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SUPREME COURT

STATE OF WISCONSIN

IN SUPREME COURT

Appeal No. 2019 AP 629

JAMA I. JAMA,

Plaintiff-Appellant,

v.

JASON C. GONZALEZ AND WISCONSIN LAWYERS MUTUAL INSURANCE COMPANY,

Defendants-Respondents-Petitioners.

BRIEF OF DEFENDANTS-RESPONDENTS-PETITIONERS

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

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

A. CASES

B. STATUTES

C. OTHER AUTHORITIES

ISSUES PRESENTED

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 related to the same underlying criminal transaction as the convictions on which they claim malpractice?

The circuit court did not address this issue; the court of appeals identified the 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 ON ORAL ARGUMENT AND PUBLICATION

The reasons for granting review also counsel for oral argument and publication, which rightly is this Court's usual practice.

STATEMENT OF THE CASE

Nature of the Case. On February 13, 2019, Judge Valerie L. Bailey-Rihn entered an order in Dane County Circuit Court Case No. 18-CV-1478, 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.) Jama appealed, and the court of appeals reversed the Circuit Court, holding that Jama's allegation that he was innocent "in the eyes of the law," rather than that he was actually innocent 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, in spite of the fact that Jama had pled guilty and remained convicted of a related theft count and a count of resisting or obstructing an officer. *See Jama v. Gonzalez*, 2021 WI App 3, 395 Wis. 2d 655, 954 N.W.2d 1. Jason Gonzalez and his insurer, Wisconsin Lawyers Mutual Insurance Company, petitioned for review, and this Court granted the petition.

Procedural Status and Relevant Facts. Attorney Jason Gonzalez represented Jama I. Jama in Dane County Circuit Court Case No. 12-CF-1759, where 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.[1] The State alleged that Jama committed each of these five crimes on January 28, 2012. *See* R.13, ¶ 7.[2] Specifically, that on January 28, 2012 Jama entered HH's apartment without her consent, 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, as recited by the Court of Appeals when it considered his criminal case, 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

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[1] *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.

[2] *See also State v. Jama* CCAP Entry, *supra* note 1.

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.[3] 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. [4] The circuit court deemed the jail time served as a result of Jama's presentence incarceration, and Jama was immediately released to probation. *Id.*

The State appealed. Jama, now represented by Attorney Cole Ruby, defended the circuit court's decision to set aside three of the five verdicts.[5] The court of appeals upheld the circuit court's decision to set aside the

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[3] *See also State v. Jama* CCAP Entry, *supra* note 1.

[4] *See also State v. Jama* CCAP Entry, *supra* note 1.

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

burglary counts (Counts 3 and 4) but directed the circuit court to reinstate the third-degree sexual assault count (Count 2).[6] *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 1; R.13, ¶ 32.

Before sentencing on Count 2 could occur, Jama's post-conviction counsel 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 pled guilty to Counts 5 and 6 and, contemporaneously, the prosecutor dismissed Counts 1 through 4 which included the sexual assault; Jama was sentenced to nine months, with the time deemed served. *See State v. Jama* CCAP Entry, *supra* note 1; R.13, ¶¶ 30, 33–35. That was the final resolution of Jama's criminal case.

That brings us to Jama's civil complaint for legal malpractice. On June 7, 2018, Jama filed suit against

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[6] 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.

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 having arrived, having taken "a gaming system and a controller from the apartment which he did not have permission to take." R.13, ¶¶ 7–9.[7] 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*

[7] Note 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 (*see* ¶ 21 of the Amended Complaint, R. 13, alleging that HH admitted to abusing alcohol on the night in question and "could not testify as to consent of the sex").

> *of the law* and this issues has essentially already been proven. [*sic*, emphasis added]

Id. ¶ 36.[8]

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 declined 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*,

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[8] 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.

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.

