Appeal No. 2019AP629

WISCONSIN COURT OF APPEALS
DISTRICT IV

JAMA I. JAMA,

PLAINTIFF-APPELLANT,

V.

JASON C. GONZALEZ AND WISCONSIN LAWYERS MUTUAL INSURANCE COMPANY,

DEFENDANTS-RESPONDENTS.

FILED

JUL 09, 2020

Sheila T. Reiff
Clerk of Supreme Court

CERTIFICATION BY WISCONSIN COURT OF APPEALS

Before Blanchard, Kloppenburg, and Nashold, JJ.

ISSUE

This appeal presents a novel issue in Wisconsin, namely whether a former criminal defendant may, as a plaintiff, sue his or her former criminal defense attorney for legal malpractice when that plaintiff alleges that he or she can show actual innocence as to *some, but not all,* of the criminal charges in the underlying criminal case, and the civil complaint alleges that the former defense attorney provided negligent representation *only* as to the charges of which the

criminal malpractice plaintiff alleges that he or she can show actual innocence.[1] This novel Wisconsin issue involves what we refer to as criminal malpractice plaintiffs' claims of "split innocence." It differs from the issues raised before and recently resolved by the Wisconsin Supreme Court in ***Skindzelewski v. Smith***, 2020 WI 57, __Wis. 2d __, __N.W.2d__, in which the Court for the first time addresses and relies on the actual innocence rule adopted in ***Hicks v. Nunnery***, 2002 WI App 87, 253 Wis. 2d 721, 643 N.W.2d 809; *see also* ***Tallmadge v. Boyle***, 2007 WI App 47, 300 Wis. 2d 510, 730 N.W.2d 173. Unlike in ***Skindzelewski***, where the criminal malpractice plaintiff could not prove actual innocence regarding the offense at issue, the criminal malpractice plaintiff in a split innocence case, such as Jama's, alleges that he or she can prove actual innocence of those charges for which he or she alleges the former defense attorney provided negligent representation. Unlike in ***Skindzelewski***, where the criminal malpractice plaintiff seeks an exception to the actual innocence rule, Jama argues that his split innocence situation falls within the rule.

Because resolution of this novel split innocence issue appears to require application of public policy considerations in ways not addressed in ***Hicks***, ***Tallmadge***, or ***Skindzelewski***, pursuant to WIS. STAT. RULE 809.61 this appeal is certified to the Wisconsin Supreme Court for its review and determination.

[1] We use the phrase "criminal malpractice plaintiff" to refer to Jama and any other person who formerly faced criminal charges and now pursues civil remedies against his or her criminal defense counsel. *See* ***Humphries v. Detch***, 712 S.E.2d 795, 800 n.5 (W. Va. 2011) (citing cases explaining that the term "criminal malpractice" refers to "legal malpractice in the course of defending a client accused of a crime" (quoted sources omitted)); ***Barker v. Capotosto***, 875 N.W.2d 157, 161 n.2 (Iowa 2016) ("The term 'criminal malpractice' has been used to describe a legal malpractice action brought by a former criminal defendant against his or her former criminal defense attorney.").

BACKGROUND

Jama I. Jama, the criminal malpractice plaintiff in this case, filed this legal malpractice action.[2] We first summarize the allegations in his civil complaint.

After Jama was criminally charged with sexual assault, burglary, and theft, he hired attorney Jason C. Gonzalez as his defense counsel. Jama told Gonzalez that he had committed the theft as charged in the criminal complaint, but that he had not committed the other crimes charged, including the two sexual assault charges. Jama asserted his innocence as to the sexual assault charges then, and has continued to do so since.

The civil complaint further alleges that, during the criminal jury trial, Gonzalez made numerous errors, including not meeting with Jama until the third day of trial after both sides rested and not asking Jama details about the case until after the trial was completed, when sentencing was impending.

At trial, Jama was convicted of four felonies (second-degree sexual assault, third-degree sexual assault, and two charges of burglary) and one misdemeanor (theft).[3]

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[2] The Honorable Ellen K. Berz presided over the criminal proceedings and the Honorable Valerie Bailey-Rihn presided over the civil action.

