or discuss that letter, because it does not constitute any part of the civil complaint, what is important to note is that Mr. Steele mischaracterizes the letter. Mr. Steele characterizes the letter as a "written reprimand," which states that Mr. Kehoe's conduct "was not condoned". In fact, the letter was a finding of no probable cause as to Mr. Steele's Bar complaint against Mr. Kehoe, and it contained advice to counsel. Rather than supporting Mr. Steele's complaint, as he seeks to use it in his brief, this finding shows that after investigation The Florida Bar determined that Mr. Kehoe had not agreed to file a Rule 3.850 motion on Mr. Steele's behalf. For if the Bar had found that Mr. Kehoe had made such an agreement, and failed to honor it, Mr. Steele's Bar complaint would not have been dismissed.

Mr. Steele cites and relies upon Johnson v. Singletary, an unpublished order issued by

the Second District Court of Appeal (IB x, 3). That order has no precedential value. Department of Legal Affairs v. District Court of Appeal, 434 So.2d 310, 311 (Fla. 1983). Because neither this Court nor counsel has access to the record in that case, or the state's response, it is unclear whether there was any contested issue. Most importantly, it appears from the Second District's order that Johnson was not told in a timely manner of the issuance of the opinion on direct appeal. That is not the case in Mr. Steele's case. Exhibit C, attached to his civil complaint, demonstrates that Mr. Steele was advised of the opinion (R1/11-12). Johnson is of no help to Mr. Steele.

In the argument section, Mr. Steele makes factual assertions concerning statements and various letters from Mr. Kehoe (IB 6). However, in none of those letters does Mr. Kehoe state that he agreed to or would prepare and file a Rule 3.850 motion for Mr. Steele.

Additionally, Mr. Steele asserts that he should be provided this relief due to Mr. Kehoe's failure to provide certain records (IB 7-8). That claim is refuted by Exhibits A and B attached to Mr. Steele's complaint (R1/8-9).

Although this appeal arises out of a complaint against private counsel, Mr. Steele seeks to now assert a "state action" claim based on his mother allegedly being improperly informed by the trial clerk of the date the mandate was issued (IB 8-11). This has absolutely nothing to do with the issues before this Court in this appeal. The affidavit of the mother is not part of the initial complaint. In fact, the affidavit of Mrs. Steele which is attached to the complaint, Exhibit N (R1/33-34), makes no mention of this telephone call. The bottom line is that this factual assertion, and the arguments surrounding it, are simply irrelevant to this case and must be disregarded.

SUMMARY OF ARGUMENTS

I.

JURISDICTION SHOULD BE DECLINED WHERE CASE DOES NOT PRESENT ISSUE OF GREAT PUBLIC IMPORTANCE

The issue before the Court is not one directly raised by this appeal. It is unnecessary to answer the certified question in order to fully and completely determine the correctness of the Fifth District's decision affirming the dismissal of a civil suit. Based on existing law, the Fifth District's affirmance was legally correct. This case, involving a civil complaint dismissed at the pleading stage, should not be used to determine an issue of potentially overriding importance and impact in the criminal law field.

II.

FIFTH DISTRICT'S DECISION MUST BE AFFIRMED WHERE MR. STEELE CANNOT MEET EXONERATION REQUIREMENT

Mr. Kehoe was Mr. Steele's appellate attorney in Steele v. State, 609 So.2d 50 (Fla. 5th DCA 1992). Mr. Steele was convicted of first degree murder and his sentence was affirmed per curiam by the Fifth District. Mr. Steele cannot maintain a malpractice cause of action where he is unable to allege or prove that he is innocent of the murder charge, or, in the alternative, that his capital conviction and sentence has been set aside. Additionally, the ramifications of allowing a convicted felon to seek redress via a legal malpractice claim (in lieu of following the rules in outlined in the applicable rules of criminal procedure) fly in the face of public policy, where the convict's damages, specifically his criminal conviction, are entirely attributable to his own criminal conduct.

III.

MR. STEELE HAS NO RIGHT TO HEARING ON EFFECTIVENESS OF COUNSEL ON COLLATERAL ATTACK

This Court, and the United States Supreme Court, have made clear that there is no right to assistance of counsel in post-conviction proceedings, such as a Rule 3.850 proceeding. As there is no right to assistance of counsel, there can be no claim of ineffective assistance of counsel in such a proceeding. Therefore, Mr. Steele is not entitled to a hearing to determine if Mr. Kehoe agreed to, and failed to, file a Rule 3.850 motion on his behalf. Also, in the context of this civil case, the Court cannot fashion such a remedy.

