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

REPLY BRIEF OF THE PETITIONER, JORANDBY AND ANSWER BRIEF OF CROSS-RESPONDENT, JORANDBY

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CERTIFICATE OF INTERESTED PERSONS

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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/Cross-Respondent
2. Richard L. Jorandby - Petitioner/Cross-Respondent
3. Robert R. Rowe - Respondent/Cross-Petitioner
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/Cross-Respondent, 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/Cross-Petitioner, 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

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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

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WHETHER A CRIMINAL DEFENDANT SHOULD BE REQUIRED TO PRESENT EVIDENCE OF "ACTUAL INNOCENCE" AS AN ELEMENT OF THE CAUSE OF ACTION FOR LEGAL MALPRACTICE ARISING FROM AN UNDERLYING CRIMINAL CASE

SUMMARY OF PETITIONER/CROSSRESPONDENT'S ARGUMENT

The conflict in opinions of the district courts of this state has been resolved concerning the running of the statute of limitations for professional negligence. Steele v. Kehoe, 24 Fla. L. Weekly S237 (Fla. May 27, 1999).

Notwithstanding this, it is still true that 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. In examining the public policy considerations underlying the rule announced in Steele and Rowe, it becomes apparent that the collateral estoppel, judicial economy and preservation of evidence effects will not occur in the absence of a finding of ineffectiveness against Jorandby in the criminal proceeding.

Moreover, the "actual innocence" requirement imposed by the district court of appeal provides a reasonable balance between the interests of criminal defendants in pursuing a malpractice action and those of the public defender offices of the State of Florida. Proof by a preponderance of evidence of "actual guilt" upholds the public policy that criminals should not profit from their criminal misdeeds merely because of negligent conduct of their attorney in the criminal proceeding. Public defenders, who in some states are immune from civil suit, require special protections because of their unique characteristics not found in other attorneys. Also, the "legal innocence" standard posited as the correct rule by Rowe, is based on fundamental, constitutional notions not applicable in

the civil context where deprivation of liberty is not at issue.

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

During the pendency of the instant appeal, this Court rendered its opinion in Steele v. Kehoe, 24 Fla. L. Weekly S237 (Fla. May 27, 1999), holding that a convicted criminal defendant must obtain appellate or postconviction relief as a precondition to maintaining a legal malpractice action, and that the statute of limitations on the malpractice action has not commenced until the defendant has obtained final appellate or postconviction relief. This Court expressly disapproved of Martin v. Pafford, 583 So. 2d 736 (Fla. 1st DCA 1991), upon which Jorandby based his argument in his initial brief.

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

The absence of success in a post-conviction relief proceeding based on claims of ineffective assistance of appellate counsel should prevent accrual of the cause of action for legal malpractice against Jorandby.

Rowe disagrees with this statement, asserting that a finding of ineffectiveness against appellate counsel is not necessary herein because the Fourth District Court only required a showing by a criminal defendant that "performance of counsel, in general, was so deficient that there is a reasonable probability that, but for attorney error, the result of the proceeding would have been different." Rowe thus suggests that the Fourth District Court's decision was not meant to address the merits of the malpractice action, but rather only address when the statute of limitations begins to run. A fair reading of the Rowe opinion clearly demonstrates that the Fourth District Court pronounced a rule that goes directly to the merits of the malpractice action, contrary to Rowe's contention. A fair reading of the opinion also illustrates that the Fourth District Court erroneously applied its own rule with respect to Jorandby.

The Fourth District Court takes substantial effort to relate that its decision is premised in great part on the collateral

estoppel effect of a ruling on post conviction relief motion for ineffective assistance of trial counsel. It was envisioned that the statute of limitations run only after the criminal defendant pursues all avenues within the confines of the criminal justice system to overturn his conviction and sentence based on attorney misconduct. It is stated that the criminal justice system is better equipped to handle ineffectiveness claims than the civil system. That court thus certainly intended by its decision to have a substantive effect on the merits of the malpractice case because it was contemplated that the post conviction relief ruling will be used as evidence in the subsequent action against the criminal trial attorney. See Rowe, 725 So. 2d at 1250.

The Fourth District Court further justifies postponing the running of the statute of limitations due to the fact that a post conviction relief motion must be filed within two years after judgment and sentence become final, thus "issues surrounding the lawyer's performance will have to be litigated in a post-conviction relief proceeding within a reasonable time after the conviction." Rowe, 725 So. 2d at 1250. The court's concern for preserving evidence arises from the pleas of criminal attorneys and public defenders who rightly believed that evidence relating to the crime and that particular attorney's conduct would be lost if the professional malpractice statute of limitations was not applied on a strict two year basis from conviction and sentence. The court understood this concern, and concluded that the requirement of filing a postconviction relief motion within two years protects the

interest of that particular attorney by timely preserving evidence.

