STATE OF WISCONSIN COURT OF APPEALS
DISTRICT 4

JAMA I. JAMA

Plaintiff-Appellant,

v. Case No. 19-AP-629

JASON C. GONZALEZ and
WISCONSIN LAWYERS MUTUAL
INSURANCE COMPANY,

Defendants-Respondents.

RESPONSE BRIEF OF DEFENDANTS-RESPONDENTS

Appeal from the Circuit Court of Dane County
Case No. 18-CV-1478
Hon. Valerie Bailey-Rihn

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II. STATEMENT OF THE ISSUES.

Issue 1: May a criminal defendant who has pleaded guilty to one or more of the charges against him maintain a malpractice case against his former criminal defense attorney on the basis of other convictions in the same underlying case, which were later vacated?

Answered by the Circuit Court: No.

III. STATEMENT ON ORAL ARGUMENT AND PUBLICATION.

Oral argument is unnecessary in this case. Publication is only necessary if the Court indulges the Appellant's request for a change in the law. WIS. STAT. § 809.23.

IV. STATEMENT OF THE CASE.

1. *Nature of the Case.*

This is an attorney malpractice case arising out of an underlying criminal case in which Attorney Jason Gonzalez represented Defendant Jama I. Jama. (Dane County Case No. 12-CF-1759.)

2. *Procedural Status.*

Mr. Jama filed his complaint on June 7, 2018. (R. 1.) Defendants-Respondents responded with a Motion to Dismiss. (R. 7.) Mr. Jama sought, and received, leave to amend his complaint. (R. 22, at 29:23-30:25.) The Amended Complaint was filed on November 16, 2018. (R. 13.) Defendants-Respondents filed a Renewed Motion to Dismiss. (R. 14.) Once the matter was fully briefed, the Court made an oral ruling on February 4, 2019, granting the Renewed Motion to Dismiss. (R. 18.) A written Order was entered on February 13, 2019. (R. 19.) Mr. Jama filed his Notice of Appeal in the Circuit Court on March 20, 2019. (R. 21.) By April 12, he had not paid the filing fee, and the appeal was dismissed. (Order entered April 12, 2019.) The appeal was reinstated on Mr. Jama's motion. (Order entered April 17, 2019.)

3. ***Disposition in the Trial Court.***

The Trial Court dismissed the case, with prejudice. (R. 18, R. 19.)

4. *Statement of Facts.*

In Dane County Case No. 12-CF-1759, Mr. Jama was charged with five crimes, all stemming from a night-time encounter with a single victim, and all taking place in the same location. (R. 13, ¶¶ 7-13.) He was

convicted at trial on all five counts. (R. 13, ¶ 25.) His trial counsel, Attorney Gonzalez, was later found to have provided ineffective assistance, and Mr. Jama was granted a new trial. (R. 13, ¶ 33.) Rather than go back to trial, Mr. Jama entered a guilty plea to two of the charges against him: violation of WIS. STAT. § 943.20(1)(a) (theft of movable property <= $2,500), and WIS. STAT. § 946.41(1) (resisting or obstructing an officer). (R. 13, ¶ 35.) The latter charge was one that had been added after the trial in which Attorney Gonzalez represented Mr. Jama. (***Id.***)

As discussed in section IV.B, *supra*, Mr. Jama has sued Attorney Gonzalez, seeking damages for harms allegedly caused by Mr. Gonzalez's negligence, and the Trial Court dismissed the case. Defendants-Respondents ask the Court of Appeals to affirm the Trial Court's dismissal.

5. ARGUMENT.

Mr. Jama proposes an interpretation Wisconsin law under which every criminal defendant who prevails – even partially – in a ***Machner***[1] hearing would be empowered to sue his or her former trial counsel for

[1] ***State v. Machner***, 92 Wis. 2d 797, 285 N.W.2d 905 (Ct. App. 1979).

legal malpractice. Wisconsin has expressly rejected such a standard, and the Court of Appeals should not shift course.

