IN THE
SUPREME COURT OF FLORIDA

Case No. SC05-1230

ISMAIL CIRA and LIRIJE CIRA
individually and as parents and natural
guardians of SAMI CIRA, BEKIM CIRA,
and KUJTIME CIRA, minors; NAIM
CIRA; and MIRIJE CIRA,

Petitioners,

v.

BOB DILLINGER, in his official capacity
as Public Defender of the Sixth Judicial
Circuit of Florida,

Respondent.

On Discretionary Review from the Second District Court of Appeal
Case No. 2D04-4285

PETITIONERS' AMENDED INITIAL BRIEF ON JURISDICTION

Timothy W. Weber, Esquire
Florida Bar No. 86789
BATTAGLIA, ROSS, DICUS & WEIN, P.A.
P.O. Box 41100
St. Petersburg, Florida 33743
(727) 381-2300
(727) 343-4059 (Fax)
Attorneys for Petitioners

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PREFACE

Petitioners will be referred to collectively as "PLAINTIFFS."

ISMAIL CIRA, individually, will be referred to as "CIRA."

Respondent will be referred to as "DILLINGER" or "the Public Defender."

STATEMENT OF FACTS AND CASE

At a jury trial at which CIRA was represented by the Public Defender, CIRA was found guilty of two counts of aggravated battery with a firearm. (A.2) CIRA maintained that he was innocent of these charges as he had acted in self-defense. (A.3) CIRA was adjudicated guilty of the two felonies and sentenced to concurrent prison terms of 92 months. (A.2) CIRA subsequently filed a motion for postconviction relief pursuant to Fla.R.Crim.P. 3.850 alleging that the Public Defender had rendered ineffective assistance of counsel at his criminal trial that prejudiced his defense. (A.2) The trial court summarily denied CIRA's motion; however, the Second District Court of Appeals ("Second District") reversed. See Cira v. State, 780 So. 2d 175 (Fla. 2d DCA 2001) (Public Defender's failure to object to irrelevant and prejudicial character evidence may have changed the outcome of CIRA's trial). On remand, the trial court vacated CIRA's convictions and sentences, expressly finding that the Public Defender had rendered ineffective assistance of counsel at CIRA's trial that prejudiced his defense. (A.3) At the time CIRA's convictions and sentences were vacated, CIRA had been incarcerated over 44 months and had incurred thousands in attorneys' fees unwinding the result of the Public Defender's negligence. (A.3)

Pursuant to the order vacating the convictions and sentences, CIRA was released on bond pending retrial. (A.3) Pursuant to an agreement with the State,

CIRA thereafter entered a plea of *nolo contendere* to the charges. (A.3) The trial court accepted the plea, withheld adjudication of guilt, and placed CIRA on probation, the only condition of which was that CIRA serve 70 days in the county jail. (A.3) After crediting CIRA for 70 days already served in jail, the trial court contemporaneously terminated CIRA's probation. (A.3) The trial court waived all costs, fines, assessments, or other penalties. (A.3) CIRA walked out of the courtroom without a felony conviction, without a prison sentence, and without further obligation.[1] (A.3)

PLAINTIFFS subsequently sued the Public Defender for legal malpractice alleging that CIRA was innocent of the charges and incurred damages as a result of the Public Defender's negligence, including wrongful incarceration and attorneys' fees. (A.3) The Public Defender filed a motion for summary judgment based solely on CIRA's plea of *nolo contendere* to the criminal charges. (A.3) The trial court granted the motion reasoning that CIRA had not been "exonerated" as required by this Court in Steele v. Kehoe, 747 So. 2d 931 (Fla. 1999), and Schreiber v. Rowe, 814 So. 2d 396 (Fla. 2002). (A.3)[2]

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[1] The Second District noted that the trial court ordered CIRA to give a DNA sample. The transcript shows that the trial court expressly stated that the DNA order was separate from the probation order and was not a condition of probation. In response to questioning by the Second District at oral argument, the undersigned explained that the trial court probably had no jurisdiction to enter this Order but that CIRA had nonetheless complied.

