IN THE SUPREME COURT OF FLORIDA

CASE NO. 95,000

ALAN H. SCHREIBER, PUBLIC DEFENDER OF
THE 17TH JUDICIAL CIRCUIT OF FLORIDA, AND
RICHARD L. JORANDBY, PUBLIC DEFENDER OF
THE 15TH JUDICIAL CIRCUIT OF FLORIDA,

Petitioners,

vs.

ROBERT R. ROWE,

Respondent.

APPEAL FROM THE DISTRICT COURT OF THE STATE OF FLORIDA
FOURTH DISTRICT

4TH DCA CASE NO. 97-1997

INITIAL BRIEF OF THE PETITIONER, JORANDBY

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CERTIFICATE OF INTERESTED PERSONS

Schreiber, etc., et al., v. Rowe

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Petitioner, Jorandby, files this Certificate of Interested Persons, listing the parties and entities interested in this appeal:

1. Alan H. Schreiber - Petitioner
2. Richard L. Jorandby - Petitioner
3. Robert R. Rowe - Respondent
3. James C. Barry, Esquire - Trial/Appellate Counsel for Jorandby
4. Neil Rose, Esquire - Appellate Counsel for Schreiber
5. Diane Tutt, Esquire - Appellate Counsel for Rowe
6. Kenneth J. Kavanaugh, Esquire - Trial Counsel for Rowe
7. Steven Befera, Esquire - Trial Counsel for Schreiber
8. Honorable Harry G. Hinckley - Trial Court Judge

CERTIFICATE OF TYPE SIZE AND STYLE

This Brief is composed in Courier 12 point, a 10cpi nonproportional font.

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INTRODUCTION

This brief is filed on behalf of Petitioner, Appellee below, Richard L. Jorandby, seeking affirmance of the order entered by the trial court on May 7, 1997 dismissing the Fifth Amended Complaint of Respondent, Appellant below, Robert R. Rowe, with prejudice.

In this brief, the parties will be referred to as follows: Petitioners will be referred individually by name, and Respondent will be referred to by name.

References to the record will be designated "R," followed by the page number.

STATEMENT OF ISSUES

ISSUE I

WHETHER SUCCESS ON A POST CONVICTION RELIEF MOTION IS A PREREQUISITE TO A CRIMINAL DEFENDANT'S FILING OF A PROFESSIONAL MALPRACTICE SUIT UNDER SECTION 95.11(4), FLORIDA STATUTES, AGAINST HIS CRIMINAL DEFENSE AND APPELLATE ATTORNEYS

ISSUE II

WHETHER A CRIMINAL DEFENDANT MUST SUCCESSFULLY OBTAIN POST CONVICTION RELIEF THROUGH A PETITION FOR WRIT OF HABEAS CORPUS ON THE GROUNDS OF INEFFECTIVE ASSISTANCE OF APPELLATE COUNSEL BEFORE FILING A PROFESSIONAL MALPRACTICE SUIT UNDER SECTION 95.11(4), FLORIDA STATUTES, AGAINST HIS CRIMINAL APPELLATE ATTORNEY

STATEMENT OF THE CASE

On December 14, 1984, Robert Rowe was convicted of several counts of capital sexual battery and was sentenced to four terms of life imprisonment. (R. 114-123). A Notice of Appeal of this conviction was filed on behalf of Rowe on February 14, 1985. (R. 114-123).

On November 12, 1986, the Public Defender of the Fifteenth Judicial Circuit was designated to pursue the direct appeal on behalf of Rowe. (R. 114-123). On April 11, 1988, the Fourth District Court of Appeal issued a per curiam opinion affirming the conviction at Rowe v. State, 523 So. 2d 590 (Fla. 4th DCA 1988).

A timely motion for post conviction relief under rule 3.850, Florida Rules of Civil Procedure, was filed by Rowe, with the trial court denying same without evidentiary hearing. The grounds for the motion for post conviction relief were characterized by the appellate court as "numerous errors committed at trial by Rowe's assistant public defender [which] amounted to a violation of the constitutional right to effective assistance of counsel." See Rowe v. Schreiber, 725 So. 2d 1245 (Fla. 4th DCA 1999). On November 20, 1991, the appellate court reversed and remanded the rule 3.850 proceedings to the trial court for conducting an evidentiary hearing "to determine the merits of defendant's position." See Rowe v. State, 588 So. 2d 344 (Fla. 4th DCA 1991).

On July 15, 1994, the trial court after evidentiary hearing granted Rowe's motion for post conviction relief and ordered a new trial based on the ineffective assistance of Rowe's **trial** counsel.

(R. 43-70). Eleven years after the original conviction, the state decided to "nolle prosequi" the charges against Rowe on May 15, 1995. (R. 120).

At no point did Plaintiff initiate a proceeding in the trial court or appellate court for post conviction habeas corpus relief on the grounds of ineffective assistance of appellate counsel against Jorandby or Assistant Public Defender, and Chief of the Appellate Division of the Public Defender's Office in and for the Fifteenth Judicial Circuit, Margaret Good Earnest.

In the interim, and in response to the trial court's order granting rule 3.850 post conviction relief, Rowe filed a complaint against Bradley Stark, Esquire, in relation to his representation of Rowe in the post conviction proceedings. (R. 1-3). In December 1995, Schreiber was joined as a defendant in Rowe's Third Amended Complaint. (R. 71-77). The addition of Schreiber occurred eleven (11) years after Rowe's conviction in Broward County. Thereafter, in April 1996, Jorandby was brought into the litigation as a party defendant in the Fourth Amended Complaint. (R. 86-94). The addition of Jorandby occurred eight (8) years after resolution of the original criminal conviction appeal. The operative pleading for purposes of this appeal is Rowe's Fifth Amended Complaint. (R. 114-123).

In his Fifth Amended Complaint, Rowe brought legal malpractice claims against Schreiber, who supervised attorneys in the Public Defender's Office in the Seventeenth Judicial Circuit during the original criminal proceedings against Rowe in 1984. (R. 114-123).

