IN THE SUPREME COURT OF FLORIDA

CASE NO. 95,000

ALAN H. SCHREIBER, etc.
et al.,

Petitioners,

vs.

ROBERT R. ROWE,

Respondent.
_____/

AMENDED
RESPONDENT'S COMBINED ANSWER BRIEF
AND INITIAL BRIEF

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INTRODUCTION

This brief is filed on behalf of the Respondent, Appellant below, ROBERT R. ROWE, seeking affirmance of the opinion of the Fourth District filed on January 27, 1999 on the issue of a criminal defendant's cause of action for legal malpractice against his defense attorney not accruing unless and until he either obtains post-conviction relief or sets aside his conviction on appeal.

Furthermore, this is an initial brief on Respondent's cross-petition, challenging the holding of the Fourth District that a plaintiff in a legal malpractice case brought against his criminal defense attorney is required to prove, as part of the causation element of the claim, that he was innocent of the crime charged in the underlying criminal proceeding.

Throughout this brief, Respondent will be referred to as "Rowe." Petitioners, Appellees below, ALAN H. SCHREIBER, Public Defender of the 17th Judicial Circuit and RICHARD L. JORANDBY, Public Defender of the 15th Judicial Circuit, will be referred to as "Schreiber" and "Jorandby" respectively.

References to the Appendix to Initial Brief of Petitioner, Jorandby, will be

referred to as “A.” followed by the appropriate page citation.

STATEMENT OF THE CASE AND FACTS

To the extent that Schreiber's Statement of the Case and Facts is taken directly from the decision of the Fourth District, Rowe accepts Schreiber's factual statement as accurately reflecting the factual background and procedural posture of the case. However, Rowe would add the following to the explanation regarding the opinion of the Fourth District:

In addition to holding that the statute of limitations period began to run from the time that Rowe's post-conviction relief motion was granted, the Fourth District also addressed another issue concerning the elements of a legal malpractice claim against a criminal defense attorney. (A. 6). Specifically, the court held that a plaintiff in this type of case is required, as part of the causation element of the cause of action, to prove by the greater weight of the evidence that he was innocent of the crimes charged in the underlying criminal proceedings. (A. 6).

As a policy justification for this holding, the court explained that unless a plaintiff can establish his innocence of the underlying criminal charges, the law views the criminal conduct as the legal cause of damages, and not the attorney's malpractice. (A. 6). Furthermore, recognizing a strong public interest in encouraging the representation of criminal defendants, the court suggested that the

rule it adopted encouraged this type of representation by reducing the risk that malpractice claims will be asserted, and if asserted, that they will be successful. (A. 7).

SUMMARY OF THE ARGUMENT

In ***Steele v. Kehoe***, 24 F.L.W. S237 (Fla., May 27, 1999), this Court recently concluded that in the context of a legal malpractice claim brought by a criminal defendant against his defense attorney, the statute of limitations does not begin to run until the defendant has obtained final appellate or post-conviction relief. This case is dispositive of the issue raised by Schreiber in his initial brief and of the first issue raised by Jorandby in his initial brief.

The second issue raised by Jorandby is not ripe for review by this Court since it was never raised either in the trial court or the Fourth District. Moreover, most of the points raised are irrelevant to the issue of when the statute of limitations begins to run, but rather concern issues that are pertinent to the merits of the malpractice claim.

On cross-petition, the Fourth District's holding that the plaintiff, as a part of the causation element of the cause of action, is required to prove by the greater weight of the evidence that he was innocent of the crimes charged in the underlying criminal proceeding is erroneous. The court has confused the concept of "legal

innocence" with "actual innocence." In so doing, the court has placed an insurmountable burden upon the criminal defendant who seeks to sue his defense attorney for malpractice.

ARGUMENT IN RESPONSE TO INITIAL BRIEFS

POINT I

A CONVICTED CRIMINAL DEFENDANT MUST OBTAIN APPELLATE OR POST-CONVICTION RELIEF AS A PRECONDITION TO MAINTAINING A LEGAL MALPRACTICE ACTION AND THE STATUTE OF LIMITATIONS DOES NOT BEGIN TO RUN UNTIL SUCH RELIEF IS OBTAINED.

