

NR-2599

IN THE SUPREME COURT
OF FLORIDA

CASE NO. 95,000

DISTRICT COURT OF APPEAL,
4TH DISTRICT NO. 97-1997

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,

_____ /

ON REVIEW FROM THE FOURTH DISTRICT COURT OF APPEAL

STATE OF FLORIDA

INITIAL BRIEF OF PETITIONER, ALAN H. SCHREIBER

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INTRODUCTION

The Petitioners, 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, were defendants in the trial court. Respondent, Robert R. Rowe, was the plaintiff in the trial court. In his brief, the parties will be referred to by name.

STATEMENT OF THE CASE AND OF THE FACTS

The statement of the case and of the facts can be taken from the decision of the Fourth District. As explained in the opinion, Rowe was convicted of several counts of capital sexual battery and was sentenced to four terms of life imprisonment on December 14, 1984. The Fourth District affirmed the conviction on April 11, 1988. See, *Rowe v. State*, 523 So.2d 590 (Fla. 4th DCA 1988). Rowe timely moved for post-conviction relief under Florida Rule of Criminal Procedure 3.850, which the trial court denied without an evidentiary hearing. On November 20, 1991, the Fourth District reversed and remanded the case for an evidentiary hearing to determine the merits of the Rowe's position. See, *Rowe v. State*, 588 So.2d 344 (Fla. 4th DCA 1991).

The grounds asserted in the motion for post-conviction relief were that numerous errors committed at trial by Rowe's assistant public defender amounted to a violation of the constitutional right to effective assistance of counsel. On July 15, 1994, after an evidentiary hearing, the trial court granted Rowe's motion for post-conviction relief and ordered a new trial based on the ineffective assistance of Rowe's trial counsel. The State *nolle prossed* the charges against Rowe on May 15, 1995.

On November 23, 1994, Rowe filed a legal malpractice suit against attorney Bradley Stark, who had represented him on the post-conviction relief matter from January 11, 1989 through March 10, 1993. In his third amended complaint, filed on December 26, 1995, Rowe added Alan Schreiber as a party. Schreiber is the Public Defender for the 17th Judicial Circuit, whose office represented Rowe at his trial in 1984. Rowe alleged that Schreiber negligently managed the office and negligently supervised the assistant public defender who had committed malpractice at the original trial.

In his fourth amended complaint, filed on March 13, 1996, Rowe added Richard Jorandby as a party. Jorandby is the Public Defender for the 15th Judicial Circuit, whose office handled the direct appeal from the 1984 conviction. Rowe alleged that his direct appeal was negligently handled based on the failure to raise the issue of ineffective assistance of trial counsel, which according to Rowe was clear from the record. Rowe claimed that Jorandby's failure to raise this issue delayed his release from prison.

Schreiber and Jorandby filed identical motions to dismiss on the ground that the actions were barred by the two-year statute of limitations contained in §95.11(4), Florida Statutes (1997). The trial court granted the motions. The Fourth District reversed, holding that the limitations' period under

§95.11(4)(a) began to run when the trial court granted Rowe's motion for post-conviction relief based on ineffective assistance of counsel. Based on that date, the Fourth District ruled that the actions against both Schreiber and Jorandby were timely.

Schreiber and Jorandby timely filed a Notice to Invoke Discretionary Jurisdiction of the Supreme Court to review the decision rendered by the Fourth District on January 27, 1999. The Fourth District certified its decision to be in direct conflict with a decision of another District Court of Appeal, specifically, the First District's decision in *Martin v. Pafford*, 583 So.2d 736 (Fla. 1st DCA 1991). In contrast to the Fourth District decision, *Martin* held that redressable harm which is necessary for a malpractice action to accrue occurred when the claimant was convicted, sent to prison, and her appeal was affirmed, and not when her conviction was reversed as a result of her post-conviction proceeding. On March 5, 1999, this Court entered its order which postponed a decision on jurisdiction and required briefs to be served by petitioners.

SUMMARY OF ARGUMENT

The trial court properly granted Schreiber's motion to dismiss Rowe's legal malpractice claim. Rowe conceded in his complaint that he knew as of December 14, 1984 that he had a potential malpractice claim against Schreiber. The two year statute of limitations for legal malpractice actions expired on April 11, 1990 - two years from the date that Rowe's conviction was affirmed (April 11, 1988). Yet Rowe did not file his action against Schreiber until more than four years later - on December 26, 1995, when he added Schreiber as a party to this action. Accordingly, the trial court correctly determined that Rowe's action was filed untimely.

Rowe contends - and the Fourth District agrees - that redressable harm or accrual of the cause of action did not arise until his post-conviction relief was granted on July 15, 1994, thus extending the statute of limitations until July 15, 1996 and making the action against Schreiber timely. Courts within the state of Florida, as well as across the land, have disagreed as to whether post conviction relief becomes an additional element in a cause of action for legal malpractice against a criminal defense attorney.