[3] More specifically, Jama was convicted of sexual assault of an intoxicated victim, sexual assault without consent, burglary with intent to commit a felony, burglary with intent to steal, and misdemeanor theft. The circuit court subsequently vacated the two burglary convictions for lack of evidence, and on appeal in the criminal case this court affirmed. *See* ***State v. Jama***, No. 2014AP2432-CR, unpublished slip op. ¶¶5, 10, 30-35 (WI App Feb. 25, 2016). In this civil case, the circuit court's decision and the parties' briefing on appeal address Jama's malpractice claims as pertaining only to the sexual assault convictions. Therefore, we do not (continued)

While serving time related to his sexual assault convictions, Jama through new counsel filed a postconviction motion for a new trial on the basis of ineffective assistance of counsel by Gonzalez in connection with the trial. After a ***Machner*** hearing,[4] the circuit court vacated all convictions based on Gonzalez's ineffective assistance of counsel and ordered a new trial. Specifically, the court found that

> [Jama] had no one to advocate for his version of events as [Gonzalez] intentionally did not speak with him, intentionally did not investigate the facts in [Jama's] possession and intentionally did not incorporate [Jama's] version into the defense theory … [Gonzalez] chose to make up "facts" which had no nexus to the facts known by [Jama,] which had little to no support in the evidence, and which were internally conflicting.

The State subsequently moved to dismiss all of the original charges against Jama except the misdemeanor theft charge, and issued a new charge of misdemeanor resisting or obstructing an officer. Jama, represented by his same postconviction counsel, pleaded guilty to both theft and resisting or obstructing. For these two convictions, the circuit court sentenced Jama to nine months in jail, "deeming time served."[5]

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refer to the burglary charges or convictions again in this certification; they are not counts of conviction and Jama does not base this civil action on them.

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

[5] The parties neither referred to the newly added resisting or obstructing charge in their arguments before the circuit court nor refer to it now in their arguments on appeal, and no details as to the basis for the charge and Jama's plea to it exist in the appellate record or in the Circuit Court Automated Programs site. We express no view about whether or how the fact that Jama admitted guilt to resisting or obstructing in this case could be pertinent to resolution of this appeal, depending on the particular doctrinal approach used to resolve the split innocence issue. Following the parties, we do not refer to the resisting or obstructing charge or conviction again in this certification, and for ease of reference we speak in terms of Jama's plea as if it were to the misdemeanor theft only.

The complaint further alleges that, as a result of Gonzalez's negligent representation at the criminal trial, Jama suffered damages including the loss of his "civil liberties and freedoms." Specifically, before the circuit court granted the postconviction motions and Jama entered the misdemeanor pleas, he served over two and one-half years in prison and was ordered to complete an Alcohol and Other Drug Abuse assessment, maintain absolute sobriety, not enter an establishment whose purpose is the sale of alcohol, report for the sex offender registry list for life, and not appear on State Street in Madison for six years.

We now move from the allegations in Jama's civil complaint against Gonzalez to summarize what took place after Jama filed this action. Gonzalez moved to dismiss the complaint on the basis that Jama's allegations, even if true, do not entitle Jama to relief. The gravamen of Gonzalez's argument was that, because Jama pleaded guilty to the theft charge after his convictions were vacated and a new trial was ordered, Jama could not prove that he was innocent of *all* charges, as required to pursue this civil action under the actual innocence rule stated in ***Hicks*** and ***Tallmadge***.

In response, Jama asserted that this malpractice action addresses only Gonzalez's negligent representation of Jama on the sexual assault charges, that Jama suffered damages from the sexual assault convictions, and that Jama is able to prove, and has always maintained, his innocence of the sexual assault charges. Jama's position is that this action alleges negligence in connection with the sexual assault convictions only and does not allege negligence in connection with the misdemeanor theft charge to which he pleaded guilty.

