

**IN THE SUPREME COURT OF FLORIDA**

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,

vs.

CASE NO.: SC05-1230  
DCA NO.: 2D04-4285  
L.T. NO.: 03-2681CI-13

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 OF FLORIDA*

**AMENDED BRIEF OF RESPONDENT ON JURISDICTION**

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## STATEMENT OF THE CASE AND FACTS

Respondent would offer the following as a supplement to the Statement contained in the Petitioner's jurisdictional brief:

After Mr. Cira's motion for post-conviction relief was granted, he was released on a \$5,000 bond pending further proceedings. (A3). He was also ordered to have no contact with one of the alleged victims of the incident giving rise to the criminal action. (A3).

Several months later, Mr. Cira appeared before the circuit court, tendered a nolo contendere plea and was sentenced on the same charges of aggravated battery of which he was originally convicted. (A3). The record contains an Order of Probation which reflects the plea and recites the sentence imposed. (A3, A5).

In the legal malpractice action, the Public Defender moved for summary judgment based on the undisputed fact that Mr. Cira was not exonerated of the criminal charges, and that exoneration is required to recover in a legal malpractice claim against a criminal defense attorney. (A3). The Public Defender attached copies of several documents to this motion, including the change of plea form signed by Mr. Cira, the transcript of the hearing on Mr. Cira's change of plea and sentencing; and the order of probation. (A3).

## **SUMMARY OF THE ARGUMENT**

### **Issue I**

There is no basis for conflict jurisdiction in this case. Neither *Steele v. Kehoe* or

*Schreiber v. Rowe* addressed the dispositive issue in the present case, which was whether a criminal defendant who enters a plea to the original charges has been exonerated. The Second District expressly recognized in its opinion that this was a question of first impression. There is no express or direct conflict with either *Steele* or *Schreiber*.

### **Issue II**

The Petitioner asserts that the Second District held that an order withholding adjudication of guilt following a nolo plea was admissible into evidence, notwithstanding Florida Evidence Code, section 90.410. This misstates the Court's opinion. The Second District expressly stated that it was not necessary for the court to decide whether evidence of the Petitioner's nolo contendere pleas was inadmissible under s. 90.410 because there was other admissible evidence in the record sufficient to sustain the summary judgment.

### **Issue III**

The Petitioner attempts to equate the settlement of the underlying civil cases in *Lenahan* and *Keramati* with his nolo contendere plea in the criminal proceeding in this case. The fundamental difference between those cases and the situation at bar is, of course, that *Lenahan* and *Keramati* did not involve criminal defense counsel and therefore do not address the exoneration requirement that is the central focus of the case at bar. The *Vinson* decision is cited for its general discussion of the meaning of a nolo contendere plea and does not deal with any of the issues ruled upon by the Second District. No conflict exists.

## ARGUMENT

### ISSUE I

WHETHER THE SECOND DISTRICT'S OPINION EXPRESSLY AND DIRECTLY CONFLICTS WITH *STEELE v. KEHOE* AND *SCHREIBER v. ROWE*.

(Restated)

Contrary to the Petitioner's assertion, the Second District's opinion has not added the additional element that the underlying criminal proceeding be terminated in Cira's favor by either acquittal, discharge, or dismissal. (Initial Brief p7; p9 FN 4). It is clear that this Court requires exoneration in order for a plaintiff to maintain a malpractice claim. *Steele v. Kehoe*, 724 So. 2d 1192 (Fla. 5th DCA 1998), approved, 747 So. 2d 931 (Fla. 1999), *Schreiber v. Rowe*, 814 So. 2d 396, 400 (Fla. 2002). In neither case, however, did this Court have to consider whether a criminal defendant who enters a plea and is sentenced on the original charges meets the requirement of exoneration. The present case dealt with that narrow issue of first impression - - and thus presents no conflict with either *Steele* or *Schreiber*. In fact, this point was expressly recognized in the Second District's opinion:

. . .in the *Steele*, *Schreiber* and *Johnson* cases, our Supreme Court and the Fifth District refer generally to obtaining post-conviction relief in the underlying criminal case as being necessary to satisfy the exoneration rule. However, the courts did not have occasion in those cases to address the particular circumstances that would satisfy this precondition to filing a legal malpractice claim. In this case, we are called upon to examine this question.

In *Steele*, the plaintiff sued his criminal defense counsel for failing to file a timely

motion for post-conviction relief. The Fifth District adopted the majority view that exoneration is a prerequisite to a legal malpractice action. 724 So. 2d at 1193. However, because Steele had not yet been able to have his post-conviction motion heard, the opinion did not analyze whether he had been exonerated.