The courts which have determined that the statute of limitations for legal malpractice claims does not accrue until after the defendant obtains post

conviction relief follow what has been called the “no relief - no harm” rule. These courts support this rule for three general reasons. The first reason is the requirement of post-conviction relief promotes judicial economy because many issues litigated in the post-conviction proceedings would be duplicated in the later malpractice action. In this regard, a denial of post-conviction relief would bar a malpractice claim under the application of defensive collateral estoppel. The “no relief - no harm” rule arguably establishes a bright line test which could help resolve statute of limitations issues.

The second reason given in support of the “no relief - no harm” rule is the nature of criminal as opposed to civil proceedings, including the constitutional and procedural safeguards found in the criminal law. Some courts are reluctant to grant civil relief to a criminal defendant who is not entitled to relief under the constitutional and statutory provisions designed for his protection. Third, some courts have supported the rule based on the reason that public policy requires that until there is relief from the conviction, the proximate cause of a defendant’s conviction is his commission of a crime, and not the attorney’s malpractice.

On the other hand, numerous cases have rejected the “no relief - no harm” rule, which has been called a legal fiction with serious analytical flaws.

These cases have concluded that adopting the “no relief - no harm” rule would subvert the policy underlying the statute of limitations, which affords the opposing party a fair opportunity to defend, relieves the court system from dealing with “stale” claims, and protects potential defendants from protracted fear of litigation. Therefore, these courts have found that post-conviction relief is not required in order to maintain a malpractice claim against a former criminal attorney.

Instead of the “no relief - no harm” rule, which ignores the policies behind the statute of limitations, these courts have adopted a workable solution to the concerns regarding judicial economy and potential unfairness to criminal defendants. This view advocates what is known as the “two track” approach, which honors the policies underlying the statute of limitations, while respecting the rights of criminal defendants and the criminal process. In this system, a criminal matter may be pending before a court, while a related civil suit arising out of that criminal matter is also pending. The trial court can stay the civil suit in order to protect the rights of the criminal defendant during the criminal proceeding. The civil and criminal cases proceed along separate tracks, without wasting judicial resources or unfairness to the criminal defendant. The two track approach provides the best balance between the

competing concerns of fairness to criminal defendants and allowing the attorney a fair opportunity to defend the malpractice case.

Unlike the “no relief - no harm” rule which links harm to relief and places no limit on how long a former defense attorney must be prepared to defend a legal malpractice claim, this court should more realistically define harm, and allow a convicted person two years from the final conviction or from discovery of the malpractice, whichever is later, to file a claim. This would be consistent with the statute of limitations, which does not require post-conviction relief in order to file a legal malpractice action. Any such requirement should be initiated by the legislature and not the courts.

Succinctly put, the two track rule fulfills twin objectives of allowing a criminal defendant to sue his attorney when he realizes he has suffered harm, yet alleviates lawyers from potential expansive and never ending liability. At the same time, if post conviction relief has been rejected, then collateral estoppel may apply to bar the civil claim for attorney malpractice. In such a manner, this court can create a rule of law which best balances the competing policy interests at hand. Under such a rule, the malpractice claim against Schreiber was properly dismissed by the trial court.

ARGUMENT

THIS COURT SHOULD ADOPT THE “TWO TRACK” APPROACH AND REJECT THE “NO RELIEF - NO HARM” RULE WHICH MAKES POST CONVICTION RELIEF AN ADDITIONAL ELEMENT IN A CAUSE OF ACTION FOR LEGAL MALPRACTICE AGAINST A CRIMINAL DEFENSE ATTORNEY, THUS MAKING THE CLAIM AGAINST SCHREIBER UNTIMELY DUE TO THE EXPIRATION OF THE STATUTE OF LIMITATIONS, AS CREATING SUCH A RULE OF LAW BEST BALANCES THE POLICIES UNDERLYING THE STATUTE OF LIMITATIONS WITH THE COMPETING POLICY INTERESTS OF JUDICIAL ECONOMY AND THE RIGHTS OF CRIMINAL DEFENDANTS.

Under Florida law, the statute of limitations begins to run from the time a cause of action accrues. Section 95.031, *Florida Statutes* (1997). “A cause of action accrues when the last element constituting the cause of action occurs.” Section 95.031(1), *Florida Statutes* (1997). In regard to professional malpractice actions, there is a two year statute of limitations with the period of limitations running “from the time the cause of action is discovered, or should have been discovered with the exercise of due diligence.” Section 95.11(4)(a), *Florida Statutes* (1997).

In *Peat, Marwick, Mitchell & Co. v. Lane*, 565 So.2d 1323, 1325 (Fla. 1990), this court explained that “[g]enerally, 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.” *Lane* cited this court’s earlier decision in *Edwards v. Ford*, 279 So.2d 851 (Fla. 1973), in which the court agreed that “the event which triggers the running of the statute of limitations is notice to, or knowledge by the injured party that a cause of action has accrued in his favor, and not the date on which the negligent act which caused the damages was actually committed.”