The circuit court granted Gonzalez's motion to dismiss, stating that, under ***Hicks*** and ***Tallmadge***, Jama has to provide "proof of innocence of all

charges" that were charged in the underlying criminal case. The court ruled, "because Mr. Jama pled guilty to the theft charge, even though he … has always claimed that he was innocent of the sexual assault charges … [Gonzalez has] prevailed on [his] motion to dismiss."

This appeal follows.

DISCUSSION

In Wisconsin, all plaintiffs alleging legal malpractice must prove four elements in order to prevail: "(1) an attorney-client relationship existed; (2) the attorney's actions were negligent; (3) the attorney's negligent actions caused the client's injury; and (4) the client suffered an actual injury." ***Skindzelewski***, 2020 WI 57, ¶9. In ***Skindzelewski***, the Supreme Court, citing ***Hicks***, 253 Wis. 2d 721, ¶34, holds that, in a criminal malpractice case, the plaintiff "must additionally prove that he was actually innocent of the criminal charge as a component of the causation element." ***Id.*** *See also* ***Tallmadge***, 300 Wis. 2d 510, ¶¶21-22 (applying the actual innocence rule to criminal malpractice claims against postconviction counsel).

The parties here do not dispute that in Wisconsin the actual innocence rule applies to all criminal malpractice plaintiffs. However, as stated above, the parties dispute how to resolve the specific split innocence issue under

the reasoning and language in controlling Wisconsin case law.[6] Gonzalez asserts that the case law supports his argument that, as the criminal malpractice plaintiff in this case, Jama has to prove innocence as to all charges of which Jama was convicted. Jama asserts that the case law supports his argument that it is sufficient to allege that he can prove innocence as to only the charges of which he was convicted and for which the plaintiff alleges that the former defense counsel provided negligent representation, even if the plaintiff cannot prove innocence on one or more other charges. As we explain, Wisconsin precedent, comprising ***Hicks***, ***Tallmadge***, and ***Skindzelewski***, does not appear to contemplate a situation like this. Certification of this appeal would give our supreme court, the policy-making body in our state court system, an opportunity to review the actual innocence requirement in the context of the novel split innocence issue here.

We first explain pertinent details of the Wisconsin Court of Appeals' ***Hicks*** and ***Tallmadge*** decisions and the Wisconsin Supreme Court's ***Skindzelewski*** decision, including the public policy considerations identified in those decisions as supporting adoption of the actual innocence rule, and how those decisions do not address the split innocence issue presented in Jama's case. We conclude by reiterating our reason for certification.

[6] As we explain in this certification, the questions raised by the parties based on the Court of Appeals' decisions in ***Hicks v. Nunnery***, 2002 WI App 87, 253 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, remain unaddressed and unanswered by the Supreme Court in ***Skindzelewski v. Smith***, 2020 WI 57, __Wis. 2d __, __N.W.2d__. For this reason, we did not order the parties to submit additional briefing based on the ***Skindzelewski*** court's affirmation of the ***Hicks*** and ***Tallmadge*** actual innocence rule.

1. Wisconsin Precedent: ***Hicks***, ***Tallmadge***, and ***Skindzelewski***

a. ***Hicks v. Nunnery***, 2002 WI App 87, 253 Wis. 2d 721, 643 N.W.2d 809.

We begin with the Court of Appeals' decision in ***Hicks***, which adopted the actual innocence rule that was relied on by the Supreme Court in ***Skindzelewski***, 2020 WI 57, ¶9.

Hicks was convicted and imprisoned on charges of robbery, burglary, and sexual assault. ***Hicks***, 253 Wis. 2d 721, ¶3. Hicks consistently maintained his innocence as to all three charges. ***Id.***, ¶37. On appeal, the court of appeals reversed all three of Hicks' convictions because Hicks had been denied effective assistance of trial counsel. ***Id.***, ¶3. The Wisconsin Supreme Court affirmed as to all three charges, but on the ground that the real controversy had not been fully tried as to any charge. ***Id.***

The State subsequently "dropped all charges against Hicks." ***Id.***, ¶12. Hicks then filed a legal malpractice suit against his former trial counsel, Attorney Nunnery. ***Id.***, ¶13. The civil jury found that Hicks would have been found not guilty on all charges at his criminal trial had it not been for Nunnery's negligent representation, and awarded Hicks substantial damages. ***Id.***, ¶¶13, 34. Nunnery appealed, arguing as pertinent here that he was entitled to judgment in his favor because Hicks failed to prove his innocence on all charges. ***Id.***, ¶¶1, 32.