With regard to the collateral estoppel and judicial economy effects, those will not occur if the rule 3.850 motion for post conviction does not attack the conduct of appellate counsel. With regard to the preservation of evidence result, that will not occur if the rule 3.850 motion for post conviction relief motion does not attack the conduct of appellate counsel. So to say that the success on a claim of ineffectiveness is the trigger of a malpractice action against all attorneys "in general" who ever representated the criminal defendant is not accurate. The Fourth District Court's own dicta belies a different result. The district court of appeal focused on the conduct of a particular allegedly deficient attorney, herein trial counsel, and proceedings specifically relating to that attorney when it held that postconviction relief was a prerequisite to the filing of the malpractice action. There is nothing within the Rowe court's reasoning which suggests that any deficiency in conduct of one counsel permits the filing of the malpractice action against any other attorney who represented the defendant in the criminal proceedings.

The district court of appeal failed to recognize that no such collateral estoppel, judicial economy or preservation of evidence effect may be had with respect to Jorandby, who was neither a party to or the subject matter of the rule 3.850 hearing. To hold that a cause of action for malpractice accrued against Jorandby in the absence of a habeas corpus proceeding for ineffective assistance of

appellate counsel, is to do great offense to the rationales underlying the Rowe opinion.

This Court's opinion in Steele is not dispositive of this point on appeal, as it primarily relies on the same authority recited in the Rowe decision for requiring success on post conviction relief. For example, this Court's own stated policy reason for requiring success on a postconviction relief proceeding in the Steele case was preservation of judicial economy by avoiding relitigation of supposedly settled matters. 24 Fla. L. Weekly at S238. This Court also concluded that habeas corpus remedies are available to address ineffective assistance of counsel. Id. Again, if one considers the rationales underlying the rule espoused in Steele and Rowe, it becomes apparent that the absence of success in habeas corpus proceeding alleging ineffective assistance of appellate counsel Jorandy warrants dismissal of the malpractice action. No rule of law should not encourage criminal defendants to sue their attorney for alleged error when that error could have been remedied by a habeas corpus proceeding.

ISSUE III

WHETHER A CRIMINAL DEFENDANT SHOULD BE REQUIRED TO PRESENT EVIDENCE OF "ACTUAL INNOCENCE" AS AN ELEMENT OF THE CAUSE OF ACTION FOR LEGAL MALPRACTICE ARISING FROM AN UNDERLYING CRIMINAL CASE

The Fourth District Court did not err when it held that actual guilt is a material consideration on the issue of proximate cause in a legal malpractice case, and proof by a preponderance of evidence of actual innocence of the crimes charged and any lesser offenses is a prerequisite to maintenance of the civil case. The Fourth District Court wisely followed many foreign jurisdictions which hold that proof of actual innocence is required to maintain a legal malpractice action arising from an underlying criminal case. See Shaw v. State, Dept. of Admin., 861 P.2d 566 (Alaska 1993); Wiley v. County of San Diego, 966 P.2d 983 (Cal. 1998); Glenn v. Aiken, 569 N.E.2d 783 (Mass. 1991); Carmel v. Lunney, 511 N.E.2d 1126 (N.Y. 1987); Morgano v. Smith, 879 P.2d 735 (Nev. 1994); Bailey v. Tucker, 621 A.2d 108 (Pa. 1993); Peeler v. Hughes & Luce, 909 S.W.2d 494 (Tex. 1995); Adkins v. Dixon, 482 S.E.2d 797 (Va. 1997), cert. denied, 522 U.S. 937, 118 S.Ct. 348 (1997); Gomez v. Peters, 470 S.E.2d 692 (Ga. Ct. App. 1996), cert. denied, 1996 Ga. LEXIS 740 (Ga. 1996); Kramer v. Dirksen, 695 N.E.2d 1288 (Ill. App. Ct. 1998); Ray v. Stone, 952 S.W.2d 220 (Ky. Ct. App. 1997); State ex rel. O'Blennis v. Adolf, 691 S.W.2d 498 (Mo. Ct. App. 1985); B.K. Industries, Inc. v. Pinks, 533 N.Y.S.2d 595 (N.Y. App. Div. 1988); Levine v. Kling, 123 F.3d 580 (7th Cir. 1997).

The primary reason espoused by these court for the additional element is that public policy insists that a criminal defendant

should not profit from his crimes, or take advantage of his own wrong, or found a claim upon his iniquity, or to acquire property by his own crime. Levine; Glenn; Ray; Adkins; Peeler. To allow a criminal defendant to so benefit would shock the public conscience, spawn disrespect for the court and generally discredit the administration of justice. State ex rel. O'Blennis, 691 S.W.2d at 504; Peeler, 909 S.W.2d at 497.

