

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

JOHN DAVID MOONEY,

Respondent,

Case No.: 35224

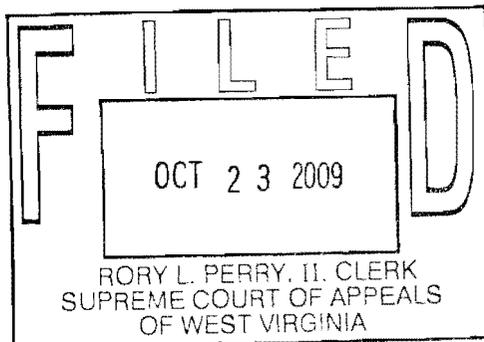
vs.

Petitioners' Opening Brief Regarding
Certified Questions from the Circuit Court
of Cabell County, West Virginia, Civ.
Action No. 08-C-1038
(Honorable F. Jane Husted, Judge)

**MICHAEL FRAZIER, and
FRAZIER & OXLEY, L.C.,**

Petitioners.

**MICHAEL FRAZIER, AND FRAZIER & OXLEY, L.C.'s OPENING
BRIEF REGARDING CERTIFIED QUESTIONS**



Michael M. Fisher (WVSB # 4353)
Ben M. McFarland (WVSB # 9991)
Jackson Kelly PLLC
500 Lee Street East, Suite 1600
Post Office Box 553
Charleston, West Virginia 25322
(304) 340-1000

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II. KIND OF PROCEEDING AND NATURE OF RULING BELOW

This Brief is filed pursuant to Rules 10 and 13 of the West Virginia Rules of Appellate Procedure. This Brief seeks to have this Honorable Court review and decide the following certified questions submitted by the Honorable F. Jane Husted of the Circuit Court of Cabell County, West Virginia, by Order dated April 8, 2009 (“Order and Certification”):

1. Whether the statute of limitations on a legal malpractice action stemming from the defense of a criminal defendant begins to run when the criminal defendant files a habeas corpus petition claiming that he suffered ineffective assistance of counsel in the underlying criminal proceedings?

Answer of the lower court: Yes.

2. Is a criminal defendant collaterally estopped from filing a civil legal malpractice claim against his attorney until the underlying criminal conviction is overturned?

Answer of the lower court: No.

3. Whether, under West Virginia law, an attorney who is court appointed to represent a criminal defendant in a federal criminal prosecution is immune from purely state law claims of legal malpractice stemming from the underlying criminal proceedings?

Answer of the lower court: No.

Order and Certification, at p. 2, attached as Exhibit A.

III. STATEMENT OF FACTS RELEVANT TO THE CERTIFIED QUESTIONS

On October 29, 2002, plaintiff John David Mooney (“Mr. Mooney”) was indicted and charged with being a felon in possession of a firearm in violation of 18 U.S.C. §§ 922(g)(1) and 924(a)(2). (*See* Compl. at ¶ 14). On January 21, 2003, defendant/petitioner Michael Frazier (“Frazier” or “Petitioner”) was appointed to represent Mr. Mooney in his federal criminal action, which was styled *U.S. v. John David Mooney*, Case No. 3:02-00231 (“underlying criminal case”). (*See* Docket Sheet at Entry 21, attached as Exhibit 1 to Defendants’ Rule 12(b)(6) Motion to Dismiss). Mr. Mooney ultimately entered into a written guilty plea for the alleged violation of 18 U.S.C. §§ 922(g)(1) and 924(a)(2) in the underlying criminal case, and he was sentenced to a term of fifteen (15) years imprisonment. (*Id.* Entry 31).

Mr. Mooney appealed his conviction to the United States Court of Appeals for the Fourth Circuit. The Fourth Circuit Court of Appeals affirmed Mr. Mooney’s conviction on March 22, 2004. (*See* Judgment Order, attached as Exhibit 2 to Defendants’ Rule 12(b)(6) Motion to Dismiss). Thereafter, on September 16, 2004, Mr. Mooney filed a motion to vacate his sentence pursuant to 28 U.S.C. § 2255, claiming he suffered ineffective assistance of counsel in the underlying criminal case. (*See* Motion Under 28 USC § 2255 to Vacate, Set Aside, or Correct Sentence by a Person in Federal Custody, attached as Exhibit 3 to Defendants’ Rule 12(b)(6) Motion to Dismiss). In particular, Mr. Mooney alleged that Frazier’s “erroneous [advice] that [Mr. Mooney] did not have an affirmative defense to the charge of being a convicted felon in possession of a firearm” led to an involuntary plea agreement and ultimately Mr. Mooney’s wrongful conviction in the underlying criminal case. *See Id.* at pp. 97 - 98. The

United States District Court for the Southern District of West Virginia denied Mr. Mooney's motion on August 23, 2006. (*See* Memorandum and Opinion Order, attached as Exhibit 4 to Defendants' Rule 12(b)(6) Motion to Dismiss).

Mr. Mooney appealed the district court's decision to the United States Court of Appeals for the Fourth Circuit on August 30, 2006. (*See* Notice of Appeal, attached as Exhibit 5 to Defendants' Rule 12(b)(6) Motion to Dismiss). On August 6, 2007, the Fourth Circuit determined that Mr. Mooney suffered ineffective assistance of counsel in the underlying criminal case and vacated his conviction and sentence. *U.S. v. Mooney*, 497 F.3d 397 (4th Cir. 2007). The U.S. Attorneys Office ultimately determined not to prosecute Mr. Mooney a second time, and he remains free from any charges associated with the underlying criminal case.

On April 10, 2008, Mr. Mooney filed a legal malpractice action against the defendant/petitioners Michael Frazier and Frazier & Oxley, L.C. ("Frazier defendants") in the United States District Court for the Southern District of West Virginia. (*See* Complaint in the United States District Court for the Southern District of West Virginia, attached as Exhibit 6 to Defendants' Rule 12(b)(6) Motion to Dismiss). In response to that complaint, the Frazier defendants filed a Rule 12(b)(1) motion to dismiss for lack of subject matter jurisdiction. On November 18, 2008, Judge Joseph R. Goodwin granted the Frazier defendants' motion to dismiss, specifically finding that the federal district court did not have subject matter jurisdiction to adjudicate the plaintiff's purely state law claims for legal malpractice. (*See* Memorandum Opinion and Order at p. 8, attached as Exhibit 7 to Defendants' Rule 12(b)(6) Motion to Dismiss).

On December 9, 2008, Mr. Mooney re-filed his state law claims for legal malpractice against the Frazier defendants in the Circuit Court of Cabell County, West Virginia.

In response to that complaint, the Frazier defendants filed a Rule 12(b)(6) motion to dismiss, asserting (i) that Mr. Mooney's state law legal malpractice claims are barred by the applicable statute of limitations, and (ii) that because Mr. Mooney's claims stem from a case in which the Frazier defendants served as court appointed counsel, they are immune from civil liability in this case. The Circuit Court of Cabell County, West Virginia did not rule on the Frazier defendants' motion to dismiss, and instead determined that the issues raised therein were pure legal questions of first impression that should be certified to this Honorable Court. (*See Order and Certification*).

Thereafter, on June 5, 2009, the Frazier defendants' filed their Petition for Review of Certified Questions to this Honorable Court. On July 6, 2009, the plaintiff filed his Response to the Frazier defendants' Petition for Review of Certified Questions. In an Order dated September 24, 2009, this Honorable Court granted the Petition to review the questions certified to it by the Circuit Court of Cabell County. The Frazier defendants now submit the instant brief in support of their positions on the certified questions.

