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SUPREME COURT

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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# REPLY BRIEF OF DEFENDANTS-RESPONDENTS-PETITIONERS

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

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Wisconsin's law with respect to legal malpractice suits filed on behalf of criminal defendants can be stated as follows: "Guilty criminal defendants are barred from pursuing legal malpractice claims." In some circumstances, that might be a harsh rule, but it's clear, supported by sound policy considerations, and simple to apply. The opinion below purports to change that bright-line rule, creating a new rule that guilty criminal defendants convicted of multiple charges may not pursue legal malpractice claims except with respect to charges as to which they claim innocence. [1] This is a fundamental change affecting every actor in the criminal justice system: judges, criminal defense attorneys, their insurers, criminal defendants, and even prosecutors and victims.

Jama does not acknowledge the fundamental change enacted by the opinion below, nor does he ask this Court to change the actual innocence rule. Instead, he argues that the actual innocence rule doesn't apply to his claims because some of his convictions have been vacated. His argument misreads binding precedent and conflates the concepts of being "presumed innocent" with being "actually innocent." This Court should adhere to its

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[1] The phrase the court of appeals employs, "split innocence," is flawed. The court could just as easily have said "split guilt," and been just as wrong, for the same reason. Neither guilt nor innocence may be split: one may not be partially guilty of an offense. A "not guilty" verdict or the dismissal of a charge does not mean that the defendant is innocent of that charge. Thus, Jama is guilty of theft; he says he is not guilty of sexual assault. To characterize Jama's situation as one of "split innocence" suggests that Jama belongs to some category of innocent persons, when in reality he is guilty of at least one crime.

recent ruling and long-standing precedent affirming the bright-line actual innocence rule and affirm the circuit court's dismissal of Jama's claims.

### A. THE COURT SHOULD NOT ADOPT AN EXCEPTION TO THE ACTUAL INNOCENCE RULE.

Jama does not ask the Court for a change in the law. He proceeds under the assumption that his claim was never barred, and that the court of appeals—rather than announcing a new standard—in fact merely clarified an aspect of the already-existing rule. (Response Brief, p. 2.) But as explained by the circuit court and in the opening brief, straightforward application of the bright-line actual innocence rule bars Jama's claims.

Jama does not address the factors identified in the opening brief that weigh against a departure from existing law. *See Bartholomew v. Wis. Patients Comp. Fund & Compcare Health Servs. Ins. Corp.*, 2006 WI 91, ¶ 33, 293 Wis. 2d 38, 717 N.W.2d 216. Specifically:

1) No developments in the law have undermined the rationale behind the actual innocence rule;

2) There are no new factual developments that make the actual innocence rule inapplicable;

3) The actual innocence rule is not detrimental to coherence and consistency in the law;

4) The actual innocence rule is not unsound in principle; and

5) The actual innocence rule is not unworkable in practice.

Jama does not even attempt to establish any of these points, because in his view, the court of appeals' decision was merely an application of "the public policy considerations stated in *Hicks*,[2] *Tallmadge*,[3] and *Skindzelewski*."[4] (Reply Brief of Plaintiff-Appellant, p. 6.) But the court of appeals did create an exception to the actual innocence rule, exactly as this Court declined to do in *Skindzelewski*. The Court should not afford Jama relief he is not even seeking, and for which he has not advocated.

"Courts decide cases and controversies. A court depends upon the parties to identify and raise issues and to advocate for a position. After considering the parties' briefs and arguments, the court renders a decision." *Horse v. Deere & Co.*, 2009 WI 75, ¶ 132, 319 Wis. 2d 147, 769 N.W.2d 536 (Ann Walsh Bradley, J., dissenting). As Justice Hagedorn recently explained in *Town of Wilson v. City of Sheboygan*:

> I have one bit of pause before officially . . . discarding the rule of reason from our jurisprudence. Namely, the parties did not ask us to go there, and in oral argument, expressly asked us not to do so. Eliminating the rule of reason would be a significant change in our doctrine. Before taking this

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[2] *Hicks v. Nunnery*, 2002 WI App 87, 254 Wis. 2d 721, 643 N.W.2d 809.