If the criminal defendant engaged in the conduct he is accused of, then he alone should bear full responsibility for the consequences of his act, and any subsequent negligent conduct by an attorney is superceded by the greater culpability of the criminal conduct. Shaw, 861 P.2d at 572.

The Levine court, through Chief Judge Posner, explained that it is contrary to fundamental principles of both tort and criminal law to allow a guilty defendant to obtain damages to compensate him for the loss of his liberty during the period of a rightful imprisonment. 123 F.3d at 582. The court reasoned:

> Tort law provides damages only for harms to the plaintiff's legally protected interests, Restatement (Second) of Torts, @ 1 comment d, @ 7(1) (1965), and the liberty of a guilty criminal is not one of them. The guilty criminal may be able to obtain an acquittal if he is skillfully represented, but he has no right to that result . . ., and the law provides no relief if that "right" is denied.

Id.

The court in Carmel also addresses the motivations behind imposition of the "actual innocence" requirement:

> New York has traditionally applied a "but for" approach to causation when evaluating legal malpractice claims. The test is whether a proper "defense would have altered the result of the prior action". To be sure, a defendant in a criminal

> proceeding might be able to prove malpractice by establishing that but for the negligent representation he would, for example, have invoked his 5th Amendment rights, or succeeded in suppressing certain evidence conclusive of his guilt. But, because he cannot assert his innocence, public policy prevents maintenance of a malpractice action against his attorney. This is so because criminal prosecutions involve constitutional and procedural safeguards designed to maintain the integrity of the judicial system and to protect criminal defendants from overreaching government actions. These aspects of criminal proceedings make criminal malpractice cases unique, and policy considerations require different pleading and substantive rules.

511 N.E.2d at 1128 (citations omitted).

The Wiley court provides compelling support for "actual innocence" :

> Our legal system is premised in part on the maxim, "No one can take advantage of his own wrong." Regardless of the attorney's negligence, a guilty defendant's conviction and sentence are the direct consequence of his own perfidy. The fact that the nonnegligent counsel "could have done better" may warrant postconviction relief, but it does not translate into civil damages, which are intended to make the plaintiff whole. While a conviction predicated on incompetence may be erroneous, it is not unjust. "Arguably, . . . the values which favor the accused in the context of the criminal process lose their validity when that process comes to its end. . . .
>
> Only an innocent person wrongly convicted due to inadequate representation has suffered a compensable injury because in that situation the nexus between the malpractice and palpable harm is sufficient to warrant a civil action, however inadequate, to redress the loss. In sum, "the notion of paying damages to a plaintiff who actually committed the criminal offense solely because a lawyer negligently failed to secure an acquittal is of quesionable public policy and is contrary to the intuitive response that damages should only be awarded to a person who is truly free from any criminal involvement."

966 P.2d at 986-987 (citations omitted). It is for those reasons that the courts reasonably decline to permit a legal malpractice action where the criminal defendant fails to establish his actual innocence.

The unique position of public defenders further justifies imposition of this higher burden of proof on the criminal defendant. Public defenders have singular characteristics such as their inability to choose clients, excessive caseloads and fixed and insufficient budgets. Working under both time and money constraints, the defense of a malpractice suit only adds to this burden. Public defenders are particularly vulnerable to malpractice because of these conditions, which are outside their control and not imposed because of the attorney's own conduct, but rather by the public defender system as a whole. Public defenders will also lose some of their independent legal judgment, as explained in Bailey. For example, public defenders, mindful that a criminal defendant has the right to sue for any perceived misstep by counsel, may call witnesses or present evidence at trial he may not otherwise for fear of being accused of unpreparedness or just plain wrong judgment. 621 A.2d at 110.

In any event, the "actual innocence" standard in the criminal malpractice suit correlates with the consideration of comparative negligence of a plaintiff in a civil malpraction action, wherein a malpractice claim may be reduced or negated entirely if the client is found to have contributed in whole or part to his loss. See generally McDow v. Dixon, 226 S.E.2d 145 (Ga. App. Ct. 1976) (stating that malpractice action may be reduced if the negligence of the plaintiff has contributed to the loss). While it is acknowledged that a finding of ineffectiveness on a rule 3.850 or habeas proceeding may be introduced into evidence in the

malpractice action, such finding has not been found to be dispositive of the establishment of the causation element of the malpractice action. Bailey. The causation analysis is incomplete in the absence of scrutiny of all the facts surrounding the underlying case, including the defendant's own conduct. Consequently, evidence concerning the culpability of the client in bringing about the disadvantageous result upon which he sues should be taken into consideration in the criminal malpractice action, as it is in the civil context.