Both Schreiber and Jorandby argue in their initial briefs that the Fourth District's opinion in this case was wrong and that the rule previously announced by the First District in ***Martin v. Pafford***, 583 So. 2d 736 (Fla. 1st DCA 1991), that a criminal defendant need not obtain collateral relief from his criminal conviction before suing his attorney civilly for malpractice, was correct.

Since the time that Schreiber and Jorandby filed their initial briefs, this Court has decided the case of ***Steele v. Kehoe***, 24 F.L.W. S237 (Fla., May 27, 1999). ***Steele***

resolves the issue raised in this case by expressly holding that, in the context of a legal malpractice claim brought by a criminal defendant against his defense attorney, the statute of limitations does not begin to run until the defendant has obtained final appellate or post-conviction relief. ***Steele*** at S238.

In ruling as it did in ***Steele***,, this Court has officially allied itself with the majority of jurisdictions that acknowledge that without obtaining relief from a criminal conviction, the criminal defendant's own actions must be presumed to be the proximate cause of the injury. *See*, ***Adkins v. Dixon***, 482 S.E. 2d 797 (Va. 1997); ***Peeler v. Hughes & Luce***, 909 S.W. 2d 494 (Tex. 1995); ***Morgano v. Smith***, 879 P. 2d 735 (Nev. 1994); ***Stevens v. Bispham***, 851 P. 2d 556 (Or. 1993); ***Shaw v. State of Alaska, Dept. of Administration***, 816 P. 2d 1358 (Alaska 1991).

Because ***Steele v. Kehoe***, *supra*, is dispositive of the main issue raised by Schreiber and Jorandby, Rowe does not feel it is necessary to further brief this issue.

POINT II

A CRIMINAL DEFENDANT NEED NOT OBTAIN POST-CONVICTION RELIEF THROUGH A PETITION FOR WRIT OF HABEAS CORPUS ON GROUNDS OF INEFFECTIVE ASSISTANCE OF APPELLATE COUNSEL BEFORE FILING A PROFESSIONAL MALPRACTICE SUIT AGAINST HIS CRIMINAL APPELLATE ATTORNEY.

As an initial response to the argument raised by Jorandby in Issue II, Rowe points out to this Court that this issue was not raised either before the trial court or the Fourth District, and thus is not ripe for consideration by this Court.

Furthermore, even on the merits, the argument is erroneous. Jorandby argues on page 22 of his initial brief that because Rowe's post-conviction relief motion did not address the ineffectiveness of Jorandby as appellate counsel, no cause of action accrued against him because Rowe did not succeed in obtaining

relief based on ineffective assistance of appellate counsel in a collateral criminal proceeding. This argument completely misapprehends the Fourth District's holding in this case. The Fourth District did not hold that it is necessary that there be a showing in the post-conviction relief proceeding that a particular attorney was ineffective, but rather that the performance of counsel, in general, was so deficient that there is a reasonable probability that, but for attorney error, the result of the proceeding would have been different. In other words, there must be a showing that it can reasonably be said that it was attorney error rather than a defendant's guilt that was the proximate cause of the conviction. Such a showing can only be made after a criminal defendant has had his conviction set aside because until that time, it is the defendant's guilt that has caused the conviction rather than any alleged attorney error.

Jorandby states on page 23 of his initial brief that he cannot be bound by the findings of fact and judicial determinations in the post-conviction relief proceedings because his office was neither a party nor the subject matter of those proceedings. Again, this assertion misses the point. Jorandby seems to overlook the fact that the relevance of the post-conviction relief proceeding is to determine when the statute of limitations begins to run, not for proving the merits of the malpractice cause of

action.