Following the reasoning and considerations of "public policy" adopted by the California Supreme Court in ***Wiley v. County of San Diego***, 966 P.2d 983 (Cal. 1998), the court in ***Hicks*** concluded, "[A]s a matter of public policy, 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." ***Id.***, ¶¶39-46, 48. Accordingly, the ***Hicks*** court held that, in addition to proving the four elements of a standard legal malpractice claim listed above, public policy considerations require that a criminal malpractice plaintiff may not prevail without also proving to the civil jury that he or she "is innocent of the charges of which he [or she] was convicted." ***Id.***, ¶46. Because the actual innocence issue had not been resolved in the circuit court, the court of appeals remanded the case for a new trial "limited to the issue of whether Hicks committed the offenses of which he was convicted." ***Id.***, ¶¶46, 56.

The ***Hicks*** court identified five specific public policy considerations relied on by the California court in ***Wiley*** as supporting its adoption of the actual innocence rule for criminal malpractice plaintiffs. We now quote them at length:

> 1. 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.
>
> 2. 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 [or her] own perfidy. [W]hile a conviction predicated on incompetence may be erroneous, it is not unjust.
>
> 3. 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 [or she] is skillfully represented, but he [or she] has no *right* to that result.
>
> 4. 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, [certain] features of the criminal justice system … 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.
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> 5. 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.

253 Wis. 2d 721, ¶¶40-44 (internal quotation marks and citations omitted).

Because the facts in ***Hicks*** did not call for the court to delve into the topic, that court did not address whether requiring that a criminal malpractice plaintiff prove that he or she "is innocent of the charges of which he [or she] was convicted" means all charges in the criminal case or only those that are the subject of the malpractice action. ***Id.***, ¶46. To repeat, Hicks alleged that trial counsel was negligent as to all of the charges on which trial counsel represented Hicks, and that Hicks had consistently maintained his innocence as to all of those charges. ***Id.***, ¶¶3, 37. Here, however, as stated, Jama alleges negligence and maintains his innocence only in connection with the sexual assault convictions and does not allege negligence in connection with the misdemeanor theft charge to which he eventually pleaded guilty.

We observe that there appears to be no suggestion in ***Hicks*** that the values embodied in the adopted public policy considerations would be undermined

if, as here, the criminal malpractice plaintiff were able to recover based strictly on negligence resulting in conviction for conduct for which the plaintiff claims actual innocence—here, sexual assault. More specifically, none of the five public policy considerations, which all concern "guilty" defendants, appear on their face to apply here, where Jama alleges he can prove he is "not guilty." The ***Hicks*** court stressed that it was adopting the actual innocence rule because "as a matter of public policy, 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." ***Id.***, ¶48. That public policy does not seem to be served when a person did not actually commit the criminal offenses that are the subject of the malpractice action.[7]

On the other hand, the public policy considerations are written in sweeping terms. Taken at a literal level, they could be read to bar all malpractice actions by any person who has been convicted of any of the original charges in the underlying criminal case, without considering the nature of the individual charges. Under this view, actual innocence would be binary in each case—guilty of any of the original charges, then not deserving of a potential civil recovery.

[7] We note that in his concurrence in ***Tallmadge***, Judge Fine summarizes the ***Hicks*** rule as follows: "a convicted defendant cannot recover against his or her lawyer for legal malpractice that allegedly caused the defendant's conviction unless the defendant can show by the civil burden of proof that he or she was actually innocent of the crime and, also, that the lawyer's malpractice was a cause of the conviction." ***Tallmadge***, 300 Wis. 2d 510, ¶32 (citing the reasoning of ***Hicks***, 253 Wis. 2d 721, ¶¶ 34-50). Judge Fine's use of the singular "conviction" and "crime" may suggest the orientation that Jama advocates, requiring only proof of innocence for each specific criminal charge as to which the criminal malpractice plaintiff alleges his or her former defense attorney performed negligently.