More recently, in *Silvestrone v. Edell*, 23 Fla. L. Weekly S625 (Fla. Dec. 17, 1998), this court considered the application of the statute of limitations to litigation related legal malpractice in a civil context. This court held that the two year statute of limitations for litigation related malpractice under Section 95.11(4)(a), Florida Statutes (1997), begins to run when final judgment becomes final.¹ In this decision, the court adopted a “bright-line rule” to provide certainty and reduce litigation over when the statute starts to run.

¹ The court explained that a judgment becomes final either upon the expiration of the time for filing an appeal or post-judgment motions, or, if an appeal is taken, upon the appeal being affirmed and either the expiration of the time for filing motions for rehearing or a denial of the motions for rehearing.

The unresolved issue which the instant case brings to the court is: When does redressable harm occur in the context of a malpractice claim against a former criminal attorney? One thing is certain, however, under the circumstances of this case. According to the allegations in paragraph 22 of Rowe's Fifth Amended Complaint, "As of December 14, 1984, Rowe knew Schreiber and Brawley had been negligent and that Rowe had a potential claim against them."

If the event which triggers the running of the statute of limitations is notice to, or knowledge by the injured party that a cause of action has accrued in his favor, then Rowe unquestionably had such notice or knowledge at the time of his conviction and sentence on December 14, 1984. In accordance with *Silvestrone*, the two year clock started running when Rowe's conviction was affirmed on April 11, 1988. Therefore, the two year statute of limitations for legal malpractice expired two years later on April 11, 1990. Under this analysis, the statute of limitations expired more than four years prior to the time that Rowe filed his third amended complaint on December 26, 1995, when he added Alan Schreiber as a party. The trial court thus properly dismissed the claim by Rowe against Schreiber based on the expiration of the two-year statute of limitations.

Rowe's position, however, is that redressable harm or accrual of the cause of action did not arise until he was granted post-conviction relief on July 15, 1994. Under this view, adopted in the Fourth District opinion, post-conviction relief under Rule 3.850 becomes an additional element in a cause of action for legal malpractice against a criminal defense attorney, such that a cause of action does not accrue for statute of limitations purposes until a criminal defendant obtains post-conviction relief. In order to understand the divergence of court decisions on this issue, both in Florida and in other states, some of the leading decisions representing each view will be examined.

The supreme courts in Alaska and Oregon are two examples of jurisdictions which have held that a legal malpractice action against a criminal attorney does not accrue for statute of limitations purposes until post-conviction relief is obtained. In *Shaw v. State of Alaska, Department of Administration, Public Defender Agency*, 816 P.2d 1358 (Alaska 1991), several years after the plaintiff was convicted, he received post-conviction relief and a reversal of his conviction on a theft charge due to the constitutional inadequacy of his counsel's representation. He then filed a malpractice action against his former criminal counsel who interposed the statute of limitations defense. The Alaska Supreme Court held that a

convicted criminal defendant must obtain post-conviction relief as a precondition to maintaining a legal malpractice claim against his or her attorney.

The court reasoned that because obtaining such relief will remain uncertain until actually granted, the statute of limitations for filing legal malpractice claims must be tolled until such relief is granted. The court explained that the requirement of post-conviction relief promotes judicial economy because many issues litigated in the quest for post-conviction relief will be duplicated later in the legal malpractice action. According to the court, if the defendant was denied post-conviction relief, the legal principal of collateral estoppel would serve to eliminate any frivolous malpractice claim. The court also believed that its decision established a bright line test which would assist courts in the resolution of statute of limitations issues. *Shaw* also acknowledged that requiring a successful post-conviction proceeding before the legal malpractice action could be brought, might appear to impose a higher burden on the allegedly wronged criminal defendant than the burden faced by a similarly wronged civil litigant.

In *Stevens v. Bispham*, 851 P.2d 556 (Oregon 1993), the Oregon Supreme Court also held that for purposes of the statute of limitations, an action for malpractice did not accrue until the conviction was set aside and the

client released. *Stevens* was a professional negligence action brought by a former criminal defendant against the lawyer who defended him. The court held that the statute of limitations for legal malpractice in a criminal context does not begin to run until the plaintiff has been exonerated of the criminal offense through reversal on direct appeal, through post-conviction relief proceedings, or otherwise. The court stated that “determining precisely when plaintiff is deemed by the law to have suffered harm is the pivotal inquiry because until he is deemed to have been harmed, that requisite element is missing and plaintiff has no claim that he could have brought against defendant and, therefore, the statute of limitations has not yet begun to run.” *Id.* at 560.

The court explained that although a plaintiff who has been wrongfully convicted has suffered “harm” in the common meaning of that term, when the conviction occurs, the court spoke of “harm” in the legal sense, i.e. “a collection of facts that the law is prepared to recognize as constituting the “harm” element of a claim for professional negligence. *Id.* at 560. The court declared “in view of the extensive statutory provisions already in place for the protection of convicted offenders, we think that it would be inappropriate to treat victims of alleged negligence by defense counsel as having been

'harmed' for the purpose of maintaining a legal malpractice action in cases like this, unless they show that their counsel failed to meet the established standards in a way that would make post-conviction relief appropriate." *Id.* at 562.