1. MR. JAMA'S LEGAL ANALYSIS IS WRONG.

In support of his agenda, Mr. Jama relies on tortured interpretations of two cases: ***Hicks v. Nunnery***, 2002 WI App 87, 254 Wis. 2d 721, 643 N.W.2d 809, and ***Tallmadge v. Boyle***, 2007 WI App 47, 300 Wis. 2d 510, 730 N.W.2d 173.

A. Hicks Does Not Establish Mr. Jama's Right To a Jury Trial.

Mr. Jama argues that "***Hicks*** clearly establishes that Jama's innocence relating to the sexual assault charges is a matter for a jury." (Brief of Plaintiff-Appellant Jama I. Jama ("Appellant's Brief"), p. 12.) This erroneous conclusion proceeds from a misreading of the salient portions of ***Hicks***.

Hicks was convicted and imprisoned for robbery, burglary, and sexual assault. ***Hicks***, at ¶ 3. His convictions were reversed, he was released from prison, and the State dismissed all charges against him. ***Id.*** He filed a legal malpractice action against his trial attorney, Nunnery. ***Id.***,

at ¶ 13. A jury found Nunnery liable, and awarded a sizeable verdict; Nunnery appealed. *Id.*

The Court of Appeals concluded that public policy precluded the imposition of liability unless Hicks could "establish his innocence of the charges for which he was convicted." *Id.*, at ¶ 34. In support of this conclusion, the Court of Appeals reviewed a California case, ***Wiley v. County of San Diego***, 19 Cal.4th 532, 79 Cal.Rptr.2d 672, 966 P.2d 893 (1998), and cited a series of public policy arguments set forth there. Specifically:

- Permitting a convicted criminal to pursue a legal malpractice claim without requiring proof of innocence would ... shock the public conscience, engender disrespect for courts and generally discredit the administration of justice. *Hicks*, at ¶ 40 (citation omitted).
- Allowing civil recoveries to guilty plaintiffs impermissibly shifts responsibility for the crime away from the convict. Regardless of the attorney's negligence, a guilty defendant's conviction and sentence are the direct consequence of his own perfidy; therefore while a conviction predicated on incompetence may be erroneous, it is not unjust. *Id.*, at ¶ 41 (citation omitted).

- Tort law provides damages only for harms to the plaintiff's legally protected interests, 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 (just as he has no right to have the jury nullify the law, though juries sometimes do that). ***Id.***, at ¶ 42 (citation omitted).
- Even in cases where the causal link between an attorney's negligence and a client's erroneous imprisonment is most obvious (such as where the attorney fails to bring a clearly meritorious motion to suppress evidence that establishes guilt, which the state could not prove without it), civil recovery by a guilty plaintiff is not warranted because of the nature and function of the constitutional substructure of our criminal justice system. That is, such features of the criminal justice system as the state's burden to prove guilt beyond a reasonable doubt, the exclusionary rule, and other constitutional protections are to safeguard against conviction of the wrongly accused and to vindicate fundamental values. They are not intended to confer any direct benefit outside the context of the criminal justice system. Thus, defense counsel's negligent failure to

utilize them to secure an acquittal or dismissal for a guilty defendant does not give rise to civil liability. ***Id.***, at ¶ 43 (citation omitted).

- Unlike victims of legal malpractice in a civil context, who most often have no redress except a recovery from the negligent attorney, wrongfully convicted criminal defendants have the opportunity to rectify the wrong by asserting their Sixth Amendment right to effective assistance of counsel. Not only does the Constitution guarantee this right, any lapse can be rectified through an array of postconviction remedies, including appeal and habeas corpus. Such relief is afforded even to those clearly guilty as long as they demonstrate incompetence and resulting prejudice. ***Id.***, at ¶ 44 (citation omitted).

The Court of Appeals was persuaded by these arguments, and concluded that the trial court had erred in instructing the jury that Hick's burden was to prove only that but for Nunnery's negligent acts or omissions, Hicks would not have been found guilty of the charges against him. ***Hicks***, at ¶ 46. This "actual innocence" standard is more rigorous than merely showing that the criminal jury would have acquitted. ***Id.***, at ¶ 38. The

new trial to which Court of Appeals found Nunnery was entitled was one in which Hicks "must convince five sixths of the civil jurors, by a preponderance of the evidence, that he did not commit ***the offenses*** of which he was convicted." ***Id.***, at ¶ 46 (emphasis supplied).