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

In ***Tallmadge***, the Court of Appeals also relied on the actual innocence rule adopted in ***Hicks***. ***Tallmadge***, 300 Wis. 2d 510, ¶12. As with ***Hicks***, the language in ***Tallmadge*** could be interpreted as either supporting or running contrary to Jama's position.

Tallmadge was sentenced to 265 years in prison after being found guilty of fifteen counts of sexual assault. ***Id.***, ¶2. His trial attorney, Attorney Weedman, unsuccessfully appealed the convictions in state court. ***Id.***, ¶¶3-5. Attorney Boyle was directed to seek habeas corpus relief for Tallmadge, but Tallmadge later fired him. ***Id.***, ¶¶6, 16-17. Tallmadge then retained a new appellate attorney, Attorney Sutton, who filed a federal writ of habeas corpus raising three issues as to all of the fifteen counts, and two issues specifically as to two of the counts. ***Id.***, ¶7. Thus, if Sutton's efforts had been in any way successful, there were potential pathways to complete reversal but also potential pathways to only partial reversal. However, the writ filed by Attorney Sutton was dismissed because it was not timely filed. ***Id.***, ¶8. Tallmadge subsequently brought a legal malpractice suit against Boyle for failing to file a state or federal writ of habeas corpus. ***Id.***, ¶¶10, 16. The circuit court granted Boyle's motion for summary judgment dismissing the complaint. ***Id.***, ¶12. Applying the ***Hicks*** innocence rule, the court stated, "There is no evidence in this record, other than Mr. Tallmadge's assertion, that he is innocent." ***Id.***

The court of appeals affirmed, holding that the same public policy considerations supporting the actual innocence rule adopted in ***Hicks*** "apply equally to cases involving criminal defense attorneys hired to represent criminal defendants after conviction." ***Id.***, ¶¶21-22. The court also stated that these public

policy considerations require that the criminal malpractice plaintiff must "prove that 'but for' that defense counsel's actions, the convicted criminal would be free."[8] ***Id.***, ¶22. The court also made the broad statement that, before Tallmadge could be entitled to "a get out of jail free card," he would have to "prov[e] to a jury that [he] is innocent of all fifteen counts for which he was convicted." ***Id.***, ¶19. The court explained that, because none of Tallmadge's appellate attorneys had been able to develop any meritorious claims in Tallmadge's criminal case as to any of the fifteen convictions, let alone all of them, any assertion that Boyle, specifically, would have secured Tallmadge's freedom was "purely speculative." ***Id.***, ¶¶18-19. Thus, it appears that the ***Tallmadge*** court approached the case as if all fifteen convictions were both the subject of the malpractice action as well as the subject of Tallmadge's unsupported assertion of innocence, despite a lack of clarity on this and other issues as summarized in the case.

The ***Tallmadge*** court reiterated the public policy considerations identified in ***Hicks***, highlighting as the primary public policy consideration the view that "[p]ermitting a convicted criminal to recover in a legal malpractice action against former defense counsel would result in the criminal being indirectly rewarded for his [or her] crimes." ***Id.***, ¶22 (citing ***Hicks***, 253 Wis. 2d 721, ¶38).

[8] This "would be free" statement and the accompanying discussion in ***Tallmadge*** are not supported by citation to authority. ***Tallmadge***, 300 Wis. 2d 510, ¶¶18-22. The ***Tallmadge*** court may have been conflating the "would be free" concept with the rule adopted by some courts in other states that a criminal malpractice plaintiff must have obtained postconviction relief vacating the convictions that are the subject of the malpractice suit, as opposed to proving actual innocence in some other manner. *See* ***Barker v. Capotosto***, 875 N.W.2d 157, 158, 166 (Iowa 2016) (concluding that public policy considerations support requiring that a criminal malpractice plaintiff obtain postconviction relief). Here, to repeat, Jama's sexual assault convictions were vacated and the State did not reissue those charges.

