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STATE OF WISCONSIN  
IN SUPREME COURT

Appeal No. 2019 AP 629

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JAMA I. JAMA,

*Plaintiff-Appellant,*

*v.*

JASON C. GONZALEZ AND WISCONSIN LAWYERS MUTUAL  
INSURANCE COMPANY,

*Defendants-Respondents-Petitioners.*

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PETITION FOR REVIEW

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JASON C. GONZALEZ AND  
WISCONSIN LAWYERS  
MUTUAL INSURANCE  
COMPANY,  
*Defendants-Respondents-  
Petitioners*

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## ISSUES PRESENTED FOR REVIEW

Defendants-Respondents-Petitioners Jason Gonzalez and Wisconsin Lawyers Mutual Insurance Company seek review of a court of appeals opinion that creates an exception to Wisconsin's actual innocence rule and that has been recommended for publication. See *Jama v. Gonzalez*, Case No. 2019AP629, unpublished slip op. (Wis. Ct. App. Dec. 10, 2020). In light of this Court's opinion in *Skindzelewski v. Smith*, 2020 WI 57, 392 Wis. 2d 117, 944 N.W.2d 575, this Court should grant review of one or more of the following three issues.

1. Is there an exception to the actual innocence rule that relieves criminal malpractice plaintiffs of establishing their innocence as to convictions on which they do not claim malpractice?

The circuit court answered no. The court of appeals answered yes.

2. If criminal malpractice plaintiffs need not establish their innocence as to all convictions, must they nevertheless establish their innocence as to all convictions transactionally related to the convictions on which they claim malpractice?

The court of appeals identified this issue but did not decide it.

3. If criminal malpractice plaintiffs need not, as a matter of law, establish their innocence as to any convictions, is the circuit court nevertheless allowed to determine, on a case-by-case basis, whether public policy considerations preclude imposing liability on the defendant, and did the circuit court correctly determine that public policy bars the claims at issue here?

The court of appeals did not address this issue.

## STATEMENT OF REASONS FOR GRANTING REVIEW

The facts and the issue presented by this case, greatly simplified, are these: Jama I. Jama was charged and convicted of sexually assaulting a woman and stealing things from her apartment. Jama was represented through trial by Attorney Jason Gonzalez. Jama obtained post-conviction relief by claiming ineffective assistance of counsel, and he then entered a deal with the State whereby he pleaded guilty to two misdemeanors, including the theft, and in exchange the State dismissed the remaining charges, including the sexual assault. Jama's Complaint does not aver his actual innocence but, rather, that the dismissal makes him innocent of the sexual assault "in the eyes of the law." R.13, ¶ 36. He concedes that he is guilty of the theft. He also claims that Gonzalez's negligent representation caused the sexual assault conviction. Does Jama state a claim for legal malpractice?

The circuit court answered no. The court of appeals answered yes, carving out a new exception to the actual innocence rule that has governed criminal malpractice claims in Wisconsin for nearly two decades, only months after this Court declined to adopt an exception to the actual innocence rule. *See Skindzelewski*, 2020 WI 57. Regardless whether one thinks that exceptions to the rule ought exist, the court of appeals' decision is incorrect. This Court should grant review to clarify its policy, harmonize Wisconsin's case law on the actual innocence rule, and finally resolve this issue of statewide import. *See* WIS. STAT. § 809.62(1r)(b), (c)2, (d).

Before the court of appeals issued its opinion, it certified Jama's appeal to this Court. *See* App. 19. In its certification, the court of appeals characterized this case as presenting "a novel issue in Wisconsin" requiring "application of public policy considerations" best performed by this Court. App. 19-20. That's true. The

actual innocence rule “arises out of public policy considerations.” *Skindzelewski*, 2020 WI 57, ¶ 9. Those public policy considerations were first enunciated in *Hicks v. Nunnery*, 2002 WI App 87, 253 Wis. 2d 721, 643 N.W.2d 809. This Court confirmed the continuing validity of those public policy considerations in *Skindzelewski*. 2020 WI 57, ¶¶ 9–11. A majority of the *Skindzelewski* Court held that those considerations did not support carving out an exception to the actual innocence rule when defense counsel’s failure to identify a valid statute of limitations defense caused the criminal defendant’s unlawful conviction. *See id.* ¶ 23. But the lower courts were left wondering when, if ever, those considerations might allow for an exception to the rule, especially in light of the separate concurrence by one member of the Court—suggesting that public policy might be well served by eliminating the actual innocence rule entirely but barring that, there should be no exceptions to the rule—and the dissent by another member of the Court—suggesting that public policy supported carving out a narrow exception to the actual innocence rule. *See id.* ¶¶ 25–32 (Hagedorn, J., concurring); ¶¶ 33–43 (Dallet, J., dissenting).