Mr. Jama's interpretation seriously misapprehends this ruling. The Court of Appeals in ***Hicks*** wrote that "persons who actually commit ***the criminal offenses*** for which they are convicted should not be permitted to recover damages for legal malpractice from their former defense attorneys," and ultimately sided with Nunnery that that Hicks must prove to a jury he is "innocent of ***the charges*** of which he was convicted in order to prevail on a claim of legal malpractice." ***Hicks***, at ¶¶ 48 & 32 (emphasis supplied).

As far as Mr. Jama's case is concerned, the salient holding in ***Hicks*** is that Mr. Jama must demonstrate not only that Attorney Gonzalez was negligent, but also that Mr. Jama is innocent. In other words, as the Seventh Circuit has observed, "in most states, including Wisconsin, a legal malpractice suit against a criminal defense attorney requires a showing that the criminal defendant (that is, the malpractice plaintiff) actually was innocent, implying acquittal and more—that the defendant really was

innocent and wasn't just acquitted because the state could not carry its heavy burden of proof." ***Saecker v. Thorie***, 234 F.3d 1010, 1013-14 (7th Cir. 2000). ***Hicks*** establishes that the question of the malpractice plaintiff's innocence is in addition to, not a substitute for, a jury question regarding whether the plaintiff would have been found not guilty absent the defendant's negligence. ***Hicks***, at ¶ 50. Nunnery was entitled to a trial on that issue - not Hicks - because that question had not been litigated in the trial court; ***Hicks*** does not establish that a malpractice plaintiff who has entered a guilty plea is entitled to trial.

B. Tallmadge Requires Innocence to All Charges.

While phrases such as "the charges," "the offenses," and "the criminal offenses" in ***Hicks*** suggest that the actual innocence requirement applies collectively (*i.e.*, the Hicks court did not require proof of innocence to "some" or "one or more" or "at least one" of the charged offenses), ***Hicks*** did not confront that question directly. The Court of Appeals clarified whether would-be malpractice plaintiffs can pick and choose which of their offenses could form the basis of a lawsuit in ***Tallmadge v. Boyle***, 2007, WI App 47, 300 Wis. 2d 510, 730 N.W.2d 173.

Tallmadge was convicted of fifteen counts of sexually assaulting minor girls. ***Tallmadge v. Boyle***, 2007 WI App 547, ¶ 2, 300 Wis. 2d 510, 730 N.W.2d 173. Attorney Boyle was paid a total of $185,000 to seek postconviction relief for Tallmadge *via* a writ of *habeas corpus*. ***Id.***, at ¶ 6. In the course of over two years, Boyle never actually filed a writ, but did produce a draft; the draft was unsatisfactory to Tallmadge, who later fired Attorney Boyle. ***Id.*** Successor counsel did file a writ, which was dismissed as untimely. ***Id.***, at ¶¶ 7-8.

Tallmadge sued, and Attorney Boyle moved for summary judgment. The trial court granted the motion, concluding that ***Hicks*** was controlling. ***Id.***, at ¶ 11. Tallmadge appealed.

The Court of Appeals reviewed the ***Hicks*** public policy factors, discussed *supra*, and agreed with the trial court. Specifically, the Court of Appeals stated that under ***Hicks***, Tallmadge could succeed only if he could prove that he was innocent of all fifteen counts for which he was convicted. ***Tallmadge***, at ¶ 19. Specifically:

> In order to prove causation, the convicted criminal must show that, but for his former attorney's conduct, he would have been

> successful in the criminal lawsuit. Success in this context is not merely to have a court grant a motion or even order a new trial. Success in this context is a get out of jail free card.

