



## Alerts

### Wisconsin Appellate Court Refines Actual Innocence Rule in Claims Against Criminal Defense Counsel

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*Jama v. Gonzalez*, No. 2019AP629, 2020 Wisc. App. LEXIS 578 (12/10/20)

#### Brief Summary

A Wisconsin appellate court held that to pursue a legal malpractice claim against a criminal defense attorney, the former client only has to show actual innocence to some, not all, of the charges for which he or she was convicted. The court distinguished *Skindzelewski v. Smith*, in which the Wisconsin Supreme Court recently denied a criminal malpractice plaintiff's request for an exception to the "actual innocence rule" based on allegations that his former defense counsel failed to raise a valid statute of limitations defense.

#### Complete Summary

The Wisconsin Court of Appeals for District IV held that plaintiff's claim that his criminal defense counsel (defendant) was negligent in the prior representation concerning two sexual assault charges could proceed, despite plaintiff's admission of guilt relating to other criminal charges. Following an incident dating back to 2014, plaintiff was charged with theft, two charges of sexual assault, and two charges of burglary. Although plaintiff admitted to defendant that he had committed the criminal theft, he denied the remaining charges. Following a jury trial, plaintiff was found guilty of four felonies—two for sexual assault and two for burglary—and one misdemeanor for theft.

Plaintiff sought post-conviction relief alleging ineffective assistance of counsel. He contended that defendant failed to meet with him until the third day of trial, by which time both sides had already rested, and that defendant failed to ask plaintiff any questions relating to the underlying facts of the criminal complaint. The criminal court vacated all convictions based on ineffective assistance of counsel and ordered a new trial. Subsequently, the state dismissed the original felony charges, kept the original misdemeanor theft charge, and added a new charge of resisting or obstructing an officer. Plaintiff pled guilty to the two misdemeanor charges and received a time-served sentence.

In the civil complaint against defendant, plaintiff alleged that he suffered damages, including loss of civil liberties and freedoms while serving two-and-one-half years in prison for the felony convictions. Defendant argued that even if

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plaintiff's allegations were true, they did not entitle plaintiff to relief because plaintiff was unable to prove he was innocent of all charges, *i.e.*, the so-called "actual innocence rule" under Wisconsin state law and most states that have addressed the issue. The circuit court dismissed plaintiff's complaint. Plaintiff appealed, arguing that his claim was focused only on defendant's negligence in connection with the sexual assault convictions.

The Wisconsin Supreme Court [recently held in \*Skindzelewski\*](#) that in addition to pleading and then proving the four elements of a legal malpractice claim under Wisconsin law—(1) the existence of an attorney-client relationship; (2) the attorney's actions were negligent; (3) the attorney's negligence caused the client's injury; and (4) the client suffered an actual injury—a criminal malpractice plaintiff must also establish that he or she was "actually innocent of the criminal charges as a component of the causation element." The court noted that the actual innocence rule was adopted as a matter of public policy which prevents individuals who commit criminal offenses and are convicted of those crimes from recovering damages for legal malpractice.

Here, the appellate court stated that plaintiff's claims of actual innocence relating to the felony convictions were supported by the state's vacating those charges. Further, plaintiff's admission of guilt relating to the theft charges, which were not part of the legal malpractice claim, was irrelevant.

The court concluded that its decision was not in contrast to the stated public policy in *Skindzelewski*, because plaintiff "would neither profit from that conduct nor escape punishment" for the criminal conduct for which he was convicted. Rather, he was "afforded the opportunity to seek full relief for the damages caused by his attorney's negligence as to the vacated convictions." The court thus determined that allowing plaintiff to proceed with his claim was consistent with Wisconsin's actual innocence rule, and the case was remanded for further proceedings.

## Significance of Decision

The appellate court refined the actual innocence rule and held that a plaintiff who sues his or her criminal defense counsel for malpractice does not need to plead and prove innocence as to all charges. Rather, to state a cause of action for malpractice, the plaintiff only needs to show actual innocence relating to the convictions that form the basis of the malpractice complaint.