ARGUMENT

The Court should reverse the court of appeals and affirm the judgment of the circuit court. The opinion below overrules long-standing precedent, conflicts with this Court's recent ruling, marks a significant policy change, and is unwarranted by the record in this case.

For decades, Wisconsin courts have required proof of actual innocence as a prerequisite to a finding of liability in a legal malpractice action in which the plaintiff is a criminal defendant. *See, e.g., Tallmadge v. Boyle*, 2007 WI App 47, 300 Wis. 2d 510, 730 N.W.2d 173; *Hicks v. Nunnery*, 2002 WI App 87, 253 Wis. 2d 721, 643 N.W.2d 809; *Harris v. Bowe*, 178 Wis. 2d 862, 868, 505 N.W.2d 159 (Ct. App. 1993); *see also Saecker v. Thorie*, 234 F.3d 1010, 1013–14 (7th Cir. 2000). Just last year, this Court reaffirmed the long-standing actual innocence rule. *See Skindzelewski v. Smith*, 2020 WI 57, 392 Wis. 2d 117, 944 N.W.2d 575. Neither this Court nor the court of appeals has ever created an exception to the bright-line actual innocence rule—until the court of appeals' opinion below.

Such ingrained precedent should not be abandoned lightly—especially where, as here, the rule at issue "is clear and workable" and courts "have consistently and coherently followed it." *Chris Hinrichs & Autovation Ltd. v. Dow Chemical Co.*, 2020 WI 2, ¶ 69, 389 Wis. 2d 669, 937 N.W.2d 37. The doctrine of stare decisis militates against adopting the precipitous change in law created by the court of appeals' decision. It is the rare case that presents the special circumstances justifying a departure from existing law:

> (1) Changes or developments in the law have undermined the rationale behind a decision;
>
> (2) there is a need to make a decision correspond to newly ascertained facts;
>
> (3) there is a showing that the precedent has become detrimental to coherence and consistency in the law;
>
> (4) the prior decision is "unsound in principle;" or
>
> (5) the prior decision is "unworkable in practice."

Bartholomew v. Wis. Patients Comp. Fund & Compcare Health Servs. Ins. Corp., 2006 WI 91, ¶ 33, 293 Wis. 2d 38, 717 N.W.2d 216.

Such special circumstances are not present here. The court of appeals veered off course when it created a gaping exception to the bright-line actual innocence rule, and this Court must right the ship.

A. THE COURT OF APPEALS ERRED BY CREATING AN EXCEPTION TO THE ACTUAL INNOCENCE RULE.

The bright-line actual innocence rule was officially announced by the court of appeals in *Hicks v. Nunnery*, 2002 WI App 87. *Hicks* has produced a settled body of law that has consistently applied the actual innocence rule without exception. In *Tallmadge v. Boyle*, the court of appeals reiterated 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). Over the past two decades, considerable reliance has been built upon this easy-to-understand, bright-line rule.

This Court recently reaffirmed the actual innocence rule in *Skindzelewski v. Smith*, 2020 WI 57. There, the Court confirmed that there are *no exceptions* to the actual innocence rule. It 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.*

Until the court of appeals' decision below, no Wisconsin court had ever granted an exception to the actual innocence rule. The court of appeals broke from that pattern, and in doing so, overruled *Skindzelewski*. But here, just as in *Skindzelewski*, there is "no principled reason to distinguish this case from the rationale of *Hicks*." *Id.* ¶ 32 (Hagedorn, J., concurring). *Hicks*, *Tallmadge*, and *Skindzelewski* confirm that the bright-line actual innocence rule is workable in practice. Just as in *Skindzelewski*, there is no reason for this Court to depart from the coherent and consistent body of law establishing the actual innocence rule.

The rationale underpinning the actual innocence rule remains valid today. *Tallmadge* reiterated the public policy considerations in favor of the rule that were first announced in *Hicks*:

> (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).