When this Court denied certification, the court of appeals took a stab at deciding the novel issue presented by Jama’s civil complaint. It created an exception to the actual innocence rule, one that allows criminal defendants to file suit against their former defense counsel when they obtain postconviction relief and claim innocence “in the eyes of the law,” though they do not claim actual innocence, as to some, but not all, of the charges of which they were originally convicted. The court of appeals got it wrong. The exception that it created is in conflict with *Hicks* and *Skindzelewski*, as well as *Tallmadge v. Boyle*, 2007 WI App 47, 300 Wis. 2d 510, 730 N.W.2d 173, an intervening court of appeals decision upholding the actual innocence rule in a case concerning a criminal defendant’s failed attempt to obtain postconviction relief as to some, but not all, of his

convictions. The exception is also in conflict with *Wilkinson v. Zelen*, 83 Cal. Rptr. 3d 779 (Cal. Ct. App. 2008), an appellate opinion issued in California—the jurisdiction in which the actual innocence rule originated—concerning a similar factual scenario.<sup>1</sup> Application of the exception in this case will require further litigation, in which the victim of the sexual assault, burglary, and theft will be subpoenaed to testify at a deposition and perhaps at trial so as to determine whether, in fact, Jama is actually innocent of *any* of the charges for which he was convicted and whether Gonzalez negligently cross-examined the victim, as Jama claims.

Of course, this Court isn't an error-correcting court, and not every erroneous appellate opinion is deserving of this Court's review. Why is review nevertheless necessary here? Because the court of appeals' opinion is indicative of a larger problem: lower courts don't know when, if ever, to allow exceptions to the actual innocence rule, and they don't know what parameters to set on any exceptions. The confusion is understandable: *Skindzelewski's* three opinions set forth four different methods of approaching proposed exceptions to the actual innocence rule. The opinion below, left untouched, won't just set a precedent for criminal malpractice actions with similar fact patterns—actions which will pop up with some frequency, as it's not uncommon for a convicted criminal who obtains postconviction relief to negotiate a plea deal with the

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<sup>1</sup> The court of appeals characterized the factual scenario as one of "split innocence." See *Jama*, Case No. 2019AP629, ¶ 1. That implies that Jama is actually innocent of the sexual assault. But Jama does not allege that he is actually innocent of that crime: he alleges that he "denied" the sexual assault when law enforcement officers interviewed him, R.13, ¶ 12, that he "informed Gonzalez" that "he had consensual sex," *id.* ¶¶ 15, 17, and that he "was innocent of these four charges in the eyes of the law," *id.* ¶ 36, but his complaint never outright alleges that he did not sexually assault the victim or that he is actually innocent of that crime.



State that results in some charges being dismissed. Now those defendants will have a cause of action against their former counsel, regardless of whether they are actually innocent. It will also set a precedent for each new proposed exception to the actual innocence rule, of which there will likely be many.

That's why this Court's guidance is needed. *See* WIS. STAT. § 809.62(1r)(b), (c)2, (d). And that's why three separate but related issues are presented for this Court's review. After *Skindzelewski*, it's not clear how this Court will wish to resolve the larger questions posed by this appeal—whether the actual innocence rule should remain in effect, whether exceptions to the rule should ever be recognized, and what sort of parameters should be placed on any exceptions—but what is clear is that regardless of this Court's answer to those questions, the circuit court correctly dismissed Jama's malpractice action.

