

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

JOHN DAVID MOONEY, an individual

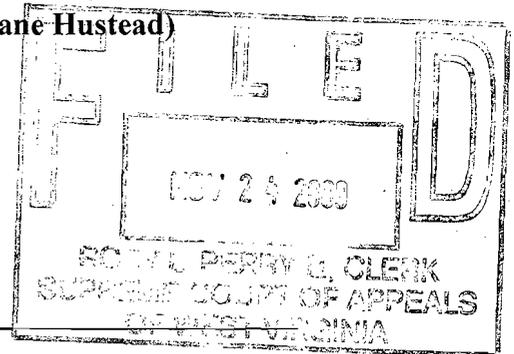
Respondent,

v.

Case No. 35224
Petition for Review of Certified Questions
from the Circuit Court of Cabell County,
West Virginia, Civil Action No. 08-C-1038
(Honorable F. Jane Husted)

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

Petitioners.



RESPONDENT JOHN DAVID MOONEY'S RESPONSE TO
MICHAEL FRAZIER AND FRAZIER & OXLEY, L.C.'S
OPENING BRIEF REGARDING CERTIFIED QUESTIONS

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28 U.S.C. § 2255

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W.Va. Code § 29-21-20

STATEMENT OF FACTS

1. On August 4, 2002, Mr. Mooney was residing with his ex-wife in Huntington, West Virginia. On that date his ex-wife placed a pistol to Mr. Mooney's temple while he was lying in bed watching television.

2. At the time that she placed the pistol against his head, Mr. Mooney was aware that his ex-wife had shot her previous ex-husband with the same pistol. Fearing for his own safety, Mr. Mooney seized the pistol from his ex-wife.

3. Since Mr. Mooney had been convicted of a felony more than twenty years (20) prior to this incident, he was also aware that it was unlawful for him to be in possession of the pistol.

4. Upon seizing the pistol from his ex-wife, Mr. Mooney twice attempted to call 911 and inform the police that he has taken the pistol away from his ex-wife. On both occasions, his ex-wife wrestled with Mr. Mooney and demanded that he return the pistol to her.

5. Mr. Mooney was unable to inform the police that he had seized the pistol from his ex-wife because of her violent behavior during the attempted telephone calls to 911.

6. Mr. Mooney worked approximately eight (8) blocks from his ex-wife's residence. Mr. Mooney believed that his boss was still at work, so he left the residence and began walking with the pistol to his work. Mr. Mooney was going to call the police from his place of work so that he could turn the pistol over to them.

7. While Mr. Mooney was walking to his work, his ex-wife called police and informed them that he has a pistol and that he was headed to his place of work. Upon arriving at his work, Mr. Mooney was arrested by police for being in possession of a firearm.

8. Mr. Mooney was charged in federal court in a single-count indictment for being a felon in possession of a firearm, in violation of 18 U.S.C. §§ 922(g)(1). As a member of the Criminal Justice Act Panel, Mr. Frazier was appointed to represent Mr. Mooney on January 1, 2003 by U.S. District Court Judge Robert Chambers. Even though Mr. Mooney insisted that he was innocent of the charge in the circumstances, he pleaded guilty because Petitioners advised him that there was no defense to a felon-in-possession charge.

9. At his sentencing hearing on May 12, 2003, Mr. Mooney sought to withdraw his guilty plea on the basis that he "did something that was right" and was innocent of the charge. However, Mr. Frazier expressed his disagreement with Mr. Mooney and advised the court that "the elements of this [felon-in-possession] offense [do not] allow for us to make that [justification] argument in front of the jury." As a result, the district court denied Mr. Mooney's request to withdraw his guilty plea and sentenced Mr. Mooney to 180 months' imprisonment.

10. Mr. Mooney then timely filed a motion under 28 U.S.C. § 2255, seeking to vacate his conviction and sentence based on a claim of ineffective assistance of counsel. He asserted that he pleaded guilty due to Mr. Frazier's erroneous advice that his charge under 18 U.S.C. § 922(g) was not subject to a justification defense.