[3] *Tallmadge v. Boyle*, 2007 WI App 47, 300 Wis. 2d 510, 730 N.W.2d 173.

[4] *Skindzelewski v. Smith*, 2020 WI 57, 302 Wis. 2d 117, 944 N.W. 2d 1.

> step, I believe we would be best served by adversarial briefing and argument.

2020 WI 16, ¶ 78, 390 Wis. 2d 266, 938 N.W.2d 493 (Hagedorn, J., concurring). Here, it would be a mistake to abandon *stare decisis* on behalf of a party who has neither raised the issue nor advocated for a change in law.

Prior to the decision below, no Wisconsin case suggested that criminals who were properly convicted of some of the charges against them can pursue malpractice claims for vacated convictions on other charges. That notion is not a part of *Hicks*, or *Tallmadge*, or *Skindzelewski*. Under the actual innocence rule, as it stood before the opinion from the court of appeals, Jama's claim was barred, and the circuit court correctly followed controlling precedent when it dismissed Jama's case.

This Court had never addressed the actual innocence rule before *Skindzelewski*.[5] There, the Court reaffirmed the bright-line actual innocence rule and declined to recognize an exception to it. *Skindzelewski* stands for two important propositions. First, it confirms the validity of the rule as Wisconsin policy. Second, and more important, it recognizes the fact that to permit legal malpractice claims by guilty defendants would require an exception to the rule, and it declines to create such an exception. In other words, even though *Skindzelewski* does not directly address Jama's fact pattern, it does provide a direct answer to Jama's appeal: guilty defendants cannot bring legal malpractice claims, even

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[5] The Court declined a petition for review in *Hicks*. *See Hicks v. Nunnery*, 2003 WI 16, 259 Wis. 2d 101, 657 N.W.2d 706.

when their convictions have been vacated. No exceptions. The Court should not change course now. [6]

In concluding that "allowing Jama to proceed with his claims [...] is consistent with the actual innocence rule adopted in *Hicks*," the court of appeals wrote that "Jama has not been afforded the opportunity to seek full relief for the damages caused by his attorney's alleged negligence as to the vacated convictions for charges of which Jama claims he is innocent." *Jama v. Gonzalez*, 2021 WI App 3, ¶¶ 25-26, 395 Wis. 2d 655, 954 N.W. 2d 1. But *Hicks* expressly recognized that wrongfully convicted criminals have remedies other than legal malpractice—the array of postconviction remedies which afford relief "even to those clearly guilty." 2002 WI App 87, ¶ 44. Correspondingly, the convictions Jama asserts were wrongful have in fact been vacated, he was allowed plead to the least serious charges against him, and the remaining charges were dismissed.[7] There is nothing, whether in *Hicks* or elsewhere, that suggests that he is entitled to something further, especially since he remains a convicted criminal.

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[6] The blame for Skindzelewski's conviction and incarceration lies not only at the feet of his defense counsel, but also the prosecutor who pursued the case, and the judge who accepted the plea and imposed the sentence. Those latter parties, however, are protected by immunity. Under the exception to the actual innocence rule announced by the court of appeals, it is only defense counsel who are made accountable for failures that might be the product of multiple agents.

[7] While the record is scant because the matter comes before this Court on appeal of a motion to dismiss the complaint, it suggests that Mr. Jama was the beneficiary of a plea bargain in which he was compensated for the time he spent in prison by having the convictions vacated.

### B. If There Is To Be an Exception to the Actual Innocence Rule, It Should Be as Narrow as Possible.

An exception to the actual innocence rule will have far-reaching consequences, beyond the presumably small community of persons who obtain relief through ineffective-assistance-of-counsel claims. Malpractice insurers, for example, will revise the way they evaluate criminal defense practitioners, who have previously been protected from malpractice suits except when their clients were truly innocent. More important, however, an exception will create new dynamics between prosecutors, defense attorneys, and criminal defendants, because whenever a conviction is set aside, any subsequent plea negotiations will be complicated by the possibility that a deal will create grounds for a malpractice action. For example, some prosecutors may be reluctant to negotiate a resolution of a case on re-trial, as appears to have occurred here, because of the prospect that a criminal defendant will use the disposition to enrich himself.