ARGUMENTS

I.

JURISDICTION SHOULD BE DECLINED WHERE CASE DOES NOT PRESENT ISSUE OF GREAT PUBLIC IMPORTANCE

This case started out as civil complaint between a client and his previous attorney. The complaint, styled as a malpractice action, actually alleged multiple theories such as breach of contract (R1/2, ¶ 6) and fraud (R1/ ¶ 17) under one umbrella in an effort to create some sort of a cause of action where one did not exist. The circuit court treated it as a standard civil complaint, and dismissed it for failure to state a cause of action. However, the Fifth District took a simple appeal, where the issue was whether or not the trial court erred in dismissing Mr. Steele's complaint, and added new, unnecessary issues. Although it affirmed the trial court's dismissal, the Fifth District, in fact, spent very little time discussing that central issue and, instead, created new issues on appeal. In the Fifth District both parties had briefed the sufficiency of the complaint issue. Neither party had briefed any issues concerning the application of Lambrix v. State, 698 So.2d 247 (Fla. 1996), Mr. Steele's right to pursue relief by a petition for writ of habeas corpus, or other such issues discussed by the Fifth District.

It is obvious that the issue certified to be of great importance is collateral to the issue of the sufficiency of the complaint to state a cause of action. It is the Fifth District's "issue," not Mr. Steele's. In effect, the Fifth District is not asking this Court to decide whether or not it is correct in affirming the trial court's order dismissing Mr. Steele's complaint. It wants this Court to create a new remedy in criminal cases whereby defendants who allege that their post-conviction attorney rendered ineffective assistance have some avenue of relief in the criminal court system.

Usually certified questions present issues which will resolve the merits of the underlying dispute. The crux of the underlying dispute before the Court in this case is whether or not the trial court correctly dismissed Mr. Steele's complaint, and whether the Fifth District correctly affirmed that dismissal. The Court, as the Fifth District did, can answer those questions without addressing the certified question. Indeed, the answer to that overriding question is not dependent upon the certified question. Whether the Court answered yes or no to the certified question, the overriding issue is still the sufficiency of Mr. Steele's complaint, not whether he is entitled to some newly fashioned remedy in criminal court.

Additionally, the issue that the Fifth District has certified to this Court has been squarely addressed by this Court and the United States Supreme Court (see Argument III, infra, pp. 22-26). While the Fifth District majority may not like the status of that law, there is no reason to consider the Fifth District's attack on that settled law to be an issue of great public importance.

For these reasons, this Court should simply decline to exercise its discretionary jurisdiction in this matter.

II.

FIFTH DISTRICT'S DECISION MUST BE AFFIRMED WHERE MR. STEELE CANNOT MEET EXONERATION REQUIREMENT (STEELE'S ARGUMENT I)

A. MR. STEELE'S ARGUMENT

In his "summary of argument," Mr. Steele seemingly concedes he is not entitled to pursue a malpractice suit at this point. Mr. Steele asserts he is entitled to relief, and

". . . whereafter, if successful, the prisoner may sue for damages if injury manifest for causation." (IB vi).

In his brief, Mr. Steele makes a one page argument that the Fifth District erred in following the general rule that exoneration is a prerequisite to a legal malpractice suit arising from a criminal conviction (IB 1). The sole authority relied upon by Mr. Steele is Heck v. Humphrey, 512 U.S. 477, 114 S.Ct. 2364, 129 L.Ed.2d 383 (1994). Heck was a suit against prosecutors and police brought under 42 U.S.C. § 1983, the federal civil rights law. Heck, however, does not support Mr. Steele's position. The Supreme Court held in Heck that in order to recover damages for an allegedly unconstitutional conviction or imprisonment, or further harm caused by actions whose unlawfulness would render a conviction or sentence invalid, a § 1983 plaintiff must prove that the conviction or sentence has been reversed on direct appeal, expunged by an executive order, declared invalid by a state tribunal authorized to make such a determination, or called in to question by federal court's issuance of a writ a habeas corpus. Further, a claim for damages bearing that relationship to a conviction or sentence that has not been so invalidated is not cognizable under § 1983. 114 S.Ct. at 2369-74.