11. The United States Circuit Court of Appeals for the Fourth Circuit granted Mr. Mooney's motion, finding that Mr. Frazier's representation of Mr. Mooney "fell below an objective standard of reasonableness," when he advised Mr. Mooney that there was not a justification defense to the charge and when he advised Mr. Mooney to plead guilty. The Fourth Circuit further found that Petitioners' erroneous legal advice "resulted from a failure to conduct the necessary legal investigation."

12. As a result, the matter was remanded to the United States District Court for the Southern District of West Virginia with the instruction that Mr. Mooney be allowed to withdraw his guilty plea.

13. Upon remand, Mr. Mooney informed the United States that he intended to invoke the justification defense at trial. Shortly after advising the United States that he intended to invoke the justification defense, the United States dismissed the indictment against Mr. Mooney with prejudice.

14. From the time that Mr. Mooney was sentenced for the possession offense until the time the charges were dismissed, Mr. Mooney had been incarcerated for over five (5) years in federal prison.

15. During his incarceration, Mr. Mooney's father passed away. Mr. Mooney was not allowed to attend his father's funeral.

16. During his incarceration, Mr. Mooney's mother also passed away. Again, Mr. Mooney was not allowed to attend his mother's funeral.

17. For the five years that he was improperly incarcerated, Mr. Mooney lived in constant fear of being beaten, raped, and/or killed. The constant and prolonged fear for his life has caused Mr. Mooney to suffer significant emotional distress.

18. Mr. Mooney ultimately filed his claim for legal malpractice against Petitioners in the Circuit Court of Cabell County. The Petitioners filed a motion to dismiss and the circuit court granted partial relief to Petitioners as set forth in the court's order. The circuit also certified three questions to this Honorable Court, which are the basis for the instant petition.

I. THE CIRCUIT COURT INCORRECTLY HELD THAT THE STATUTE OF LIMITATIONS ON A LEGAL MALPRACTICE CLAIM STEMMING FROM THE DEFENSE OF A CRIMINAL DEFENDANT BEGINS TO RUN WHEN A 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 matter begins to run upon the plaintiff's filing a habeas corpus petition claiming that he suffered ineffective assistance of counsel in the underlying criminal case. It does not.

A. This Is An Issue Of First Impression In West Virginia.

Contrary to Petitioners' claim, this matter has not been decided in West Virginia and is an issue of first impression. The Circuit Court and Petitioners erroneously relied upon Vansickle v. Kohout, 599 S.E.2d 856 (W.Va. 2004) for the proposition that Mr. Mooney's claim is barred by the statute of limitations. In doing so, they overlooked an obvious and important distinction between Vansickle and the instant case.

In Vansickle, the Plaintiff filed a legal malpractice suit against the attorney that represented him in an underlying *civil* action. Mr. Mooney's legal malpractice is related to an underlying *criminal* action. This is important because the overwhelming majority of states have concluded that the statute of limitations for criminal malpractice actions should not begin to run until the plaintiff has *obtained* post-conviction relief. Belk v. Cheshire, 159 N.C. App. 325; 583 S.E.2d 700 (NC 2003).

The different statute of limitations standard for criminal malpractice actions is based upon three public policy principles: 1) the criminal justice system affords individuals charged with crimes a panoply of protections against abuses of the system and wrongful conviction, including safeguards against incompetent and ineffective counsel; 2) a guilty defendant should

not be allowed to profit from criminal behavior; and 3) the pool of legal representation available to indigent criminal attorneys needs to be preserved. Belk, at 706.

In regards to the first principle, the criminal justice system provides many safeguards to protect against wrongful conviction that simply do not exist in the civil setting. These safeguards include, the requirement of proof beyond a reasonable doubt, the exclusionary rule, the right to counsel, the right against self-incrimination, the right to a speedy trial, and the right to post-conviction relief.