### STATEMENT OF THE CASE

*Nature of the Case.* This is an appeal of an order entered in Dane County Circuit Court Case No. 18-cv-1478 by the Honorable Valerie L. Bailey-Rihn dismissing plaintiff Jama I. Jama's legal malpractice complaint for failure to state a claim for relief based on Wisconsin's actual innocence rule. R.19. The court of appeals reversed the circuit court, holding that Jama's allegation that he was innocent "in the eyes of the law" of the convictions for which he sought damages was sufficient to state a claim for legal malpractice against his former criminal defense attorney, Jason Gonzalez, despite the fact that Jama pleaded guilty and remained convicted of a related theft count and a count of resisting or obstructing an officer. *See Jama v. Gonzalez*, Case No. 2019AP629, unpublished slip op. (Wis. Ct. App. Dec. 10, 2020). The panel recommended publication of the opinion. *See id.* Jason Gonzalez and his insurer, Wisconsin Lawyers Mutual Insurance Company, petition for review.

*Procedural Status and Relevant Facts.* This legal malpractice case arises out of an underlying criminal case, Dane County Circuit Court Case No. 12-cf-1759, in which Attorney Jason Gonzalez represented criminal defendant Jama I. Jama. So that's where we'll begin.

On September 17, 2012, the State issued a criminal complaint against Jama. Eventually, Jama was charged with the following five crimes:

- Count 1: second-degree sexual assault, in violation of WIS. STAT. § 940.225(2)(cm) (intercourse with a person who is so intoxicated as to be incapable of giving consent)
- Count 2: third-degree sexual assault, in violation of § 940.225(3) (intercourse with a person without that person's consent)
- Count 3: burglary with intent to commit a felony (the felony being sexual assault)
- Count 4: burglary with intent to steal
- Count 5: misdemeanor theft

R.13, ¶¶ 6, 13; *State v. Jama*, 2016 WI App 26, ¶ 5, 367 Wis. 2d 748, 877 N.W.2d 650.<sup>2</sup> The State alleged that Jama committed each of these five crimes on January 28, 2012. See R.13, ¶ 7.<sup>3</sup> Specifically, it alleged that on January 28, 2012, Jama entered HH's apartment without her consent,

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<sup>2</sup> See also *State v. Jama I. Jama*, WIS. CIR. CT. ACCESS, <https://wcca.wicourts.gov/caseDetail.html?caseNo=2012CF001759&countyNo=13&mode=details> [hereinafter *State v. Jama* CCAP Entry]. The Court may take judicial notice of this electronic court record pursuant to WIS. STAT. § 902.01.

<sup>3</sup> See also *State v. Jama* CCAP Entry, *supra* note 2.

sexually assaulted her, and stole her gaming system and controller. *See* R.13, ¶¶ 7-10.

Gonzalez represented Jama through trial. According to the evidence presented at trial, Jama approached HH on the evening of January 28, 2012. HH was walking home from a bar, and she was highly intoxicated. Jama helped her enter her apartment building. Once inside the apartment, HH was struck on the back of the head and rendered unconscious. When she awoke, she was on the floor, naked from the waist down. She reported to the police that Jama sexually assaulted her and took items from her apartment. Later, DNA from sperm found in HH's underwear was determined to be a match to Jama, and items that HH reported stolen were recovered from Jama's apartment and his brother's car. *Jama*, 2016 WI App 26, ¶¶ 2-4.

The jury found Jama guilty on all five counts. On September 5, 2014, the circuit court set aside the verdicts on Counts 2, 3, and 4. *Id.* ¶ 5; R.13, ¶¶ 25, 26. It revoked Jama's bail on the remaining two counts, and Jama was taken into custody pending sentencing. R.13, ¶ 25.<sup>4</sup> On December 4, 2014, the circuit court sentenced Jama as follows:

- Count 1: sentence withheld in favor of 6 years' probation
- Count 5: 9 months' jail

R.13, ¶ 28.<sup>5</sup> The circuit court deemed the jail time served as a result of Jama's presentence incarceration, and Jama was immediately released to probation. *Id.*

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<sup>4</sup> *See also State v. Jama* CCAP Entry, *supra* note 2.

<sup>5</sup> *See also State v. Jama* CCAP Entry, *supra* note 2.