For these reasons and the reasons identified in the opening brief, if there is to be an exception to the actual innocence rule, it ought be as narrow as possible. Defendants-Appellants proposed the exception adopted by the California Court of Appeal in *Wilkinson v. Zelen*, 83 Cal. Rptr. 3d 779 (Cal. Ct. App. 2008). Jama dismisses this notion on the grounds that Defendants-Appellants failed "to cite any controlling case law." (Response Brief, p. 12.) Jama misses the point: The controlling case law requires this Court to reverse the decision below and affirm the dismissal of Jama's claims. It is only if this Court chooses to part ways with the controlling case law that an exception should be considered, and in that

event, *Wilkinson*'s "transactionally related" approach is worth considering. *Wilkinson* is not binding on Wisconsin, but its reasoning applies directly to Jama, who admits to committing theft as part of the same course of conduct that precipitated his other charges.

In *Wilkinson*, the criminal malpractice plaintiff was arrested for misdemeanor driving under the influence and leaving the scene of an accident. 83 Cal. Rptr. 3d at 781. While in custody, she allegedly battered an officer and was charged with a felony for that conduct. *Id.* at 784. Her defense was one of involuntary intoxication: she presented evidence that she was under the influence of a date rape drug during the events in question. *See id.* She was tried and convicted, and all three convictions were vacated. *Id.* at 781. She subsequently pleaded no contest to misdemeanor driving under the influence and a new charge of resisting an officer. *Id.* at 783. The remaining two counts were dismissed on the prosecutor's motion. *Id.* She brought a malpractice suit against her defense attorney, and she alleged actual innocence of all charges of which she was convicted. *Id.* at 781–82.

The California Court of Appeals held that the actual innocence rule barred the malpractice claims. It explained that the plaintiff "voluntarily entered no contest pleas to two misdemeanors, one of which was part of the original judgment in the criminal action, and both were based on the same course of conduct for which she was originally charged." *Id.* at 786. Thus, she "could not establish factual innocence" as required by the actual innocence rule. *Id.*

Just as in *Wilkinson*, Jama voluntarily entered pleas (in fact, he pleaded guilty rather than no contest) to two

misdemeanor counts, one of which was part of the original judgment in the criminal action. Jama argues that the sexual intercourse underlying his sexual assault convictions "occurred hours apart" from the theft to which he pled guilty and "consists of distinct and entirely separate acts." (Response Brief, p. 3.) But the convictions at issue in *Wilkinson* were also based on separate acts that took place over the course of an evening. And "hours apart" is an overstatement: the two offenses took place in the span of 90 minutes. (R. 13, ¶¶ 7-9.) Regardless, *Wilkinson* imposes no time limit, and it would be unreasonable to do so. What matters is whether the convictions at issue stem from the same course of conduct. In both cases, they do. Just like the plaintiff in *Wilkinson*, Jama does not dispute the general chain of events that the State alleged, and the jury found, occurred on the evening in question. His convictions are transactionally related and because he is admittedly guilty of one of those convictions, the actual innocence rule bars his claims.

Jama also argues that the sexual assault convictions are "unrelated" to the theft conviction because each offense is legally unique, involving different legal elements and distinct punishments. (Response Brief, p. 11.) That's not the definition of "related" that *Wilkinson* used, and it's a definition that imposes no real limits: all criminal defendants with multiple convictions arising from the same conduct are convicted of offenses with different legal elements and distinct punishments, thanks to the Double Jeopardy Clause. Jama's proposed definition would allow criminal malpractice claims by *any* criminal defendant who has at least one conviction vacated, eviscerating the actual innocence rule.