The post-conviction process is an essential part of the system, providing another level of court review after the defendant's direct appeal. "The purpose of post-conviction, after all, is to prevent the wrongly accused and the unjustly convicted from suffering undeserved criminal penalties, and to enforce the constitutional guarantees of a fair trial." Gibson v. Trant, et al., 58 S.W.3d 103, 113 (S.Ct. Tenn. 2001). "Tort law cannot possibly serve these ends." Id. These differences highlight a basic theoretical and procedural distinction "between civil and criminal malpractice actions that... strongly supports treating these cases differently." Id. at 111.

Petitioners' argument that the statute of limitations for a criminal malpractice claim begins to run prior to post-conviction relief fails on an even more fundamental level. By allowing an individual convicted of a crime to file suit prior to obtaining post-conviction relief, someone "unquestionably guilty of a crime, whose conviction is upheld" will be allowed to sue his defense lawyer and recover damages for the time he spent in jail. Id. at 110.

Such a result is "indefensible" because a "criminal should not profit from his wrongdoing." Id. at 110. Also, by allowing the criminal defendant to shift responsibility to their counsel and away from their own illegal actions would "shock the public conscience, engender disrespect for courts, and generally discredit the administration of justice." Id. at 110. Based

upon these ethical concerns, there is a major flaw in the minority position that a convicted criminal may sue his attorney for damages without having his underlying conviction overturned.

The final policy reason why a convicted criminal should not be allowed to sue his attorney until his conviction has been overturned is because it will have a chilling effect on counsel willing to represent criminal defendants. If the threat of malpractice looms over the representation of a criminal defendant, the result will be the diminution of defense counsel's willingness to exercise independent legal judgment, which will be replaced by a defensive mindset geared more towards avoiding malpractice and less towards obtaining acquittals.

Furthermore, the availability of actions by defendants against their former attorneys will provide a powerful disincentive to practitioners in the field to continue in that field. The proliferation of such suits will certainly increase insurance premiums for such practitioners. Such costs will ultimately be passed on to the system at large, because there will be fewer attorneys to represent a greater number of clients, and the cost of retaining such attorneys will inevitably rise.

Unlike in the civil litigation area, a client does not come before the criminal justice system under the care of his counsel alone; he comes with a full panoply of rights, powers, and privileges. These rights and privileges not only protect the client from abuses of the system but are designed to protect the client from a deficient representative. Thus, whereas in a civil matter a case once lost is lost forever, in a criminal matter a defendant is entitled to a second chance (perhaps even a third or fourth chance) to insure that an injustice has not been committed. For these reasons, the lower court should have recognized that criminal malpractice actions are distinct from civil legal malpractice actions, and as a result the statute of limitations to sustain such a cause of action must likewise differ.

Petitioners glaring failure is their inability to distinguish between civil and criminal malpractice claims. They claim that because West Virginia does not recognize the “exhaustion of appeals” rule in civil malpractice claims, that it should not recognize the rule in criminal malpractice claims. Not only do the majority of the states adopt the exhaustion of appeal rule in criminal cases, they reject it in civil cases. For example, the Alaska Supreme Court has clearly held, just like West Virginia, that in a civil malpractice claim the statute of limitations is *not* tolled until the appeal process is completed. Beesley v. Van Doren, 873 P.2d 1280 (1994). However, it takes the opposite position in criminal malpractice claims, where the statute of limitations does not run until the defendant has obtained post-conviction relief. Shaw v. State, 816 P.2d 1358 (1991). Therefore, because Vansickle only applies in the context of a civil malpractice claim, it has no bearing upon Mr. Mooney’s criminal malpractice claim.

B. West Virginia Law Requires That Mr. Mooney’s Conviction Be Overturned Before He Can File A Claim For Legal Malpractice.

In West Virginia, a cause of action does not accrue until all of the requisite elements of the cause of action have occurred. Bennett v. ASCO, 218 W.Va. 41, 621 S.E.2d 710 (2005). Thus, a plaintiff cannot bring a claim for legal malpractice unless he can prove the following three elements: 1) the attorney’s employment; 2) his neglect of a reasonable duty; and 3) that such negligence resulted in, and was, the *proximate cause* of the loss to the client. Sheetz v. Bowles Rice, 209 W. Va. 318; 547 S.E.2d 256 (2001).