The State appealed. Jama, now represented by Attorney Cole Ruby, defended the circuit court's decision to set aside three of the five verdicts.<sup>6</sup> The court of appeals upheld the circuit court's decision to set aside the burglary counts (Counts 3 and 4) but directed the circuit court to reinstate the third-degree sexual assault count (Count 2).<sup>7</sup> See *Jama*, 2016 WI App 26, ¶ 1; R.13, ¶ 27. Around the same time, Jama's probation was revoked and he was returned to custody. See *State v. Jama* CCAP Entry, *supra* note 2; R.13, ¶ 32.

Before sentencing on Count 2 could occur, Jama's post-conviction counsel, Attorney Ruby, filed a motion for new trial. A *Machner* hearing was held on August 4, 2016. On February 10, 2017, the circuit court granted Jama's motion and vacated the three remaining convictions. Jama was released on a signature bond pending retrial. On September 20, 2017, the state filed an amended information adding Count 6: resisting or obstructing an officer. That same day, Jama pleaded guilty to Counts 5 and 6, and in exchange, the prosecutor dismissed Counts 1 through 4. See *State v. Jama* CCAP Entry, *supra* note 2; R.13, ¶¶ 30, 33–35. That was the final resolution of Jama's criminal case.

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<sup>6</sup> See *State v. Jama I. Jama*, WIS. CT. SYS. SUP. CT. & CT. APPEALS ACCESS, <https://wscca.wicourts.gov/caseDetails.do?caseNo=2014AP002432>.

<sup>7</sup> Here's why, briefly: The circuit court reasoned that the jury found that the victim, HH, was so intoxicated as to be incapable of giving consent (hence the guilty verdict on Count 1) and that because HH was not competent to make a decision regarding consent, the guilty verdict on Count 2 (intercourse without consent) was "legally inconsistent." *Id.* ¶ 10. The court of appeals rejected that reasoning. See *id.* ¶¶ 11–19. But the court of appeals agreed with the circuit court that there was no evidence that HH did not consent to Jama entering her apartment, as "consent" is defined differently in the burglary context. See *id.* ¶¶ 27–35.

That brings us to Jama's civil complaint for legal malpractice. On June 7, 2018, Jama filed suit against Gonzalez and Wisconsin Lawyers Mutual Insurance Company (WILMIC). *See* R.1.

The operative civil complaint alleges that "there is video evidence of [HH] allowing Jama into her apartment" on January 28, 2012, that HH removed her clothes, that "[t]he two then engaged in sexual intercourse," that HH then fell asleep, and that Jama left about 90 minutes after arriving, taking "a gaming system and a controller from the apartment which he did not have permission to take." R.13, ¶¶ 7-9.<sup>8</sup> It alleges that, at some point, Jama told Gonzalez that he did not commit the sexual assault or burglary. *Id.* ¶ 15. However, the complaint does not allege actual innocence. It alleges that Gonzalez negligently represented Jama by, among other things, failing to discuss the facts of the incident with Jama before trial, arguing inconsistent theories of defense at trial, failing to object to certain evidence relevant to HH's credibility, and failing to effectively cross-examine HH. *Id.* ¶¶ 39, 55, 72. In sum, it alleges:

That due to Gonzalez malpractice, Jama was convicted of Counts 1-4 which were subsequently vacated, dismissed by the prosecution and never retried. It is for these 4 counts that Jama brings his claims for malpractice and suffered damages. Jama was innocent of these four charges *in the eyes of the law* and this issues has essentially already been proven. [sic, emphasis added]

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<sup>8</sup> It's worth noting that the facts, as Jama alleges them, are *consistent* with the jury's finding of guilt on both sexual assault counts: Jama engaged in sexual intercourse with HH, and HH was so intoxicated that she was unable to give consent.

*Id.* ¶ 36.<sup>9</sup>

Gonzalez and WILMIC moved to dismiss Jama's complaint in its entirety, relying on Wisconsin's actual innocence rule, which bars legal malpractice claims against criminal defense lawyers unless the criminal defendant/malpractice plaintiff is actually innocent—not just acquitted—of the crimes of which he or she was originally convicted. R.8. On February 4, 2019, the circuit court issued an oral ruling granting the motion. *See* R.23. It explained that there were "strong" public policy considerations favoring "not finding legal malpractice in a criminal case unless the defendant can prove that they are innocent of all charges." R.23:5. The circuit court held that the actual innocence rule barred Jama's claims, and therefore it dismissed them. R.23:7.