We observe that, as in ***Hicks***, there appears to be nothing in the ***Tallmadge*** court's discussion of this and the other public policy considerations to suggest that a criminal malpractice plaintiff cannot recover for negligent representation as to crimes that the plaintiff alleges he or she can show he or she did not commit.

On the other hand, ***Tallmadge*** contains broad language—"would be free" and "get out of jail free card"—that in itself could suggest the view, intended by the court or not, that the criminal malpractice plaintiff cannot show actual innocence unless he or she "would be free" on all charges in the underlying criminal case.

c. ***Skindzelewski v. Smith***, 2020 WI 57, __Wis. 2d __, __N.W.2d__.

The Wisconsin Supreme Court in ***Skindzelewski*** affirmed the ***Hicks*** actual innocence rule, stating that it "requires a criminal [malpractice plaintiff] to establish [that he or she] did not commit the crime of which he [or she] was convicted." ***Skindzelewski***, 2020 WI 57, ¶2. Skindzelewski, the criminal malpractice plaintiff, conceded his guilt as to his underlying offense of "theft by contractor," but sought an exception to having to establish his actual innocence because his attorney had negligently failed to raise a statute of limitations defense, which would have precluded his conviction. ***Id.***, ¶¶1-3, 17. The court declined to establish such an exception to the actual innocence rule, stating that the exception that Skindzelewski sought would be contrary to public policy considerations and "reward criminality." ***Id.***, ¶¶2, 22. The court explained that "[t]he law bars such legal malpractice claims because even if an attorney's negligence harms a defendant by adversely affecting the outcome of the case, attorney error does not negate a guilty defendant's culpability." ***Id.***, ¶17.

Thus, the court in ***Skindzelewski*** confirms the actual innocence rule adopted in ***Hicks***, which as stated above could be interpreted to require actual innocence of all underlying criminal charges. On the other hand, as explained below, the decision contains language that could support Jama's argument that, on the facts of his split innocence situation, proof of his actual innocence of the charges as to which he alleges legal malpractice falls within the actual innocence rule.

Skindzelewski's claim "rests on a legal error that would have precluded his conviction notwithstanding his guilt." ***Id.***, ¶17. Unlike in ***Skindzelewski***, Jama alleges that his injury is "entirely unrelated to [his] criminal behavior" and rests on legal errors that led to a conviction as to which he asserts his innocence. ***Id.***, ¶18.

The analysis in ***Skindzelewski*** echoes the focus in ***Hicks*** on supporting the actual innocence rule with considerations of public policy. Throughout, the court uses language such as "actually guilty," "culpable behavior," and "the guilty" in support of its determination to avoid "rewarding criminality." ***Id.***, ¶¶17, 23.The court also emphasizes that "the defendant … bears ultimate responsibility for his [or her] criminal conduct." ***Id.***, ¶17. In contrast, here Jama contends that he does not seek reward for his criminality, but seeks damages for injury caused by Gonzalez's legal representation regarding offenses that Jama has always asserted he did not commit. The ***Skindzelewski*** court reasons that "[d]espite [Skindzelewski's] guilt, the law afforded Skindzelewski a remedy for the erroneous conviction—namely, his liberty. The law does not, however, give him an additional monetary remedy against his negligent lawyer. Doing so would be tantamount to rewarding this guilty defendant for his crime, which 'would … shock the public conscience, engender disrespect for courts and

generally discredit the administration of justice.'" ***Id.***, ¶22, (quoting ***Hicks***, 253 Wis. 2d 721, ¶40). Here, however, Jama argues that he was imprisoned for sexual assault charges, despite his innocence as to those charges, and he does not seek "additional monetary remedy."