Before this Court's approval of the *Steele* decision, the issue was also discussed in *Rowe v. Schreiber*, 725 So. 2d 1245 (Fla. 4th DCA 1999). Rowe was convicted of sexual battery in 1984. After his initial appeal was denied, he sought conviction relief under rule 3.850 based on errors committed at trial by his assistant public defender. After an evidentiary hearing, the trial granted the motion for post-conviction relief and ordered a new trial. The state later dropped the charges. Since the charges were dropped, there was no need to discuss or rule upon the meaning of exoneration, since a defendant who obtains final release from all charges obviously qualifies.

Four months after the Fourth District's decision in *Rowe*, the Florida Supreme Court issued its review of the *Kehoe* decision. The court approved the exoneration requirement, stating:

A...we find that we should follow the majority rule and hold that a convicted criminal defendant must obtain appellate or post-conviction 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 post-conviction relief.

747 So. 2d at 933. The court listed several reasons for adopting this view, including:

(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;

\* \* \*

(4) requiring appellate or post-conviction relief prerequisite to a malpractice claim will preserve judicial economy by avoiding the re-litigation 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.* at 933.

The Second District's opinion in the present case is obviously consistent with the requirement of final relief and the reasons for that requirement. A person who obtains a new trial is in no way exonerated and has not obtained final relief. Moreover, to allow him to recover in a malpractice action in absence of exoneration would open the door to situations where a criminal defendant could obtain a new trial under Rule 3.850, sue his criminal defense lawyer, recover damages, and then later be convicted of the original charges. By properly recognizing the meaning of the word exoneration, the Second District has preserved the objectives of this Court as set forth in *Kehoe*. A ruling in favor of Mr. Cira would have allowed parallel criminal/civil litigation with potentially inconsistent and absurd results.

This Court's approval of *Rowe* came almost three years later. *Schreiber v. Rowe*, 814 So. 2d 396, 400 (Fla. 2002). The exoneration issue was addressed in a single paragraph:

Subsequent to the district court's decision below, this Court decided *Steele v. Kehoe*, 747 So. 2d 931 (Fla. 1999), wherein we concluded that a convicted criminal defendant must obtain appellate or post-conviction relief as a precondition to maintaining a legal malpractice action. We further held that the statute of limitations in a malpractice action does not commence until the criminal defendant has obtained final appellate or post-conviction relief. *Id.* at 398.

The Second District's ruling in the case at bar is entirely consistent with both *Steele v. Kehoe* and *Schreiber v. Rowe*. It recognizes the requirement of exoneration as established in those cases. The result here is different because the Second District was faced with a factual scenario that was qualitatively different from any previously addressed by either this Court or any other District. This was truly a case of first impression. There is no basis for conflict review.

## **ISSUE II**

**WHETHER THE SECOND DISTRICT'S OPINION EXPRESSLY AND DIRECTLY CONFLICTS WITH *RAYDO v. STATE*.**

(Restated)

The Petitioner's claim that the Second District's opinion expressly and directly conflicts with this Court's decision in *Raydo v. State*, 713 So. 2d 996 (Fla. 1998) is based

on a misapplication of *Raydo* and a misstatement of the opinion below.

The Petitioners assert conflict with *Raydo* because the Second District held that an order withholding adjudication of guilt following a nolo plea was admissible into evidence, notwithstanding Florida Evidence Code, section 90.410. This is inaccurate. With regard to the admissibility of evidence of the Petitioner's nolo contendere plea, the Second District stated:

We need not decide whether section 90.410 makes evidence of Mr. Cira's nolo contendere pleas inadmissible in the legal malpractice action because there is other admissible evidence in the record sufficient to sustain the summary judgment. For purposes of a summary judgment, the critical issue is whether Mr. Cira had been exonerated. We have already referred to the provisions of the order granting Mr. Cira's motion for post-conviction relief and the order placing him on probation. Absent any reference to the nolo contendere pleas, these documents were sufficient to establish that the criminal prosecution was not resolved in Mr. Cira's favor. Mr. Cira's complaint referenced the order for post-conviction relief. The admissibility and evidence of that order is unchallenged. (Emphasis added).

Next, the Second District addressed the admissibility of the order placing the Petitioner on probation. The court noted that this is a separate issue from the issue of admissibility in evidence of the plea itself. Section 90.410 addresses the latter but not the former. The court concluded, the order placing Mr. Cira on probation was admissible in evidence for the limited purpose of showing the final disposition of the charges against him after the entry of the order for post-conviction relief.