Id. The Court of Appeals agreed with the trial court because there was "no evidence to demonstrate that Tallmadge had any possibility of securing a new trial on all fifteen convictions." *Id.*, at ¶ 18. So it is with Mr. Jama: he has entered a guilty plea to one of the charges against him, and by doing so has expressly waived any factual disputes about what did or did not happen at or before the time of the alleged offense. ***State v. Merryfield***, 229 Wis. 2d 52, 61, 598 N.W.2d 251 (Ct. App. 1999). Having pleaded guilty, Mr. Jama cannot prove his innocence, which is an essential component of his claims against Attorney Gonzalez. ***Harris v. Bowe***, 178 Wis. 2d 862, 868, 505 N.W.2d 159 (Ct. App. 1993).

C. Wisconsin's Law on Malpractice Claims in the Criminal Context Is Consistent with the Mainstream.

Of those jurisdictions to have considered the issue, a majority have adopted an "actual innocence" requirement in the manner of ***Hicks***. *See* ***Wiley v. County of San Diego***, 19 Cal.4th 532, 79 Cal.Rptr.2d 672, 966 P.2d 983, 985, 991 (1998) (holding that actual innocence is a required element of a plaintiff's cause of action in a criminal malpractice action; as noted *supra*,

this is the case that Wisconsin's Court of Appeals followed in ***Hicks***); *Schreiber v. Rowe*, 814 So.2d 396, 399 (Fla. 2002) (*per curiam*) (same); ***Glenn v. Aiken***, 409 Mass. 699, 569 N.E.2d 783, 786 (1991) (same); ***Rodriguez v. Nielsen***, 259 Neb. 264, 609 N.W.2d 368, 374 (2000) (same); ***Morgano v. Smith***, 110 Nev. 1025, 879 P.2d 735, 738 (1994) (holding that "in order to prevail at trial, the [criminal malpractice] plaintiff must prove actual innocence of the underlying charge"); ***Mahoney v. Shaheen, Cappiello, Stein & Gordon, P.A.***, 143 N.H. 491, 727 A.2d 996, 998-99 (1999) (holding that only clients able to prove actual innocence can challenge decisions made by defense counsel through malpractice actions); ***Carmel v. Lunney***, 70 N.Y.2d 169, 518 N.Y.S.2d 605, 511 N.E.2d 1126, 1128 (1987) (holding that a criminal malpractice plaintiff "must allege ... innocence or a colorable claim of innocence" to state a cause of action); ***Bailey v. Tucker***, 533 Pa. 237, 621 A.2d 108, 113 (1993) ("[D]efendant must prove, by a preponderance of the evidence, that he did not commit any unlawful acts with which he was charged as well as any lesser offenses included therein [to maintain criminal malpractice suit]."); ***Ang v. Martin***, 154 Wash.2d 477, 114 P.3d 637, 642 (2005) (requiring criminal malpractice plaintiffs to prove actual innocence by a preponderance of the evidence to state a cause of

action); ***Humphries v. Detch***, 227 W.Va. 627, 712 S.E.2d 795, 801 (2011) (same); *see also* ***Lamb v. Manweiler***, 129 Idaho 269, 923 P.2d 976, 979 (1996) (noting that plaintiff did not dispute that in a criminal malpractice action the plaintiff "must establish the additional element of actual innocence of the underlying criminal charges"); ***Adkins v. Dixon***, 253 Va. 275, 482 S.E.2d 797, 802 (1997) (holding that actual guilt is a material consideration on issue of proximate cause).

Wisconsin law in this area aligns with the majority. And some of these have even clarified, analogously to ***Tallmadge***, that the actual innocence requirement applies to all charges against would-be malpractice plaintiffs. *See, e.g.*, ***Bailey v. Tucker***, 533 Pa. 237, 621 A.2d 108, 113 (1993), cited *supra*. To the extent that Mr. Jama feels this constitutes an injustice, he is swimming against the prevailing current of legal authority on the issue.