Rowe's claim against Jorandby arises from his supervision of attorneys in the Public Defender's Office in the Fifteenth Judicial Circuit who represented Rowe in the appellate proceedings from his original sexual battery convictions. (R. 114-123).

More specifically, in Count I, Rowe sought damages against Schreiber based on Schreiber's negligent management of office resources and his negligent supervision over assistant public defenders which resulted in Rowe's case being inadequately prepared for trial. (R. 117).

Count II of the Fifth Amended Complaint sought damages against Jorandby, alleging that Jorandby and Margaret Good Earnest, were negligent in their handling of the appeal based on their failure to raise the issue of ineffective assistance of trial counsel. (R. 119-120). Plaintiff maintained that had this issue been raised in the initial appeal, an evidentiary hearing or new trial would have been mandated by the appellate court, and that as a result of Jorandby's negligence, Rowe's release from prison and later invalidation of his conviction and sentence were delayed. (R. 120).

A final count in the Fifth Amended Complaint addresses allegations of negligence against Bradley Stark, the private attorney who undertook Plaintiff's representation in January 1989 for the purpose of pursuing a motion for post conviction relief. (R. 121). The case against Mr. Stark remains pending below.

In response to the Fifth Amended Complaint, Schreiber and Jorandby filed motions to dismiss on the grounds that the two year statute of limitations applicable to professional malpractice,

section 95.11(4), Florida Statutes, barred Rowe's claims. (R. 124-128, 129-133). The trial court had previously heard argument and granted dismissal on motions filed by Schreiber and Jorandby relating to the Third and Fourth Amended Complaints. (R. 85, 109-10). In an Order dated May 7, 1997, the trial court granted Schreiber's and Jorandby's motions to dismiss with prejudice. (R. 134).

A Notice of Appeal of the Order of May 7, 1991 was timely taken in the Fourth District Court of Appeal by Rowe. (R. 135-36). The appellate court rendered its decision in Rowe v. Schreiber, 725 So. 2d 1245 (Fla. 4th DCA 1999). Within its opinion, the fourth district explicitly certified conflict between its opinion and that of Martin V. Pafford, 583 So. 2d 736 (Fla. 1st DCA 1991). A Notice to Invoke the Discretionary Jurisdiction of the Supreme Court of Florida was thereafter timely filed in this Court based on the certified conflict of opinion of the district courts of this state.

SUMMARY OF PETITIONER'S ARGUMENT

The trial court correctly ruled that Rowe's professional malpractice claim against Jorandby, which accrued on April 11, 1988 upon issuance of the Fourth District Court of Appeal's opinion affirming his conviction, was barred by the two year statute of limitations under section 95.11(4), Florida Statutes. The language of section 95.11(4) does not explicitly nor implicitly permit tolling of the statute of limitations period in cases involving alleged malpractice arising from criminal cases. The statute is unambiguous, and strict construction rules mandate that the two year period commences for filing a malpractice action against appellate counsel from the point when the criminal defendant's direct appeal is affirmed. The conflict in opinions of the district courts of this state should be resolved in favor of the First District Court's decision in Martin v. Pafford, 583 So. 2d 736 (Fla. 1st DCA 1991).

Even in the event this Court uphold's the Fourth District Court's decision in Rowe v. Schreiber, 725 So. 2d 1245 (Fla. 4th DCA 1999), regarding success in a post conviction relief proceeding as a precondition to filing a malpractice claim, the claim against Jorandby should be dismissed. No cause of action has accrued against Jorandby because Rowe has not succeeded in obtaining relief from his conviction and sentence based on ineffective assistance of appellate counsel. Jorandby cannot be bound by any judicial determination of deficient trial counsel conduct, and there has been no judicial determination that Jorandby "harmed" Rowe, thus

the "proximate cause" element of the legal malpractice action cannot be met. Furthermore, Rowe could not prove in a habeas corpus proceeding that Jorandby's failure to assert a claim of ineffective assistance of trial counsel was a meritorious issue overlooked by appellate counsel on direct appeal which would have undermined the fairness and correctness of the appellate decision of Rowe v. State, 523 So. 2d 590 (Fla. 4th DCA 1988).

ARGUMENT

ISSUE I

WHETHER SUCCESS ON A POST CONVICTION RELIEF MOTION IS A PREREQUISITE TO A CRIMINAL DEFENDANT'S FILING OF A PROFESSIONAL MALPRACTICE SUIT UNDER SECTION 95.11(4), FLORIDA STATUTES, AGAINST HIS CRIMINAL DEFENSE AND APPELLATE ATTORNEYS

Petitioner Jorandby seeks to invoke the discretionary jurisdiction of this Court on the basis of a certification of conflict in the decisions of the district courts in Rowe v. Schreiber, 725 So. 2d 1245 (Fla. 4th DCA 1999) and Martin v. Pafford, 583 So. 2d 736 (Fla. 1st DCA 1991). The issue of primary importance to review in this Court is whether a criminal defendant must successfully obtain some type of post conviction relief from his conviction and sentence before he can sue his criminal defense and appellate attorneys civilly for professional malpractice. The Fourth District Court answered that question in the affirmative, thereby conflicting with the First District Court in Martin which held a contrary position.

Eight years after affirmance of Rowe's conviction and sentence on direct appeal from his 1984 criminal conviction, Richard L. Jorandby, Public Defender of the Fifteenth Judicial Circuit, has been called upon to defend himself in a legal malpractice action involving the sole allegation that Jorandby was negligent in prosecuting Rowe's direct appeal by failing to raise the issue of ineffective assistance of trial counsel.

The Fourth District Court in Rowe v. Schreiber has effectively excepted criminal defense and appellate attorneys from the protection of the statute of limitations and singled them out for

open-ended liability. In addressing whether the statute of limitations bars Rowe's action, the plain language of the pertinent statutory provision should not be ignored. Section 95.11(4), Florida Statutes (1997), provides:

> **95.11 Limitations other than for the recovery of real property.** - Actions other than for recover of real property shall be commenced as follows:
>
> . . . .
>
> (4) WITHIN TWO YEARS.-
> (a) An action for professional malpractice, other than medical malpractice, whether founded on contract or tort; provided that the period of limitations shall run from the time the cause of action is discovered or should have been discovered with the exercise of due diligence. However, the limitation of actions herein for professional malpractice shall be limited to persons in privity with the professional.