Nothing in the opinion below contradicts the *Raydo*. That case discussed the problems inherent in allowing a defendant to be impeached with a nolo contendere plea when there has been no disposition. *Id.* at 1001. The Court noted that section 90.410, precludes evidence of a nolo contendere plea in any criminal proceeding, then concluded, “We... hold that a defendant’s nolo contendere plea, without a conviction entered on that plea, is not admissible to attack a defendant’s credibility pursuant to section 90.610(1).” *Id.* It is clear that the Second District’s decision in this case addressed issues which were not considered by this Court in *Raydo*. No conflict exists.

### **ISSUE III**

WHETHER THE SECOND DISTRICT’S OPINION EXPRESSLY AND DIRECTLY CONFLICTS WITH CASE LAW HOLDING THAT COMPROMISE OF THE UNDERLYING LITIGATION DOES NOT BAR MAINTENANCE OF A LEGAL MALPRACTICE CLAIM.

(Restated)

Petitioner asserts that the Second District’s decision conflicts with numerous cases holding that a compromise of underlying litigation does not bar a malpractice claim, citing this Court’s decision *Vinson v. State*, 345 So. 2d 711 (Fla. 1977) and two district court decisions - - *Lenahan v. Forkey*, 702 So. 2d 610 (Fla. 4th DCA 1997) and *Keramati v. Schackow*, 553 So. 2d 741 (Fla. 5th DCA 1989).

It appears that the Petitioner is attempting to equate the voluntary dismissal or settlement of the civil cases in *Lenahan* and *Keramati* with his plea and sentence in the

underlying criminal proceeding in this case. In *Lenahan*, the issue was whether the trial court erred in granting summary judgment in favor of the defendant in a legal malpractice suit when the underlying case was voluntarily dismissed. The appellate court concluded that the defendant had failed to establish the absence of a justiciable issue of fact with regard to the plaintiff's ability to establish a "redressable harm." *Id.* at 612. Similarly, in *Keramati v. Schackow*, 553 So. 2d 741 (Fla. 5th DCA 1989), the court considered whether the plaintiff in a malpractice claim was equitably estopped from maintaining a claim against her former attorney when she accepted a settlement of the underlying case. The district court reversed, concluding that the claim was not barred. *Id.* at 746.

The fundamental difference between those cases and the situation at bar is, of course, that *Lenahan* and *Keramati* did not involve underlying criminal prosecutions and therefore do not address the exoneration requirement that is the central focus of the case at bar. Hence, it is not surprising that this argument was neither presented to nor addressed by the Second District.

In *Vinson*, this Court considered whether the trial court had authority to reject a defendant's nolo contendere plea and find the defendant not guilty. In discussing the general nature and effect of a nolo contendere plea, this Court quoted *Tucker v. United States of America*, 196 F. 260 (7th Cir. 1912), which stated that a nolo contendere plea represents a compromise between the state and the defendant. *Id.* at 713. That may be true, but it does not deal with any of the issues ruled upon by the Second District

in the present case.

**CONCLUSION**

For the reasons stated, the Respondent respectfully requests that this Court deny discretionary review of this case.

**CERTIFICATE OF SERVICE**

**I HEREBY CERTIFY** that a true and correct copy of the foregoing was furnished via U.S. Mail to Timothy W. Weber, Esq., Battaglia, Ross, et al., P.O. Box 41100, St. Petersburg, FL 33743, this \_\_\_\_\_ day of September, 2005.

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**CERTIFICATE OF COMPLIANCE**

I HEREBY CERTIFY that this Amended Brief of Respondent on Jurisdiction satisfies the requirements of Florida Rules of Appellate Procedure 9.100(1) and

9.210(a)(2) and is submitted in Times New Roman 14-point font.

JENNIFER J. CARD

**IN THE SUPREME COURT OF FLORIDA**

ISMAIL CIRA AND LIRIJE CIRA,  
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EXHIBIT A- Second District opinion filed June 15, 2005:

*Ismail Cira and Lirije Cira, individually and as parents and natural guardians of SAMI CIRA, BEKIM CIRA, and KUJTIME CIRA, minors; NAIM CIRA; and MIJIJE CIRA, Appellants v. BOB DILLINGER, in his official capacity as Public Defender of the Sixth Judicial Circuit of Florida, Appellee, 903 So. 2d 367; 2005 Fla. App. LEXIS 9197; 30 Fla. L. Weekly D 1478*