Finally, the court states that attorney error does not "sever[] the causal link between a criminal defendant's culpable behavior and the time spent incarcerated, when the criminal defendant is *actually guilty*." ***Id.***, ¶17. "In contrast, if a defendant … serves the maximum time authorized by statute for his [or her] criminal conduct but then serves additional time as a result of his [or her] attorney's error, the additional time of incarceration is causally unconnected to the antecedent criminality." ***Id.***, ¶18. Here, if Jama serves the maximum time authorized by statute for his admitted misdemeanor theft conduct, but then serves additional time as a result of sexual assault convictions that resulted from his attorney's negligence, the additional time of his incarceration is unconnected to any criminal behavior on Jama's part.

2. Application of Actual Innocence Rule to Split Innocence Situation

We now discuss a divided decision from an intermediate appeals court in California, which contains reasoning on both sides of the issue in a split innocence case, albeit premised on the California rule that a criminal malpractice plaintiff must prove actual innocence by obtaining postconviction exoneration. ***Wilkinson v. Zelen***, 83 Cal. Rptr. 3d 779 (Cal. Ct. App. 2008). We review this decision in some detail to provide context for its reasoning and because it is the only case we have found that illuminates alternative approaches in a split innocence context. In addition, the majority and dissenting opinions apply public

policy considerations that are most appropriately addressed by the Wisconsin Supreme Court.

In ***Wilkinson***, the State presented the following evidence at Wilkinson's criminal trial. Responding to a call reporting erratic driving, officers found Wilkinson stopped at a curb, behind the wheel but with her head resting on the front passenger seat. ***Wilkinson***, 83 Cal. Rptr. 3d at 784. When officers tapped on the window, Wilkinson drove off, then stopped after an officer gave chase. ***Id.*** Wilkinson smelled strongly of alcohol, exhibited slurred speech, and could not complete a field sobriety test. ***Id.*** Officers arrested her and transported her to the police station, where she was belligerent and uncooperative. ***Id.*** Specifically, she grabbed an officer's arm, causing a welt; charged at another officer; and yelled, kicked, and banged at a door. ***Id.***

Wilkinson testified as follows. ***Id.*** On the night in question, she was at a bar where she met a man who offered to buy her a drink. ***Id.*** She accepted and drank two glasses of wine. ***Id.*** She agreed to meet the man at a restaurant for dinner, and at the restaurant she had three more drinks, over the course of three hours, while she waited for the man, who never arrived. ***Id.*** She drove away, and the next thing she remembered was waking up in jail. ***Id.*** After being released from jail, she filed a police report alleging that she had been drugged. ***Id.***

A toxicologist, testifying for the defense, opined that on the night in question Wilkinson was under the influence of a "date rape" drug. ***Id.*** An officer also testifying for the defense stated that Wilkinson's symptoms appeared much more severe than what would be expected of someone who had consumed five alcoholic drinks over several hours. ***Id.***

Wilkinson was convicted of felony battery on a custodial officer, misdemeanor driving under the influence, and misdemeanor failing to stop at the scene of an accident. ***Id.*** at 781.

After all three convictions were vacated, Wilkinson pleaded no contest to the original misdemeanor driving while under the influence and an added misdemeanor resisting or obstructing an officer, and the remaining two original counts (felony battery and misdemeanor failing to stop) were dismissed. ***Id.*** at 781, 783.

Wilkinson sued her trial counsel for malpractice, alleging actual innocence "of all charges on which [Wilkinson] was convicted," namely, driving under the influence and obstruction. ***Id.*** at 781-82. The circuit court granted the defendant's motion to dismiss without leave to amend on the ground that Wilkinson could not plead that she was factually innocent of all the charges, despite the fact that she had not been convicted on the original felony battery charge after reversal of the initial conviction. ***Id.*** at 781, 783. On appeal, Wilkinson argued that her civil action was based on malpractice resulting in the felony battery charge and therefore it was not barred by her pleas to the two misdemeanors and that she should be allowed to amend her complaint to allege innocence of the felony charge. ***Id.*** at 782-83.