[2] The trial court, despite CIRA's objections, did not explain its reason for

CIRA timely appealed to the Second District, which thereafter affirmed in a written opinion. See Cira v. Dillinger, 903 So. 2d 367 (Fla. 2d DCA 2005). The Second District held that the grant of postconviction relief from CIRA's convictions and sentences was insufficient to satisfy the "exoneration" requirements of Steele and Schreiber. (A.4) The court reasoned that the order vacating CIRA's convictions and sentences allowed retrial and imposed conditions of pretrial release and was thus not exonerating. (A.4-5) The court further reasoned that even if the *nolo plea* itself were inadmissible, the order of probation entered pursuant to the plea was admissible for the limited purpose of showing CIRA was not exonerated. (A.5) The Second District concluded that CIRA's convictions and sentences were not caused by the Public Defender's malpractice but were causally related to CIRA's own actions. (A.4)

CIRA timely filed a notice of discretionary review with the Second District seeking review in this Court based on conflict with Steele and Rowe.

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disregarding Fla.Evid.Code § 90.410 (evidence of a plea of *nolo contendere* is inadmissible in any civil or criminal proceeding).

SUMMARY OF ARGUMENT

Jurisdiction in this Court is invoked pursuant to Article V, § 3(b)(3) of the Florida Constitution and Fla.R.App.P. 9.030(a)(2)(A)(iv) on the basis of express and direct conflict between the decision of the Second District in Cira v. Dillinger, 903 So. 2d 367 (Fla. 2d DCA 2005), and the decisions of this Court in Steele v. Kehoe, 747 So. 2d 931 (Fla. 1999), and Schreiber v. Rowe, 814 So. 2d 396 (Fla. 2002). The Second District's decision divorces the law of legal malpractice in the criminal defense context from basic principles of causation without any compelling policy justification.

Jurisdiction is also proper based on conflict with Raydo v. State, 713 So. 2d 996 (Fla. 1998) (§ 90.410 expressly excludes evidence of a plea of *nolo contendere* and state could not ask defendant about plea *or anticipated felony sentence* in the absence of an adjudication), as well as decisions holding that compromise of the underlying litigation does not negate a legal malpractice action. E.g. Keramati v. Schackow, 553 So. 2d 741 (Fla. 5th DCA 1989) (reversing summary judgment based on settlement and noting that settlement of underlying litigation could be a form of mitigation of damages); Lenahan v. Russell Forkey, P.A., 702 So. 2d 610 (Fla. 4th DCA 1997) (Pariente, J.) (reversing judgment based on voluntary dismissal of suit allegedly prejudiced by attorneys' malpractice)

ARGUMENT

I. THE LOWER COURT'S DECISION EXPRESSLY AND DIRECTLY CONFLICTS WITH STEELE V. KEHOE, 747 SO. 2D 931 (FLA. 1999), AND SCHREIBER V. ROWE, 814 SO. 2D 396 (FLA. 2002), AND ENGRAFTS AN UNWARRANTED ADDITIONAL ELEMENT ONTO A CLAIM FOR LEGAL MALPRACTICE AGAINST DEFENSE COUNSEL

The correction of erroneous precedent is at the heart of this Court's exercise of its conflict jurisdiction. See Wainwright v. Taylor, 476 So. 2d 669, 670 (Fla. 1985). The decision of the lower court injects a new element into the law of legal malpractice that will result in erroneous adjudications of other individual cases if not corrected by this Court. Moreover, the efficacy of the bright-line rules established in the conflict cases will be eroded and legitimate claims for damages causally linked to attorney malpractice will be denied. Because of the importance of these issues and the existence of express and direct conflict of decision, this Court should accept jurisdiction.

In Steele v. Kehoe, 747 So. 2d 931 (Fla. 1999), this Court reviewed the dismissal of a legal malpractice action brought by Steele, an inmate convicted of first-degree murder. 747 So. 2d at 932. Steele alleged that he had hired Kehoe, an attorney, to timely file a motion for postconviction relief and that Kehoe failed to do so. Id. Steele further alleged that he subsequently filed a motion for postconviction relief, which was denied as untimely, and was thus prevented from establishing his actual innocence. Id. The trial court dismissed Steele's suit stating that "Steele

cannot prove his actual innocence in the underlying first-degree murder charge which he was convicted of; nor can he establish or allege that his underlying conviction has been set aside." Id. The Fifth District affirmed but certified a question of great public importance to this Court. 747 So. 2d at 932.