**IV. CERTIFIED QUESTIONS OF LAW TO BE ANSWERED AND BRIEF
TO ADOPT CERTIFIED QUESTIONS 1 AND 2, AND
TO OVERTURN CERTIFIED QUESTION 3**

1. Whether the statute of limitations on a legal malpractice action stemming from the defense of a criminal defendant begins to run when the criminal defendant files a habeas corpus petition claiming that he suffered ineffective assistance of counsel in the underlying criminal proceedings?

Answer of the lower court: Yes.

2. Is a criminal defendant collaterally estopped from filing a civil legal malpractice claim against his attorney until the underlying criminal conviction is overturned?

Answer of the lower court: No.

3. Whether, under West Virginia law, an attorney who is court appointed to represent a criminal defendant in a federal criminal prosecution is immune from purely state law claims of legal malpractice stemming from the underlying criminal proceedings?

Answer of the lower court: No.

Order and Certification at p. 2.

Petitioners assert that the Circuit Court of Cabell County correctly ruled that the statute of limitations on a civil legal malpractice action stemming from the defense of a criminal defendant begins to run no later than the time the criminal defendant files a habeas corpus petition claiming that he suffered ineffective assistance of counsel in the underlying criminal proceedings. Petitioners further assert that the Circuit Court of Cabell County correctly ruled that a convicted criminal defendant is not collaterally estopped from instituting a civil legal malpractice claim against his attorney until the underlying criminal conviction is overturned. Finally, the petitioners assert that the Circuit Court of Cabell County erred when it held that a West Virginia attorney, who was appointed by a federal court in West Virginia to represent a criminal defendant in a federal criminal prosecution, is not immune from a subsequent purely state law claim for legal malpractice that stems from the underlying criminal proceedings. Accordingly, the petitioners respectfully request that this Honorable Court adopt the Circuit Court of Cabell County's rulings with regard to Certified Questions 1 and 2, and hold that the Circuit Court of Cabell County erred in ruling on Certified Question 3.

V. POINTS AND AUTHORITIES AND DISCUSSION OF THE LAW

A. Standard of Review

The appellate standard of review of questions of law answered and certified by a circuit court is *de novo*. Syl. Pt. 1, *Williamson v. Greene*, 490 S.E.2d 23 (W.Va. 1997).

B. **The Circuit Court correctly held that the statute of limitations on a legal malpractice claim stemming from the defense of a criminal defendant begins to run when the criminal defendant files a habeas corpus petition claiming ineffective assistance of counsel.**

The first question certified before this Court is whether the statute of limitations on a legal malpractice action stemming from the defense of a criminal defendant begins to run when the criminal defendant files a habeas corpus petition claiming that he suffered ineffective assistance of counsel in the underlying criminal case. In this case, Mr. Mooney filed a habeas petition on September 16, 2004, claiming that he was improperly convicted due to the Frazier defendants' erroneous advice that Mr. Mooney did not have an affirmative defense to the charges in the underlying criminal case. (*See* Motion Under 28 USC § 2255 to Vacate, Set Aside, or Correct Sentence by a Person in Federal Custody at pp. 97 - 98, Doc. 10). Thus, it is undisputed that when Mr. Mooney filed his habeas petition on September 16, 2004, he had formed the belief that his attorney's alleged erroneous advice led to his improper conviction in the underlying criminal proceedings.

1. **The law surrounding the statute of limitations in West Virginia**

It has long been the well-settled law of West Virginia that the statute of limitations for a “legal malpractice [action] accrues when the malpractice occurs, or when the client knows, or by reasonable effort should know, of the malpractice.” Syl. Pt. 5, *Vansickle v. Kohout*, 599 S.E.2d 856 (W.Va. 2004); *see also Cart v. Marcum*, 423 S.E.2d 644 (W.Va. 1992) (stating that the statute of limitations begins to run when the tort occurs, or when the plaintiff knows, or by reasonable diligence should know of the claim).

Mr. Mooney seeks to have this Court change the well-settled law surrounding the statute of limitations by carving out a tolling exception when the alleged legal malpractice action stems from the defense of a convicted criminal defendant. In particular, Mr. Mooney alleges that the statute of limitations should be tolled pending the outcome of a convicted criminal defendants’ habeas petition claiming that he suffered ineffective assistance of counsel in the underlying case. However, as will be discussed more fully below, Mr. Mooney’s argument in this regard is contrary to prior decisions from this Court addressing statutes of limitation, and ultimately would serve to impair, rather than promote, the well-established policies surrounding statutes of limitation.

This Court has previously addressed, and rejected, an argument similar to Mr. Mooney’s in the context of a malicious prosecution action against an attorney. *See McCammon v. Okdaker*, 516 S.E.2d 38 (W.Va. 1999). *McCammon* arose from an underlying medical malpractice action wherein the defendant doctor (Dr. McCammon) obtained a defense verdict at the trial court level. *Id.* at 42. The lower court judgment was entered on June 15, 1993, and the plaintiffs appealed that decision on January 28, 1994. *Id.* On February 17, 1995, this Court affirmed the medical malpractice defense verdict in the underlying action. *Id.*

Thereafter, on January 23, 1996, Dr. McCammon instituted claims for malicious prosecution and intentional infliction of emotional distress against the attorneys who represented the plaintiffs in the underlying medical malpractice action. *Id.* The defendant attorneys responded with a motion to dismiss, asserting that Dr. McCammon's claims were barred by the statute of limitations. *Id.* With regard to the one-year statute of limitations applicable to the malicious prosecution claim, the issue was when the statute began to run. *Id.* at 43.

Much like Mr. Mooney is asserting in the instant action, Dr. McCammon alleged that the statute was tolled pending the outcome of the appeal of the underlying medical malpractice action. *Id.* Dr. McCammon based this argument on the fact that one of the necessary elements for succeeding on a malicious prosecution claim was establishing that the underlying action was terminated in his favor, and that so long as the appeal was pending, which obviously could have reversed the underlying decision, he was precluded from establishing that the underlying action was "terminated" in his favor. *Id.* at 43 - 45. Thus, the dispositive issue was when "termination" occurs for purposes of a malicious prosecution claim in cases in which an appeal is pending. *Id.* at 43.

This Court first noted that there was a split among the jurisdictions—some that hold that "the pendency of an appeal precludes the maintenance of a malicious prosecution action because the proceedings are not considered terminated" until the rendition of the appeal process, and some that hold that the "right to maintain an action for malicious prosecution accrues [upon the] judgment [in the underlying action] by the trial court, [regardless of whether] an appeal is [pending]." *Id.* at 43 - 44. In reaching a decision on this issue, this Court relied heavily on its previous decision in *Allen v. Burdett*, 109 S.E. 739 (W.Va. 1921), wherein this Court had already held that the statute of limitations for a malicious prosecution claim begins to

run upon the rendition of the trial court judgment even though there is a possibility that an appeal may be filed at a later date. *Id.* at 44, *citing Allen*, 109 S.E. at 740. Unlike in *Allen*, where no appeal of the lower court judgment had been filed, the issue in *McCammon* was whether the actual pendency of an appeal tolled the statute of limitations on a malicious prosecution claim. *Id.*

This Court saw no reason to deviate from its holding in *Allen* simply because an appeal was actually taken up on the lower court judgment. Thus, this Court held that the statute of limitations for a malicious prosecution claim accrues upon the termination of the trial court judgment, and is barred if not asserted within one-year of such judgment, regardless of whether an appeal has been filed on the lower court judgment. *Id.* at 46. In so holding, this Court stated that it favored a “stringent” approach to the statute of limitations, because if it “were to adopt the position urged by the plaintiff, it would extend indefinitely the time period for bringing a malicious prosecution action in cases in which appeals are pending.” *Id.* at 45 [emphasis added].