This same issue, again in the context of a 42 U.S.C. § 1983 claim, was recently addressed by the Eighth Circuit in Williams v. Schario, 93 F.3d 527 (8th Cir. 1996). There, Mr. Williams filed suit against several police officers claiming that (inter alia) he was arrested without probable cause. The Eighth Circuit held that the claim could not stand until his conviction had been successfully challenged.

> We agree with the district court that a judgment in Williams's favor on his damages claim that defendants engaged in malicious prosecution and presented perjured testimony would "necessarily imply the invalidity of his conviction or sentence"; therefore, Williams's claims are **not cognizable and must be dismissed unless and until** Williams shows his "conviction or sentence has been reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal authorized to

> make such determination, or called into question by federal court's issuance of a writ of habeas corpus."

Id. at 529, citing Heck (emphasis added). See also Hill v. Hopper, 112 F.3d 1088 (11th Cir. 1997)(§ 1983 cannot be used to circumvent federal habeas corpus rules).

Mr. Steele poses a hypothetical in which a defendant is rightly convicted, but wrongly sentenced to a term beyond the statutory maximum (IB 1). Mr. Steele asserts that upon vacation of the illegal sentence, had the prisoner served time beyond the statutory maximum, he would have a cause of action under Heck against the attorney even though he has not been exonerated in full. The Court need not address Mr. Steele's hypothetical, since it is far afield from the facts of this case. Mr. Steele was convicted and given a legal sentence for the crime of murder in the first degree. He makes no contention that he is guilty but somehow serving an illegal sentence. The bottom line is that the principles applied in Heck would preclude Mr. Steele's lawsuit against Mr. Kehoe, because neither the conviction or sentence have been reversed, expunged, declared invalid, or called into question by any lawful body.

B. LEGAL MALPRACTICE - FAILURE TO ALLEGE CAUSATION

In order to pursue a legal malpractice claim Mr. Steele must allege that 1) attorney Kehoe owed him a duty, 2) attorney Kehoe breached that duty, and 3) an injury resulted from that breach of duty and the breach of duty was the proximate cause of the injury. Bolves v. Hullinger, 629 So.2d 198 (Fla. 5th DCA 1993); Weiner v. Moreno, 271 So.2d 217 (Fla. 3d DCA 1973). As Bolves explained, in order for the ex-client to be successful in a malpractice suit against his ex-attorney, the ex-client must prove that, but for the attorney's malpractice, the ex-client would not have suffered an injury. 629 So.2d at 200.

In Mr. Steele's case, Mr. Steele suit was dismissed because he failed to allege and plead

element one, the duty requirement, and failed to allege/show that he is innocent of the murder charge. Additionally, Mr. Steele could not allege that an injury resulted from Mr. Kehoe's actions or that the injury was an proximate cause of Mr. Kehoe's actions, since Mr. Kehoe did not cause his conviction or his incarceration.

The alleged injury in this case was that Mr. Steele was convicted of murder in the first degree. That predated Mr. Kehoe's representation of Mr. Steele. Since Mr. Steele's own actions are the proximate cause of his injury, Mr. Steele's claim must fail as a matter of law. Both Weiner and Bolves mandate this result since any injury Mr. Steele suffered was the direct and proximate result of his own criminal activities, and not any conduct on Mr. Kehoe's part. See e.g., Orr v. Black & Furci, P.A., 876 F.Supp. 1270 (M.D.Fla. 1995); Streeter v. Young, 583 So.2d 1339 (Ala. 1991).

C. PUBLIC POLICY PRECLUDES MALPRACTICE CLAIM BY A CONVICTED MURDERER AGAINST ATTORNEY

While a plain reading of Weiner and Bolves clearly requires this Court affirm the dismissal order in favor of the attorney, Mr. Kehoe advances an additional basis for the affirmance. The reasoning of Weiner and Bolves, as well as the public policy of Florida, require that in order for Mr. Steele's allegation to survive a motion to dismiss, he must show that he is innocent of the criminal charge and that he has successfully availed himself of either the appellate or collateral attacked avenues allowed by Florida law. Since Mr. Steele is not innocent of the crime, nor has he had his conviction overturned, Mr. Kehoe was entitled to dismissal.

As Judge Harris stated in Steele, there is logical support for holding that exoneration is a prerequisite to a legal malpractice action arising from a criminal prosecution.