Jama appealed, arguing that he "has already proven, through 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, at 11. The court of appeals certified the appeal to this Court, but this Court refused certification. *See* App. 19. The court of appeals then reversed. It held that Jama may bring a legal malpractice claim against his former criminal defense attorney as long as he is "able to prove his innocence *only* for the specific criminal charges as to which he alleges his former criminal attorney performed negligently." *Jama*, Case No. 2019AP629, ¶ 2. It concluded that "the circuit court erroneously dismissed Jama's complaint because Jama claims actual innocence as to the vacated sexual assault convictions that form the basis of his malpractice claims in that complaint." *Id.* ¶ 38.

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<sup>9</sup> As the above factual recitation, which is based on the official court record, explains, Jama was never convicted or sentenced on Counts 2, 3, and 4.

## ARGUMENT

### A. THIS COURT SHOULD GRANT REVIEW TO CONSIDER WHETHER THE COURT OF APPEALS ERRED BY CREATING AN EXCEPTION TO THE ACTUAL INNOCENCE RULE.

“The actual innocence rule has been part of Wisconsin jurisprudence for nearly two decades.” *Skindzelewski*, 2020 WI 57, ¶ 11. It was first adopted by the court of appeals in *Hicks*, 2002 WI App 87. It was reaffirmed in *Tallmadge*, in which the court of appeals explained that “liability in a legal malpractice action when the plaintiff is a criminal defendant cannot be imposed unless the plaintiff can establish that he was innocent of the charges of which he was convicted.” 2007 WI App 47, ¶ 18 (cleaned up). *Tallmadge* reiterated the public policy considerations underpinning the actual innocence rule:

- (1) Permitting a convicted criminal to recover in a legal malpractice action against former defense counsel would result in the criminal being indirectly rewarded for his crimes;
- (2) 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;
- (3) Allowing guilty plaintiffs to recover in a civil suit against their former criminal defense attorneys shifts the responsibility for the criminal act away from the convict, who would not be in jail had he not broken the law;

- (4) A guilty criminal does not have a right to liberty, and thus should not benefit from tort law;
- (5) The constitutional safeguards of the criminal justice system provide proper relief and should not give rise to civil liability; and
- (6) Wrongfully convicted defendants have other remedies to redress any wrongs.

*Id.* ¶ 22 (cleaned up).

These public policy considerations militate against creating an exception to the actual innocence rule in cases such as Jama's. A criminal defendant who is convicted of several crimes and later claims that he or she is innocent "in the eyes of the law" of at least one of those crimes is *still a convicted criminal*. This case exemplifies all of the policy considerations, and the second, fifth, and sixth in particular: Jama obtained relief through the criminal justice system because his sexual assault conviction was vacated and his attorney negotiated a deal that resulted in the sexual assault charges being dismissed. Allowing him to pursue a malpractice claim despite his admitted guilt on the theft charge—and despite his notable failure to allege that he is actually innocent of the sexual assault—would force the victim to sit through a deposition and another trial, causing the public and likely the victim to lose respect for the courts and discredit the administration of justice. Carving out an exception to the actual innocence rule for convicted criminals such as Jama would run contrary to public policy.

It would also run contrary to this Court's controlling opinions. In particular, the *Skindzelewski* Court recently rejected a criminal malpractice plaintiff's request to adopt an exception to the actual innocence rule "which



would relieve a plaintiff of establishing his innocence whenever defense counsel's negligence results in a conviction or sentence unauthorized by law." 2020 WI 57, ¶ 12. The *Skindzelewski* Court explained, "The law does not recognize a cause of action for a criminal defendant against his attorney merely because a more competent attorney could have achieved a better result." *Id.* ¶ 23. When a criminal defendant concedes guilt, his "claim of legal malpractice against his criminal defense attorney is legally barred." *Id.*

Just as in *Skindzelewski*, there is "no principled reason to distinguish this case from the rationale of *Hicks*." *Id.* ¶ 32 (Hagedorn, J., concurring). If not corrected, the new exception to the actual innocence rule created by the decision below runs the risk of eroding the public policy considerations underpinning the rule and paving the way for additional exceptions in the future.