Finally, this Court addressed the potential problem that its holding could result in inconsistent judgments (e.g. the situation where an underlying action is terminated in favor of a defendant, who then files and succeeds on a malicious prosecution claim during the pendency of an appeal of the lower court judgment, which could change the fact that the lower court judgment it was terminated in favor of the defendant). *Id.* at 46. Here this Court stated that any risk of inconsistent judgments could be avoided if the circuit court would simply “stay the malicious prosecution proceedings until the appeal is disposed of.” *Id.*

This Court’s decision in *McCammon* provides guidance to the issues raised in certified question 1. First, similar to the plaintiff in *McCammon*, Mr. Mooney asserts that the statute of limitations for his legal malpractice action should be tolled pending the outcome of his

post conviction appeal process. However, as this Court noted in *McCammon*, tolling the statute of limitations pending the outcome of an appeal of a criminal conviction would extend indefinitely the time period for bringing a legal malpractice action based on an alleged improper criminal conviction. This would severely undermine the well-established principles underlying statutes of limitations, because it would delay the filing of claims against lawyers and open the door for stale claims where memories have faded, witnesses may have died or become unavailable, evidence may have been lost, and facts may have become obscured, all to the severe prejudice of the parties. See *Morgan v. Grace Hospital, Inc.*, 144 S.E.2d 156, 164 (W.Va. 1965) (stating that the purpose of all statutes of limitation are “to require the prosecution of a right of action within a reasonable time, to prevent undue delay in bringing suit on claims, and to suppress the assertion of fraudulent and stale claims to the surprise of the parties, when the evidence may have been [lost], or the facts may have become obscure because of defective memory, or the witnesses may have died or disappeared and thus become unavailable”).¹

¹The following hypothetical discussion might be instructive on the importance of considering the principles underlying statutes of limitation. Let us assume that the defendants in this case were never made aware that the plaintiff had filed a § 2255 petition claiming that the defendants rendered ineffective assistance of counsel. Let us also assume that the United States Attorneys’ Office, believing that there was no chance that the § 2255 petition would be successful, never contacted the defendants about the circumstances of their representation of the plaintiff, never attempted to secure an affidavit, testimony, or other evidence from the defendants in response to allegations in the § 2255 petition, and allowed the § 2255 petition to be decided upon the self-serving affidavit provided by the plaintiff. Let us further assume that when the United States Attorneys’ Office received the shocking news that the United States Court of Appeals had ruled that the defendants had rendered ineffective assistance of counsel and that the case was being remanded for trial, the United States Attorneys’ Office was further shocked to learn that the gun involved in the plaintiff’s offense had been returned to the plaintiff’s ex-wife (the victim), that the 911 tapes surrounding the ex-wife’s calls to the police on the night of the offense had been lost, that the federal agents could not locate the ex-wife, and that relatives of the ex-wife reported to the agents that she no longer wished to be involved in any prosecution of the plaintiff. Thus, let us assume that based upon these facts, the United States Attorneys’ Office exercised its prosecutorial discretion not to proceed to trial and dismissed the case against the plaintiff.

Under this hypothetical scenario, the principles underlying the statute of limitations could have been served had the plaintiff filed his civil action against the defendants in a timely manner. First,

Indeed this Court has relied on the well-established policies surrounding statutes of limitation when deciding whether to toll the statute of limitations for a legal malpractice action pending the outcome of a party's "efforts to reverse or mitigate the harm [of the malpractice] through administrative and/or judicial appeals." *Vansickle v. Kohout*, 599 S.E.2d 856, 861 (W.Va. 2004). The plaintiff in *Vansickle* sought to have the so-called "continuous representation" doctrine, which tolls the statute until the professional relationship terminates with respect to the matter underlying the malpractice, extended "to the extent that any ongoing action to mitigate the damages from an act of malpractice [would] toll the statute until the case reaches an ultimate administrative or judicial resolution." *Id.* at 860. In refusing to toll the statute, this Court specifically stated that the well-established principles underlying statutes of limitations (namely that such statutes are designed to encourage promptness in instituting suits, to suppress stale or fraudulent claims, and to avoid inconvenience) should not be "ingore[d] . . . in order to adopt [an] entirely different statute of limitations for lawyer malpractice actions." *Id.* at 861. [emphasis added]. Finally, this Court stated that courts remain free to stay a legal malpractice action "in order to await the conclusion of some other proceeding that might establish a client's damages." *Id.*

This Court's decisions in *McCammon* and *Vansickle* establish that statutes of limitation are to be applied in a "stringent" manner so as to promote, rather than impair, the well-

perhaps the defendants would have learned that a § 2255 petition had been filed and they could have taken steps to intervene or provide an affidavit, testimony, or other evidence to make sure that the petition was based upon a full record. Moreover, if the plaintiff had timely filed his civil action, the defendants could have taken steps to request that the gun, 911 tapes, and other evidence be preserved and taken steps to depose or otherwise preserve the testimony of the ex-wife. However, under this hypothetical scenario, the defendants were not timely advised of the legal malpractice claims and were prejudiced by the passage of time and loss of critical evidence.

established policies served by statutes of limitation. While Mr. Mooney seeks to have this Court adopt a law that tolls the statute pending the outcome of a criminal defendant's appeal process, this Court has made it clear that there is no tolling exception pending the outcome of the appellate process. Finally, and consistent with this Court's holdings in *McCammon* and *Vansickle*, in order to serve the policies of the statute of limitations and avoid the risk of inconsistent judgments (e.g. the situation where a convicted plaintiff files and succeeds on a legal malpractice claim asserting that his attorney's conduct led to his improper conviction, and then fails to obtain habeas relief because the appropriate appellate court finds that his counsel was not ineffective and that the conviction was proper), when a criminal defendant has formed the belief that he has a claim against his former attorney, it is up to him to file his legal malpractice claim within the applicable time period, and such malpractice action can then be stayed pending the outcome of the appellate process. By requiring the legal malpractice action to be filed in a timely manner and subsequently staying the matter pending the outcome of the ineffective assistance of counsel proceedings, a defendant/lawyer is put on notice of the claim, which prevents unfair surprise to the parties, and allows them to do that which is necessary to preserve evidence and prevent the prosecution of stale claims.²

Finally, and in keeping with the principles set forth above in *McCammon* and *Vansickle*, the United States District Court for the Northern District of West Virginia has noted that the accrual date for a legal malpractice claim based on an underlying criminal conviction is the date on which the plaintiff filed his petition for writ of habeas corpus claiming ineffective assistance of counsel. *Schuch v. Cipriani*, 2006 WL 1651023 (N.D. W.V. June 13, 2006). The

² In some cases, the parties may not want to stay the proceedings, but to proceed with discovery to preserve testimony and evidence.

issue in *Schuch*, which involved a legal malpractice claim filed after a finding that the plaintiff's counsel was ineffective in the underlying federal criminal proceedings, was whether the federal court had subject matter jurisdiction to adjudicate the plaintiff's legal malpractice claim. The federal court held that the plaintiff's claim for legal malpractice based on the underlying federal criminal proceedings did not create federal question subject matter jurisdiction. *Id.* at *2.