2. MR. JAMA'S UNDERSTANDING OF HIS OWN CASE IS WRONG.

Mr. Jama argues, without citation to any supporting authority, that he should be allowed to pursue malpractice claims related to the charges on which he maintains his innocence, in spite of the fact that ***Tallmadge*** says, in so many words, that when a defendant cannot prove innocence

with respect to all convictions, there is no recoverable injury. ***Tallmadge,*** at ¶ 19. In the course of that argument, he writes:

> Jama has already proven, though [*sic*] his criminal appeal, that but for Gonzalez' negligence, he would not have been convicted of the now vacated sexual assault charges. Jama has already met the burden of proving ineffectiveness and he has received his "get out of jail free card."

(Appellant's Brief, p. 11.) This is wrong, on a number of levels.

First, Mr. Jama's criminal appeal does not even mention either Attorney Gonzalez or negligence, and in fact reinstates a verdict convicting him of sexual assault. ***State v. Jama,*** 2016 WI App 26, ¶ 36, 367 Wis. 2d 748, 877 N.W.2d 650 (unpublished). Even construing the comment about "criminal appeal" as referring to the ruling at the ***Machner*** hearing, Mr. Jama cites no such finding. Accepting as true (for the purposes of the motion to dismiss) Mr. Jama's allegation that the Trial Court "held that Jama did not receive a fair trial with a reliable result," the fact that Mr. Jama was granted a new trial is a far cry from a finding that but for his attorney's negligence, Mr. Jama would never have been

convicted in the first place.[2] (R. 13, ¶¶ 31, 33.) The Trial Court granted Mr. Jama's motion and ordered a new trial, but this is precisely the posture that the Court of Appeals called insufficient in ***Tallmadge*** ("success in this context is not merely to have a court grant a motion or even order a new trial"). ***Tallmadge***, at ¶ 19. Finally, Mr. Jama certainly did not receive the "get out of jail free card" contemplated in ***Tallmadge*** (***Id.***): he entered a guilty plea, the Trial Court entered a judgment of conviction, and Mr. Jama received a custodial sentence. (Dane County Case No. 12-CF-1759.) Mr. Jama remains a convicted criminal.

At several junctures, Mr. Jama claims that the Trial Court ruled that he was "estopped" or "precluded" from asserting his innocence with respect to the two sexual assault charges. (Appellant's Brief, pp. 2, 18.) There was never any such ruling; the substance of the Trial Court's ruling was as follows:

> In a criminal matter, there has to be proof of innocence of all charges. And because Mr. Jama pled guilty to the theft charge, even though he claimed and is taking the position

[2] Attorney Gonzalez does not concede negligence, and has not been found to have been negligent.

> that he has always claimed that he was innocent of the sexual assault charges, I do find that the defendants have prevailed on their motion to dismiss, and I will dismiss the matter.

(R. 23, at 7:3-10.) Nothing in the Trial Court's ruling concerned estoppel or preclusion. The Trial Court simply ruled that, bound by ***Hicks*** and ***Tallmadge***, it was irrelevant in the context of a malpractice suit whether Mr. Jama had committed the sexual assaults because he had committed the theft.

As a final note, Mr. Jama complains that he sat in prison, but concedes that this was a result of violating his probation. (Appellant's Brief, p. 5.) Mr. Jama may feel that he ought not to have been on probation in the first place, but he cannot contest that in order not to be incarcerated, he had only to comply with the terms of his probation.

3. MR. JAMA'S AMENDED COMPLAINT FAILS TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED.

One basis for Defendants' Renewed Motion to Dismiss was failure to state a claim. "A motion to dismiss for failure to state a claim tests the legal sufficiency of the complaint." ***John Doe 67C v. Archdiocese of***

Milwaukee, 2005 WI 123, ¶ 19, 284 Wis. 2d 307, 700 N.W.2d 180 (internal quotation omitted). Pleadings are to be liberally construed, with a view toward substantial justice to the parties. WIS. STAT. § 802.02(6). Facts alleged are taken as true, and only the legal premises derived therefrom are challenged. ***John Doe 67C***, ¶ 19, *citing* ***Ritterbusch v. Ritterbusch***, 50 Wis. 2d 633, 636, 184 N.W.2d 865, 866 (1971). A court must not accept as true "threadbare recitals of a cause of action's elements, supported by mere conclusory statements." ***Ashcroft v. Iqbal***, 556 U.S. 662, 678, 129 S.Ct. 1937 (2009). In the same vein, "[l]egal conclusions stated in the complaint are not accepted as true, and they are insufficient to enable a complaint to withstand a motion to dismiss." ***Data Key Partners v. Permira Advisers LLC***, 2014 WI 86, ¶ 19, 356 Wis. 2d 665, 849 N.W.2d 693. As stated by the Wisconsin Supreme Court:

> In order to satisfy WIS. STAT. § 802.02(1)(a), a complaint must plead facts, which if true, would entitle the plaintiff to relief. [...] Bare legal conclusions set out in a complaint provide no assistance in warding off a motion to dismiss. [...] Plaintiffs must allege facts that, if true, plausibly suggest a violation of applicable law.

Id., at ¶ 21 (internal citations omitted).

This "plausible claim for relief" pleading standard "does not require 'detailed factual allegations,' but it demands more than an unadorned the-defendant-unlawfully-harmed-me accusation." ***Iqbal***, at 678. As the United States Supreme Court explained:

> a claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. The plausibility standard is not akin to a "probability requirement," but it asks for more than a sheer possibility that a defendant has acted unlawfully. Where a complaint pleads facts that are "merely consistent with" a defendant's liability, it "stops short of the line between possibility and plausibility of 'entitlement to relief.'"

Id., *quoting* ***Bell Atlantic Corp. v. Twombly***, 550 U.S. 544, 127 S.Ct. 1955 (2007) (citation omitted).

Generally, a legal malpractice claim requires the proof of four elements:

1. The existence of a lawyer-client relationship between the claimant and the attorney;

2. The attorney's acts or omissions constituted negligence;

3. The negligence caused injury to the claimant; and

4. The nature and extent of the injury.

See, e.g., ***Lewandowski v. Continental Cas. Co.***, 88 Wis. 2d 271, 277, 276 N.W.2d 284 (1979). As discussed *supra*, that standard is heightened in the context of a malpractice claim involving a criminal case, however, because "as a matter of public policy, persons who actually commit the criminal offences for which they are convicted should not be permitted to recover damages for legal malpractice from their former defense attorneys." ***Hicks v. Nunnery***, 2002 WI App. 87, ¶ 48, 253 Wis. 2d 721, 643 N.W.2d 809. As a result, claimants seeking to recover on claims for legal malpractice in their criminal cases must prove their actual innocence in addition to the four elements outlined above. ***Hicks***, ¶ 50.

The bottom line is that Mr. Jama's Amended Complaint offers no facts which, if true, would plausibly suggest Mr. Jama is entitled to relief. ***Data Key Partners v. Permira Advisers LLC***, 2014 WI 86, ¶ 21, 356 Wis. 2d 665, 849 N.W.2d 693. Nor can it: Mr. Jama entered a guilty plea to one of the charges in the initial criminal complaint, and acknowledges that he cannot prove his innocence. (R. 13, ¶ 35; R. 16, p. 5; Appellant's Brief, pp.

5, 12, 14.) The Amended Complaint therefore fails to meet the minimum pleading standard announced in ***Twombly***, and adopted in Wisconsin under ***Data Key Partners v. Permira Advisers LLC***, 2014 WI 86, ¶ 21, 356 Wis. 2d 665, 849 N.W.2d 693.

The logic of ***Bell Atlantic Corp. v. Twombly*** is instructive in this case. In ***Twombly***, a group of consumers brought a class action alleging that local exchange carriers had conspired to prevent competitive entry into their markets, and to avoid competing with one another, in violation of the Sherman antitrust act. The Supreme Court held that the complaint's pleading of parallel business conduct along with the accusation of a conspiracy was insufficient to survive a motion to dismiss. Specifically, the Court concluded that "without more, parallel conduct does not suggest conspiracy, and a conclusory allegation of agreement at some unidentified point does not supply facts adequate to show illegality." ***Twombly***, at 556-57.