The court stated that it would not be appropriate to treat a complaining convicted offender as having been "harmed" in a legally cognizable way by that conviction while the conviction and sentence remained valid for all other purposes. *Id.* at 562. *Stevens* therefore held that in order for one convicted of a criminal offense to bring an action for professional negligence against that person's criminal defense counsel, the person must, in addition to alleging a duty, its breach, and causation, allege "harm" in that the person has been exonerated of the criminal offense through reversal on direct appeal, through post-conviction relief proceedings, or otherwise. The court specifically ruled that the plaintiff had not suffered such harm at the hands of defendant unless and until he was exonerated of the criminal offense. Because the date of exoneration in that case was within two years of the date of the filing of the malpractice claim, the claim was timely filed.

Stevens relied on *Carmel v. Lunney*, 70 N.Y.2d 169, 518 N.Y.S.2d 605, 511 N.E.2d 1126 (1987), in which the New York Court of Appeals held that the

plaintiff's failure to successfully challenge his underlying conviction was fatal to his claim in the malpractice action. In *Carmel*, the court declared that the plaintiff must allege his innocence in the criminal proceeding in order to state a cause of action for legal malpractice arising from negligent representation in the criminal proceeding. Because the plaintiff's conviction had not been successfully challenged, the court ruled that he could neither assert, nor establish his innocence which precluded a malpractice action against his attorney.

Another decision which supports Rowe's position to some extent is *Steele v. Kehoe*, 23 Fla. L. Weekly D771 (Fla. 5th DCA, March 20, 1998), rev. granted 92950 (Fla. Sept. 14, 1998). In that case, a convicted criminal defendant sued his lawyer for malpractice for failing to timely file a Rule 3.85 motion on his behalf. The trial court dismissed the complaint, ruling that the 3.85 motion was "jurisdictionally barred" since the defendant was unable to prove that he was improperly convicted, because he had not had the underlying conviction set aside which he of course, could not do because of his lawyer's untimely filing of the motion. The Fifth District affirmed the dismissal of a civil malpractice action against the attorney.

Steele seemed to broadly hold that “exoneration is a pre-requisite to a legal malpractice action arising from a criminal prosecution.” However, *Steele* was really concerned with the more narrow issue of the appropriate remedy for a defendant whose attorney neglects to file a rule 3.850 motion within the two year time limitations of the rule. Unlike the instant case against Schreiber, *Steele* did not involve a claim of malpractice concerning the ineffective assistance of counsel at a criminal trial. Therefore, the broad statement of the court regarding exoneration as a pre-requisite to a legal malpractice action arising from a criminal prosecution appears to be dicta, as applied to the facts herein.

The Fifth District justified its ruling with three policy reasons:

First, criminal procedure provides a remedy for ineffective assistance of counsel. Judicial economy will be best served if we permit the criminal court to determine the issue of ineffective assistance of counsel. If the court should determine that the attorney’s representation, even if sub-par did not effect the result of the criminal trial, any subsequent malpractice action should not lie. Second, public policy should recognize that unless a defendant is exonerated, the proximate cause of the defendant’s conviction is his or her commission of a crime and not legal malpractice. Third and most important, unless exoneration is accomplished, a legal malpractice action would be an inadequate remedy. *Id.* at 772.

On the other hand, a number of cases, including *Martin v. Pafford*, 583 So.2d 736 (Fla. 1st DCA 1991), have rejected the view that a cause of action for legal malpractice does not accrue until the plaintiff obtains post-conviction relief. Martin appealed a final summary judgment entered in favor of Pafford based upon the trial court's determination that Martin's legal malpractice action was barred by the statute of limitations. The court considered that a post-conviction proceeding was collateral to the criminal action under attack, was independent of the original prosecution, and was civil in nature rather than criminal. *Id.* at 738.

The court found no basis for Martin's contention that she had to await the outcome of her post-conviction proceeding before initiating her suit for malpractice. To the contrary, the court ruled that "the redressable harm occurred when claimant was convicted, sent to prison, and her appeal was affirmed. The redressable harm did not occur when appellant's conviction was reversed as a result of her post-conviction proceeding." *Id.* at 738. The court stated:

Martin's claim of malpractice was not dependent upon appellant's reversal of her conviction. 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 post-conviction proceeding, she would

have still 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.

Because Martin was injured when she was convicted and sent to jail and her appeal was affirmed, the court ruled that the malpractice claim was untimely filed. *Id.* at 739.²

Martin v. Pafford hardly stands alone in rejecting the "no relief - no harm" rule. The supreme courts of Michigan and Nebraska have refused to accept the "no relief - no harm" rule and have come up with workable solutions to the concerns regarding judicial economy and potential unfairness to criminal defendants. In *Gebhardt v. O'Rourke*, 444 Mich. 535, 510 N.W. 2nd 900 (1994), the Supreme Court of Michigan considered whether Gebhardt's attorney malpractice suit was barred by the statute of limitations.