Nothing within section 95.11(4) provides that actions for professional malpractice arising out of criminal defense or appellate representation are to be treated differently or that the running of the limitations period should be postponed until all post-conviction proceedings are exhausted. Section 95.051, Florida Statutes, which sets out the legislatively-prescribed circumstances when a limitations period may be tolled, likewise does not provide for tolling because of pendency of collateral criminal proceedings.

Section 95.031, Florida Statutes, articulates that the statute of limitations runs from the time the cause of action accrues. "A cause of action accrues when the last element constituting the cause of action occurs." Sec. 95.031, Fla. Stat. (1997). A cause of action for legal malpractice consists of the following elements: "the attorney's employment, the attorneys' neglect of a reasonable

duty, and that such negligence resulted in and was the proximate cause of loss to the plaintiff." Brennan v. Ruffner, 640 So. 2d 143, 144 (Fla. 4th DCA 1994). The only modification that has been made for malpractice actions is the provision in section 95.11(4)(a), that, notwithstanding when such actions accrues, "the period of limitations shall run from the time the cause of action was discovered or should have been discovered with the exercise of due diligence." This Court has construed the knowledge component of section 95.11(4) to mean that "a cause of action for negligence does not accrue until the existence of a redressable harm or injury has been established and the injured party knows or should know of either the injury or the negligent act. Peat, Marwick, Mitchell & Co. v. Lane, 565 So. 2d 1323, 1325 (Fla. 1990)(and citations therein).

Pursuant to established rules of construction, this Court should not engraft a new exception to the unambiguous language of section 95.11(4) relating to accrual of the cause of action. Obtaining post-judgment relief in criminal proceedings has never been an element of legal malpractice actions. See Martin v. Pafford, 583 So. 2d 736 (Fla. 1st DCA 1991); see also Henzel v. Fink, 340 So. 2d 1262 (Fla. 3d DCA 1976), cert. denied, 348 So. 2d 948 (Fla. 1977). In Martin, the second district rejected any notion that the statute of limitations depends on the seeking and granting of post-conviction relief. Instead, Martin correctly relied upon the plain language of the statute in determining that the redressable harm, as contemplated by Peat, occurred when the

defendant was convicted, sent to prison and her appeal was affirmed. 583 So. 2d at 738.

The plaintiff in Martin was convicted of first degree murder in 1981. Her direct appeal was affirmed in 1982. In 1984, Martin was advised by an attorney that her defense attorney was incompetent. In 1985, she filed a motion for post-conviction relief which was denied by the trial court; however, the appellate court reversed in 1986 and remanded for a new trial based upon the ground of ineffective assistance of trial counsel. In 1987, Martin filed suit against her defense counsel for legal malpractice.

On appeal from the trial court's order granting the defendant summary judgment based upon the two year statute, Martin argued that her cause of action for malpractice did not accrue until the underlying legal proceeding had been completed on appellate review, because until that time, she could not determine if there was any actionable error by the attorney. 583 So. 2d at 738(citing Peat, 565 So. 2d at 1325 (and cases cited therein)). Martin contended that the "underlying legal proceeding" encompassed the rule 3.850 post conviction proceeding.

The first district soundly refused to include post conviction proceedings as part of the "underlying legal proceeding," noting that post conviction actions are civil in nature and not part of the criminal process itself. Martin, 583 So. 2d at 738; see also Steele v. Kehoe, 724 So. 2d 1192, 1194 (Fla. 5th DCA 1998), rev. granted, 722 So. 2d 194 (Fla. 1998); see generally Murray v. Giarratano, 492 U.S. 1, 13, 109 S. Ct. 2765, 2772, 106 L. Ed. 2d 1

(1989). Consequently, the taking of a direct appeal and the decision thereon were the final steps within the criminal process, characterized as the "underlying legal proceeding" in question in Martin which formed the basis for the legal malpractice action. Thus for purposes of finality or completion of the underlying legal proceeding, and as suggested by this court in Peat, affirmance of the direct appeal against Martin served as the completion point of the underlying proceeding and the trigger date for commencement of the statute of limitations. It was at the conclusion of the direct appeal that Martin knew she was harmed. The court thus concluded:

> Martin was not required to have succeeded in obtaining collateral relief from her criminal conviction before she could civilly sue her attorney for malpractice. If she had not even filed a postconviction proceeding, she would still have been entitled to bring her civil suit for malpractice. Therefore, there is no basis for Martin's claim that she had to await termination of the appellate process following her post conviction proceeding before she could file suit.

Id. at 738.

The court in Martin was constrained in its review of that case by the civil nature of post conviction relief and the absence of any statutory provision creating exceptions to the running of the two year statute of limitations or legislative requirement of success in post conviction proceeding. That court reached the correct result upon adherence to the plain language of section 95.11(4). It also interpreted the statute of limitations in a manner that is consistent in its application for all professions.

Indeed this Court recognized the need to maintain uniformity when applying the statute of limitations for professional malpractice absent legislative intent to distinguish certain

professions in the application of the limitations period. Peat, 565 So. 2d at 1325. There is no legislative intent manifested in the language of section 95.11(4) which states or suggests that criminal defense or appellate attorneys should receive disparate treatment from other attorneys or classes of professionals. By the unambiguous terms of section 95.11(4), aggrieved criminal defendants must file their cause of action for legal malpractice against their criminal appellate attorney no later than two years from the date of affirmance on direct appeal. Here, Rowe should have filed his malpractice action against Jorandby no later than April 11, 1988, and his failure to do so should relieve Jorandby from the burden of defending an unreasonably delayed suit.

The Martin holding also anticipates those instances when a criminal defendant is released from custody for reasons unrelated to a final ruling on a rule 3.850 or habeas proceeding, yet his incarceration may have resulted, at least in part, upon deficient attorney conduct. For example, consider the situation where a defendant's sentence may be shorter than the time it takes to pursue a collateral criminal proceeding to its finality. Under this scenario, the Fourth District Court's holding would work to forever bar this defendant from filing a legal malpractice case against his attorney due to the fact that he did not obtain success on a post conviction action on the grounds of ineffective assistance of counsel. This is certainly an unintended and undesirable result, but nonetheless a consequence of the holding in Rowe v. Schreiber.