The “proximate cause” element destroys the Petitioners’ argument because Mr. Mooney could not argue that Petitioners were the proximate cause of his injuries until his conviction was overturned. This is because the proximate cause of a defendant’s conviction is his commission of the criminal act, not the attorney’s malpractice. See Peeler v. Hughes & Luce, 909 S.W.2d 494, 498 (Tex. 1995) (“We therefore hold that, as a matter of law, it is the illegal conduct rather than

the negligence of a convict's counsel that is the cause in fact of any injuries flowing from the conviction, unless the conviction has been overturned."). Likewise, "if a potential criminal plaintiff is unsuccessful in obtaining relief from conviction, then it would seem that the attorney's conduct was not the proximate cause of the conviction or injury." Rodriguez v. Neilsen, 609 N.W.2d 368 (S.Ct. Neb. 2000). This is because in a civil malpractice action, the focus is solely on the defendant attorney's alleged error or omission; the client's conduct is irrelevant. "In the criminal malpractice context by contrast, a defendant's own criminal act remains the ultimate source of this predicament irrespective of counsel's subsequent negligence." Gibson, at 112.

Therefore, if Mr. Mooney had filed his malpractice action against Petitioner's prior to having his conviction overturned, he would have been subject to a Rule 12(b)(6) motion to dismiss. For example, the New Hampshire Supreme Court acknowledged that such a motion would be appropriate, "We are persuaded by the reasoning of the Supreme Court of Minnesota, which held that until appellate or collateral relief is obtained with regard to the underlying conviction, a claim for criminal malpractice cannot survive a motion to dismiss." Therrieu v. Sullivan, 153 N.H. 211; 891 A.2d 560 (S.Ct. N.H. 2006), *citing*, Noske v. Friedberg, 670 N.W.2d 740, 744-45 (Minn. 2003).

It is important to note that West Virginia has already adopted this requirement for claims based upon malicious criminal prosecutions, which are in essence legal malpractice claims against the prosecution. A plaintiff cannot maintain a suit for malicious prosecution in West Virginia unless, and until, he can show that the criminal prosecution was terminated in his favor. Wyatt v. Gridella, 82 W.Va. 266; 95 S.E.2d 956 (1918). Thus, because West Virginia has

already adopted this requirement for malicious prosecution claims, this Court should extend the requirement to criminal legal malpractice claims.

C. The Vast Majority of Jurisdictions Require That The Underlying Conviction Be Overturned Before One May Bring A Criminal Legal Malpractice Claim.

By far, the vast majority of states addressing this issue have ruled that a plaintiff must have his conviction overturned before he may file a criminal legal malpractice claim. Those states include:

Alabama – The Supreme Court of Alabama affirmed defendant’s motion for summary judgment because the plaintiff *failed* to show that his conviction had the proximate result of the defendant’s alleged negligence. Streeter v. Young, 583 So.2d 1339 (Ala. 1991).

Alaska – a convicted criminal *must* obtain post-conviction relief before pursuing an action for legal malpractice against his attorney, and the statute of limitations for such claims is tolled until the granting of post-conviction relief. Latham v. Alaska Public Defender Agency, 2006 Alas. LEXIS 81 (S.Ct. Alaska 2006).

Florida – “The statute of limitations on a malpractice action has *not* commenced until the defendant has obtained final appellate or post-conviction relief. This is because without obtaining relief from the conviction, the criminal defendant’s own actions must be presumed to be the proximate cause of the injury. Steele v. Kehoe, 747 So.2d 931 (S.Ct. FL 1999).

Georgia – In order to establish legal malpractice, a plaintiff *must show* that he would have prevailed in the underlying litigation if the defendant had not been negligent, and where the underlying action is a criminal trial, the plaintiff is *precluded* from doing this if he has plead guilty. Gomez v. Peters, 221 Ga. App. 57; 470 S.E.2d 692 (1996).

Idaho – In a legal malpractice action arising from the representation of a defendant in a criminal proceeding, the person pursuing the claim *must establish* the additional element of exoneration of the underlying criminal charges. Lamb v. Manweiller, 129 Idaho 269; 923 P.2d 976 (1996).