> First, criminal procedure provides a remedy for ineffective assistance of counsel. Judicial economy will be best served if we permit the criminal court to determine the issue of ineffective assistance of counsel. If the court should determine that the attorney's representation, even if sub-par, did not affect the result of the criminal trial then a subsequent malpractice action should not lie. Second, public policy should recognize that unless a defendant is exonerated, the proximate cause of the defendant's conviction is his or her commission of a crime and not legal malpractice. Third, and most important, unless exoneration is accomplished, a legal malpractice action would be an inadequate remedy.

23 Fla. L. Weekly at D772. See also Turner v. Anderson, 704 So.2d 748 (Fla. 4th DCA 1998) (public policy would preclude client from recovering on legal malpractice claim against attorney where client's misconduct was equally at fault).

While no Florida appellate court has specifically interpreted Florida law as requiring the additional element that the plaintiff have his conviction overturned, several other state's supreme courts have reached such a conclusion.[3/] Based on Florida public policy considerations and the reasoning advanced by these other courts that have addressed this issue, this Court should affirm the dismissal order on the basis that Mr. Steele cannot prove his innocence, nor prove that his conviction has been set aside.

One of the leading cases is Stevens v. Bispham, 851 P.2d 556 (Or. 1993). In Stevens, the Oregon Supreme Court examined a factual scenario analogous to this case. A criminal defendant pled no contest to criminal charges and at the plea, the defendant acknowledged that

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3/ In May, 1998, the American Law Institute approved its Restatement of the Law Governing Lawyers. In one part of the Restatement, the American Law Institute adopted the position that a criminal defense client who has been convicted must obtain post-conviction relief as a prerequisite to bringing a malpractice action against his former defense attorney.

he was satisfied with his attorney's services. Later the defendant sued the attorney alleging malpractice.

In Oregon the elements of a malpractice claim are similar to those in Florida. Stevens, 851 P.2d at 560. In concluding that prior to bringing a malpractice claim, a criminal defendant must gain exoneration of the criminal offense, the Oregon Supreme Court provided a comprehensive and enlightening analysis.

> Legal malpractice is a common law tort claim. In the absence of any pertinent legislation, it is for this court to define what constitutes legally cognizable harm in a tort case. The legislature has not addressed directly the question of when a person whose lawyer in a criminal case is guilty of professional negligence has been harmed for the purposes of a professional negligent action; this court therefor must do so. However, the failure of the legislature to address the specific question does not mean that the legislature had not provided general policy guidance bearing on our decision.
>
> We refer to "policy" because the choice of what constitutes legally cognizable harm is a policy choice. In this case, the specific policy choice to be made is the following:
>
> When is a person who had been convicted of a criminal offense deemed to have been "harmed" by any negligence of defense counsel that the person alleges contributed to the person's conviction? **In our view, the answer to that question is informed by the comprehensive legislative scheme that constitutes the substantive and procedural criminal law in Oregon.**
>
> Persons accused of criminal offenses in Oregon are afforded a wide range of procedural protections, many of which are derived from requirements of the Oregon and United States Constitution. For example, one accused of a criminal offense is entitled to be represented by counsel, ORS 135.040, to be informed of the charge against the person, ORS 135.020, to be admitted to bail, ORS 135.230 *et seq.*, to have reciprocal discovery of pertinent information, ORS 135.805 *et seq.*, to be tried by a jury, ORS 136.001, and to have each element of the charge proved beyond

a reasonable doubt, ORS 136.415. After a conviction, the person is entitled to have a pre-sentence investigation to determine an appropriate sanction, ORS 137.077, to be represented by counsel throughout the sentencing proceeding, ORS 137.071(4) (by implication), and to be heard personally before any sentence is passed. Or. Const., Art. I, Section 11. Following sentencing, the person is entitled to take an appeal, ORS 138.020 and 138.040 and to be represented by counsel on appeal, ORS 138.480 *et seq.* Finally, with all other avenues of relief exhausted, the person is entitled to attack collaterally the conviction and sentence under Oregon's post-conviction relief law, ORS 138.510 *et seq.* on the ground, inter alia, that the person's counsel did not provide constitutionally adequate representation at trial or on appeal ORS 138.530(1)(a).

