IN THE SUPREME COURT OF FLORIDA,

ACENCION MEDRANO,

Appellant

v.

STATE OF FLORIDA,

Appellee.

Case No. 93,997

****

ON PETITION FOR DISCRETIONARY REVIEW
BASED ON CERTIFIED QUESTION

****

ANSWER BRIEF OF RESPONDENT ON THE MERITS

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CERTIFICATE OF INTERESTED PERSONS

Counsel for the Appellee certifies that the following persons or entities may have an interest in the outcome of this case:

1. **CAROL COBOURN ASBURY,** Assistant Attorney General
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   Robert Butterworth, Attorney General
   (appellate counsel for State/Appellee)

2. **ACENCION MEDRANO**
   (defendant/appellant)

3. **LONWORTH BUTLER, JR.,**
   (alleged 3.850 counsel for defendant/appellant)

4. **JOSEPH CHLOUPEK**, Assistant Public Defender
   Office of the Public Defender, Fifteenth Judicial Circuit
   Richard Jorandby, Public Defender
   (appellate counsel for defendant/Petitioner on direct appeal)

5. **HONORABLE EDWARD A. MILLER**
   (trial judge)

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PRELIMINARY STATEMENT

Respondent was the prosecution and petitioner was the defendant in the Criminal Division of the Circuit Court of the Nineteenth Judicial Circuit, in and for Okeechobee County, Florida.

In this brief, the parties will be referred to as they appear before this Court, except that the Respondent may also be referred to as "State" or "Prosecution."

The following symbols will be used;

AB = Petitioner's Initial Brief

R = Record on Appeal

STATEMENT OF THE CASE AND FACTS

Mandate issued in the direct appeal of appellant's case on March 13, 1995. On or about July 6, 1998 appellant filed a petition for writ of habeas corpus claiming that his privately retained collateral counsel was ineffective for failing to file a motion for post conviction relief within the two year time limit. As noted by the Fourth District Court of Appeal, the appellant has never filed a motion for post conviction relief with the trial court and had it denied as untimely. The Fourth District Court concluded that this petition was, therefore, premature.

Attached to the appellant's petition to the 4th DCA is Exhibit A, which is a letter to appellant from his direct appeal counsel, Joseph Chloupek, Assistant Public Defender. The letter is dated February 9, 1995. In that letter Mr. Chloupek informed appellant that his direct appeal had been denied by the 4th DCA. Mr. Chloupek stated that he had reviewed the filed in the appellant's case and came "to the conclusion that there is no further legal action" the Office of the Public Defender could take for the appellant. Appellant was informed in this letter that he had two years from the date the judgment becomes final to file his motion for post conviction relief. See, Exhibit A, appellant's petition to the 4th DCA.

Attached to the appellant's merit brief is Exhibit B dated September 7, 1995, which is a letter from the appellant to Mr. Lonworth Butler, Jr. In that letter appellant asked Mr. Lonworth what course of action Mr. Lonworth was going to be taking concerning his case. See, Exhibit E, appellant's petition to the 4th DCA; See also, Exhibit B, Appellant's Brief on the Merits.

Attached to the appellant's merit's brief is Exhibit C dated August 12, 1996, which is a letter from Mr. Lonworth Butler, Jr. to appellant. In that letter Mr. Lonworth informs the appellant that he is in the process of reviewing his case. Mr. Lonworth does not promise appellant that a motion

for post conviction relief will be filed but only states that he "will contact the appellant regarding his findings."

Appellant apparently does not contact Mr. Lonworth again until after the two years time limit has run. In Exhibit D, attached to the Merits Brief, is a letter from appellant to Mr. Lonworth asking for his explanation as to why a motion for post conviction relief was not filed in his case.