In so holding, however, the Court in *Schuch* also opined in dictum that even if it did have subject matter jurisdiction, the applicable statute of limitations would have barred the plaintiff's legal malpractice claim, specifically stating:

It should be noted that if this Court had subject matter jurisdiction, the plaintiff's complaint would fail on the merits ... This Court finds that the defendants' motion for summary judgment would be granted based on the applicable two year statute of limitations, *see Hall v. Nichols*, 400 S.E.2d 901, 904-05 (W.Va.1990), which accrued when the plaintiff knew, or should have known, of the facts underlying this action. *Vansickle v. Kohout*, 599 S.E.2d 856, 860 (W.Va.2004). **This Court agrees with the defendants that this date would have been prior to September 9, 2003, the date on which the plaintiff [began] to work on his habeas petition.** Accordingly, if this Court had subject matter jurisdiction ... the defendants' motion for summary judgment would have been granted.

Id. [emphasis added].

Not only is the above commentary from the Court in *Schuch* consistent with the principles set forth in *Vansickle* and *McCammom*, it is also in accord with the well-settled West Virginia law that there is no tolling of the statute of limitations for incarcerated persons. *See Craig v. Marshall*, 331 S.E.2d 510, 513 (W.Va. 1985) (stating that there is “no tolling provision in [West Virginia’s] statute of limitations with regard to a prisoner’s claim during the period of his incarceration”); *Woodson v. City of Lewisburg*, 2008 WL 906322 (S.D. W.Va. March 31, 2008), unpublished opinion (noting that “West Virginia does not have a statute that tolls the

period of limitations because a plaintiff becomes incarcerated”). The West Virginia legislature specifically did not include a tolling provision in the statute of limitations, and this Court should therefore refuse to carve out an exception to this well-settled law concerning the statute of limitations.

In sum, this Court has made it clear that the statute of limitations begins to run when a plaintiff knows or should know of his claim, and that the statute will not be tolled pending the outcome of the appellate process, especially when to do so would undermine the policies underlying statutes of limitation. In addition, and consistent with the previous decisions from this Court, at least one federal court in West Virginia has specifically opined that the statute of limitations for a legal malpractice action based on an underlying criminal case begins to run when the criminal defendant forms the belief his counsel’s negligent conduct led to his conviction, which occurs no later than the institution of the habeas proceedings claiming ineffective assistance of counsel. Finally, there is no tolling of the statute of limitations in West Virginia for incarcerated persons. For these reasons, and in keeping with the rationales set forth in *McCammon* and *Vansickle*, this Court should hold that the statute of limitations on a legal malpractice action stemming from the defense of a criminal defendant begins to run when the criminal defendant files a habeas corpus petition claiming that he suffered ineffective assistance of counsel in the underlying criminal case.

2. **The law of other jurisdictions addressing whether the statute of limitations for a legal malpractice action is tolled pending the outcome of an appeal of the underlying criminal conviction.**

Although there is a split among the jurisdictions that have considered this issue, the well-settled law of West Virginia surrounding the statute of limitations clearly favors a holding that is consistent with those jurisdictions that hold that the statute of limitations on a legal malpractice action stemming from an underlying criminal case begins to run when the criminal defendant first forms the belief that his former's attorney's conduct led to his improper conviction.

Courts that have addressed the statute of limitations on a legal malpractice action stemming from an underlying criminal action appear to take one of two different approaches when deciding whether the statute of limitations is tolled pending the outcome of any post conviction relief proceedings. Some jurisdictions favor a "one-track" approach, which requires a criminal defendant to first litigate a successful claim for post-conviction relief before permitting him to even file a claim for legal malpractice, and further provides that the statute of limitations on such claim does not begin to run until the plaintiff obtains post-conviction relief. *See e.g. Shaw v. Alaska*, 816 P.2d 1358 (Alaska 1991); *Griffin v. Goldenhersh*, 323 Ill.App.3d 398 (Ill.App. 5th Dist. 2001). Other jurisdictions favor what is referred to as a "two track" approach, wherein a criminal defendant is permitted to simultaneously pursue a claim for post conviction relief and a claim for legal malpractice, and the statute of limitations generally begins to run when the criminal defendant knows or should know of the his alleged claim. *See Gebhardt v. O'Rourke*, 510 N.W.2d 900 (Mich. 1994); *Berringer v. Steele*, 133 Md.App 442 (Md.App. 2000). West Virginia law favors the "two track" approach and should be adopted by this Court.

Before addressing the “two-track” approach, which is in accord with West Virginia law, the Petitioners will briefly address the rationale behind the so-called “one-track” approach. One of the most often cited case that favors the “one-track” approach is *Shaw v. Alaska*, 816 P.2d 1358 (Alaska 1991). *Shaw* involved an action in which the criminal defendant/malpractice plaintiff (“Mr. Shaw”) was convicted in 1973 for two counts of burglary and two counts of larceny. *Id.* at 1359. On August 15, 1986, some thirteen years later, Mr. Shaw’s convictions were set aside as being constitutionally defective. *Id.* at 1360. Thereafter, on January 13, 1988, Mr. Shaw filed suit against the attorney who represented him in the 1973 criminal action, alleging that an improper conflict of interest led to his conviction. *Id.* The defendant/attorney argued that the action was barred by the two-year statute of limitations, which was granted by the lower court. *Id.*

The Court in *Shaw* reversed the lower court’s decision, holding that “a convicted criminal defendant must obtain post-conviction relief before pursuing an action for legal malpractice against [his] attorney.” *Id.* [emphasis added]. The Court further held that because such post-conviction “relief will remain uncertain until actually granted, the statute of limitations for filing legal malpractice claims must be tolled until such relief is granted.” *Id.* In noting that there is a split among the jurisdictions on this issue, the Court opined that “public policy requires some form of post-conviction relief as a pre-requisite to the filing of a legal malpractice action.” *Id.* [emphasis added]. In particular, the Court in *Shaw* found that “the requirement of post-conviction relief promotes judicial economy because many issues litigated in the quest for post-conviction relief will be duplicated later in the malpractice action.” *Id.* at 1361. According to the Court, this is so because dispositive post-conviction relief is relevant to the issue of proximate cause and damages. *Id.* The Court also opined that if post-conviction relief is denied,

then the convicted criminal defendant would be collaterally estopped from filing any frivolous malpractice claim. *Id.*

Moreover, the Court opined that the requirement of post-conviction relief as a prerequisite to a legal malpractice action establishes a bright line test with regard to the running of the statute of limitations, because the statute always begins to run on the date of the post-conviction relief. *Id.* Finally, the Court noted that it was concerned that an attorney defending a legal malpractice action may disclose certain privileged documents that might “hurt a criminal defendant” obtain post-conviction relief, and that it was desirable to allow a criminal defendant to pursue post-conviction relief “without the distraction of also filing a legal malpractice claim.” *Id.* For these reasons the Court adopted the so-called “one track” approach with regard to the statute of limitations on legal malpractice actions stemming from an underlying criminal matter.

The most often cited case adopting the so-called “two track” approach appears to be the case of *Gebhardt v. O’Rourke*, 510 N.W.2d 900 (Mich. 1994). The criminal defendant in *Gebhardt* was convicted on January 8, 1987 of aiding and abetting a rape. *Id.* At 901. Thereafter, the convicted criminal defendant (“Ms. Gebhardt”) moved for a new trial, alleging that her attorney, among other things, failed to “provide a substantial defense” in the underlying matter. *Id.* The conviction was eventually overturned, and on November 3, 1989, Ms. Gebhardt filed a legal malpractice action against her former attorney, who responded with a motion to dismiss based on the statute of limitations. *Id.* at 902.