**B. THIS COURT SHOULD GRANT REVIEW TO CONSIDER WHETHER TO SET PARAMETERS LIMITING THE COURT OF APPEALS' EXCEPTION.**

Even if this Court agrees with the court of appeals' decision to create an exception to the actual innocence rule, it should grant review to provide guidance on the parameters of the exception and particularly to consider whether to adopt the transactionally related approach identified by the court of appeals in its request for certification but not discussed in the court of appeals' final opinion.

The transactionally related approach was adopted by the California Court of Appeal in *Wilkinson v. Zelen*, 83 Cal. Rptr. 3d 779 (Cal. Ct. App. 2008). *Wilkinson* contains facts similar to this case: Wilkinson was convicted of three charges; those convictions were later vacated in a post-conviction proceeding based on Wilkinson's claim of ineffective assistance of counsel; pursuant to a negotiated plea agreement, Wilkinson then pleaded no contest to

one of the original charges and an added charge, and the remaining two charges were dismissed on the prosecutor's motion; Wilkinson then filed a criminal malpractice claim against her trial counsel. *See id.* at 781–83.

*Wilkinson* also relies on the same actual innocence rule—with the same public policy underpinnings—as Wisconsin courts do. There's good reason for this: *Hicks* adopted the actual innocence rule as enunciated by the California Supreme Court in *Wiley v. County of San Diego*, 966 P.2d 983 (Cal. 1998). *See Hicks*, 2002 WI App 87, ¶¶ 39–46. *Wilkinson* relied heavily on *Wiley*, which remains controlling precedent in California. *See Wilkinson*, 83 Cal. Rptr. 3d at 781, 785, 788.

*Wilkinson* applied the same actual innocence rule and the same public policy considerations to similar facts and held that a criminal malpractice plaintiff “must be exonerated of all transactionally related offenses” as a prerequisite to stating a claim for criminal malpractice.<sup>10</sup> 83 Cal. Rptr. 3d at 787–88. *Wilkinson* therefore concluded that the trial court properly dismissed Wilkinson's criminal malpractice claim because the court record and the allegations in her civil complaint unequivocally demonstrated that she entered no contest pleas to two offenses transactionally related to the charge on which she claimed factual innocence. *See id.* *Wilkinson* explained that this result is “consistent with the thrust of *Wiley* . . .

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<sup>10</sup> The “exoneration” requirement comes from *Coscia v. McKenna & Cuneo*, 25 P.3d 670 (Cal. 2001), in which the Supreme Court of California explained that under *Wiley*, a criminal malpractice plaintiff “must obtain reversal of his or her conviction, or other exoneration by postconviction relief . . . as a predicate to recovery.” *Id.* at 674. In other words, vacatur of the conviction is a necessary, but not sufficient, condition to obtain recovery in a legal malpractice action. Actual innocence must still be proven. *See id.* at 673 (describing the issue presented as “whether exoneration by postconviction relief is required *before* a plaintiff in a criminal malpractice action can *prove* actual innocence” (emphasis added)).

that one who engages in criminal conduct . . . may not recover in a legal malpractice action. Other remedies, such as a new trial or a plea to a reduced offense, . . . are a sufficient remedy for legal malpractice in a criminal prosecution.” *Id.* at 788.

In the opinion below, the court of appeals parted way with California’s courts without explanation, creating a new exception to the actual innocence rule without establishing any clear parameters. Given that Wisconsin’s actual innocence rule has its roots in California’s jurisprudence, this Court’s review is needed to provide guidance on the parameters of the newly created exception and to clarify and harmonize the law on this issue of statewide importance.

**C. THIS COURT SHOULD GRANT REVIEW TO CONSIDER WHETHER THE CIRCUIT COURT PROPERLY DISMISSED JAMA’S CLAIMS BASED ON PUBLIC POLICY CONSIDERATIONS.**

In Wisconsin, public policy considerations may preclude tort liability despite a finding of negligence. *See Miller v. Wal-Mart Stores, Inc.*, 219 Wis. 2d 250, 264–65, 580 N.W.2d 233 (1998). The public policy determination must be made by the court, not the jury, and it can be made as early as the pleadings stage. *See id.*; accord *Nichols v. Progressive N. Ins. Co.*, 2008 WI 20, ¶ 21, 308 Wis. 2d 17, 746 N.W.2d 220.