This case exemplifies the policy reasons militating in favor of the bright-line actual innocence rule. 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, such as Jama, is *still a convicted criminal.* 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 for the time he served on those convictions. He now seeks additional, monetary relief despite his admitted guilt on the theft charge—and despite his failure even to allege that he is actually innocent of the sexual assault. Allowing him to pursue a malpractice claim would force the victim to sit through a deposition and another trial.[9] It would appear that in the civil litigation, the victim would not be afforded the constitutional and statutory protections that she enjoyed as a victim in the criminal case. The victim could not be faulted for losing respect for the courts; nor could the public at large.

The public policy rationale behind the bright-line actual innocence rule remains valid today. One might conceive of *other* policy considerations militating against the

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[9] Again, Jama admits that he engaged in sexual intercourse with the victim. The only issues are whether the victim was capable of consenting and whether she did in fact consent. Jama alleges that Gonzalez was negligent in failing to effectively cross-examine the victim. Thus, the malpractice litigation would involve relitigating Jama's criminal case, and the victim would be an essential witness.

actual innocence rule, but such policy considerations also existed when the rule was first adopted, and there's no reason to disturb the settled body of law surrounding the rule now. If there are to be changes to the rule, the legislature ought to craft them, as it has the opportunity to hear from all parties with a stake in the broader issues at play.[10] *See Borgnis v. Falk Co.*, 147 Wis. 327, 351, 133 N.W. 209 (1911) ("When acting within constitutional limitations, the legislature settles and declares the public policy of a state, and not the court."). *Hicks* and its progeny have built a settled body of law on which the courts and other actors—such as the legal malpractice insurance industry—rely. The bright-line rule should remain in place unless and until the legislature says otherwise.

In sum, the actual innocence rule is underpinned by a settled body of law, consistently applied, and is eminently workable in practice. It remains sound in principle. This bright-line rule greatly simplifies the question of who may sue a criminal defense lawyer for malpractice, and in doing so, it streamlines the process of bringing such cases to a conclusion. The rationale behind the Court's original adoption of the rule remains valid. This Court should affirm the consistent application of the actual innocence rule, an application without exceptions.

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[10] For example, any change to the actual innocence rule will likely trigger the question whether public defenders are entitled to immunity from criminal malpractice suits—a question that some states have answered through statutory enactment. *See Laughlin v. Perry*, 604 S.W.3d 621, 631 (Miss. 2020). Wisconsin courts have not yet addressed this question—but for the actual innocence rule, *Skindzelewski* might have provided the opportunity. *See Skindzelewksi*, 2020 WI 57, ¶ 5 & n.4.

B. IF THERE IS TO BE AN EXCEPTION TO THE ACTUAL INNOCENCE RULE, IT SHOULD BE NARROWER THAN THE ONE ANNOUNCED BY THE COURT OF APPEALS.

This Court should not disturb the actual innocence rule for the reasons explained above. But were the Court inclined to create an exception to the actual innocence rule, it should limit that exception to those plaintiffs who allege actual innocence with respect to criminal convictions that are not part of the same course of conduct as those for which they have admitted guilt.

The California Court of Appeal adopted such a "transactionally related" approach in *Wilkinson v. Zelen*, 83 Cal. Rptr. 3d 779 (Cal. Ct. App. 2008). Wilkinson was initially arrested for driving under the influence and failing to stop at the scene of an accident; later, after she had been transported to the police station, she battered an officer. She was convicted for all three offenses, but 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 pled 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.[11] 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 related by the same course of conduct to the charge on which she claimed factual innocence. *See id.* *Wilkinson* explained that this result is "consistent with the thrust of *Wiley* . . . 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.

That same logic applies here: Jama, by his own admission, engaged in sexual intercourse with and stole from the victim within an 80-minute stretch of time. Jama received a sufficient remedy for any legal malpractice

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[11] 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 may have occurred: he pled to a reduced offense. He should not be allowed to recover damages as a result of his criminal interaction with the victim.