When a defendant in a criminal case is convicted because of the known malpractice of his trial attorney and goes to jail, a cause of action for legal malpractice is complete against the trial attorney. Likewise, when that defendant's direct appeal is affirmed because of the known malpractice of his appellate attorney and he remains incarcerated, a cause of action for legal malpractice against appellate counsel is complete. Losing one's liberty and thereafter remaining confined should qualify as "harm" that is "redressable" in an action at law for damages.

It is interesting to note the dichotomy that now exists between determinations of "harm" or "loss" for rule 3.850 purposes and for civil malpractice purposes under the Rowe v. Schreiber rule. The Fourth District Court states that the standards for an ineffectiveness claim pursuant to rule 3.850 proceedings and professional malpractice under section 95.11(4) are the same, but the court reaches the contradictory conclusion that the harm or loss experienced by the criminal defendant giving rise to both actions occurs at different points in time. If the standards are indeed identical for the collateral criminal proceeding and the civil action, and such a standard requires existence of harm or loss to the criminal defendant in both proceedings, it should follow that the conduct precipitating the harm occurs at the same time. Rule 3.850 provides that the motion for post conviction relief shall not be filed more than two years after the judgment and sentence become final, thus suggesting that harm to the criminal defendant arises at least when the conviction is affirmed

on appeal. See rule 3.850(b), Fla. R. Civ. P. If the criminal defendant takes advantage of the remedy afforded by rule 3.850, he is unequivocally aware that he was harmed immediately upon rendition of the unfavorable decision on direct appeal. Why for purposes of section 95.11(4) then does a criminal defendant not know he was harmed until **after** success on the post conviction relief motion, a motion brought by the defendant purely because he was harmed as a result of his attorney's conduct? Why these divergent definitions of "harm" exist is not fully explored nor explained by the court in Rowe v. Schreiber.

In those instances when a criminal defendant chooses to pursue both the civil and criminal path to address his allegations of defective representation, the fact that the parallel proceedings will involve overlapping proof and the determination of similar issues does not mandate that the final resolution of one proceeding be made a condition precedent to instituting the other. Under the current legislative scheme the civil action must be filed notwithstanding any pending post conviction proceedings as there is no stated exception otherwise. Additionally, the judicial system is well-equipped to handle parallel proceedings.

What has been characterized as a "two track" approach to handling parallel civil and criminal proceedings, has been thoroughly analyzed and accepted as the fairest means to balance the competing interests of criminal defendants and their attorneys. See Gebhardt v. O'Rourke, 510 N.W. 2d 900, 907 (Mich. 1994); Duncan v. Campbell, 936 P. 2d 863, 868-69 (N.M. 1997); Seevers v. Potter,

537 N.W. 2d 505, 511 (Neb. 1995). The "two track" approach also preserves the integrity of the statute of limitations as written, without the necessity of incorporating judicially-created exceptions that toll or prerequisites that defer running of the limitations period.

The Fourth District Court has rejected the two tier system of Gebhardt, in favor of the rule implemented by the Alaska Supreme Court in Shaw v. State of Alaska, 816 P. 2d 1358 (Alaska 1991). The fourth district agreed with Shaw that a defendant must obtain post conviction relief before pursuing an action for legal malpractice against their defense attorney. Rowe, 725 So. 2d at 1250(citing Shaw, 816 P. 2d at 1360)(other citations omitted).

Gebhardt is analogous to the case sub judice because the court in that case dealt with a statute that contained a notice or knowledge requirement similar to Florida's section 95.11(4); under MSA 27A.5838, the client has six months after he discovers or should have discovered the existence of his claim to file suit. 510 N.W. 2d at 903. Although the limitation period is shorter for Michigan, the Florida and Michigan statutes are sufficiently substantively similar in nature to make Gebhardt particularly persuasive herein.

In Gebhardt, the Michigan court found the approach in Shaw, which it termed the "no relief-no harm" rule, to be a "legal fiction with serious analytical flaws." 510 N.W. 2d at 906. Gebhardt's reasoning is equally applicable to Rowe's and the Fourth District Court's "no post conviction relief-no redressable harm"

rule:

> Rather than being a legal definition of harm, the rule is a legal fiction that divorces the law from reality. "Persons convicted of a crime will be astonished to learn that, even if their lawyers' negligence resulted in their being wrongly convicted and imprisoned, they were not harmed when they were wrongly convicted and imprisoned but, rather, that they are harmed only if and when they are exonerated."
>
> This legal fiction of "harm" subverts the policy of a statute of limitations by extending indefinitely the time in which this type of legal malpractice claim could potentially accrue. . . .

Id. at 906, n.13 (quoting Stevens v. Bispham, 851 P. 2d 556, 566 (Or. 1993)(Unis, J., specially concurring)).

Gebhardt also discredits the justification put forth by Shaw, and hence the Fourth District Court herein, that first obtaining post conviction relief saves precious judicial resources. The argument goes as follows: under collateral estoppel principles, if one loses his post conviction action, he is forever barred from pursuing what would then be construed as a frivolous civil suit against his lawyer, thus judicial resources are conserved; and if one wins, the judicial determination is binding if a civil malpractice suit is filed, thus judicial resources are conserved by not having to relitigate the same issues in two proceedings. Conservation of judicial resources in this manner is generally a worthy goal, but only where the statutory scheme permits as much. Nothing within Chapter 95, Florida Statutes, however, provides that actions for professional malpractice arising out of criminal defense or appellate representation should be postponed until all post-conviction proceedings are exhausted. As the court in Gebhardt states, the availability of collateral estoppel "should

not lead to subversion of the statute of limitations by allowing a criminal defendant to first obtain post conviction relief before starting the clock on the limitation period." 510 N.W. 2d at 906-07. The Gebhardt court highlights the problems inherent in proceeding simultaneously with a civil and criminal action in the absence of a stay of the civil malpractice action, but specifically acknowledges that the legislature in Michigan enacted a statute that it was bound to uphold. That court found a "workable solution" to alleviate those problems:

> As pointed out by defendants, situations are numerous where a criminal matter is pending before a court, and a related civil suit arising out of that criminal matter is also pending. Commonly, the court presented with the civil suit will yield to the criminal matter, allowing it to proceed so that the rights of the criminal defendant will not be infringed. Thus, the civil and criminal cases proceed along separate tracks, without danger the two will collide producing waste of judicial resources or unfairness to the criminal defendant.