### C. THE DISMISSAL OF JAMA'S MALPRACTICE COMPLAINT WAS PROPER.

Even if the Court chooses to abandon the actual innocence rule, it should still affirm the dismissal of Jama's claims because the dismissal is supported by public policy reasons. Jama falls short of alleging that he is actually innocent, he admits that he stole items from the victim's apartment and engaged in sexual intercourse with the victim, and he has already received relief through the criminal justice system for the alleged ineffective assistance of counsel. This Court should sustain the circuit court's holding, even if it were to disagree with the circuit court's theory or reasoning. *See Liberty Trucking Co. v. Department of Industry, Labor & Human Relations*, 57 Wis. 2d 331, 342, 204 N.W.2d 457 (1973). Jama does not address Petitioners' argument that the circuit's court's dismissal of his complaint was proper even in the absence of an actual innocence rule, aside from arguing that the Amended Complaint "clearly asserts that Jama is innocent of the sexual assault charges against him." (Response Brief, p. 13.)

In reality, the Amended Complaint never actually alleges that Jama didn't commit the sexual assault. Turning to the allegations Jama cites in support of his claim of innocence, the first three merely concern what Jama said to detectives or to Gonzalez. (R. 13, ¶¶ 12, 15, & 17.) In other words, Jama offers hearsay: that he told others he did not commit the sexual assault. Even assuming Jama said these things, pleading that one made certain statements is distinct from pleading that those statements are actually true.

Three other allegations concern hypothetical communications that never took place. Specifically:

- "Gonzalez never talked to Jama about his defense or presented actual facts showing Jama's encounter with [HH] was consensual." (R. 13, ¶ 18.)

- "Testifying would have allowed the Plaintiff to tell his side of the story and that he and [HH] had consensual sexual relations." (R. 13, ¶ 47.)

- "A preliminary review would have informed [Gonzalez] of the following: intercourse did occur, the Plaintiff asserted he was the one that had sex with [HH], and the Plaintiff asserted the sex was consensual and that he took the gaming device." (R. 13, ¶ 55.)

Allegations about communications that never happened are not allegations of actual innocence. Pleading that one *would have* made certain statements is distinct from pleading that those statements are actually true.

Finally, Jama points to paragraph 36 of his Amended Complaint, in which he alleges, after recounting the procedural history through which "counts 1-4 . . . were subsequently vacated, dismissed by the prosecution and never retried," that "Jama was innocent of these four charges in the eyes of the law and this issues [*sic*] has essentially already been proven." (R. 13. ¶ 36.) Jama appears to interpret the granting of his motion for postconviction relief as a finding of innocence. That is not the case. Judge Berz made no finding that Jama was innocent, only that the reliability of his trial had been undermined. This is a far cry from actual innocence, and there are many reasons—having nothing to do with Jama being actually innocent—why the prosecution might have elected to resolve the matter by dismissing some

charges and accepting pleas for others. There was no exoneration here.

Finally, Jama misconstrues the circuit court's ruling as a finding of his innocence. (Response Brief, p. 14.) Specifically, Jama construes this appeal as a challenge to the following statement from the circuit court:

> And because Mr. Jama pled guilty to the theft charge, even though he claimed and is taking the position 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.) This is not a finding that Jama has alleged actual innocence. It is a conclusion that regardless of whether he alleged actual innocence to the sexual assault, Jama's claims are barred. Petitioners are not challenging this conclusion; instead, they ask this Court to uphold the circuit court's dismissal of Jama's claims, whether under the controlling actual innocence rule or under a case-by-case policy analysis.

## CONCLUSION

For these reasons and the reasons stated in the opening brief, 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, June 1, 2021.

Respectfully submitted,

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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 2,921 words. *See* WIS. STAT. § 809.19(8)(c)2.

Peyton B. Engel

## CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

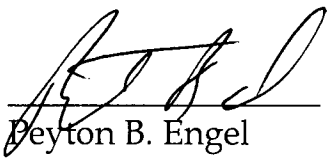
I hereby certify that:

I have submitted an electronic copy of this brief 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.



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