The applicable statute required a plaintiff in a legal malpractice action to file suit within two years of the attorney's last day of service, or within six months of when the plaintiff discovered, or should have discovered the claim. The court agreed that the plaintiff's action was barred under both the two-year

²See dissent of Chief Judge Griffin in *Steele*, relying on the *Martin* decision.

accrual and the six-month discovery provisions of the statute. The court articulated that its decision conformed with the policies underlying the statute of limitations, which affords the opposing party a fair opportunity to defend, relieves the court system from dealing with “stale” claims, and protects potential defendants from protracted fear of litigation.

Gebhardt had argued that a required element of a cause of action for legal malpractice, in the context of an underlying criminal conviction, was final post-conviction relief. Gebhardt contended that until post-conviction relief was obtained, he could not have discovered that the attorney was the proximate cause of his harm, or that ascertainable harm had even occurred. The Michigan supreme court, however, rejected the “no relief - no harm” rule advocated by *Gebhardt* “because it is a legal fiction with serious analytical flaws.” The court also found that the policy arguments supporting the adoption of such a rule were unpersuasive when balanced against the policies underlying the statute of limitations. *Id. at 906.*

The court declared:

Issue preclusion and collateral estoppel should be utilized in the appropriate case. However, the availability of these devices should not lead to a subversion of the statute of limitations by allowing a criminal defendant to first obtain post-conviction relief before starting the clock on the limitation.

In adopting a workable solution to the concerns regarding judicial economy and potential unfairness to criminal defendants, the court explained that there are numerous situations where a criminal matter is pending before a court, and a related civil suit arising out of that criminal matter is also pending. The court presented with the civil suit will commonly 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 that the two will collide producing waste of judicial resources or unfairness to the criminal defendant.” *Id. at 907.*

The court thus adopted the “two track” approach which recognizes that a criminal defendant who initiated post-conviction relief proceedings should have sufficient knowledge to have discovered his claim against the initial defense attorney for statute of limitations purposes. To put the defense attorney on notice that he will have to defend against a malpractice claim, thereby honoring the policies underlying the statute of limitations, the criminal defendant must file his malpractice complaint within six months of discovering the existence of the claim, or within two years of the attorney’s last date of service, in accordance with the particular statute of limitation involved in that state. With the claim preserved, the claimant should seek a stay in the civil

court until the criminal case is resolved. The trial court in the civil suit would have discretion whether the stay would last until judgment in the criminal matter is final, or, if after the initial judgment on post-conviction relief, justice would permit going forward with the civil suit while the appeal process in the criminal manner continues until final determination. *Id.* at 907.

“Utilizing this ‘two track’ approach provides the best balance between the competing concerns of fairness to criminal defendants and allowing the attorney a fair opportunity to defend.” *Id.* at 907. Consistent with the *Martin* decision, the Michigan Supreme Court in *Gebhardt* rationalized that a cause of action for malpractice could well exist regardless of the outcome of post-judgment proceedings in the underlying case. *Id.* at 907. The court ruled that a criminal defendant’s legal malpractice action accrues on the last date of his attorney’s professional service in the underlying criminal matter out of which the negligence arose, after which he has two years to file suit. The malpractice suit would not be barred by the two-year provision if it is filed within six months of when the claimant discovers, or should have discovered, the malpractice claim. The court held that successful post-conviction relief is not a prerequisite to the maintenance of a claim for legal malpractice arising out of negligent representation in a criminal matter. Since *Gebhardt* did not

file suit within two years of her attorney's appearance at her sentencing for the criminal charge, his last day of professional service, or within six months after she moved for a new trial, which was when she should have discovered her claim, the statute of limitations precluded her suit.

The Supreme Court of Nebraska adopted the two track approach of *Gebhardt* in *Seevers v. Potter*, 537 N.W. 2nd 505 (Neb. 1995). Seevers, like *Gebhardt* and like *Rowe* herein, argued that the statute of limitations in a legal malpractice claim against a criminal attorney is tolled until the criminal defendant successfully obtains post-conviction relief. In Nebraska, the statute of limitations begins running upon the occurrence of the professional negligence alleged, not when the plaintiff realizes the damage caused by the negligence. In adopting its statute of limitations, the Nebraska legislature “opted for the occurrence rule, tempered or ameliorated by a provision for discovery.” *Id. at 511*. The fact that the plaintiff was imprisoned after his conviction did not affect the plaintiff's ability to reasonably recognize that there might be a viable claim for legal malpractice against the criminal trial attorney, according to the court. *Id. at 511*.

The Nebraska Supreme Court found the *Gebhardt* analysis more persuasive than the “no relief - no harm” rule and thus adopted that reasoning.

Because Seevers could have reasonably discovered that he had a potential cause of action more than a year before he filed his legal malpractice claim, the action was barred by the statute of limitations.