The Michigan statute of limitations required a plaintiff to file her legal malpractice action within two years of the attorney’s last day of service, or within six months of when the plaintiff discovered, or should have discovered the claim. *Id.* Ms. Gebhardt argued that the statute of limitations should have been tolled until she obtained post-conviction relief. *Id.*

at 904 - 05. The Court in *Gebhardt* noted generally that the “statute of limitations is not tolled by an appeal of the underlying matter.” *Id.* at 905. The Court went on to apply a literal interpretation of the statute of limitations, and held that the plaintiff’s claims were time barred. *Id.* In so doing, the Court in *Gebhardt* stated that the “literal interpretation we apply today conforms with the policies underlying the statute of limitations,” namely that such statutes are designed to give “the opposing party a fair opportunity to defend, relieve[] the court system from dealing with stale claims, and protect[] potential defendants from protracted fear of litigation.” *Id.*

Next the Court in *Gebhardt* addressed the “one-track” approach that criminal defendants often advocate after their conviction is overturned, specifically stating:

In an effort to get around the [statute of limitations] defense, a plaintiff argues that his cause of action did not accrue until all of the elements of his claim had occurred. Harm and causation being the easiest elements to manipulate, the plaintiff argues that until postconviction relief was obtained, he could not have discovered that the attorney was the proximate cause of his harm, or that ascertainable harm had even occurred. Rather than analyzing discovery of harm and proximate cause under typical discovery-rule analysis, some courts have held that, as a matter of law, legally cognizable harm cannot occur until the wrongly convicted criminal defendant has obtained appellate relief.

Id. at 906. The Court rejected this as a “legal fiction that divorces the law from reality” because it means that persons who were “wrongly convicted and imprisoned” due to their attorney’s negligence “were not harmed when they were wrongly convicted and imprisoned but, rather, that they are harmed only if and when they are exonerated.” *Id.* [emphasis added]. The Court continued by noting that this “legal fiction of harm subverts the policy of a statute of limitations by extending indefinitely the time in which this type of legal malpractice claim could potentially accrue.” *Id.* [emphasis added].

The Court in *Gebhardt* next addressed the policy considerations enumerated in the *Shaw* decision discussed above. First, with regard to the notion that if post-conviction relief is denied, collateral estoppel will eliminate frivolous claims and thereby promote judicial economy, the Court in *Gebhardt* stated while “[i]ssue preclusion and collateral estoppel should be utilized in the appropriate case . . . the availability of these devices should not lead to a subversion of the statute of limitations by allowing a criminal defendant to first obtain post-conviction relief before starting the clock on the limitations period.” *Id.* at 906 - 07. Next, with regard to the remaining concerns of judicial economy and fairness to the criminal defendant that were raised by the Court in *Shaw*, the Court in *Gebhardt* stated that there is a “workable solution” to such concerns, namely that the civil matter should be stayed pending the outcome of the criminal matter. *Id.*

Finally, the Court in *Gebhardt* summarized the rationale behind its adoption of the so-called “two-track” approach:

The “two track” approach adopted today recognizes that a criminal defendant who has initiated postconviction relief proceedings should have knowledge sufficient to have discovered his claim against his initial defense attorney for statute of limitation purposes. In order to put the defense attorney on notice that he will have to defend against a malpractice claim, and thereby honor the policies underlying the statute of limitations, the criminal defendant must file his malpractice complaint within six months of discovering the existence of the claim, or within two years of his attorney's last day of service in the matter in which the alleged negligence occurred. With his claim preserved, he can and should seek a stay in the civil suit until the criminal case is resolved. The trial court handling the civil suit would have discretion regarding whether the stay would continue until judgment in the criminal matter is final or, if after the initial judgment on postconviction relief, justice would permit going forward with the civil suit while the appeal process in the criminal matter continues until final determination.

Id. at 907. Having found that the “two-track” approach provides the best balance between the competing concerns of fairness to criminal defendants and allowing the attorney a fair opportunity to defend,” the Court in *Gebhardt* opted to side with those jurisdictions that hold that the statute of limitations on a legal malpractice action stemming from an underlying criminal matter begins to run when the criminal defendant knows or should know of his claim. *Id.*

The rationale underlying the so-called “two-track” approach is consistent with the well-settled West Virginia law concerning the statute of limitations. First, as in *Gebhardt*, this Court has previously held that there is generally no tolling of the statute of limitations during the pendency of an appeal because to do so would “extend indefinitely” the time period for filing a claim. *See McCammon*, 516 S.E.2d at 45 (W.Va. 1999). Moreover, the well-settled law of West Virginia is that a legal malpractice claim accrues when the plaintiff knows or should know of his claim, and just like the courts adopting the “two-track” approach hold, this Court has held that the West Virginia statute of limitations is to be applied in a “stringent” manner so as to promote the policies underlying statutes of limitation. *Vansickle*, 599 S.E.2d at 861 (W.Va. 2004) (noting that statutes of limitations are designed to encourage promptness in instituting suits, to suppress stale or fraudulent claims, and to avoid inconvenience, and that such principles should not be “ingore[d] . . . in order to adopt [an] entirely different statute of limitations for lawyer malpractice actions”) [emphasis added].

Finally, and consistent with the “two-track” approach, this Court has previously held that when an action is being pursued (such as an appeal) that could affect a simultaneous claim against an attorney, the claim against the attorney can be stayed pending the outcome of the other proceeding. *McCammon*, 516 S.E.2d at 46 (W.Va. 1999); *Vansickle*, 599 S.E.2d at 861 (W.Va. 2004). As the Court stated in *Gebhardt* stated, utilizing this “two-track” approach,

which includes staying the habeas proceedings pending the outcome of the appellate process, “provides the best balance between the competing concerns of fairness to criminal defendants and allowing the attorney a fair opportunity to defend” the legal malpractice claim. *Gebhardt*, 510 N.W.2d at 907 (Mich. 1994). Accordingly, the so-called “two-track” approach is much more consistent with West Virginia law, and should therefore be adopted by this Court.

The Montana Supreme Court recently considered the rationales underlying both approaches to the statute of limitations on legal malpractice actions stemming from an underlying criminal case, and found that the two-track approach is the superior method to reconcile statutes of limitation with the policy concerns of judicial economy:

After considering both approaches, we find the Michigan Supreme Court's analysis in *Gebhardt* more persuasive because it incorporates a strict reading of the statute of limitations that at the same time addresses the problems posed by multiple litigations. The two-track approach recognizes that a criminal defendant who has initiated postconviction relief proceedings does have, or should have, sufficient knowledge of his or her legal malpractice claim for statute of limitations purposes. **Therefore, in order to put counsel on notice that he or she will have to defend against a malpractice claim, and thereby honor the policies underlying the statute of limitations, we hold that a criminal defendant must file a malpractice complaint within three years of discovering the act, error or omission . . . with the claim preserved, the defendant can seek a stay in the civil suit until the criminal case is resolved.** The trial court handling the civil suit would have discretion regarding the duration of the stay, keeping in mind the nature of the claim asserted for postconviction relief.

Ereth v. Cascade County, 81 P.3d 463, 469 (Mont. 2003) [emphasis added].

Several other jurisdictions have likewise adopted some variation of the so-called “two track” approach as explained above in *Gebhardt*. See e.g., *Seevers v. Potter*, 537 N.W.2d 505, 511 (Neb. 1995); *Berringer v. Steele*, 133 Md.App 442 (Md.App. 2000); *Silvers v. Brodeur*, 682 N.E.2d 811, 816 (Ind.App. 1997); *Duncan v. Campbell*, 936 P.2d 863, 867-68 (N.M. 1997);

see also, Quick v. Swem, 568 A.2d 223, 224 (Pa.Super. 1989); *Krahn v. Kinney*, 538 N.E.2d 1058, 1061 (Ohio 1989).