Rowe suggests that the Fourth District Court's rule improperly deems a criminal defendant guilty of the charges unless and until he can prove that he is innocent, thereby disregarding the fundamental, constitutional notion of "innocent until proven guilty." Rowe's argument suggests that a unrebuttable presumption of innocence prevail in this civil malpractice action merely by the fact that he was "legally innocent" of the sexual crimes. Rowe fails to recognize, however, that the fundamental, constitutional notions reiterated in his brief are justified in the criminal setting, but the relevance and viability of such notions are lacking in the civil arena.

Legal guilt or legal innocence is that determination made by the trier of fact in a criminal trial. Shaw, 861 P.2d at 570 n.3. Actual guilt is not a consideration in a criminal proceeding. A primary goal of the criminal justice system is to protect the innocent against an erroneous conviction. Shaw, 861 P.2d at 570. "Society has made a 'fundamental value determination . . . that it

is far worse to convict an innocent man than to let a guilty man go free.'" Id (citation omitted). Reliable factfinding in the criminal case, that is seeking the truth about the alleged criminal events, is weighed against the articulated desire to protect innocent persons. Thus, the search for the truth of actual guilt or innocence is sacrificed to some extent in the criminal proceeding, rather giving way to a determination of legal guilt or innocence. Shaw, 861 P.2d at 571. The possible erroneous deprivation of liberty justifies the legal innocence standard in the criminal proceeding. No similar deprivation occurs in a civil case, thus the protective barriers provided an accused by law and constitution are no longer applicable. Shaw, 861 P.2d at 571. There is no longer a reason to accede truth finding in a civil case, and many reasons to require proof of actual guilt or innocence.

Rowe additionally contends that the burden of proof created by the Fourth District Court's opinion places the public defender in the untenable position of having to argue the former client's guilt in this subsequent action when it argued the contrary position of innocence in the criminal case. The requirement of proof of "actual innocence" neither places the public defender in an untenable or unethical position. The adversarial nature of the cause of action for professional negligence naturally engenders this contradiction in action on the part of the attorney. Whether malpractice arises from a criminal context or a civil context, the attorney being sued has the right to defend himself. A means of

defense for the attorney is to take up a position contrary to that he had when advocating the client's position in the underlying civil case. In a civil case, it is the client's burden to establish that he suffered a loss of a viable claim as a result of an attorney's conduct. Lenahan v. Russell L. Forkey, P.A., 702 So. 2d 610, 612 (Fla. 4th DCA 1997). A similar burden exists herein under the Rowe v. Schreiber opinion requiring the defendant to show success on a post-conviction relief motion and his actual innocence as evidence of proximate causation. It thus follows that in either circumstance, civil attorneys and criminal attorneys alike must present evidence to counter the client's claim of redressable harm.

In defense of the malpractice action, it is contemplated that a criminal attorney may introduce into evidence that which impacts the criminal defendant's entitlement to compensation. Bailey, 621 A.2d at 115 n.12; Shaw, 861 P.2d at 573. The Florida Rules of Professional Conduct expressly permit the attorney to reveal attorney-client privileged information in specified limited circumstances. The rules permit a lawyer to reveal such information to the extent the lawyer believes necessary to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and client. R. Regulating Fla. Bar 4-1.6(c)(2) and (e); See Adelman v. Adelman, 561 So. 2d 671 (Fla. 3d DCA 1990). Not only does the relinquishment of the privilege exist as to communications, but it applies to the attorney's files, and otherwise suppressible evidence of factual guilty. See Reed v. State, 640 So. 2d 1094 (Fla. 1994)(holding waiver of the privilege

extends to the attorney's files since "the passage of time often dims the recollection of a defendant's original trial counsel with respect to client conversations and trial strategies"); Bailey, 621 A.2d at 115 n.12; Shaw, 861 P.2d at 573. Any concerns about release of the sensitive, privileged information (herein evidence of participation in sexual acts with a child) are assuaged by the fact that disclosure is contemplated to be made in a manner which limits access to the information to the tribunal or other persons having a need to know it, and appropriate protective orders may be sought. See R. Regulating Fla. Bar. 4-1.6 Comment (1999).

Moreover, the State of Florida has not yet abolished the cause of action for legal malpractice against public defenders, as has been done in several other states. Some form of immunity for public defenders, either qualified or absolute, has been adopted in New York, Nevada, Delaware, Vermont, New Mexico and Minnesota. See generally Note: Malpractice Immunity: An Illegitimate and Ineffective Response to the Indigent-Defense Crisis, 45 Duke L.J. 783 (Feb. 1996). The mere endurance of a criminal defendant's right to seek civil redress against the public defender, arguably a special, vulnerable class of attorneys, is in and of itself of great worth to criminal defendants. Hence, the imposition of the "actual innocence" burden works to adequately balance the rights to the criminal defendant, with the public interest of maintaining the integrity of the public defender system.

The Fourth District Court's rule concerning proof of "actual innocence" is premised on well-reasoned and widely accepted

principles and should be adopted as the rule for the State of Florida.

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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