The foregoing list is by no means exhaustive, but it does demonstrate that the legislature has seen fit to control very fully the criminal justice process from pre-trial proceedings through post-conviction relief proceedings, and to provide for nearly all conceivable contingencies that might arise as a case makes its way through that system. The list also demonstrates the legislature's intention that only those persons deserving of conviction will be, or will remain, convicted. But the elaboration and completeness of the scheme also appears to establish something else, *viz.* that **it is the public policy of this state to treat any person who has been convicted of any criminal offense as validly convicted unless and until the person's conviction has been reversed,** whether on appeal or through post-conviction relief, or the person otherwise has been exonerated. Any policy choice that this court might make concerning when a person in plaintiff's position should be deemed to have been harmed by legal malpractice on the part of the person's criminal defense counsel should respect, and not hinder, the valid policy choices already made by the legislature.

Respecting the legislature's comprehensive criminal justice construct means, at a minimum, that **it is inappropriate to permit a person who has been convicted of a criminal offense to assert in the courts a claim for legal malpractice in connection with that conviction unless and until the person had challenged successfully the conviction** through the direct appeal or post-conviction processes now provided by Oregon law, or the person otherwise has been exonerated of the offense.

There are several reasons for adopting the foregoing rule. **The**

first has to do with the nature of any legal malpractice claim that would be brought in cases like this one. The gravamen of such a claim will be that plaintiff's criminal defense counsel failed in some way to perform counsel's obligations in accordance with the standard of the legal community. But the nature and extent of counsel's obligations in this specialized area of the law are matters of constitutional import that have been the subject of many decisions both by this court and by the Supreme Court of the United States. Cases illustrating the principles involved are Strickland v. Washington, 466 U.S. 668, 687-88, 104 S.Ct. 2052, 2064-65, 80 L.Ed.2d 674 (1984) (counsel must provide "reasonably effective assistance ***under prevailing professional norms*** considering all the circumstances") and Krummacher v. Gierloff, 290 Or. 867, 872, 627 P.2d 458 (1981) (counsel must give "adequate performance *** of those functions of professional assistance which an accused person relies upon counsel to perform on his behalf"). Moreover, those constitutional standards specifically are supposed to be vindicated by proceedings under Oregon's post-conviction relief law. See Krummacher v. Gierloff, supra, 290 Or. at 869, 627 P.2d 458 (illustrating process). In review of the extensive statutory provisions already in place for the protection of convicted offenders, we think that it would be inappropriate to treat victims of alleged negligence by defense counsel as having been "harmed," for the purpose of maintaining a legal malpractice action in cases like this, unless they show that their counsel failed to meet the established standards in a way that would make post-conviction relief appropriate.

A second consideration has to do with the nature of a criminal conviction. In our society, no other legal outcome of the trial process is so difficult to obtain. **Yet, to allow a person convicted of a criminal offense to sue that person's lawyer without having first overturned the conviction would mean that the courts would be permitting relitigation of a matter that is supposed to be settled:** The complaining party is deemed by the law to be guilty. The panoply of protections accorded to the criminally accused (including direct appeal and post-conviction relief) is so inclusive, and the significance of a conviction so important to vindication of the rule of law, that it would appear most unusual to permit a person to prosecute a legal malpractice action premised on some flaw in the process that led to that person's conviction at the same time that the person's conviction remained valid for all other purposes. In other words, while the conviction and sentence remain valid for all other purposes, it is inappropriate to treat a

> complaining convicted offender as having been "harmed" in a legally cognizable way by that conviction.
>
> **At least one other consideration is pertinent**. However a person comes to be convicted-whether by a plea to the charge, through a plea agreement, or after a trial to judge or jury- for the purposes of a case like this one, the person convicted is deemed equally guilty. Many prisoners complaints in this area will relate to the failure of counsel to get a "better deal" for the accused. But many "better deals" will relate to terms of sentence or of probation. Such complaints would not result in reversal for a conviction, either outright or for a new trial. It is only in these latter circumstances, however, that a legal malpractice action will be available. Although a plaintiff may wish that he or she had gotten a better deal, we do not consider it appropriate, outside of circumstances where the kid or relief that we have described is available under the post-conviction relief law, to treat a convicted offender as having been caused "harm" in a legally cognizable way by any disposition of that person's case that was legally permissible. (Emphasis added).