This Court rephrased the certified question and answered it. Id. The court first addressed the Fifth District's holding that "exoneration" was a prerequisite to a legal malpractice action. Id. at 933. The court noted that "a majority of jurisdictions have held that appellate or postconviction relief is a prerequisite to maintaining the action." Id. (citing cases omitted). The court noted that these jurisdictions base this prerequisite on the following policy arguments: (1) without obtaining relief from the conviction or sentence, the criminal defendant's own actions must be presumed to be the proximate cause of the injury; (2) monetary remedies are inadequate to redress the harm to incarcerated criminal defendants; (3) appellate, postconviction, and habeas remedies are available to address ineffective assistance of counsel; (4) requiring appellate or postconviction relief prerequisite to a malpractice claims will preserve judicial economy by avoiding the relitigation of supposedly settled matters; and (5) relief from the conviction or sentence provides a bright line for determining when the statute of limitations runs on the malpractice action. Id. This Court held:

> We agree with the above policy considerations set forth in these cases, and we find that we should follow the majority rule *and hold that a convicted criminal defendant must obtain appellate or postconviction relief as a precondition to maintaining a legal malpractice action.*

> *We also hold that the statute of limitations on the malpractice action has not commenced until the defendant has obtained final appellate or postconviction relief.*

Id. Applying these rules to Steele's case, this Court concluded, "If Steele's belated postconviction motion is granted and he receives relief from his conviction and sentence, he may then pursue the legal malpractice action against Kehoe." Id. at 934.

In the instant case, the lower court disagreed that Steele's "exoneration" requirement was met upon the grant of postconviction or appellate relief from the negligently caused conviction. (A.3) Instead, it held that "proof of appellate or postconviction relief, without more, is insufficient to satisfy the "exoneration" requirement." (A.3)[3] In so doing, the court added the additional element that the underlying criminal proceeding must be subsequently terminated in CIRA's favor by acquittal, discharge, or dismissal. (A.3) A civil legal malpractice plaintiff has never been required to meet such a burden in Florida (see Section III, supra), and the lower court's rule defeats the bright-line rules established by this Court concerning when the last element is met and the cause of action accrues for limitations purposes. Steele, 932 So. 2d at 933 (statute of limitations commences

[3] Conflict is present when an announced rule of law conflicts with other appellate expressions of law. See City of Jacksonville v. Florida First Nat'l Bank of Jacksonville, 339 So. 2d 632, 633 (Fla. 1976) (quoting Adams v. Seaboard Coastline R.R. Co., 296 So. 2d 1 (Fla. 1974)).

when appellate or postconviction relief becomes final).[4]

Without explanation or analysis, the lower court stated that its rule was consistent with the policy arguments noted in Steele, specifically "the argument that 'without obtaining relief from the conviction or sentence, the criminal defendant's own actions must be presumed to be the proximate cause of the injury.'" (A.3)[5] The lack of analysis behind this statement is telling as none of the policy reasons advanced in Steele are implicated on these facts and it is undisputed that CIRA obtained relief from his convictions and sentences.[6] Moreover, the trial court found that ineffective assistance of counsel prejudiced CIRA's defense, i.e. that there is a reasonable likelihood that but for defense counsel's negligence the outcome of the trial would have been different. See Strickland v. Washington, 466 U.S. 668, 687 (1984). The Second District's causation analysis ignored its own prior published decision, Cira v. State, 780 So. 2d 175, and the order vacating the convictions.

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[4] The lower court's decision also expressly conflicts with Steele which, after stating the rule, held, "[i]f Steele's belated postconviction motion is granted and he receives relief from his conviction or sentence, he may then pursue the legal malpractice claim against Kehoe." Id. at 398. In the instant case, the lower court acknowledged that CIRA's motion for postconviction relief was granted and that he received relief from his convictions and sentences. (A.1) However, it held that CIRA could not pursue his claim for legal malpractice.