Id. at 907.

Concerned with establishing a precedent that would "potentially indefinitely toll the statute of limitations" for malpractice in New Mexico, the court in Duncan found the rule pronounced by Gebhardt to be the appropriate rule. Again, the prevailing concern in Duncan was to create a system that avoids doing violence to the legislative scheme in place, but also provides the best balance between the competing interests of the criminal defendant and the attorney. 936 P. 2d at 868. Duncan reasoned that the employment of the two track system as outlined by Gebhardt supplied the best solution:

We agree with the Michigan court that the legislative policies

> underlying statutes of limitations, which courts are bound to uphold, suggest that neither the statutes of limitations nor the elements of the tort of malpractice should be altered to satisfy other policy concerns. Rather, Plaintiff's concerns may be accommodated by recognizing that there may be two tracks, one civil and one criminal, arising out of malpractice committed in criminal cases. In appropriate cases, the civil track may be stayed while the criminal track is pursued.

Id. (citations omitted).

Limited reference to the special concurrence in Stevens v. Bispham by the court in Gebhardt does not adequately apprise this Court of the well-reasoned and exhaustive analysis prepared by Judge Unis in rejecting the "no relief - no harm" rule announced by Shaw, and adopted by the Fourth District Court. This brief will only highlight a few of the many valid points presented by the concurrence, which in whole addresses every injurious consequence resultant from application of the rule. Judge Unis refers to this rule as the "no exoneration - no harm," and reflects that the rule destroys the certainty and stability the statute of limitations is intended to provide and to avoid the burden inherent in defending stale claims. Stevens, 851 P. 2d at 571. Judge Unis finds that the running of the statute of limitations, under Shaw and the majority in Stevens, "does not depend on how long it has been since a lawyer committed negligence, does not depend on how long it has been since the negligence caused a person to be convicted, and does not depend on how long it has been since the person knew that the lawyer's negligence caused the conviction." Id. Ultimately, Judge Unis notes that the "no exoneration - no harm" rule is a judicially-created change in the law of statute of limitations which must be made by the legislature rather than the courts. Id. at 574.

By recommending that this Court adopt the rationale posited by Gebhardt and Duncan, Jorandby offers a solution for both upholding the statute as enacted and not unduly wasting judicial resources because stays are usually sought and available at the earliest stages of the civil proceedings and collateral estoppel principles will still operate in that situation. Rowe v. Schreiber is ambitious in its desire to create an exception to the statute where one did not before exist. There is no need to do so when the rule of Martin is entirely consistent with the language of section 95.11(4), without reading exceptions into it, and the procedure for implementing such a rule is feasible and practical as demonstrated by Gebhardt.

All attorneys, including criminal trial and appellate attorneys, are entitled to the certainty of the two year statute of limitations. The statute itself provides a "bright line" for every profession, and there is no compelling reason to create a separate system for criminal trial and appellate attorneys. Since collateral relief may take many years to pursue, for instance over ten years in the instant case, the statute of limitations is now unnaturally extended beyond any period originally contemplated by the legislature. Moreover, it is the province of the legislature to weigh any competing policy concerns and to decide whether a modification of the statute of limitations is warranted under these circumstances.

ISSUE II

WHETHER A CRIMINAL DEFENDANT MUST SUCCESSFULLY OBTAIN POST CONVICTION RELIEF THROUGH A PETITION FOR WRIT OF HABEAS CORPUS ON THE GROUNDS OF INEFFECTIVE ASSISTANCE OF APPELLATE COUNSEL BEFORE FILING A PROFESSIONAL MALPRACTICE SUIT UNDER SECTION 95.11(4), FLORIDA STATUTES, AGAINST HIS CRIMINAL APPELLATE ATTORNEY

Rowe argued below that the two year statute of limitations period under section 95.11(4), Florida Statutes, for filing a legal malpractice action does not begin to run until such time as a defendant obtains post-conviction relief, since before that time the defendant is unable to establish that his "redressable harm" was proximately caused by Defendants.

The Fourth District Court agreed with Rowe and held that obtaining post conviction relief in criminal proceedings is a necessary element for pursuing a legal malpractice action against criminal defense counsel:

> [A] defendant must successfully obtain post-conviction relief for the cause of action to accrue [under section 95.11(4)] in a case involving legal malpractice of a criminal defense attorney. Such a requirement screens the case through the time sensitive and established pathways of the rules of criminal procedure; the complexity of multiple ongoing actions in civil and criminal court is avoided. This requirement better implements the public policy of Florida and creates a bright line rule in the criminal area . . . .

Rowe, 725 So. 2d at 1249. Thus, Rowe must demonstrate that the loss he suffered, i.e. conviction and sentence, was caused by his attorney. Rowe must do so through a post conviction proceeding or collateral action within the context of the criminal courts. If Rowe so proves that his attorney caused this loss, "redressable harm" arises and triggers the commencement of the statute of

limitations under section 95.11(4) as to that attorney. Conversely, the absence of success in a post-conviction relief proceeding based on claims of ineffective assistance of counsel should prevent accrual of the cause of action for legal malpractice.

In applying the "bright line" rule advocated by Rowe and adopted in the appellate opinion, the Fourth District Court concludes that the negligence actions against Schreiber and Jorandby were timely. The application of this rule to the facts in the case sub judice should not, however, have yielded the result that it did, that is reversal of the trial court's dismissal of the action for Jorandby. No cause of action has accrued against Jorandby because Rowe has not succeeded in obtaining relief based on ineffective assistance of **appellate counsel** in a collateral criminal proceeding. Although postconviction relief proceedings were successful in establishing the harm caused by Schreiber's office as trial counsel, there has been no showing of "redressable harm" caused by appellate counsel to justify continued imposition of the tort claim against Jorandby.