Iowa – Viable causes of action for legal malpractice *cannot* be maintained in the absence of relief from an underlying conviction, and

thus a claim does not accrue until such relief is granted. Trobaugh v. Sondag, 668 N.W.2d 577 (S.Ct. Iowa 2003).

Kentucky – where the plaintiff pled guilty to criminal charges, he could *not* demonstrate that negligence on the part of his attorney was the proximate cause of his conviction. Ray v. Stone, 952 S.W.2d 220 (Ky.Ct. App. 1997).

Minnesota – “*Because it is inconsistent to simultaneously treat an existent conviction as both legal and wrongful, and because there are existing procedures that permit a convicted defendant to obtain relief from a conviction on the ground of ineffective assistance of counsel, the appellate court holds that a cause of action for legal malpractice that is barred on a claim of counsel’s acts are the proximate cause of a plaintiff’s criminal conviction accrues, and the statute of limitations begins to run, when the plaintiff obtains relief from the conviction.*” Noske v. Friedberg, 656 N.W.2d 409 (Minn. App. 2003). (emphasis added).

Nevada – In a legal malpractice case arising from a criminal defense, proximate cause does *not* exist until post-conviction or appellate relief is granted. Clark v. Robinson, 113 Nev. 949; 944 P.2d 788 (S.Ct. Nev. 1997).

New Hampshire – “New Hampshire follows the ‘bright line’ or one-track approach with respect to criminal legal malpractice claims; thus the limitations period would *not* accrue until a defendant obtained direct or collateral relief from his or her underlying criminal conviction.” Therrieu v. Sullivan, 153 N.H. 211; 891 A.2d 560 (S.Ct. N.H. 2006).

New Jersey – In a legal malpractice action brought by a defendant against the attorney who represented him in a criminal case, the statute of limitations does *not* run until the defendant receives relief in the form of exoneration. McKnight v. Office of Public Defender, 197 N.J. 180; 962 A.2d 482 (S.Ct. NJ 2008).

New York – The criminal client bears the burden to plead and prove that the client’s conviction was due to the attorney’s actions alone and not due to some consequences of his guilt. In order to open the door for even a colorable claim of innocence, criminal defendants must free themselves of the conviction, for the conviction *precludes* those potential plaintiffs from asserting innocence in a civil suit. Britt v. Legal Aid, 95 N.Y. 2d 443; 741 N.E.2d 109 (Ct. App. NY 2000).

Oregon – In order for one convicted of a criminal offense to bring an action for professional negligence against that person’s criminal defense

counsel, that person must, in addition to alleging a duty, its breach, and causation, allege "harm" in that the person has been exonerated of the criminal offense through *reversal* on direct appeal, through post-conviction relief proceedings, or otherwise. Stevens v. Bispham, 316 Ore. 221; 851 P.2d 556 (1993).

Texas – Plaintiffs who have been convicted of a criminal offense may negate the sole proximate cause bar to their claim for legal malpractice in connection with that conviction *only* if they have been exonerated on direct appeal, through post-conviction relief, or otherwise. As a matter of law, it is the illegal conduct rather than the negligence of a convict's counsel that is the cause in fact of any injuries flowing from conviction, unless the conviction has been overruled. Peeler v. Hughes, 909 S.W.2d 494 (S.Ct. TX 1995).

Virginia – statute of limitations for legal malpractice does *not* begin to run until plaintiff obtains post-conviction relief. Adkins v. Dixon, 253 Va. 275, 482 S.E.2d 797 (Va. 1997).

Washington – Cause of action for legal malpractice is *precluded* in absence of post-conviction relief. Doggett v. Perez, 348 F.Supp.2d 1169 (E.D. Wash. 2004).

Wisconsin - Policy considerations preclude the imposition of liability in a legal malpractice case stemming from representation in a criminal case in which the client was convicted *unless* the client can establish that the charges of which he was convicted have been dismissed. Hicks v. Nunnery, 2002 WI App 87; 253 Wis. 2d 721 (Wis. App. 2002).