Appellant then files a petition for writ of habeas corpus requesting the right to file a belated based on ineffectiveness of collateral counsel. Appellant's main contention was that he hired a private attorney to file a motion for post conviction relief. The private attorney did not file a motion for post conviction relief within the two year time limit, therefore, appellant contends, he is entitled to a belated 3.850 motion. Appellant asked the Fourth District Court also to compel Mr. Lonworht Butler to supply the appellant with the rest of his legal materials in order to prepare a proper legal defense.[1]

The Fourth District Court of Appeal held the petition was premature since the appellant has never filed a rule 3.850 motion. Second, the Fourth District Court dismissed the petition citing to Lambrix v. State, 698 So. 2d 247, 248 (Fla. 1996). This question was certified:

> IS A PETITIONER ENTITLED TO FILE A BELATED RULE 3.850 MOTION FOR COLLATERAL RELIEF IF HE CAN PROVE THAT PRIVATELY-RETAINED COUNSEL AGREED TO FILE A TIMELY RULE 3.850 MOTION FOR COLLATERAL RELIEF BUT FAILED TO DO SO.

This appeal follows.

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[1]Appellant admits in his petition that his transcripts were returned and he obviously has all the correspondent from and between Mr. Lonsworth and himself. He does not define "legal materials", however, after contacting Mr. Lonsworth, the undersigned counsel has learned that Mr. Lonsworth has returned all of appellant's file to the appellant.

SUMMARY OF ARGUMENT

The law is well settled that defendants are not constitutionally entitled to counsel in postconviction litigation. Appellant therefore cannot overcome the procedural default attached to his failure to file a timely motion for postconviction relief by blaming the error on collateral counsel's allegedly deficient performance. The procedural defect is not overcome simply because appellant retained private counsel to pursue collateral relief rather than obtaining court appointed counsel through state funds. Moreover, other remedial bar sanctions are available and reflect a body of caselaw that contemplates redress for any deficiency which meets the standards set-forth.

ARGUMENT

POINT ON APPEAL

APPELLANT IS NOT ENTITLED TO A BELATED MOTION FOR POST CONVICTION RELIEF BASED ON INEFFECTIVE ASSISTANCE OF POST CONVICTION COUNSEL

The Fourth District Court of Appeal certified the following question after dismissing a petition for writ of habeas corpus, wherein the appellant requested a belated motion for post conviction relief based on ineffective assistance of collateral counsel:

> IS A PETITIONER ENTITLED TO FILE BELATED RULE 3.850 MOTION FOR COLLATERAL RELIEF IF HE CAN PROVE THAT PRIVATELY-RETAINED COUNSEL AGREED TO FILE A TIMELY RULE 3.850 MOTION FOR COLLATERAL RELIEF BUT FAILED TO DO SO?

It is well settled that a defendant has a right to appointed counsel in his first appeal as of right in state court. Douglas v. California, 372 U.S. 353, 83 S.Ct. 814, 9 L.Ed.2d 811 (1963). "The constitutional mandate [guaranteeing effective assistance of counsel] is addressed to the action of the State in obtaining a criminal conviction through a procedure that fails to meet the standard of due process of law" Evitts v. Lucey, 469 U.S. 387, 396, 105 S.Ct. 830, 836, 83 L.Ed. 2d 821 (1985).; State v. Meyers, 430 So. 2d 440, 443 (Fla. 1983). Additionally it is also well settled that there is no constitutional right to an attorney in state post-conviction proceedings. Pennsylvania v. Finley, 481 U.S. 551, 107 S.Ct. 1990, 95 L.Ed. 2d 539 (1987); Murray v. Giarratano, 492 U.S. 1, 109 S.Ct. 2765, 106 L.Ed. 2d 1 (1989).Coleman v. Thompson, 501 U.S. 722, 754 (1991); Lambrix v. State, 698 So. 2d 247, 248 (Fla. 1996), cert denied, No. 97-7000 U.S. Feb. 23, 1998); Butterworth v. Kenny; Hill v. Jones, 81 F.3d 1015, 1025 (11th Cir. 1996) (no constitutional right to postconviction relief counsel

in this circuit; ineffective assistance of postconviction relief counsel not cognizable claim).

Irrespective of the clear precedent cited above, the district court is requesting that this Court carve out an exception to the law. Sub judice, appellant's privately retained counsel did not file a motion for postconviction relief within the time limitations proscribed by rule 3.850. Appellant therefore sought relief in the district court alleging that his counsel's 'omission' amounted to ineffective representation entitling him to pursue a collateral attack of his criminal conviction beyond the two year time limitation. While district court properly rejected the claim under Lambrix, 698 So. 2D 247 (Fla. 1996), it erroneously, attempts to fashion an exception to Lambrix hinging solely on whether collateral counsel was privately obtained or court appointed. The district court adopted the certified question presently before this Court in Steele v. Kehoe, 23 Fla. L. Weekly D771 (Fla. 5th DCA March 20, 1998), review granted September 14, 1998, Case no. 92,950, as a basis for review. [2] This Court must answer that question in the negative for the following reasons.