In *Duncan v. Cambell*, 936 P. 2nd 863 (N.M. App. 1997), the court in New Mexico also adopted the two-track approach of *Gebhardt*. Like Rowe, Duncan asserted in his complaint that he knew from the time of the criminal trial that his attorneys failed to adequately and properly represent him. The court reflected that when dealing with statutes of limitations, it was dealing with legislatively imposed restrictions and that those restrictions were enacted for particular reasons. The underlying purpose of the statute of limitations is to compel the exercise of a right of action within a reasonable time so that the party against whom the action is brought will have the fair opportunity to defend. *Id. at 866*.

The supreme court of Missouri is another court that concluded that having a conviction set aside is not a condition to maintaining a negligence action against a former attorney. *Jepson v. Stubbs*, 555 S.W.2d 307, 313 (Mo. Sup. Ct. 1977). Additionally, the supreme court of Ohio held that a plaintiff need not allege a reversal of his conviction in order to state a cause of action for legal malpractice arising from representation in a criminal

proceeding. *Krahn v. Kinney*, 538 N.E. 2d 1058, 1061 (Ohio Sup. Ct. 1989). The court required the same elements of proof from all legal malpractice actions, whether arising from criminal or from civil representations. The court further distinguished between an action to vacate a criminal judgment based on ineffective assistance of counsel and a cause of action for legal malpractice. Specifically, a claim of ineffective assistance of counsel is based on constitutional guarantees and seeks reversal of a criminal conviction; while a claim for legal malpractice is a common law action, grounded in tort, which seeks monetary damages. Proof of one does not necessarily establish the other. *Id.* at 1062. *See also, Quick v. Swem*, 586 A.2d 223 (Pa. App. 1989) (post conviction relief is not necessary to maintain civil action against trial counsel).

Perhaps the most impressive analysis concerning the problems with the “no relief - no harm” rule is contained in Justice Unis’ specially concurring opinion in *Stevens v. Bispham*, 851 P. 2nd (Supreme Court Oregon, 1993). As explained, the majority in *Stevens* held that to bring a professional negligence claim against a former criminal defense counsel, in addition to alleging a duty, its breach, and causation, the person must allege “harm” in that the person

has been exonerated of the criminal offense. In response to this holding,

Justice Unis believed that:

Plaintiff and other persons convicted of a crime will be astonished to learn that even if their lawyers' negligence resulted in their being wrongfully convicted and imprisoned, they were not harmed when they were wrongfully convicted and imprisoned but, rather, that they are harmed only if and when they are exonerated. Such persons will be no less astonished because of the majority's insistence that its rule is simply a legal definition of harm. (i.e., a legal fiction). Such attempts to divorce the law from reality should be avoided.

Justice Unis described the majority's holding as the "no-exoneration/no-harm" rule. Justice Unis agreed that with the majority that the trial court wrongly granted summary judgment for the defendant, but reasoned that the resolution of the issue of when plaintiff discovered the defendant's act and omissions had caused him harm presented a genuine issue of material fact. For a number of reasons, Justice Unis strongly and wisely rejected the majority's "no-exoneration/no-harm" rule.

Initially, Justice Unis presented an argument that the "no-exoneration/no-harm" rule interfered with the objectives of the statute of limitations. *Id. at 571*. The statute of limitations, of course, define when an action is barred due to the passage of an excessive period of time from the accrual of the cause of action. "Statute of limitations are designed to promote

stability in the affairs of persons and to avoid the unfairness and burdens inherent in defending stale claims.” *Id. at 571.*

The “no-exoneration/no-harm” rule means that the running of the statute of limitations does not depend on how long it has been since the attorney committed malpractice, it does not depend on how long it has been since the malpractice cause a person to be convicted, and it does not depend on how long it has been since the person knew that the attorney’s malpractice caused the conviction. According to the majority in *Stevens*, the claim is timely as long as it is brought within two years of the plaintiff’s exoneration of the criminal offense, because the claim did not accrue and the statute of limitations did not begin running until that time. *Id. at 571.* Incredibly, under such a theory, “claims by convicted persons for legal malpractice may never be stale, because exoneration of the criminal offense through reversal or vacation after one month or after three decades may suddenly cause the claim to accrue.” *Id. at 571-572.*

Justice Unis illuminated that “the majority’s link between harm and exoneration means that there may be no limit on how long criminal defense lawyers must be prepared to defend a claim for legal malpractice in defending a person who has been convicted of a crime. According to the majority, as

long as a conviction is valid, and even if everyone knows about the criminal defendant's lawyer's negligence, the claim for legal malpractice has not even accrued; it could accrue at any time with no time limitations, and the criminal defense lawyer would then have to defend it." *Id.* at 571 f.n. 7.