The majority of states have adopted this approach because it is correct. West Virginia has already adopted this line of reasoning in regards to malicious prosecution claims. It should take the next logical step and follow the vast majority of other states in holding that a plaintiff cannot sue his criminal defense attorney for malpractice until his underlying conviction has been overturned. Therefore, Respondent respectfully requests that this Honorable Court reverse the decision of the circuit court and answer the first certified question in the negative.

II. PETITIONER WAS COLLATERALLY ESTOPPED FROM FILING HIS CIVIL MALPRACTICE CLAIM AGAINST HIS ATTORNEY UNTIL HIS UNDERLYING CRIMINAL CONVICTION WAS OVERTURNED.

The Defendant argues that the statute of limitations began to run as soon as the Plaintiff filed his Motion to Vacate on September 16, 2004. This is wrong. Pursuant to West Virginia law, the Plaintiff was collaterally estopped from filing his malpractice action until his conviction was actually overturned.

A. West Virginia Law Required the Application of the Collateral Estoppel Doctrine to Mr. Mooney's Claims until His Conviction was overturned.

In West Virginia, the doctrine of collateral estoppel prevents the relitigation in a civil setting of issues already resolved in a criminal setting. Leach v. Schlaegel, 191 W.Va. 538, 447 S.E.2d 1 (1994). This is especially true when the facts underlying a legal malpractice claim have already been adjudicated in a criminal matter. Walden v. Staker, 189 W.Va. 222, 429 S.E.2d 504 (1993).

In Walden, the plaintiff filed a legal malpractice claim against the attorney that represented her in her divorce from her husband. In her malpractice claim, the plaintiff asserted that her attorney had a conflict of interest, that she did not understand the settlement agreement, and that she was under duress throughout the divorce proceeding. *Id.* at 507.

Her attorney challenged the malpractice claim on the basis of collateral estoppel. The attorney argued that the plaintiff had already unsuccessfully raised each and every one of the same issues in her Motion to Set Aside the Final Divorce Decree in the previous case. The West Virginia Supreme Court upheld the dismissal of the plaintiff's legal malpractice claim on collateral estoppel grounds. Specifically, the court held that the claim should be dismissed because, "collateral estoppel is designed to foreclose relitigation of issues in a second suit which

have actually been litigated in the earlier suit even though there may be a difference in the causes of action between the parties of the first and second suit.” *Id.* at 508.

In reaching its decision, the West Virginia Supreme Court relied upon McCord v. Bailey, 636 F.2d 606 (D.C. Cir. 1980). In that case, the plaintiff filed a malpractice action against his attorneys following the denial of an appeal of a criminal conviction based upon a claim of ineffective assistance of counsel. The federal court held that the plaintiff was collaterally estopped from asserting the malpractice claim against his attorney because he had a full and fair opportunity to litigate the issue in the first case.

In this case, the Defendants’ representation of Plaintiff ended on or about March 22, 2004 when Plaintiff’s appeal of the denial of his motion to withdraw his plea was denied. Thereafter, on September 16, 2004, Plaintiff filed a motion to vacate his sentence based upon ineffective assistance of counsel. This issue was litigated in the district court over the course of two years and then subsequently by the Fourth Circuit over the course of approximately one year, culminating in the determination by the Fourth Circuit that Defendants were ineffective and therefore, Plaintiff’s conviction was overturned on August 6, 2007. During this time, Plaintiff was collaterally estopped from relitigating the very issue of his counsel’s ineffective assistance in a legal malpractice claim. Thus, the statute of limitations did not begin to run on the Plaintiff’s malpractice claim until the Fourth Circuit issued its ruling that counsel was in fact ineffective, which was on August 6, 2007.

B. The Majority of Other States Also Apply the Collateral Estoppel Doctrine.

The justification for precluding a plaintiff from filing suit for legal malpractice until his underlying conviction is overturned was set forth in a case almost identical to the instant case. In Therrien v. Sullivan, 323 F.Supp.2d 253 (D.C. N.H., 2004), the plaintiff was originally convicted

of felonious sexual assault. After having spent five years incarcerated, the plaintiff was granted a new trial based upon ineffective assistance of counsel. The state did not re prosecute the case. As a result, the plaintiff sued his attorney in the criminal case for legal malpractice.