The gravamen of the district court's analysis in Steele is based on a due process claiming stemming from a defendant's "right to access" to the courts enunciated in Bounds v. Smith, 430 U.S.817, 97 S.Ct. 1491, 52 L.Ed.2d 72 (1977). The Steele court attempts to merge a right of access with a Sixth Amendment right to counsel. "The right to be heard on a 3.850 motion should not be lost because of late filing when one employs counsel to file the motion and finds out too late that counsel has not done so." Steele at D773, n 3. However the United States Supreme Court has repeatedly rejected the proposition that a due process right to access to the courts must be expanded to include a constitutional right to counsel. Murray, 492 U.S. at 11. Relying on Murray and Bounds this Court has likewise, refused to expand a right to access to courts include a constitutional right

[2]See also, Diaz v. State, 23 Fla. L. Weekly D2558 (Fla. 2nd DCA Nov. 20, 1998).

to counsel. Butterworth v. Kenny, 23 Fla. Law weekly S229, 230 (Fla. 1998). The constitution requires that the State provide effective assistance of counsel in the direct appeal only. Beyond the direct appeal the State is not required to enable the prisoner to discover grievances, and to litigate effectively once in court. A state needs only to provide inmates with tools needed to attack sentences directly or collaterally. Lewis v. Casey, 518 U.S. 343, 116 S.Ct. 2174, 135 L.Ed.2d 606 (1996) (cited with approval in Butterworth v. Kenny, 23 L. Weekly S229 (Fla. 1998)). What is required in post conviction relief proceedings, whether capital or non-capital, is that the defendant have meaningful access to the judicial process. Butterworth, 23 Fla L. Weekly at S230 (citing to Bounds v. Smith, 430 U.S. 817 (1977)). The "access to the courts" jurisprudence enunciated in Bounds is rooted largely in the principles of equal protection, imposing limited affirmative obligations on the States to ensure that their criminal procedures did not discriminate on the basis of poverty. These cases ensured equality of access, not access in its own right. Lewis v. Casey, 518 U.S. 343, 116 S.Ct. 2174, 135 L.Ed.2d 606 (1996). Bounds does not create an abstract, free-standing right to a constitutionally effective assistance of counsel when an inmate retains his own private counsel. Once the State has met its burden of providing the tools necessary for the appellant to attack his sentence, directly or collaterally, under Bounds, "[i]mpairment of any other litigating capacity is simply one of the incidental (and perfectly constitutional) consequences of conviction and incarceration." Lewis, 116 S.Ct. at 2182. Consequently any attempt by the district court to merge a defendant's's meaningful access to the courts with a Sixth Amendment right to counsel is contrary to both federal and Florida law.

Since it has been clearly established, that there is no constitutional right to counsel in state collateral proceedings, for the appellant to prevail there must be some exception to the rule

established in the above cases. Presumably this exception arises because the appellant has the financial capabilities to hire a private attorney to review his case for a possible motion for post conviction relief.[3] Appellant argues that having retained private counsel to file his motion for post conviction relief, the constitution now requires that the State bear the burden of any ineffectiveness on the part of his privately retained counsel. This would carve out an exception for the "rich" defendant which is not granted to the indigent defendant. See, Section 27.51, Fla. Stat. (1997) (providing no authority for public defenders to represent noncapital defendants with postconviction representation); Russo v. Akers, 23 Fla. L. Weekly S597 (Fla. Nov. 25, 1998). Indeed, to accept such an exception would be to establish an equal protection argument to those indigent defendants, who cannot afford privately retained attorneys -- a contention which has been rejected by this Court in Butterworth v. Kenny, 28 Fla. L. Weekly S229 (Fla. April. 23, 1998).[4] Furthermore, to make such a ruling would be to defy logic.