There is simply no logical basis to support Jorandby's claim that the only way that a criminal defendant is permitted to pursue a legal malpractice claim is if he successfully raises issues of the specific attorney's ineffectiveness during post-conviction relief or habeas corpus proceedings. The courts have held that the time to file a habeas corpus petition for ineffective assistance of appellate counsel is when post-conviction relief has been denied as to trial counsel. ***White v. State***, 456 So. 2d 1302 (Fla. 2d DCA 1984). Likewise, there is no legitimate basis to support the flawed claim that there should be a different standard for commencing the statute of limitations for a criminal trial counsel and a criminal appellate counsel. The relevant consideration is when Rowe can justifiably make the claim that it is not his actions resulting in his conviction, but rather some other cause or causes -- namely, the conduct of the defense attorneys. To the extent that Rowe can prove that both Schreiber and Jorandby proximately caused him to suffer damages as a result of their negligence, he should be entitled to collect damages from both of them. Whether Rowe is able to prove the inadequacy of his appellate counsel is a question for the trier of fact on the merits of the malpractice action. It has absolutely nothing to do with when the statute of limitations begins to run on the malpractice

claim.

Moreover, while Rowe does not believe that the point raised by Jorandby beginning on page 30 of his brief, concerning raising ineffectiveness of counsel on direct appeal, is relevant to the issue of when the statute of limitations begins to run, he would nonetheless point out that Jorandby's recitation of the law is not correct. While it is true that as a general rule, ineffectiveness claims cannot be raised on direct appeal, there is a limited, but controlling, exception to this rule which applies where the facts giving rise to the claim of ineffective assistance of trial counsel are apparent on the face of the record. ***Stewart v. State***, 420 So. 2d 862 (Fla. 1982); ***Blanco v. Wainwright***, 507 So. 2d 1377 (Fla. 1987); ***Foster v. State***, 387 So. 2d 344 (Fla. 1980); ***Mizell v, State***, 716 So. 2d 829 (Fla. 3d DCA 1998); ***Gordon v. State***, 469 So. 2d 795 (Fla. 4th DCA 1985). Regardless, this issue is not relevant to when the statute of limitations begins to run, but rather, as with most of the issues raised by Jorandby herein, concerns the merits of legal malpractice cause of action.

ARGUMENT ON CROSS-PETITION

BY HOLDING THAT A SHOWING OF ACTUAL INNOCENCE MUST BE MADE AS AN ELEMENT OF THE LEGAL MALPRACTICE CLAIM, THE FOURTH DISTRICT HAS PLACED AN INSURMOUNTABLE BURDEN UPON THE CRIMINAL DEFENDANT WHO SEEKS TO SUE HIS DEFENSE ATTORNEY FOR MALPRACTICE.

In addition to ruling on the statute of limitations issue, the Fourth District's opinion also addressed an issue concerning the elements of a legal malpractice claim against a criminal defense attorney. The court held that the plaintiff, as a part of the causation element of the cause of action, is required to prove by the greater weight of the evidence that he was innocent of the crimes charged in the underlying criminal proceeding. By concluding that a showing of innocence must be made as an element of the legal malpractice claim, the Fourth District has effectively done away with the cause of action by placing an insurmountable burden upon the criminal defendant who seeks to sue his defense attorney for malpractice.

In holding as it did, the court misapprehended the significant distinction between "actual innocence" and "legal innocence" and, in so doing, completely disregards the fundamental, constitutional notion of "innocent until proven guilty." *See* ***State v. Troehler***, 546 So. 2d 109 (Fla. 4th DCA 1989)(citing to ***Brooke v. State***, 128 So.

814 (1930)). The opinion fails to recognize that one who has had his conviction set aside is deemed innocent in the eyes of the law and that a person who has been accused of a crime does not have the burden to show that he is innocent. ***State v. Troehler***, *supra*.(recognizing that the state has the burden of establishing all the essential elements with which an accused is charged). To the contrary, a criminal defendant is innocent unless and until he is proven guilty. Consequently, by virtue of the fact that Rowe successfully obtained post-conviction relief and was never retried on the charges brought against him, he is innocent of the crimes with which he was charged. In the legal malpractice claim, the jury should be charged that because Rowe's conviction was vacated, he is presumed innocent of the charges.