In response, the attorney sought to dismiss the case under Rule 12(b)(6) as untimely. In rejecting the motion to dismiss, the court held that a legal malpractice claim arising from a criminal case required, among other things, proof of actual innocence. Furthermore, the court held that until the plaintiff's conviction was vacated, the doctrine of collateral estoppel barred him from pursuing a malpractice claim because it barred him from claiming he was actually innocent of the crime for which he was convicted. More specifically, the court held, "Even in jurisdictions which do not require exoneration, the doctrine of collateral estoppel prevents a legal malpractice claim from accruing **until the conviction is at least vacated.**" *Id.* at 256 (emphasis added). Finally, the court concluded its opinion with the determination that, "the statute of limitations did not begin to run until plaintiff was granted a new trial." *Id.*

Just as in Walden, McCord, and Therrien, the Plaintiff was collaterally estopped from bringing his legal malpractice claim until his conviction was overturned. It was at that point that the statute of limitations began to run. Since his conviction was overturned on August 6, 2007, Mr. Mooney had two (2) years from that date to file his legal malpractice claim.

Again, Mr. Mooney's position is the same as that adopted by the majority of states addressing this issue. For example, the following states have used collateral estoppel to bar cases similar to Mr. Mooney's:

Arizona – Plaintiff could not bring legal malpractice claim against his criminal defense counsel until his criminal conviction had been set aside. Glaze v. Larsen; 207 Ariz. 26; 83 P.3d 26 (S.Ct. Ariz. 2004).

California – "The California Supreme Court holds that an intact conviction precludes recovery in a legal malpractice action."

Therefore, a plaintiff must obtain post-conviction relief in the form of a final disposition of the underlying criminal case as a prerequisite to bringing a malpractice action against former criminal defense counsel. Coscia v. McKenna & Cuneo, 25 Cal. 4th 1194; 25 P.3d 670 (S.Ct. Calif. 2001).

Connecticut – Plaintiff was collaterally estopped from bringing legal malpractice claim against his criminal defense counsel because he was denied habeas corpus relief on his ineffective assistance of counsel claim. Gray v. Weinstein, 110 Conn, App. 763; 955 A.2d 1246 (2008).

Delaware – Plaintiff’s civil suit for legal malpractice was barred by collateral estoppel because plaintiff failed to obtain post-conviction relief for ineffective assistance of counsel. Sanders v. Malik, 711 A.2d 32 (S.Ct. Del. 1998).

Illinois – A plaintiff is collaterally estopped from arguing facts established and issues decided in a criminal proceeding. As such, a legal malpractice cause of action does not accrue until the plaintiff’s conviction is overturned. Griffin v. Goldenhirsh, 323 Ill.App.3d 398; 752 N.E.2d 1232 (Ill. App. 2001).

Kansas – a person convicted in a criminal action must obtain post-conviction relief before maintaining an action alleging malpractice against his former criminal defense attorneys. Canaan v. Barte, 276 Kan. 116; 72 P.3d 911 (S.Ct. Kan. 2003)

Mississippi – Plaintiff collaterally estopped from bringing legal malpractice claim against his criminal attorney because his conviction was affirmed on appeal. Stewart v. Walls, 534 So. 2d 1033 (S.Ct. Miss. 1988).

Missouri – A criminal client’s plea of guilty precludes him, pursuant to the principle of collateral estoppel, from bringing a legal malpractice action against the attorney who represented him at the plea hearing. Ahern v. Turner, 758 S.W.2d 108 (1988).

Maine – “Doctrine of collateral estoppel is dispositive” because plaintiff’s guilty plea in underlying criminal case precluded him from bringing legal malpractice claim against his attorney. Butler v. Mooers, 2001 ME 56; 771 A.2d 1034 (S.Ct. ME 2001).