[5] The lower court imposed a presumption of guilt on CIRA that could only have been overcome by proof of acquittal, dismissal or discharge. (A.8)

[6] The lower court's decision also runs afoul of the well-established rule that a plea of *nolo contendere* without an adjudication of guilt does not admit nor establish guilt. Garron v. State, 528 So. 2d 353 (Fla. 1988) (*nolo contendere* plea followed by withhold of adjudication not a conviction).

For many of the same reasons, the lower court's opinion conflicts with Schreiber. In Schreiber, this Court held that the cause of action accrued upon the final grant of postconviction relief *even though a new trial was ordered and charges remained pending for eleven months thereafter.* This Court affirmed the decision of the district court holding that the statute of limitations "began to run when the trial court granted Rowe's motion for postconviction relief based on ineffective assistance of counsel." Id. at 398.

The lower court's order contradicts Schreiber. The lower court held that not all of the elements supporting the claim were satisfied as of the time CIRA's motion for postconviction relief was granted. The court further reasoned that because the order granting postconviction relief imposed conditions for pretrial release and allowed a new trial, CIRA could not maintain his claim. The order granting postconviction relief in Schreiber also ordered a new trial yet this was not a bar to Rowe's claim nor did it operate to delay commencement of the statute.

II. THE LOWER COURT'S DECISION EXPRESSLY AND DIRECTLY CONFLICTS WITH RAYDO V. STATE, 713 SO. 2D 996 (FLA. 1998), REGARDING THE ADMISSIBILITY OF AN ORDER THAT WITHHOLDS ADJUDICATION OF GUILT FOLLOWING A PLEA OF *NOLO CONTENDERE*

The lower court held that an order withholding adjudication of guilt following a *nolo* plea was admissible into evidence, notwithstanding Fla.Evid.Code. § 90.410. In Raydo v. State, 713 So. 2d 996, 1001 (Fla. 1998), this Court held that § 90.410

excluded evidence of a plea of *nolo contendere* and that the State could not ask the defendant about the plea or *an anticipated felony sentence in the absence of an adjudication*. The Second District, in allowing the order withholding adjudication and placing CIRA on probation into evidence, has announced a rule in conflict with Raydo.

III. THE LOWER COURT'S DECISION ALSO CONFLICTS WITH NUMEROUS CASES HOLDING THAT COMPROMISE OF THE UNDERLYING LITIGATION FOLLOWING LEGAL MALPRACTICE DOES NOT BAR MAINTENANCE OF THE CLAIM

A *nolo* plea is in the nature of a compromise between the State and the defendant. See Vinson v. State, 345 So. 2d 711, 713 (Fla. 1977) (citing State v. LaRose, 71 N.H. 435, 52 A. 943). Florida law is clear that compromise of the underlying litigation does not bar maintenance of a legal malpractice claim. E.g. Keramati v. Schackow, 553 So. 2d 741 (Fla. 5th DCA 1989) (reversing summary judgment based on settlement and noting that settlement of underlying litigation could be a form of mitigation of damages); Lenahan v. Russell Forkey, P.A., 702 So. 2d 610 (Fla. 4th DCA 1997) (Pariente, J.) (reversing summary judgment based on voluntary dismissal of suit allegedly prejudiced by attorneys' malpractice).

CONCLUSION

PLAINTIFFS respectfully request this Court to accept jurisdiction.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished via U.S. Mail to **Scot E. Samis, Esquire and John D. Kiernan, Esquire**, Abbey, Adams, Byelick, Kiernan, Mueller & Lancaster, L.L.P., Post Office Box 1511, St. Petersburg, Florida 33731 this 17th day of August, 2005.

/s/ Timothy W. Weber
Timothy W. Weber, Esquire
Florida Bar No. 86789
BATTAGLIA, ROSS, DICUS & WEIN, P.A.
Wachovia Bank Building
980 Tyrone Boulevard
Post Office Box 41100
St. Petersburg, Florida 33743
Telephone No.: (727) 381-2300
Fax: (727) 343-4059
Attorneys for Petitioners

CERTIFICATE OF FONT COMPLIANCE

I HEREBY CERTIFY that this brief complies with the font requirements of Fla.R.App.P. 9.210(a)(2).

/s/ Timothy W. Weber

TIMOTHY W. WEBER, ESQUIRE

Florida Bar No.: 86789