For all of the foregoing reasons, and in keeping with existing West Virginia precedent on the statute of limitations, this Court should refuse to carve out a tolling exception to the statute of limitations, and hold that the statute of limitations on a legal malpractice action stemming from the defense of a criminal defendant begins to run when the criminal defendant files a habeas corpus petition claiming that he suffered ineffective assistance of counsel in the underlying criminal case

C. The Circuit Court correctly ruled that a criminal defendant is not collaterally estopped from filing a civil legal malpractice claim against his attorney until the underlying criminal conviction is overturned.

The next question certified to this Court is whether a criminal defendant is collaterally estopped from filing a civil legal malpractice claim against his attorney until the underlying criminal conviction is overturned. As part of the plaintiff's attempt to have this Court carve out an exception to the statute of limitations, the plaintiff asserts that up until the time his conviction was overturned, he was collaterally estopped from pursuing a legal malpractice claim against his former attorney. Plaintiff alleges that because he was collaterally estopped from pursuing his legal malpractice claim until his conviction was overturned, the statute of limitations should be tolled pending the outcome of his habeas proceedings.

In support of this argument, the plaintiff asserts that a required element of his legal malpractice claim is that he must establish that he was "actually innocent" of the crime for

which he was convicted, and since he was convicted in the underlying criminal case, he was collaterally estopped from establishing he was actually innocent in the underlying criminal case. However, this Court does not need to decide whether “actual innocence” is a required element of the plaintiff’s legal malpractice claim, because regardless of whether this is a required element, the doctrine of collateral estoppel does not bar the plaintiff from filing or pursuing his legal malpractice claim. This conclusion is consistent with both West Virginia law as well as the so-called “two track” approach to these types of legal malpractice claims discussed above.

This Court has long held that “[t]he application of the doctrine of collateral estoppel is discretionary with the trial court and rests upon a number of factual predicates.” Syl. Pt. 7, *Conley v. Spillers*, 301 S.E.2d 216 (W.Va. 1983). Consistent with this approach, many of the courts adopting the so-called “two-track” approach to the statute of limitations have stated that while “[i]ssue preclusion and collateral estoppel should be utilized in the appropriate case ... these devices should not lead to a subversion of the statute of limitations by allowing a criminal defendant to first obtain postconviction relief before starting the clock on the limitations period.” *Gebhardt v. O’Rourke*, 510 N.W.2d 900, 906 - 07 (Mich. 1994); *see also, Silvers v. Brodeur*, 682 N.E.2d 811, 817 - 18 (Ind.App. 1997). This Court should likewise refuse to allow the plaintiff to utilize the discretionary doctrine of collateral estoppel to undermine the well-settled policies of the statute of limitations.

An appellate court in Maryland has recently held that although post-conviction relief is a condition precedent to *recovery* in a legal malpractice action stemming from an underlying criminal case, such post-conviction relief is not a condition precedent to the *initiation* of such a legal malpractice action. *Berringer v. Steele*, 133 Md.App 442, 484 (Md.App. 2000)

[emphasis in original]. In explaining the rationale behind this ruling, the Court in *Berringer* stated that:

Public policy considerations prompt us to align ourselves with those jurisdictions that have imposed appellate, post conviction, or habeas relief, dependent upon attorney error, as a predicate to *recovery* in a criminal malpractice action, when the claim is based on an alleged deficiency for which appellate, post conviction, or habeas relief would be available ... Ordinarily, when the alleged negligence of defense counsel contributed to a conviction, the proper redress for the ineffective assistance of counsel is pursuit of one of the aforementioned forms of post trial relief; a criminal defendant may prevail in having the judgment of conviction vacated in a post conviction, appellate, or habeas proceeding, for any number of reasons. If a potential criminal plaintiff is unsuccessful in obtaining relief from conviction, then it would seem that the attorneys' conduct was not the proximate cause of the conviction or injury. Nevertheless, we conclude that a criminal plaintiff need not obtain post conviction relief prior to the *initiation* of a criminal malpractice action, so long as the criminal plaintiff has initiated a post conviction action. Moreover, in our view, the question of a criminal plaintiff's innocence is subsumed within the inquiry of whether the defense lawyer's conduct was the proximate cause of the conviction or the failure to secure dismissal of charges.

Id. [emphasis in original].

After conducting a thorough survey of the law, the Court in *Berringer* went on to adopt the “two-track” approach to the statute of limitations, thereby refusing to carve out a tolling exception and requiring a criminal plaintiff to comply with the well-settled law surrounding the statute of limitations. *Id.* at 497. Finally, like the many other jurisdictions that have adopted the “two-track” approach to the statute of limitations on these legal malpractice claims, the Court in *Berringer* addressed the situation where a criminal plaintiff is required to file a legal malpractice claim prior to obtaining post-conviction relief:

Because a criminal plaintiff must timely file a criminal malpractice action, we recognize that a criminal plaintiff may have to initiate the malpractice suit prior to resolution of all post conviction proceedings, in order to satisfy limitations. In that circumstance, upon motion of either party, the trial court in the criminal malpractice action should not dismiss the malpractice case merely

because the criminal plaintiff has not obtained post conviction relief. Rather, the court should stay the malpractice suit pending the criminal plaintiff's diligent effort to obtain resolution of the requisite post conviction, appellate, or habeas proceedings.

Id., citing *Bailey v. Tucker*, 621 A.2d 108 (Pa. 1993).

The decision in *Berringer* is instructive in this case, because it establishes that even if this Court were to agree with the plaintiff that post-conviction relief is a condition precedent to *recovery* in a legal malpractice action stemming from an underlying criminal case, this does not preclude a plaintiff from *initiating* a legal malpractice action against his attorney once he has formed the belief that his attorney negligently represented him. Moreover, as in *Berringer*, rather than allowing the doctrine of collateral estoppel to completely subvert the statute of limitations, when a criminal plaintiff is required to file a legal malpractice claim against his attorney before he obtains post-conviction relief in order to comply with the statute of limitations, the trial court is free to stay the legal malpractice action pending the outcome of the post-conviction relief proceedings.

In this case, the plaintiff is essentially arguing that he cannot prove his legal malpractice claim unless and until he obtains post-conviction relief. However, as this Court has specifically held, legal malpractice action can always be stayed “**in order to await the conclusion of some other proceeding that might establish a client’s damages.**” *Vansickle v. Kohout*, 599 S.E.2d 856, 861 (W.Va. 2004) (further noting that the policies underlying statutes of limitations should not be “ingore[d] . . . in order to adopt [an] entirely different statute of limitations for lawyer malpractice actions”). Regardless of anything the plaintiff says in response to the above, it is indisputable that the plaintiff is seeking to utilize the doctrine of collateral estoppel in order to have this Court adopt an entirely new statute of limitations for

lawyer malpractice actions stemming from an underlying criminal case. The plaintiff's approach completely undermines the policies behind the statute of limitations, and this Court should refuse to interpret the discretionary doctrine of collateral estoppel in such a manner that tolls the statute of limitations for an indefinite period of time.

Throughout the course of these proceedings, the plaintiff has, in somewhat of an alternative collateral estoppel argument, asserted that the United States District Court's Order dated August 23, 2006 denying his initial ineffective assistance of counsel claim collaterally estopped him from re-litigating the very issue of his counsel's ineffective assistance in a legal malpractice claim. In other words, the plaintiff asserts that the issue of his counsel's effectiveness was "actually litigated" before the United States District Court for the Southern District of West Virginia, and because the district court denied his claim for ineffective assistance of counsel on August 23, 2006, he then became collaterally estopped from re-litigating such issues in a subsequent legal malpractice claim.