To suggest that Rowe must now show that, as a matter of fact, he is innocent of the criminal charges asserted against him places a higher burden upon him as a malpractice litigant than as a criminal defendant. By so holding, the Fourth District overlooked the fact that our criminal justice system is based upon notions of legal, rather than actual, guilt and therefore does not recognize a mechanism for determining actual innocence. To suggest that this concept can and should be used in a civil malpractice trial is therefore unreasonable.

Moreover, had the state decided to re-try Rowe after his conviction was set

aside, the state would have had the burden of proof. Rowe had no control over whether the state re-tried him. The Fourth District has now determined that the burden is on Rowe to show his innocence. He would not have had this burden in the criminal trial, had there been a second trial.

Instead of placing the burden on the criminal defendant to prove his innocence in the civil malpractice trial, and consistent with the arguments asserted by Rowe throughout this appeal, a criminal defendant seeking to sue his defense attorney for malpractice should have to prove legal innocence, through a showing of an invalidation of the conviction either on appeal or through post-conviction relief.

The Fourth District's opinion advances a public policy argument that one who is guilty of a crime should not be able to benefit from that crime even if his attorney was negligent in his representation. While Rowe does not disagree with this argument,[1] and therefore does not believe that a person who has a valid criminal

[1] In ***Orr v. Black & Furci***, 876 F. Supp 1270 (M.D. Fla. 1995), a district court judge in the Middle District of Florida held that where a criminal defendant pleads guilty to a crime, as a malpractice plaintiff he must prove his innocence in order to maintain a cause of action against his attorney. ***Orr*** at 1276. While it makes sense to require a criminal defendant who has plead guilty and then, for whatever reason, has his sentence set aside and attempts to assert a claim for legal malpractice, to prove actual innocence in order to contradict the guilty plea, the same cannot be said for a criminal defendant who has maintained his innocence throughout, is successful in invalidating his conviction and is not retried.

conviction against him should be able to sue for malpractice, he does not believe that it is necessary to make a criminal defendant who has had his conviction invalidated prove actual innocence in order to comport with these public policy concerns. This is true because a person who has had his conviction set aside is not guilty of any crime in the eyes of the law. By holding as it does, the Fourth District overlooks this essential fact and improperly deems the criminal defendant guilty of the charges unless and until he can prove his innocence.

Furthermore, it must be recognized that in order to have succeeded on his post-conviction relief claim of ineffective assistance of counsel, Rowe has already made a showing not only that his defense attorney's performance was deficient, but also that the deficient performance was so significant that there is a reasonable probability that, but for counsel's errors, the result of the criminal trial would have been different. ***Overton v. State***, 531 So. 2d 1382 (Fla. 1st DCA 1988)(discussing ***Strickland v. Washington***, 466 U.S. 668 (1984) wherein the Supreme Court provided a constitutional standard for evaluating ineffective assistance of counsel claims). Thus, in effect, Rowe has already met the concerns regarding proximate cause (by meeting the standards of ***Strickland v. Washington***) by virtue of having succeeded on the post-conviction relief claim.

It is this fact that distinguishes the instant case from the case of ***Glenn v. Aiken***, 569 N.E.2d 783 (Mass. 1991), which was discussed in detail in the Fourth District's opinion. In ***Glenn***, a criminal defendant had his arson conviction set aside based on the impropriety of the judge's charge to the jury. While the court in ***Glenn*** did hold that the criminal defendant, who was the plaintiff in the malpractice case, would have the burden to prove that he was innocent of the arson charged in the underlying proceeding, it limited its holding by recognizing that "[i]t may be difficult to defend logically a rule that requires proof of innocence as a condition to recovery, especially if a clear act of negligence of defense counsel was obviously the cause of the defendant's conviction of a crime." ***Id.*** at 787. Insofar as the negligence of defense counsel was so obvious and severe in Rowe's case, as is evidenced by the fact that the trial court in the criminal case entered a 25-page order reversing his conviction and sentence (which the state did not appeal) this is one of those cases where it is not logical to require a criminal defendant to prove his actual innocence.[2]