Were this Court to agree with the court of appeals that Jama’s failure to plead actual innocence does not preclude his legal malpractice claims as a matter of law, it should nevertheless grant review to address whether public policy may be used on a case-by-case basis to limit liability in criminal malpractice cases and whether the circuit court properly applied those factors to dismiss Jama’s claims.

The case-by-case approach is the one advocated by Judge Dykman back in 2002 when the majority of the *Hicks* Court chose to adopt the actual innocence rule. *See Hicks*, 2002 WI App 87, ¶¶ 77–113 (Dykman, J., dissenting). The case-by-case approach remains a topic of discussion today. *See Skindzelewski*, 2020 WI 57, ¶¶ 27–29 (Hagedorn, J., concurring).

If this Court were to abandon the actual innocence rule in favor of the case-by-case approach in cases such as this one – or in all criminal malpractice cases – it should still reverse the court of appeals’ decision below. The allegations in Jama’s complaint establish that he is attempting to recover damages based on the theory that he has “proven” his innocence “in the eyes of the law” by having convinced the circuit court to vacate the sexual assault conviction based on a claim of ineffective assistance of counsel and by having negotiated a deal with the prosecutor to dismiss that charge. R.13, ¶ 26. He admits that he stole items from the victim’s apartment during the time that he was also alleged to have sexually assaulted her. *See id.* ¶¶ 7–9. He admits that he engaged in sexual intercourse with the victim during the time in which the jury found she was so intoxicated that she was incapable of giving consent. *See id.* ¶ 8. He does not allege that she was capable of giving consent or that she in fact consented to the sexual intercourse. He does not allege that he is actually innocent of any of his convictions. Even if some criminal malpractice actions might be deemed allowed to proceed past the pleadings stage under the case-by-case approach, this isn’t such a case. *Cf. Hicks*, 2002 WI App 87, ¶¶ 106–11 (Dykman, J., dissenting) (describing criminal malpractice scenarios in which Judge Dykman would preclude or allow recovery under the case-by-case approach). The circuit court correctly concluded that public policy bars Jama’s claims.

## CONCLUSION

For these reasons, Jason C. Gonzalez and Wisconsin Lawyers Mutual Insurance Company respectfully request that this Court grant the petition for review, reverse the court of appeals' mandate, and affirm the judgment of the Dane County Circuit Court dismissing Jama I. Jama's complaint for failure to state a claim.

Dated at Madison, Wisconsin, January 7, 2021.

Respectfully submitted,

JASON C. GONZALEZ AND  
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**CERTIFICATION**

I certify that this petition conforms with the rules contained in WIS. STAT. § 809.62(4) for a petition for review produced using proportional serif font. The length of this petition is 4,759 words. *See* WIS. STAT. § 809.19(8)(d).

  
Catherine E. White**CERTIFICATE OF COMPLIANCE  
WITH RULE 809.62(4)(b)**

I hereby certify that:

I have submitted an electronic copy of this petition for review, excluding the appendix, if any, which complies with the requirements of WIS. STAT. §§ 809.62(4)(b) and 809.19(12).

I further certify that:

This electronic petition for review is identical in content and format to the printed form of the brief filed as of this date.

A copy of this certificate has been served with the paper copies of this petition for review filed with the court and served on the opposing party.

  
Catherine E. White

### APPENDIX CERTIFICATION

I certify that filed with this petition for review, either as a separate document or as a part of this petition, is an appendix that complies with WIS. STAT. § 809.62(2)(f) and that contains, at a minimum, (1) a table of contents; (2) the decision and opinion of the court of appeals; (3) the findings or opinion of the circuit court necessary for an understanding of the petition; and (4) portions of the record necessary for an understanding of the petition.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using first names and last initials instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.



Catherine E. White

**CERTIFICATE OF COMPLIANCE  
WITH RULE 809.62(4)(b)**

I hereby certify that:

I have submitted an electronic copy of this appendix, which complies with the requirements of WIS. STAT. §§ 809.62(4)(b) and 809.19(13).

I further certify that:

This electronic appendix is identical in content and format to the printed form of the appendix filed as of this date.

A copy of this certificate has been served with the paper copies of this appendix filed with the court and served on the opposing party.

  
Catherine E. White