Once again, however, plaintiff's argument fails, because even if he did become collaterally estopped from "re-litigating" anything as a result of the district court's August 23, 2006 order, his claim would still fail as barred by the two-year statute of limitations for legal malpractice claims. As discussed above, the plaintiff formed the belief that the defendants were negligent no later than the time when he filed his motion to vacate based on ineffective assistance of counsel, which occurred on September 16, 2004. The plaintiff argues that he became collaterally estopped from pursuing his legal malpractice claim on August 23, 2006, which means that from September 16, 2004 until August 23, 2006, the statute of limitations was running. Thus, under the plaintiff's argument, the statute had run for some 23-months until he became collaterally estopped from pursuing his legal malpractice claim on August 23, 2006.

Under the plaintiff's argument, plaintiff was no longer collaterally estopped from pursuing his legal malpractice claim when the Fourth Circuit overturned his conviction on August 8, 2007. Plaintiff did not file his complaint in this case until April 18, 2008, which is approximately 8-months after the plaintiff was allegedly no longer collaterally estopped from pursuing his legal malpractice claim. Putting all this together, the statute of limitations was running for 23-months until the plaintiff was allegedly collaterally estopped from pursuing his legal malpractice claim, and then for another 8-months from the time he was allegedly no longer collaterally estopped until he actually filed his complaint. Thus, under the plaintiff's argument, the statute of limitations ran for approximately 31-months before the plaintiff actually filed his complaint, which is well beyond the 2-year statute of limitations period. Thus, even under this argument regarding collateral estoppel, plaintiff's claims are still barred by the applicable statute of limitations.

For all of the foregoing reasons, and in keeping with existing West Virginia precedent on the statute of limitations and the so-called "two-track" approach to the statute of limitations discussed above, this Court should hold that a criminal defendant is not collaterally estopped from **filing** a civil legal malpractice claim against his attorney until the underlying criminal conviction is overturned.

D. The Circuit Court incorrectly held that the defendants were not immune from suit by an indigent criminal defendant asserting purely state law claims of legal malpractice stemming from their representation of the indigent criminal defendant during the federal court criminal case.

The third question certified before this Court is whether, under West Virginia Law, an attorney who is court appointed to represent a criminal defendant in a federal criminal prosecution is immune from purely state law claims of legal malpractice stemming from the underlying criminal proceedings. The Circuit Court answered this certified question in the negative.

The defendants contend that the State of West Virginia is free to define available defenses, including the defense of immunity, in this instance; that the State of West Virginia clearly provides immunity to criminal defense attorneys who represent indigent criminal defendants in analogous situations; that there are compelling state interests which mandate that the defendants be immune from the plaintiff's suit in this matter; and that the plaintiff's state law claims of legal malpractice against the defendants should be dismissed in this case. The plaintiff urges this Court to strictly construe West Virginia Code Section 29-21-20 and find that no immunity exists. However, the defendants submit that the ends of justice and logic dictate that it is in the best interests of the citizens of West Virginia in general, in particular indigent criminal defendants in West Virginia, to declare that criminal defense attorneys, such as the defendants in this case, are immune from claims of legal malpractice asserted by indigent criminal defendants stemming from a court appointed criminal legal representation in federal court.

It is well-settled law that when "state law creates a cause of action, the State is free to define the defenses to that claim, including the defense of immunity, unless, of course, the state rule is in conflict with federal law." *Ferri v. Ackerman*, 444 U.S. 193, 198 (1979) (holding that federal law does not preempt a state's ability to decide whether court appointed attorneys are

entitled to immunity from civil liability; further holding that federal law does not provide immunity for court-appointed counsel in a state malpractice action).

In this case it is indisputable that plaintiff's legal malpractice claims against these defendants are purely matters of state law. *Schuch v. Cipriani*, 2006 W.L. 1651023 (N.D.W.V. June 13, 2006) (noting that a legal malpractice claim stemming from the defense of an underlying federal criminal case is purely a state law claim). Because federal law does not preempt this State's ability to provide immunity for court appointed attorneys, this State remains free to define the defenses to plaintiff's legal malpractice claim, including the defense of immunity. *Ferri v. Ackerman*, 444 U.S. 193, 198 (1979). Because the United States Supreme Court in *Ferri* held that the Criminal Justice Act of 1964 does not preempt a state's ability to provide immunity for court appointed attorneys, this Court must look to West Virginia law to decide whether the defendants are immune from the state-based legal malpractice claims asserted by the plaintiff.

West Virginia has already declared an express interest in providing quality legal representation in certain situations to those who face an economic barrier to afford adequate legal counsel. Specifically, in West Virginia Code Section 29-21-1, the Legislature declared, in part, as follows:

“The Legislature finds and declares that in certain proceedings the state is required to provide high quality legal assistance to indigent persons who would be otherwise unable to afford adequate legal counsel; that providing legal representation to those who face an economic barrier to adequate legal counsel will serve the ends of justice in accordance with rights and privileges guaranteed to all citizens by the Constitution of the United States of America and the constitution of the state of West Virginia; that the availability of quality legal assistance reaffirms the faith of our citizens in our government of laws; . . .”

Accordingly, the State of West Virginia has declared a strong interest to provide high quality legal assistance to indigent persons who face an economic barrier to adequate legal counsel. In addition, the State of West Virginia has found and declared that a system for appointment of counsel serves the ends of justice in accordance with the rights and privileges guaranteed to all citizens by the Constitution of the United States of America and the constitution of the State of West Virginia. In other words, the State of West Virginia has clearly declared its public interests and made a commitment to provide quality defense counsel to West Virginia criminal indigent defendants in an effort to serve the ends of justice, to support both the federal and state Constitutions, and to reaffirm the faith of our citizens in our government of laws.

Such interests are further reflected in West Virginia Code Section 29-21-20. That section provides, as follows:

Any attorney who provides legal representation under the provisions of this article under appointment by a circuit court or by the supreme court of appeals, and whose only compensation therefore is paid under the provisions of this article, shall be immune from liability arising from that representation in the same manner and to the same extent that prosecuting attorneys are immune from liability.

W.V. Code § 29-21-20. This section reveals that not only are prosecuting attorneys³ immune from liability in suits by criminal defendants, but that the State of West Virginia has mandated that attorneys appointed to represent West Virginia criminal indigent defendants by a circuit court or by the Supreme Court shall be immune from liability arising from said representation as

³The United States District Court for the Southern District of West Virginia held, in *Pniewski v. Martorella*, 2008 WL 4057523 (S.D.W.Va. 2008), that the West Virginia Supreme Court would apply the doctrine of prosecutorial immunity, as established by the United States Supreme Court in *Imbler v. Pachtman*, 424 U.S. 409 (1976), in subsequent cases and would conclude that a prosecutor is immune from liability for damages stemming from claims under West Virginia law.

well. This mandate was followed in *Powell v. Wood County Commission*, 209 W. Va. 639, 550 S.E.2d 617 (W. Va. 2001), wherein this Court held that when a court appoints a private attorney to represent an indigent client and that client then sues the attorney for malpractice in connection with that representation, the attorney is immune from liability arising from that representation in the same manner and to the same extent that prosecuting attorneys are immune from liability pursuant to the statute providing immunity to appointed counsel.

It is anticipated that the plaintiff will argue that a strict and hypertechnical construction of West Virginia Code Section 29-21-20 does not provide immunity for an attorney appointed by a federal court to represent a West Virginia criminal defendant. Specifically, the plaintiff will argue that West Virginia Code Section 29-21-20 only provides immunity to an attorney who was appointed to provide legal representation by a circuit court or by the Supreme Court.