Moreover, a convicted person potentially can be exonerated of the criminal offense at any time, and suddenly the claim for legal malpractice accrues and the two-year statute of limitations begins to run. The length of a sentence is not even a limitation, because a conviction could be vacated or a pardon granted even after a person served the full sentence and was released. Yet the majority prevents the claim from even accruing before the convicted person is exonerated. In many cases a person would never be considered harmed, no matter how clear it was that the lawyer's negligence caused the person to be convicted and wrongfully imprisoned. *Id.*

Judge Unis stated that it made more sense to give a more realistic definition of harm, and to allow convicted persons, like anyone else with a potential negligence claim, two years from the date that the person suffered harm and knew or should have known that the harm was caused by the lawyer's negligence to file the claim. *Id.*

The more appropriate rule under existing law, and the rule consistent with professional negligence claims generally, is that

a claim for legal malpractice arising from a lawyer's defense of a client in a criminal case accrues and the two-year statute of limitations begins to run when the client suffered harm and knew or should have known that the harm was caused by the client's lawyer's negligence. Thus, if plaintiff both was harmed and knew or should have known that the harm was caused by defendant's negligence more than two years before bringing the action against defendant, the statute of limitations would bar the action.

Ironically, the majority's "no-exoneration/no-harm" rule leaves criminal defense lawyers open to the interminable possibility of being sued by an convicted client who has not been exonerated but who, theoretically, could be exonerated at any future time. . ."
Id. at 572.

Justice Unis also pointed out that the legislature defined the statute of limitations for a professional negligence claim as two years, with no distinctions dependent on whether the claim arises from representation in a civil case or in a criminal case. "A client should not be required to obtain a reversal either of a civil or of a criminal judgment in order to bring a claim against a lawyer for legal malpractice. In crafting and applying the "no-exoneration/no-harm" rule, the majority undermines the legislature's statute of limitations. . . "*Id.* at 573.

Justice Unis also revealed other analytical flaws in the reasoning which supports the "no-exoneration/no-harm" rule. First, no statute required a petition for post-conviction relief as a jurisdictional pre-requisite for the filing of a timely professional negligence action. Nowhere is it stated in the statute

that the legislature has enacted “the mandatory hoops that the majority requires a plaintiff to jump through before being permitted to file a legal malpractice claim against a criminal defense lawyer.” *Id.* at 574. “A change in the statute of limitations for professional negligence, if warranted because of the evils feared by the majority, must be made by the legislature rather than by this court.” *Id.* at 574.

Judge Unis also explained that the fact that a criminal defendant has not been exonerated of the criminal offense does not mean that the criminal defendant has not been harmed by the lawyer’s negligence. In effect, the “no-exoneration/no-harm” rule results in an inappropriate form of issue preclusion against criminal defendants. *Id.* at 575. The issue of whether a criminal defendant is proven guilty beyond a reasonable doubt is not the same issue as whether the lawyer’s negligent representation contributed to the conviction. The “no-exoneration/no-harm” rule allows criminal defense lawyers to hide behind their own negligence by asserting their clients’ convictions as defenses to the claims of negligence against the lawyers. But in civil matters, lawyers who represent losing clients do not have the ability to respond that the client lost, and that therefore the lawyer was not negligent.

The problem created by the majority’s rule can be compounded. A criminal defendant may (1) be wrongfully convicted at trial and

imprisoned because of ineffective assistance of trial counsel; (2) lose on appeal because of ineffective assistance of appellate counsel; and (3) lose on post-conviction relief proceedings because of ineffective assistance of post-conviction relief counsel, and have no other legal resource with respect to that conviction. Today, the majority decides that cumulative effect of all this legal malpractice is that the criminal defendant *has not even been harmed* and, thus, has no claim against any of the lawyers whose representation was negligent and resulted in the wrongful conviction and continued imprisonment. (citations omitted) (emphasis added). *Id.* at 575.

Judge Unis wisely pointed out that the “no-exoneration/no-harm” rule mixes two discrete concepts, the occurrence of harm and the extent of damages. “As a practical matter, there can be no doubt that, if a criminal defense lawyer’s negligence causes a client to be wrongfully convicted and imprisoned, the client is harmed on the first day of the sentence of imprisonment, if not before. That is a question of when the harm *occurred*. The *extent* of the damage, but not its occurrence, is affected by whether the person is ultimately exonerated.” *Id.* at 576. If the claimant is exonerated of the criminal conviction, the claimant has obviously been harmed. Ironically, the client who is convicted wrongfully but not exonerated has suffered the greatest harm. However, this individual is precluded from suing under such a rule.

As Judge Justice Unis noted, the theme underlying the “no-exoneration/no-relief” rule is that a guilty person has not been harmed by a conviction and thus should not be able to bring a malpractice case against his lawyer as a result of the conviction, regardless of whether the person, although guilty, should have been acquitted. *Id.* at 577. In sum, Judge Unis stated that in crafting the “no-exoneration/no-harm” rule, the majority “clings to a legal fiction defining harm that utterly fails to resemble reality. I regret that the majority does not see how wrong that rule is.” *Id.* at 579.