Without justification, the Fourth District has placed an additional element upon a criminal defendant who seeks to prove a claim for legal malpractice against his

[2] This will be true in any case in which the criminal defendant succeeds in having his conviction vacated due to the ineffective assistance of counsel. Such relief will not be granted for minor deficiencies in the performance of defense counsel.

defense attorney -- an element not required of a civil client seeking to sue his attorney under the same cause of action. A civil defendant who has been found liable and seeks to sue his attorney for malpractice does not have to prove that he did not engage in the challenged conduct, but rather only that "but for" his attorney's failure to assert a particular defense, he would not have been found liable. *See, e.g.*, ***Smalley Transportation Co. v. Marks, Gray, Conroy & Gibbs***, 649 So. 2d 257 (Fla. 1st DCA 1994). For example, a defendant in an untimely filed slander case need not show that he did not, in fact, defame the plaintiff, but rather only that he would not have been found liable had his attorney asserted the defense of statute of limitations.

An additional policy argument asserted by the court in support of its adoption of the rule that a criminal defendant must prove his innocence as an element of his legal malpractice claim is that the public has a strong interest in encouraging the representation of criminal defendants, and that the rule adopted encourages legal representation by reducing the risk that malpractice claims will be asserted and, if asserted, will be successful. While Rowe does not deny that the public has an interest in seeing that criminal defendants are represented, he does not believe that it is necessary to place an additional burden over and above the usual proximate

cause requirement upon a criminal defendant seeking to prove legal malpractice.[3] Moreover, the public's interest with regard to criminal defendants is not merely to assure that they have representation, but more importantly, to see that the representation that they receive is, at the very least, meets the standards set forth in ***Strickland***. There is no legitimate purpose to be served in making it harder for the criminal defendant to succeed in the civil malpractice case, while conversely making it easier for the defense counsel (whose representation has been shown to be constitutionally deficient) to prevail in the civil malpractice case.

Additionally, the Court should consider the ethical problems that this holding may cause to criminal defense attorneys. If the criminal defendant must prove his innocence in the civil legal malpractice case, this means that the defense attorney (now the defendant in the malpractice action), will have to attempt to prove the former client's guilt. Such a position is untenable for defense counsel who likely argued in the criminal trial that the former client was innocent.

The fact remains that a criminal defendant who has successfully obtained

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[3] As the concurring opinion in ***Glenn v. Aiken***, 569 N.E.2d 790 (Mass 1991) points out: "There is no reason to believe that this application of the ordinary proximate cause requirement will deter attorneys from representing criminal defendants any more than physicians are deterred from treating patients because of the threat of malpractice." ***Glenn*** at 790.

post-conviction relief based upon ineffective assistance of counsel has already met an extremely high burden of showing that his counsel's deficient performance was likely the cause of his conviction. To suggest that a criminal defendant, who has already had his conviction and sentence set aside based upon ineffective assistance of counsel, must go a step further and make a showing of actual innocence, places an unreasonable and unnecessary burden upon the criminal defendant.

CONCLUSION

Based on the foregoing arguments and authorities, the decision of the Fourth District regarding when the statute of limitations begins to run for criminal defendants seeking to sue their defense attorneys for malpractice should be affirmed.

However, the decision of the Fourth District regarding the need for a criminal defendant in a legal malpractice case against his defense attorney to prove as an element of his case, actual innocence of the underlying charges against him, should be reversed.

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CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing Amended Brief was furnished by mail this 29th day of June, 1999 to NEIL ROSE, ESQUIRE, P. O. Box 223340, Hollywood, Florida 33022, JAMES C. BARRY, ESQUIRE, 1555 Palm Beach Lakes Boulevard, Suite 1600, West Palm Beach, Florida 33401 and KENNETH J. KAVANAUGH, ESQUIRE, 400 S.E. 8th Street, Fort Lauderdale, Florida 33316-5000.

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