Such a narrow construction and argument by the plaintiff, if adopted by this Court, would lead to an illogical and unjust result, inconsistent with the declared interests of the State of West Virginia. Specifically, according to the anticipated argument of the plaintiff, a West Virginia attorney who is appointed by circuit court or the Supreme Court to represent a West Virginia indigent criminal defendant, who asserts state law causes of action stemming from that representation, would be immune from such suit; while a West Virginia attorney who is appointed by a federal court to represent a West Virginia indigent criminal defendant, who asserts state causes of action stemming from that representation, would not be immune.

The plaintiff's position in this regard is illogical and inconsistent with the declared interests of West Virginia to provide high quality legal assistance to West Virginia indigent persons who face an economic barrier to affording legal counsel. Moreover, the

plaintiff's position would be directly inconsistent with the stated interests of West Virginia to serve the ends of justice in accordance with the rights and privileges guaranteed to all citizens by both the Constitution of the United States of America and the constitution of the State of West Virginia, which would, in turn, fail to reaffirm the faith of our citizens in our government of laws.

Consequently, the defendants pray that this Court find that the defendants in this case, who are West Virginia attorneys that were appointed to represent a West Virginia indigent criminal defendant, are immune from these purely state law claims against them stemming from legal malpractice, regardless of the fact that the defendants were appointed by a federal court sitting in West Virginia instead of a circuit court or the West Virginia Supreme Court. Such a finding would serve the ends of justice guaranteed to all citizens by the Constitution of the United States of America and the constitution of the State of West Virginia and would satisfy the declared public interests of West Virginia.

VI. CONCLUSION

For all of the above reasons, the defendants, Michael Frazier and Frazier & Oxley, L.C., respectfully request that this Honorable Court affirm the lower court's ruling on Certified Questions 1 and 2, and overturn the lower court's ruling on Certified Question 3, and award any such other relief as it deems just and appropriate.

VII. REQUEST FOR ORAL ARGUMENT

The defendants, Michael Frazier and Frazier & Oxley, L.C., the petitioners herein, respectfully request that the Court permit them to present oral argument in support of their position on the above Certified Questions.

**MICHAEL FRAZIER and
FRAZIER & OXLEY, L.C.**



Michael M. Fisher, Esquire (WVSB #4353)
Ben M. McFarland, Esquire (WVSB #9991)
Jackson Kelly PLLC
500 Lee Street, East, Suite 1600
Post Office Box 553
Charleston, West Virginia 25322
(304) 340-1000

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

JOHN DAVID MOONEY

Respondent,

Case No.: 35224

vs.

Petitioners' Opening Brief Regarding
Certified Questions from the Circuit Court
of Cabell County, West Virginia, Civ.
Action No. 08-C-1038
(Honorable F. Jane Husted, Judge)

**MICHAEL FRAZIER, and
FRAZIER & OXLEY, L.C.**

Petitioners.

CERTIFICATE OF SERVICE

I, Michael M. Fisher, counsel for defendants, do hereby certify that I have served **Michael Frazier, and Frazier & Oxley, L.C.'s Opening Brief Regarding Certified Questions** upon counsel of record this 22nd day of October 2009, by placing a true and exact copy thereof in the regular course of the United States mail, postage prepaid, addressed as follows:

Nicholas S. Preservati, Esquire
Preservati Law Offices PLLC
300 Capitol Street Suite 1018
P. O. Box 1431
Charleston, WV 25325
Counsel for Plaintiff



Michael M. Fisher, Esquire (WVSB #4353)

IN THE CIRCUIT COURT OF CABELL COUNTY, WEST VIRGINIA

JOHN DAVID MOONEY, an individual

Plaintiff,

v.

Civil Action No. 08-C-1038

**MICHAEL FRAZIER, an individual,
and FRAZIER & OXLEY, L.C.,
a West Virginia legal corporation,**

Defendants.

ORDER AND CERTIFICATION

On February 12, 2009, came the defendants, Michael Frazier and Frazier & Oxley, L.C., by counsel, and the plaintiff, John David Mooney, by counsel, for a hearing concerning "Defendants' Rule 12(b)(6) Motion to Dismiss" and the "Plaintiff's Response to Defendants' Rule 12(b)(6) Motion to Dismiss." Essentially, the defendants, who had been previously appointed by the United States District Court to represent the plaintiff in a criminal matter, argued that the plaintiffs' subsequent state law legal malpractice claims should be dismissed on statute of limitations and immunity grounds. The plaintiff opposed the motion by claiming that the plaintiff had timely filed his legal malpractice claims and that the defendants were not immune from such claims under West Virginia law. After full consideration of the written pleadings and the oral argument of the parties, the Court found that each of the legal issues raised were questions of first impression in West Virginia and that the following certified questions should be submitted to the Supreme Court of Appeals of West Virginia for consideration. Accordingly, the Court hereby certifies the following questions for the Supreme Court's consideration:



1. Whether the statute of limitations on a legal malpractice action stemming from the defense of a criminal defendant begins to run when the criminal defendant files a habeas corpus petition claiming that he suffered ineffective assistance of counsel in the underlying criminal proceedings?

Yes

No

2. Is a criminal defendant collaterally estopped from filing a civil legal malpractice claim against his attorney until the underlying criminal conviction is overturned?

Yes

No

3. Whether, under West Virginia law, an attorney who is court appointed to represent a criminal defendant in a federal criminal prosecution is immune from purely state law claims of legal malpractice stemming from the underlying criminal proceedings?

Yes

No

Pursuant to West Virginia Code Section 58-5-2, the Court also certifies that each of the above questions arise as purely questions of law relating to the challenge of the sufficiency of a pleading.

The Court orders that further proceedings in this matter be stayed until such questions shall have been decided by the Supreme Court and the decision thereof certified back to this Court.

The Circuit Clerk is directed to provide certified copies of this order and certification to the parties.

The defendants are directed to file with the Circuit Clerk an original and nine (9) copies of a petition within sixty (60) days of the date of the entry of this order and certification and the plaintiff is directed to file an original and nine (9) copies of a response within thirty (30) days of the filing of the petition, if plaintiff chooses to file a response.

Within thirty (30) days of the designations of the record by the parties, the Circuit Clerk is ordered to assemble, paginate, and index the designated portions of the record by the parties and, together with the original and copies of the petition and any opposing response, transmit the same to the Clerk of Supreme Court of Appeals of West Virginia.

Entered this ____ day of _____, 2009.

/s/ F. JANE HUSTEAD

Honorable F. Jane Hustead

Prepared by:



Michael M. Fisher, Esquire (WVSB #4353)
JACKSON KELLY PLLC
500 Lee Street East, Suite 1600
P. O. Box 553
Charleston, West Virginia 25322
(304) 340-1000
Counsel for Defendants

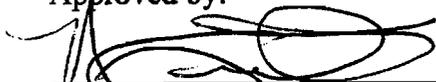
STATE OF WEST VIRGINIA
COUNTY OF CABELL

I, ADELL CHANDLER, CLERK OF THE CIRCUIT COURT FOR THE COUNTY AND STATE AFORESAID DO HEREBY CERTIFY THAT THE FOREGOING IS A TRUE COPY FROM THE RECORDS OF SAID COURT ENTERED ON _____

GIVEN UNDER MY HAND AND SEAL OF SAID COURT THIS _____

 CLERK
CIRCUIT COURT OF CABELL COUNTY WEST VIRGINIA

Approved by:



Nicholas S. Preservati, Esquire (WVSB #8050)
PRESERVATI LAW OFFICES PLLC
300 Capitol Street Suite 1018
P. O. Box 1431
Charleston, WV 25325
Counsel for Plaintiff