In *Silvers v. Brodeur*, 682 N.E.2d 811 (Ind. Ct. App. 1997), Silvers - like Rowe herein - argued that the statute of limitation did not begin to run until his petition for post conviction relief was granted. As in Florida, the Indiana statute of limitations for legal malpractice claims is two years, subject to the “discovery rule,” which provides that the time does not begin to run until the plaintiff knows, or in the exercise of ordinary diligence could have discovered, that he had sustained an injury. *Id.* at 813. Like Rowe, Silvers argued that until his conviction was set aside, he could not prove damages or proximate causation, and could not therefore establish a cause of action for legal malpractice.

Concluding that the “discovery rule” controlled whether a legal malpractice action by a criminal defendant was timely, the court thus required a criminal defendant to file his malpractice action within two years of discovering the malpractice. “This rule meets the dual goals of permitting criminal defendants to file claims against their attorneys when they become aware that they have suffered harm, yet relieves attorneys from the prospect of unlimited and unending liability. Further, the discovery rule still allows the application of collateral estoppel in those cases in which a post-conviction or appellate court has determined the issue of a criminal defense attorney’s effectiveness.” *Id.* at 817-818. Silver’s claim was therefore barred. The

Silvers court

also note[d] that an attempt to establish an easy, bright-line test for determining the accrual of the statute of limitations by requiring exoneration fails in its application. In particular, those states which require exoneration do not specify at what point a criminal defendant is exonerated: when he achieves successful post-conviction relief, when he is retried and a different result is achieved, or when he can no longer be retried for the same crime. To simply require successful post-conviction relief ignores the fact that a defendant may be retried and convicted of the same or a similar crime. Similarly, some defendants will never be retried, and therefore, will never obtain a different result. Finally, to prohibit a malpractice claim until a criminal defendant can no longer be tried for the crime would among other problems, essentially deny relief for those previously convicted of murder, as murder has no statute of limitations. *Id.* at 817.

Essentially, *Silvers* followed the two track approach by advising the trial court, in a legal malpractice proceedings, to hold the malpractice claim in abeyance until the conclusion of any criminal proceedings which bear either on the criminal defendant's conviction or the effectiveness of his attorney. *Id.* at 818.

The facts of the case *sub judice* exemplify the policy reasons underlying the statute of limitations. Florida's two year statute of limitations for legal malpractice provides the lawyer a fair opportunity to defend, relieves the court system from dealing with stale claims, and protects potential defendants from protracted fear of litigation. Applying the "no relief - no harm" rule to Rowe's claim would defeat not only the language of the statute but also the very purpose of the statute itself. Rowe knew that he had a potential malpractice claim against Schreiber more than fourteen years ago on December 14, 1984, yet he waited more than eleven years before he sued Schreiber. To allow the claim so long after Rowe knew of the alleged negligence would hamper Schreiber's fair opportunity to defend; add a stale claim to the court system; and extend the fear of protracted litigation. The "no relief - no harm" rule thus violates the time period provided by the statute and subverts the integrity of the statute of limitations.

Adopting the two track approach, on the other hand, gives the court an opportunity to uphold the limitations period mandated by the legislature and to honor the policies underlying the statute of limitations, while simultaneously taking into account the interests of judicial economy and the rights of criminal defendants. This approach requires that any malpractice action against Schreiber be filed within two years after his conviction was final. To protect his rights in the criminal matter, Rowe could have sought a stay of the civil claim during the pendency of the criminal matter. In the meantime, Schreiber would at least be made aware of the malpractice claim timely enough to have a fair opportunity to defend it. Under this rule, Rowe's action was filed against Schreiber more than four years after the expiration of the statute of limitations.

By allowing the court to balance the competing policy interests involved and by more realistically defining harm, the two track approach is simply a better rule. Consistent with the language of the statute of limitations, this approach provides two years from final conviction or from discovery of the malpractice, whichever is later, for a malpractice claim to be brought against a former criminal attorney. Post-conviction relief is not a required element of the claim, but if such relief has been denied, defensive collateral estoppel applies to bar the civil malpractice claim, thus serving the interests of judicial

economy. Applying this rule, Rowe's malpractice claim against Schreiber was correctly dismissed by the trial court based on the expiration of the statute of limitations.

CONCLUSION

Based on the foregoing, Petitioner Alan H. Schreiber requests that this court enter its order affirming the trial court's dismissal of the motion to dismiss based on the expiration of the statute of limitations.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was sent via U.S. Mail this 29th day of April, 1999, to: Diane H. Tutt, Esq., 7900 Peters Road, Suite B-100, Plantation FL 33324, counsel for Respondent Robert R. Rowe; Kenneth J. Kavanaugh, Esq., 400 S.E. 8th Street, Ft. Lauderdale FL 33316-5000, counsel for Respondent Robert R. Rowe; James C. Barry, Esq., Adams, Coogler, Watson & Merkel, P.A., Post Office Box 2069, 1555 Palm Beach Lakes Blvd., Suite 1600, West Palm Beach, FL 33402-2069, counsel for Petitioner, Richard L. Jorandby.

I HEREBY CERTIFY that this brief is produced in 14 point Arial font type, which is proportionately spaced.

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