The postconviction relief proceeding was instituted by Rowe pursuant to rule 3.850, Florida Rules of Civil Procedure. The sole subject matter of the evidentiary hearing conducted by the trial court was whether Assistant Public Defender in the Seventeenth Judicial Circuit, Douglas Brawley, rendered effective assistance in handling Rowe's 1984 criminal case. On July 15, 1994, the trial court vacated Rowe's conviction and sentence and remanded for a new

trial based on ineffectiveness of trial counsel in the following areas: failure to properly preserve grounds for motion for continuance of criminal trial, failure to consult with a defense medical expert or offer a defense medical expert at trial, failure to procure services of a child psychologist, failure to introduce into evidence a court-ordered visitation schedule or victim's taped diary, failure to present testimony of an impeachment witness, failure to investigate authenticity of an alleged jump rope used in commission of a sexual battery, failure to conduct pretrial investigation into medical records and history of the victim, failure to object to testimony of witness vouching for credibility of the victim and failure to properly object at trial to admissions of certain testimony and evidence.

Jorandby cannot be said to be bound by the findings of fact and judicial determination as a matter of law in the rule 3.850 proceeding. Jorandby, as Public Defender of the Fifteenth Judicial Circuit, had no involvement in or supervision over the assistant public defender employed by the Seventeenth Judicial Circuit handling defense of Rowe's Broward County criminal case. Jorandby's office operated as appellate counsel on direct appeal from the criminal conviction only. His office was neither a party to nor the subject matter of the rule 3.850 proceedings. Additionally, the evidence and court record utilized by the trial court in prosecution of Schreiber in the rule 3.850 matter is entirely distinct and separate from the evidence and record which would be used by the appellate court to hear claims of

ineffectiveness against Jorandby.

As a matter of law, the performance of appellate counsel was not and could not be made the subject of Rowe's rule 3.850 motion. A claim of relief predicated on the assertion of ineffective assistance of appellate counsel can only be reached in a petition for writ of habeas corpus in the appellate court which heard the direct appeal. Wilson v. Wainwright, 474 So. 2d 1162 (Fla. 1985)(determining that supreme court, as appellate court which heard direct appeal in capital criminal case, had jurisdiction to hear petitioner for writ of habeas corpus alleging in effective assistance of appellate counsel); Barclay v. Wainwright, 444 So. 2d 956 (Fla. 1984)(hearing and granting petition for writ of habeas corpus on claims of ineffective assistance of appellate counsel in capital case); Smith v. State, 400 So. 2d 956, 960 (Fla. 1981); ; Knight v. State, 394 So. 2d 997, 999 (Fla. 1981); Ragan v. Dugger, 544 So. 2d 1052, 1054 (Fla. 1st DCA 1989); Irby v. State, 454 So. 2d 757, 758 (Fla. 1st DCA 1984); Triola v. State, 464 So. 2d 1312, 1313 (Fla. 2d DCA 1985); Hernandez v. State, 501 So. 2d 163 (Fla. 3d DCA 1987); Romano v. State, 491 So. 2d 1188, 1189 (Fla. 4th DCA 1986); Disinger v. State, 574 So. 2d 268 (Fla. 5th DCA 1991). Prior to January 1, 1997, there was no specific time bar for filing writs of habeas corpus alleging ineffective assistance of appellate counsel. The two year limitation period contained in rule 3.850 on post conviction relief was not applicable to habeas corpus proceedings prior to that time. See Ragan, 544 So. 2d at 1054. As the cases cited above demonstrate, Rowe had a viable remedy to

redress any wrongs he believed were occasioned upon him by designated appellate counsel. During his period of incarceration from 1988, when his conviction was affirmed on direct appeal, through 1995, when he was released from prison, Rowe never availed himself of his right to petition for writ of habeas corpus to seek reversal of his conviction and sentence due to an alleged ineffectiveness of appellate counsel, Jorandby.[1]

In light of the differing roles Schreiber and Jorandby had in handling Rowe's criminal case, and the differing procedures designed to address alleged inadequacies of each office, Schreiber as trial counsel and Jorandby as appellate counsel should each be entitled to an exacting and ascertainable standard for commencement of the statute of limitations for legal malpractice. The prerequisite of success on a post conviction relief motion for accrual of the cause of action involving legal malpractice should mean, in the case of appellate counsel, that an appellate court has granted a petition for writ of habeas corpus on the grounds of ineffective assistance of appellate counsel. The lack of any decision to that effect obviates the public policy considerations embraced by the Fourth District Court in Rowe v. Schreiber.

Allowing the statute of limitations to run against Schreiber

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[1] Habeas corpus affords prompt judicial determination of the validity of a prisoner's restraint or detention in custody only. See Thomas v. Dugger, 548 So. 2d 230 (Fla. 1989); Seccia v. Wainwright, 487 So. 2d 1156 (Fla. 1st DCA 1986). Consequently, when Plaintiff was released from prison in 1995 when the state decided to "nolle prosequi" the charges, such a remedy disappeared.

and Jorandby from date the trial court afforded rule 3.850 post conviction relief based on ineffectiveness of trial counsel, severely and irreparably prejudices Jorandby in defense of the malpractice claim. Jorandby's office was assigned to the criminal appeal in 1986, ten years before his addition as party defendant to the negligence case. Eight years elapsed before appellate counsel was placed on notice that their performance somehow contributed to Rowe's incarceration. Rowe deprived the Fourth District Court of the opportunity to "screen the case through time sensitive and established pathways of the rules of criminal procedure." Rowe, 725 So. 2d at 1249. Jorandby has not had the opportunity to fully and fairly litigate this issue in a habeas proceeding, thus a "stale, antiquated claim" is placed on Jorandby who is now at "'grave disadvantage' as a result of 'tattered or faded memories, misplaced or discarded records or missing or deceased witnesses.'" Id. at 1250 (and citations therein).