Analogous reasoning applies here: the Amended Complaint recites a litany of bases on which the trial court grounded its finding that Attorney Gonzalez's representation of Mr. Jama was ineffective, but supplies no factual basis for the conclusion that but for these alleged

deficiencies, Mr. Jama would have been acquitted. And indeed, it cannot: Mr. Jama is guilty of one of the original charges, and admits as much. In order to proceed with a legal negligence cause of action, Mr. Jama must establish not only that there was negligence, but that this negligence caused him to receive a conviction he otherwise would not have. The Complaint falls short of that mark: it is not enough to plead facts ***consistent*** with being harmed by negligence - Mr. Jama must provide allegations that plausibly suggest he is entitled to relief. ***Twombly***, at 557.

Mr. Jama has not pled facts which, if true, would establish that he was convicted wrongfully. To the contrary: he voluntarily entered a guilty plea to one of the charges in the initial criminal complaint. Conclusory speculations that an attorney's negligence caused loss are not enough to show that the client would have prevailed in the underlying action. *See, e.g.,* ***Anderson v. Vavrek***, 727 Fed. Appx. 870 (7th Cir. 2018) (*citing* ***Tallmadge*** *and* ***W. Bend Mut. Ins. Co. v. Schumacher***, 844 F.3d 670, 679 (7th Cir. 2016).)

6. CONCLUSION.

Mr. Jama is not innocent. Possibly he may not have committed some of the crimes with which he was charged,[3] but he openly admits that he did commit theft in the course of the events that precipitated his criminal case. (Amended Complaint, ¶ 35; see also R. 22, at 7:21-8:17.) There is no need for a jury to decide Mr. Jama's innocence when he has entered a plea of guilty. Mr. Jama's guilty plea precludes him from satisfying an essential component of his claims against Attorney Gonzalez: not only is he unable show that he would have been acquitted in his criminal case, he has affirmatively admitted his guilt. ***Harris v. Bowe***, 178 Wis. 2d 862, 868, 505 N.W.2d 159 (Ct. App. 1993).

The Court of Appeals should decline to modify the actual innocence rule announced in ***Hicks***, and then clarified in ***Tallmadge***. For the reasons set forth above, Defendants-Respondents respectfully request that the Court of Appeals affirm the Trial Court's order dismissing the case.

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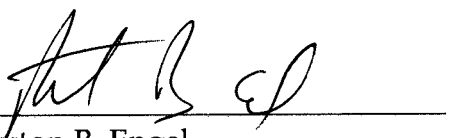
[3] Defendants-Respondents do not concede that Mr. Jama is actually innocent of any particular charges, but for the purposes of their Renewed Motion to Dismiss, the facts of the Amended Complaint are accepted as true. ***John Doe 67C v. Archdiocese of Milwaukee***, 2005 WI 123, ¶ 19, 284 Wis. 2d 307, 700 N.W.2d 180.

Respectfully submitted this 17th day of July, 2019.

HURLEY BURISH, S.C.



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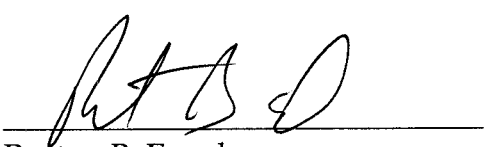
7. FORM AND LENGTH CERTIFICATION.

I hereby certify that this brief conforms to the rules contained in WIS. STAT. §§ 809.19(8)(b) and (c) for a brief and appendix produced with a proportional serif font. The length of this brief is 5,111 words.

Dated submitted this 17th day of July, 2019.

HURLEY BURISH, S.C.



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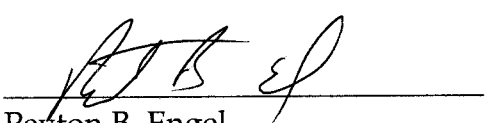
8. CERTIFICATION OF ELECTRONIC COPY.

Pursuant to WIS. STAT. § 809.19(12)(f), the undersigned hereby certifies that the text of the electronic copy of the brief is identical to the text of the paper copy of the brief.

Dated submitted this 17th day of July, 2019.

HURLEY BURISH, S.C.



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