Another such case is Peeler v. Hughes & Luce, 909 S.W.2d 494 (Tex. 1995). In Peeler, the defendant pled guilty to a federal offense. She later filed a civil malpractice complaint against her defense attorney, alleging that the attorney had failed to advise her that the United States Attorney had offered her absolute transactional immunity. That claim was supported by an affidavit from a federal prosecutor. Id. at 496. The trial court, the intermediate appellate court, and the Texas Supreme Court all ruled that the plaintiff's complaint failed to state a cause of action. In so doing, the Texas Supreme Court stated:

> Because of public policy, we side with the majority of courts and hold that plaintiffs who have been convicted of a criminal offense may negate the sole proximate cause bar to their claim for legal malpractice in connection with that conviction only if they have been exonerated on direct appeal, through post-conviction relief, or otherwise. While we agree with the other state courts that public policy prohibits convicts from profiting from their illegal conduct, we also believe that allowing civil recovery for convicts impermissibly shifts responsibility for the

> crime away from the convict. This opportunity to shift much, if not all, of the punishment assessed against convicts for their criminal acts to their former attorneys, drastically diminishes the consequences of the convicts' criminal conduct and seriously undermines our system of criminal justice. . . . We therefore hold that, as a matter of law, it is the illegal conduct rather than the negligence of a convict's counsel that is the cause in fact of any injuries flowing from the conviction, unless the conviction has been overturned.

Id. at 497-98 (citation omitted).

To the extent Peeler and Stevens dealt with a plea of guilty and Mr. Steele's case proceeded to trial, the relevant factor is whether the defendant was convicted. See Stevens, supra; Carmel v. Lunney, 511 N.E.2d 1126 (N.Y. 1987). In Stevens and Carmel the appellate courts found that an adjudication of guilt prohibited the ex-client as a matter of law from recovering for negligent representation. Id. at 1127. Mr. Steele was adjudicated guilty in his case.

The primary basis for the courts' decisions in Peeler and Stevens was that it would be inappropriate for a guilty criminal defendant to benefit from his criminal activities by suing his attorney for malpractice. In reaching their conclusion, both the Peeler and Stevens courts applied longstanding public policy considerations. Those same public policy considerations are present in Florida.

As a result, this Court, utilizing the logic of Peeler and Stevens, should hold that since Mr. Steele has not proven his innocence, nor did he have his conviction set aside, Mr. Kehoe's motion to dismiss was appropriately granted. Even if this Court is unwilling to extend the logic of the well-reasoned opinions of Peeler and Stevens to Florida, this Court should affirm the order of dismissal on the basis that Mr. Steele's actions are the sole legal and proximate cause

of his injuries, not Mr. Kehoe's actions.

D. MARTIN V. PAFFORD DOES NOT ADDRESS THIS ISSUE

Chief Judge Griffin discussed Martin v. Pafford, 583 So.2d 736 (Fla. 1st DCA 1991), in connection with this issue. 23 Fla. L. Weekly at D775. However, the issue decided in Martin was whether the applicable statute of limitation had run --**not** whether Martin had to prove that her conviction had been set aside or that she was innocent of same. Further, Martin is factually distinguishable since Martin prevailed in her Rule 3.850 motion on the claim of ineffectiveness of trial counsel and was awarded a new trial by the First District. The malpractice suit was filed after the appellate court ruling of ineffective assistance. As for the paragraph that appears at page 738 of the court's opinion (regarding whether Martin was entitled to seek redress on her malpractice claim prior to having the criminal conviction set aside), that is clearly dicta. Furthermore, the district court cites no authority for the proposition that appears in those four sentences. As such, Martin offers no precedential authority and based upon the authority cited within Mr. Kehoe's brief, clearly is not persuasive.

* * *

To allow a convicted criminal to sue his criminal defense attorney for malpractice, without having satisfied the exoneration prerequisite, will flood the civil courts of this state with suits by convicts seeking to relitigate their criminal case, seeking to harass and cause a professional and financial penalty to the former attorney, and seeking financial gain from the criminal conviction. The exoneration prerequisite sets forth a bright line, easily understood by litigants and courts alike. It is the policy that should be followed in this state.

III.

MR. STEELE HAS NO RIGHT TO HEARING ON EFFECTIVENESS OF COUNSEL ON COLLATERAL ATTACK (STEELE'S ARGUMENT II)

As asserted in Mr. Kehoe's Argument I, this Court should decline to exercise its discretionary jurisdiction in this matter. Should it exercise that jurisdiction, it should decide the appeal on the merits, and decline to answer the question certified by the Fifth District. However, if it chooses to answer the question certified by the Fifth District, that answer must be "No."