This Court has recently held that appellate counsel's performance should not be vulnerable to attack after five years from issuance of the mandate on direct appeal. See McCray v. State, 699 So. 2d 1366 (Fla. 1997). As stated above, prior to January 1, 1997, there was no specific time bar for filing writs of habeas corpus alleging ineffective assistance of appellate counsel. The Supreme Court adopted amendments and new provisions to rule 9.140, Florida Rules of Appellate Procedure, which now provides as follows with respect to time limitations for filing habeas proceedings for ineffective assistance of appellate counsel:

> (j) Petitions Seeking Belated Appeal of Alleging Ineffective Assistance of Appellate Counsel.
>
> (1) Forum. Petitions seeking belated appeal or alleging ineffective assistance of appellate counsel shall be filed in the appellate court to which the appeal was or should have been taken.
>
> . . . .
>
> (3) Time limits.
>
> . . . .
>
> (B) **A petition alleging ineffective assistance of appellate counsel shall not be filed more than two years after the conviction becomes final on direct review unless it alleges under oath with a specific factual basis that the petitioner was affirmatively misled about the results of the appeal by counsel.**
>
> (C) Time periods under this subdivision shall not begin to run prior to the effective date of this rule.

The 1996 amendments to the rules of procedure became effective January 1, 1997, at 12:01 a.m. Amend. to Fla. Rules of Appellate Proc., 696 So. 2d 1103, 1107 (Fla. 1996).

This Court interpreted the time limitations of the amended rule 9.140, determining that a laches defense may still exist under certain circumstances even if the petition is filed within the two years provided by the rule:

> [A]ny petition for writ of habeas corpus claiming ineffective assistance of appellate counsel is presumed to be the result of an unreasonable delay and to prejudice the state if the petition has been filed more than five years from the date the petitioner's conviction became final. We further conclude that this initial presumption may be overcome only if the petitioner alleges under oath, with a specific factual basis, that the petitioner was affirmatively misled about the results of the appeal by counsel.

McCray, 699 So. 2d at 1366. The Committee Notes to the 1996

Amendment adopted by this Court to rule 9.140 clarifies the point at which conviction is "final":

> Subdivision (j)(3)(B) allows two years "after the conviction becomes final." For purposes of the subdivision a conviction become final after issuance of the **mandate or other final process of the highest court to which direct review is taken,** including review to the Florida Supreme Court and United States Supreme Court.

To avoid retroactively extinguishing the rights of defendants convicted before January 1, 1997, the effective date of the rule, the Committee Notes to rule 9.140 describe that the two year time limit for such defendants was to be calculated beginning on January 1, 1997. See Fla. R. Civ. P. 9.140(j)(3)(C), Committee Notes to 1996 Amendment. The supreme court in McCray was particularly concerned with a petition filed within the two years of the effective date of the rule, but fifteen years after direct appeal:

> The doctrine [of laches] is properly applied to habeas corpus petitions "when the delay in bringing a claim for collateral relief has been unreasonable and the state has been prejudiced in responding to the claim." Anderson v. Singletary, 688 So. 2d 462, 463 (Fla. 4th DCA 1997). . . . Moreover, the doctrine of laches has been applied to bar a collateral relief proceeding when, from the face of the petition, it is obvious that the state has been manifestly prejudiced and no reason for an extraordinary delay has been provided. Anderson (petition filed fifteen years after appeal was decided and saying nothing to justify delay barred by laches where trial transcripts and appellate records had been destroyed). This Court has implemented time restrictions in the filing of collateral relief petitions because inmates must not be allowed to engage in inordinate delays in bringing their claims for relief before the courts without justification and because convictions must eventually become final. As time goes by, records are destroyed, essential evidence may become tainted or disappear, memories of witnesses fade, and witnesses may die or be otherwise unavailable.

This Court acknowledged the substantial prejudice that befalls appellate counsels faced with defending themselves after inordinate

and unjustified delay. This same rationale applies equally well in the instant context where the issues surrounding Jorandby and Ms. Good Earnest's performance were not litigated within a reasonable time after affirmance of Rowe's conviction on direct appeal.

Under the Fourth District Court's analysis, Rowe cannot state that he pursued a collateral criminal proceeding to address claims that the conduct of appellate counsel was deficient. No findings of fact or rulings as a matter of law were rendered by any court of this state pertaining to performance of appellate counsel herein. Consequently, Rowe cannot establish the final "proximate cause" element of a tort action for legal malpractice, as he has not successfully obtained an invalidation of his conviction and sentence based on ineffectiveness of appellate counsel.

Rowe cannot escape the fact that he has not fulfilled his duty to show that he was harmed by Jorandby. Nor could he prevail in establishing such harm in a habeas proceeding. If the standards of proof are equivalent for a claim of ineffective assistance of appellate counsel and legal malpractice in a civil proceeding, the criteria put forth by this Court in Wilson v. Wainwright, is particularly instructive herein:

> The criteria for proving ineffective assistance of appellate counsel parallel the [Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L. Ed. 2d 674 (1984)] standard for ineffective trial counsel: Petitioner must show 1) specific errors or omissions which show that appellate counsel's performance deviated from the norm or fell outside the range of professionally acceptable performance and 2) the deficiency of that performance compromised the appellate process to such a degree as to undermine the confidence in the fairness and correctness of the appellate result. Johnson v. Wainwright, 463 So. 2d 207 (Fla. 1985).

See generally Zeidwig v. Ward, 548 So. 2d 209, 214 (Fla. 1989); Rowe, 725 So. 2d at 1250. The "undermining of confidence in the fairness and correctness of the appellate result" spoken of by this Court can result when a meritorious appellate issue is not raised by appellate counsel and the issue is not erased by harmless error principles. See Guerra-Villafane v. Singletary, 24 Fla. L. Weekly D701 (Fla. 3d DCA Mar. 17, 1999).