In the opinion below, the court of appeals erroneously assumed that any time served by Jama beyond the maximum time authorized by statute for the charges to which he pleaded guilty "is unconnected to any criminal behavior on Jama's part." *Jama*, 2021 WI App 3, ¶ 37. "Unconnected" is a stretch, to say the least: the criminal behavior to which Jama pled guilty involves the same location, the same victim, and the same time-span of roughly 80 minutes—in short, the same course of conduct—as the charges to which Jama claims to be innocent "in the eyes of the law."

The court of appeals parted ways with California's courts without explanation, abandoning the bright-line actual innocence rule without adopting California's requirement that criminal malpractice plaintiffs who allege actual innocence with respect to some convictions must also establish that those convictions are not part of the same course of conduct as those for which they have admitted guilt.

Should this Court determine that special circumstances warrant abandoning the bright-line actual innocence rule, the circumstances require that this Court follow California's lead in creating a narrow exception to the bright-line rule.

C. THE RECORD HERE SHOULD NOT PROMPT A CHANGE IN LAW.

Even if members this Court were inclined to adopt a large-scale change in the actual innocence rule—or jettison the rule entirely—this case is not the vehicle in

which to make that change. That's because even without the actual innocence rule, the circuit court properly applied public policy factors to dismiss Jama's claims. *See, e.g., Nicols v. Progressive N. Ins. Co.*, 2008 WI 20, ¶ 12, 308 Wis. 2d 117, 746 N.W.2d 220 ("Wisconsin court have reserved the right to deny the existence of a negligence claim based on public policy reasons." (cleaned up)).

Even if the actual innocence rule were altered to allow some criminal malpractice actions to proceed past the pleadings stage, this case would not proceed. 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. *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.

Thus, in dismissing Jama's claims, the circuit court referenced the public policy concerns underpinning the actual innocence rule, writing that "allowing civil remedies to guilty plaintiffs impermissibly shifts responsibility for the crime away from the convict" and that "the constitutional safeguards of the criminal justice system should provide proper relief and should not give rise to civil liability." (R. 23, at 5:16-17, 6:2-4.) Regardless whether the actual innocence rule is employed here, this

case shouldn't be allowed to proceed past the pleadings stage. *See 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).

If this Court is not inclined to reverse the decision below for the reasons explained above, it should, at the very least, vacate the court of appeals' decision and leave the larger policy questions for an appeal featuring a more robust record—including a plaintiff who actually claims to be factually innocent of at least one conviction.

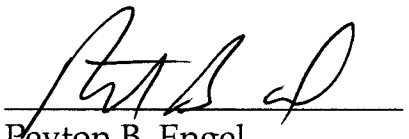
CONCLUSION

For the reasons set forth above, Jason C. Gonzalez and Wisconsin Lawyers Mutual Insurance Company respectfully request that this Court reverse the court of appeals' decision 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, April 23, 2021.

Respectfully submitted,

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



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CERTIFICATION

I certify that this petition conforms with the rules contained in WIS. STAT. § 809.19(8)(b) and (c) for a brief produced using proportional serif font. The length of the portions of this brief described in WIS. STAT. § 809.19(1)(d), (e), and (f) is 4,420 words. *See* WIS. STAT. § 809.19(8)(c)1.

Peyton B. Engel

CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

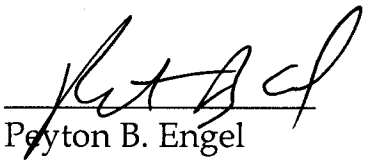
I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of WIS. STAT. § 809.19(12).

I further certify that:

This electronic brief 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.



Peyton B. Engel

APPENDIX CERTIFICATION

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with WIS. STAT. § 809.19(2)(a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; and (3) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decisions of the administrative agency.

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.

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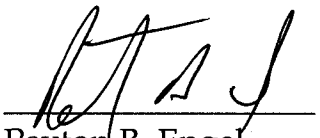

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