As to Mr. Steele's second count, the trial/civil court recognized it had no ability to order a hearing in the criminal case. There is no basis for such a claim --the circuit court, civil division, cannot impose such relief in face of a prior criminal court ruling and the subsequent affirmance by the appellate court. Ward v. Dugger, 508 So.2d 778 (Fla. 1st DCA 1987), is of no support. It has nothing to do with any civil cause of action being used as a basis to obtain a belated Rule 3.850 hearing.

Recognizing that, the Fifth District wanted to order the civil division of the circuit court to transfer Mr. Steele's case to the criminal division of the circuit court in order to hold an evidentiary hearing on Mr. Steele's claim that Mr. Kehoe failed to honor an agreement to file a Rule 3.850 petition for Mr. Steele.[4/] The Fifth District did not remand for a hearing,

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4/ It is important to note that Mr. Steele has not presented any written agreement to this effect. In fact, in his motion for rehearing to the Fifth District, Mr. Steele stated:

> . . . Mr. Kehoe was **employed** only to file an appeal in the murder case. This was by contract; however, Mr. Kehoe volunteered at no additional charge to represent Appellant in the Rule 3.850 proceeding. . . .

(IB; App., p. 3; emphasis in original).

however, because of this Court's decision Lambrix v. State, 698 So.2d 247 (Fla. 1996). It is also important to note Mr. Steele does not discuss Lambrix in his initial brief, even though the Fifth District stated it is the hurdle he must overcome to obtain the 3.850 relief he desires. This demonstrates that Mr. Steele has no way around Lambrix, except with smoke and mirrors.

Apparently, the rationale underlying the Fifth District's desire to remand for a hearing would be to determine whether Mr. Kehoe rendered ineffective assistance of counsel in failing to file the Rule 3.850 motion on Mr. Steele's behalf. If the hearing determined that Mr. Kehoe had so failed, the Fifth District would hold that Mr. Steele could file a belated Rule 3.850 motion, the merits of which must be addressed by the circuit court.

In Lambrix, the defendant argued that his collateral counsel's failure to appeal the trial court's denial of his request to represent himself constituted ineffective assistance of counsel. This Court stated:

> However, claims of ineffective assistant of post-conviction counsel do not present a valid basis for relief. Murray v. Giarratano, 492 U.S. 1, 109 S.Ct. 2765, 106 L.Ed.2d 1 (1989); Pennsylvania v. Finley, 481 U.S. 551, 107 S.Ct. 1990, 95 L.Ed.2d 539 (1987).

Id. at 248. This Court recently discussed and reiterated that same principle in State v. Kenny, ___ So.2d ___ (Fla. 4/23/98) [23 Fla. L. Weekly S229, S230].

In Finley, the United States Supreme Court categorically rejected an argument that prisoners have a constitutional right to counsel when mounting collateral attacks on their convictions. The Court also rejected the contention that the Fourteenth Amendment mandated the state to provide effective assistance of counsel to allow an indigent petitioner to pursue the collateral attack. Murray applied Finley in a capital setting.

Subsequently, in Coleman v. Thompson, 501 U.S. 722, 111 S.Ct. 2546, 115 L.Ed.2d

640 (1991), the Court rejected an attack on a conviction where the defendant's claim was that he could demonstrate the cause necessary to excuse a procedural default based upon the ineffective assistance of his collateral counsel to timely file an appeal from the denial of a state petition for collateral relief. In rejecting that argument, the Court stated that in order to constitute cause, the attorney error must amount to constitutionally ineffective assistance of counsel and this standard could not be satisfied in the absence of a constitutional right to counsel. 111 S.Ct. at 2566. It therefore could not be satisfied in a collateral proceeding.

The lower federal courts have similarly applied this rule. See e.g., Jones v. Crosby, 137 F.3d 1279, 1280 (11th Cir. 1998) (Jones had no constitutional right to counsel in state post-conviction proceedings), cert. denied, 118 S.Ct. 1351 (1998).; Mackall v. Angelone, 131 F.3d 442 (4th Cir. 1997), cert. denied, 118 S.Ct. 907 (1998).

Coleman was discussed at the Fifth District level by only one judge. Judge Sharp mentioned it briefly. However, an application of the principles set forth in Coleman to Mr. Steele's case demonstrates that as a matter of federal constitutional law, Mr. Steele has no right to effective assistance of collateral counsel to timely prepare or file an appeal or the original motion. What is critical to understand is that Coleman, as allegedly did Mr. Steele, had an attorney in the post-conviction matter. 111 S.Ct. at 2566. Thus, the distinction Judge Harris attempted to make, 23 Fla. L. Weekly at D772 and n. 3., between a situation in which a defendant had counsel and the right to appointed counsel, makes no difference as a matter of constitutional law.