The State has a paramount interest in maintaining the integrity of its rules and proceedings. The criminal justice system in Florida is structured both to determine the guilt or innocence of

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[3] See, Steele v. Kehoe, 23 Fla. L. Weekly D771, D773 n.3 (Fla. 5th DCA March 20, 1998), cited with approval by the Fourth District Court, "We are not suggesting that due process requires the appointment of an attorney in all 3.850 cases. We are suggesting that a defendant has the right in all 3.850 cases to employ counsel if one is not appointed. The presence of counsel, appointed or employed, carries with it certain rights and restrictions. The primary right is that one experienced in the law acts in the defendant's stead."

[4] Appellant should repose in the same position as any other post-trial, postconviction litigant, specifically any redress involving counsel should be a right to charge malpractice and resolution obtain upon satisfaction that the standards for such action are met. Indeed, additionally as recognized in Herrera v. Collins, 506 US 390,411-12 (1993), should a "convicted offender" make a valid claim that but for some external forces, relief should have been forthcoming, to with: that he could not have been convicted and sentenced or, that equity mandates a change in his conviction and/or sentence, relief via executive clemency would be available.

defendants and to resolve all questions incident to that determination, including the constitutionality of the procedures leading to the verdict. The State's complement of procedural rules facilitates this process by channeling, to the extent possible, the resolution of various types of questions to the stage of the judicial process at which they can be resolved most fairly and efficiently. Procedural default rules protect the integrity of this process by imposing a forfeiture sanction for failure to follow applicable state procedural rules, thereby deterring litigants from deviating from the carefully crafted judicial scheme. and assuring finality to litigation. Generally, the threat of losing the right to raise a claim in state proceedings will be sufficient to ensure compliance with the State's procedural rules. In the instant case, the appellant was well aware of the fact that he had two years to file his post conviction relief. Although he hired an attorney, he, did nothing until the two year time limit had passed. Appellant is in no different posture than any other pro se defendant who misses a deadline. See, Wainwright v. Torna, 455 U.S. 586 (1982), where the United States Supreme Court held that "respondent had no constitutional right to counsel, [therefore] he could not be deprived of the effective assistance of counsel by his retained counsel's failure to file the applicatoin timely." The reasoning in Torna, is well suited to the facts herein and equally applied, that the failure of retained counsel to do an act where counsel is not constitutionally mandated does not equate to an external factor that would warrant an exception to the rules governing postconviction procedure under Rule 3.850.

An analogous situation was addressed by this court in State v. Meyers 430 So. 2d 440 (Fla. 1983). In Meyers this Court held that State action, for due process purposes, is not involved in the failure of either a court appointed or privately retained attorney to file a timely notice of appeal on behalf of a convicted defendant, so as to entitle the defendant to a belated appellate review by the

Supreme Court via a petition for writ of habeas corpus. Meyers approved the dissent in Pressley v. Wainwright, 367 So. 2d 222 (Fla. 1979) whereby Justice England stated that there can be no constitutional right to effective assistance of counsel where court appointed attorney failed to file a timely petition for certiorari review within the thirty day rule after the district court affirmed his convictions. To accord such a right would be to "erode the jurisdictional requirements the Florida Supreme Court had established for all appeals or, potentially, to offer a different measure of justice to the non-indigent appellant." Meyers at 442. In other words, the appointment of counsel or the hiring of a private attorney for due process purposes cannot translate into a constitutional claim of ineffective assistance counsel attributed to the State when said counsel fails to follow the procedural rules of the State. In essence, Meyers answered the certified question now posed before this Court. Under the due process, equal protection, and access-to-courts rationale upon which the federal courts and this Court have relied, claims of ineffective assistance of post conviction counsel do not present a valid basis for relief. The certified question must be answered in the negative, affirming Lambrix.

CONCLUSION

WHEREFORE based on the foregoing arguments and authorities cited herein, the Appellee respectfully requests this honorable Court to dismiss this appeal and affirm the Fourth District Court's order dismissing the petition for writ of habeas corpus.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of hereof has been furnished to ACENCION MEDRANO, Pro Se, DC#140622 B2-11-B, South Bay Correctional Facility, 600 U.S. Hwy 27 South, South Bay, FL 33493, this 3rd day of December, 1998.

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Of Counsel