Based on its reading of California precedent, the California Court of Appeals held that a criminal malpractice plaintiff "must prove factual innocence and exoneration as to *all transactionally related offenses* comprising the basis for the underlying criminal proceeding in order to maintain a malpractice action." ***Id.*** at 781 (emphasis added). On this basis, the majority affirmed the dismissal of Wilkinson's complaint because "the judicially noticed facts unequivocally

demonstrate that Wilkinson plead[ed] no contest to two offenses transactionally related to the felony charge." ***Id.*** at 788.

The majority noted that the actual innocence rule stems from the public policy considerations that the remedies provided within the criminal justice system provide sufficient relief for a defendant who has in fact committed a crime, and that a guilty defendant's harm is due to his or her own criminal conduct rather than any attorney error. ***Id.*** at 785. The majority also noted that the habeas corpus relief Wilkinson obtained did not establish her innocence on any of the charged offenses and that, therefore, she had had not obtained exoneration. ***Id.*** at 786. The majority noted California precedent applying the actual innocence/exoneration rule to bar a malpractice claim when the plaintiff had pleaded guilty to a lesser included offense, and explained that it would be a logical extension of that rule to require that a criminal malpractice plaintiff must also obtain exoneration of all transactionally related offenses. ***Id.*** at 787.

The dissent took the view that this "transactionally related" approach was an unwarranted departure from prior California precedent, which the dissenter understood

> to mean that no malpractice action can be brought if the plaintiff cannot prove actual innocence of all criminal activity arising from the conduct underlying the conviction *that is the subject of the malpractice action*. The fact that a malpractice plaintiff committed *some* crime—no matter how unrelated to the crime of which the plaintiff was exonerated and is innocent—should not bar the plaintiff's malpractice action based on the attorney's negligence in connection with the exonerated crime.

Id. at 793 (Armstrong, J., dissenting, first emphasis added). The dissent further noted that

> the offenses to which plaintiff ultimately entered no contest pleas—driving under the influence and obstructing a peace officer—may be separate from and unrelated to the felony count of battery of a custodial officer. If Wilkinson can plead facts that the two misdemeanors of which she stands convicted involved conduct unrelated to the felony battery conviction, she can state a cause of action for professional negligence.
>
> If Wilkinson can plead such facts, the policy considerations upon which the court in ***Wiley*** based the requirement of actual innocence would not be implicated in this case. She would not profit from the criminal conduct of which she stands convicted; she would not escape or diminish her punishment for that conduct; and there would be no prospect of conflicting resolutions on the issue of whether she committed a battery against a custodial officer. Moreover, although Wilkinson has obtained postconviction relief on her felony conviction, she has not been afforded full relief for her attorney's alleged negligence. She allegedly suffered damages resulting specifically from her conviction on the felony count, including the loss of her job and denial of her petition for naturalization, that are readily compensable in money damages.

Id. at 791-92 (citations omitted).

The dissent referenced the following "troubling hypothetical" to illustrate the difference between a split innocence case and the facts of a non-split innocence case such as ***Wiley***:

> Suppose a defendant is convicted of a multi-count indictment and one of the convictions is first degree murder and another conviction is trespass, and a habeas corpus petition is granted, and the murder conviction is dismissed outright, yet the defendant pleads nolo contendere to the trespass, which is essentially the situation we have here. [D]oes public policy prevent that defendant from suing his or her attorney on the felony conviction when they have been actually innocent of that crime[?]

Id. at 792.

The dissent concluded that Wilkinson "should have the opportunity to attempt to plead actual innocence as to the felony conviction that was vacated by the writ of habeas corpus and that formed the gravamen of her malpractice claim against [her former defense attorney], and to plead that the felony conviction was unrelated to the two counts to which she pleaded no contest." ***Id.*** at 789.

CONCLUSION

In sum, certification by the Wisconsin Supreme Court is warranted to address the novel split innocence issue presented here because resolution of this issue appears to require the application of public policy considerations in ways that we believe have not already been resolved in ***Hicks***, ***Tallmadge***, or ***Skindzelewski***. In addition, at least one set of appellate judges in a jurisdiction that has adopted the actual innocence rule has issued a divided ruling in a split innocence case.