The Fifth District seemed to believe that, despite Lambrix and the numerous other authorities, that this Court should create a distinction between the right to appointed counsel and

the right to counsel. The Fifth District apparently wanted to create a subcategory of cases whereby the ineffective assistance of counsel rule could apply if the defendant had counsel, regardless of whether it was appointed or he was able to retain counsel on his own. Coleman precludes that. Additionally, in Vagner v. Wainwright, 398 So.2d 448, 452 (Fla. 1981), this Court ruled that the same standard for evaluating ineffective assistance of counsel claims shall apply to cases of retained counsel as is applied to cases of appointed counsel. Any attempt to creaste different rules for retained versus appointed attroneys is doomed to failure. Whether Mr. Kehoe was retained, volunteered, or was appointed, the same standard applies. Yet Lambrix, Finley, Murray, and especially Coleman, all make clear that no standard applies, because there is no right to counsel or effective assistance of counsel in a post-conviction proceeding.

* * *

Mr. Steele asserts that exceptional circumstances exist as to permit filing of Rule 3.850 outside the two year period (IB 2). That is simply an effort to get around the Lambrix/Coleman rule, which he fails to address. Additionally, he cites six cases which he asserts support his argument (IB 2). One of them, Hollingshead v. State, 194 So.2d 577 (Fla. 1967), concerns the filing of a notice of appeal on direct appeal. The other five cases concern the filing of a notice of appeal in a Rule 3.850 case. None are applicable to the present situation, which deals with Mr. Steele's effort to file a timely Rule 3.850 motion, not an appeal in such a case.

Mr. Steele also argues that the denial of the state to afford him a full and fair hearing on his claims would violate due process under the circumstances presented below. Mr. Steele cites two cases, Keeney v. Tamayo-Reyes, 504 U.S. 1, 112 S.Ct. 1715, 118 L.Ed.2d 318 (1992), and Chambers v. Mississippi, 410 U.S. 284, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973) (IB 3). Keeney

presents no issue similar to Mr. Steele's. Keeney involved a defendant who entered a plea, then sought to collaterally attack it. The sole issue before the Supreme Court was to determine the correct standard for excusing the defendant's failure to develop material facts in the state court proceeding. Chambers involved a direct appeal in which the Supreme Court ruled that the defendant was denied a fair trial due to the trial court's unfairly preventing him from cross examining a state witness and introducing testimony that another individual had confessed. Chambers has nothing whatsoever to do with the issues before this Court.

Mr. Steele's reliance on State v. Meyer, 430 So.2d 440 (Fla. 1983) (IB 5) is misplaced. Meyer involved a situation in which court-appointed counsel failed to timely file notices of direct appeal. It did not involve post-conviction proceedings, and is therefore inapplicable.

Similarly, Evitts v. Lucey, 469 U.S. 387, 105 S.Ct. 830, 83 L.Ed.2d 821 (1985) (IB 5-6), is unavailing because it simply held that a criminal defendant is entitled to effective assistance of counsel on a first (direct) appeal. It did not provided for the right to effective assistance of counsel on post-conviction matter.

The bottom line from all of this is that, as the Fifth District recognized, the law as it now exists precludes Mr. Steele from attacking his attorney either in civil court or criminal court. There is no reason to change that well-settled law based on the allegations of Mr. Steele in this case. This Court, if it answers the question certified by the Fifth District, must adhere to Lambrix and its progeny, and not create a remedy in civil court for a convicted criminal to obtain untimely post-conviction relief.

CONCLUSION

Based on the arguments and authorities set forth in this brief, this Court should decline to exercise its discretionary jurisdiction to review the decision of, or answer the question certified by, the Fifth District Court of Appeal. Alternatively, this Court must affirm the Fifth District's decision.

RESPECTFULLY SUBMITTED this 25th day of June, 1998, in Orlando, Orange County, Florida.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 25th day of June, 1998, a true copy of the foregoing was furnished by United States Mail to William Stewart Steele, DC# 346856, Madison Correctional Institution, P.O. Box 692, Madison, Florida 32341-0692 and to Bonnie Jean Parrish, Assistant Attorney General (amicus curiae), 444 Seabreeze Blvd, Suite 500, Daytona Beach, Florida 32118.

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