At the core of Count II of the Fifth Amended Complaint is Jorandby's decision not to assert a point of error on direct appeal for Brawley's ineffective assistance of trial counsel. Count II, Paragraphs 27 and 28 of the Fifth Amended Complaint alleges as follows against Jorandby:

> 27. JORANDBY and [Margaret Good Earnest] were **negligent in prosecuting ROWE's appeal in failing to raise Brawley's ineffective assistance of counsel** with respect to Brawley's failure to object to the opinion testimony of Sharon Anderson, HRS Counselor; Brawley's failure to object to the reading of the transcript of Tamara Rowe's statement by Detective Sandra Ledegang; Brawley's cross examination of Detective Ledegang, which opened the door to the reading of the transcript of Tamara Rowe; Brawley's failure to object to the Prosecutor's questions to ROWE as to whether other State witnesses had been lying; and Brawley's opening the door, and thereafter, failing to move for a mistrial, as to the testimony of Detective Ledegang about the nude painting in ROWE's apartment. Said instances of Brawley's ineffective assistance of counsel were clear on the record at the time of the appeal and were the express bases of the Trial Court's "Order Granting Defendant's Motion to Vacate Convictions and Sentences," as set out in Exhibit C.
>
> 28. Had JORANDBY and [Margaret Good Earnest] asserted Brawley's ineffective assistance of counsel based on the above described instances in the initial appeal, an evidentiary hearing or new trial would have been mandated by the Appellate Court. Because Brawley's ineffective assistance of counsel was not raised on the initial appeal, the Appellate Court issued a per curiam opinion affirming the Trial Court on April 11, 1988.

In making this decision, Jorandby relied upon the well-settled precept that the adequacy of a lawyer's representation may not raised for the first time on direct appeal. See McKinney v. State, 579 So. 2d 80, 82 (Fla. 1991); State v. Barber, 301 So. 2d 7, 9 (Fla. 1974); Wingate v. State, 24 Fla. L. Weekly D836 (Fla. 1st DCA Mar. 26, 1999); Dennis v. State, 696 So. 2d 1280, 1282 (Fla. 4th DCA 1997). A claim of ineffectiveness of trial counsel is not a matter presented to and ruled upon by the trial court adversely to the defendant during the criminal trial, and thus not within the purview of the appellate court's review. Barber, 301 So. 2d at 9; Dennis, 696 So. 2d at 1282. The proper procedure for raising ineffective assistance of trial counsel is a motion for post-conviction relief under rule 3.850. McKinney, 579 So. 2d at 82; Dennis, 696 So. 2d at 1282. Rowe's claim of constitutional violation arising from ineffective assistance of trial counsel has been fully addressed to the trial court by way of his rule 3.850 motion and he has received the relief sought. Again, another element of the cause of action for legal malpractice is missing; Jorandby did not neglect his duty to Rowe nor did his performance fall below the norm of the profession when he followed Florida case law and statutes indicating that inadequacy of trial court should not be raised as a point of error on direct appeal.

Likewise, Rowe cannot establish that a meritorious point was overlooked by Jorandby on direct appeal. The recent decision in Guerra-Villafane is quite instructive on that point. The court in that case granted a petition for writ of habeas corpus which

asserted ineffective assistance of appellate counsel in failing to raise error arising from a denial to give a requested jury instruction. Defense counsel at trial requested an instruction on the entrapment defense, the trial court judge agreed to read the standard instruction. Defense counsel objected to the standard instruction on the basis that it was incomplete in light of new case law. The trial court overruled the objection, read the standard instruction, and defendant was ultimately convicted. Defense counsel's objection and the trial court's adverse ruling were clear on the face of the record on appeal, but appellate counsel did not raise the issue on direct appeal. The court specifically held that the error surrounding the entrapment defense instruction was a meritorious appellate issue, determined the error was not harmless and concluded that the failure to raise the error constituted ineffective assistance of trial counsel to warrant a new trial.

The existence of the objection and the adverse ruling was of great importance to the determination of ineffective assistance in Guerra-Villafane because appeals may not be taken unless prejudicial error is properly preserved for the record. See Dennis, 696 So. 2d at 1282 (citing section 924.051(3), Fla. Stat. (Supp. 1996)). An issue is not "preserved" unless it was "timely raised before, and ruled on by, the trial court." Id. at 1282 (citing section 924.051(1)(b), Fla. Stat. (Supp. 1996)). As outlined above, the deficiencies of Mr. Brawley's performance in the 1984 criminal case constituting ineffective assistance included his

failure to investigate or prepare pretrial, failure to introduce evidence of exculpatory nature, and failure to present testimony. None of these deficiencies create a record for appeal; these failures were not first presented to the criminal trial court for ruling and thus are not reviewable on direct appeal. The trial court is the appropriate forum to present such claims where evidence to explain why certain actions were taken or omitted by trial counsel. McKinney, 579 So. 2d at 82.

Two further points were considered evidence of Mr. Brawley's ineffective assistance, including failure to object to testimony of witness vouching for credibility of the victim and failure to properly object at trial to admissions of certain testimony and evidence. With respect to the former, this point was indeed raised by Jorandby on direct appeal as a point of error. With regard to the latter, the lack of objection meant that any claim of error was not preserved on the trial record and concededly was not raised by appellate counsel, nor could it have been, for purposes of appellate review.

If the appellate court had heard a petition for writ of habeas corpus based on ineffective assistance of appellate counsel, Jorandby would have been found to have raised every meritorious appellate issue preserved on the record. Jorandby can sufficiently demonstrate that a claim for inadequate trial counsel is not cognizable on direct review, and all underlying errors which made up the overarching claim of ineffectiveness were not preserved errors in and of themselves to permit direct review. All

confidence in the fairness and correctness of the Rowe v. State, 523 So. 2d 590 (Fla. 4th DCA 1988), decision is thus maintained.

CONCLUSION

The trial court correctly applied the law of Florida in granting dismissal of the Fifth Amended Complaint with prejudice as to Jorandby on the basis of the running of the statute of limitations. Accordingly, the final judgment should be affirmed in all respects.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by US Mail this _____ day of April, 1999 to the following: Diane H. Tutt, Esquire, Diane H. Tutt, P.A., 7900 Peters Road, Suite B-100, Plantation, FL 33324; Kenneth J. Kavanaugh, Esquire, 400 S.E. 8th Street, Fort Lauderdale, FL 33316-5000 and Neil Rose, Esquire, 1909 Tyler Street, Seventh Floor, Hollywood, FL 33020.

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