Oklahoma – Plaintiff collaterally estopped from bringing a civil claim for professional negligence arising from his representation as a criminal defendant because his ineffective assistance of counsel

argument had twice been rejected in post-conviction proceedings. Robinson v. Southerland, 2005 OK CIV APP 80; 123 P.3d 35 (2005).

Pennsylvania – Claims for legal malpractice related to criminal matters are substantially different from, and warrant distinct treatment than claims for legal malpractice in civil settings. As such, a plaintiff cannot bring a legal malpractice claim against his criminal attorney “until he has pursued post-trial remedies and obtained relief which was dependent upon attorney error. Bailey v. Tucker, 533 Pa. 237; 621 A.2d 108 (S.Ct. Penn. 1993).

South Carolina – Courts are to consider whether a plaintiff has received post-conviction relief of the underlying criminal conviction before he may bring a legal malpractice claim. If the doctrine of collateral estoppel applies, a judgment of conviction precludes the plaintiff in a malpractice action from proving proximate cause. Brown v. Theos, 338 S.C. 305; 526 S.E.2d 232 (1999).

Tennessee – Guilty plea in criminal case has preclusive effect and plaintiff cannot bring legal malpractice claim until he obtains post-conviction relief. Gibson v. Trant, et al., 58 S.W.3d 103 (S.Ct. Tenn. 2001).

C. The Minority Position that Mr. Mooney Should Have Filed His Action While Still Incarcerated in Ludicrous and has Been Summarily Rejected by the Majority of States.

Petitioners argue that Mr. Mooney should have filed his legal malpractice claim before his conviction was even overturned. They then argue that the circuit court should have stayed the malpractice case until Mr. Mooney obtained post-conviction relief. In support of this “two-track” approach, petitioners rely heavily upon Krahn v. Kinney, 43 Ohio St. 3d 103, 538 N.E.2d 1058, 1061 (Ohio 1989); and Gebhardt v. O'Rourke, 444 Mich. 535, 510 N.W.2d 900, 908 (Mich. 1994), which hold that such a “two-track” system is necessary to preclude staleness of claims.

These two cases, as well as Petitioners’ argument regarding stale claims, have been outright rejected by numerous courts. For example, the court in Therrien v. Sullivan, 153 N.H. 211; 891 A.2d 560 (S.Ct. N.H. 2006) rejected these arguments when it held:

The defendant contends that even when a plaintiff's attempts to obtain post-conviction relief "outlast the statute of limitations, the plaintiff is not without a remedy." He argues that "there is nothing prohibiting the plaintiff in such circumstances from filing the action within the statute of limitations, and simultaneously moving to stay the malpractice action while the plaintiff seeks post-conviction relief." *We reject this argument.* As the court in Noske observed:

Allowing a criminal defendant-plaintiff to commence a legal malpractice action before obtaining post-conviction relief in the criminal matter and then staying the malpractice action until the issue of post-conviction relief in the criminal matter is settled *would squander scarce judicial resources.*

We recognize, as the defendant argues, that one of the fundamental principles of the statute of limitations is to "eliminate stale claims and grant repose to liability that otherwise would linger on indefinitely." ...However, in cases such as this, "where [the] attorney's malpractice occurs during litigation, the dangers associated with delay are lessened because a record will have been made of the actions which form the substance of the later malpractice action." *Accordingly, the policy against allowing a defendant to collaterally attack a valid criminal conviction in a subsequent civil proceeding outweighs the policy of preventing stale claims.*

Id. at 215. (emphasis added).

In addition, "the 'two-track' approach presents serious problems of judicial administration. It encourages the filing of malpractice suits that may be unnecessary, because the criminal defendant/malpractice plaintiff will often ultimately be unable to obtain a favorable termination in the criminal action." Glaze v. Larsen; 207 Ariz. 26; 83 P.3d 26 (S.Ct. Ariz. 2004).

Concluding otherwise might effectively encourage every defendant convicted of a crime to immediately file a malpractice action against his or her attorney (and then seek a stay of that proceeding), to protect against losing the cause of action before he or she obtains collateral relief from the underlying conviction. "That, in turn, would likely have an adverse impact on the number of attorneys willing to represent criminal defendants. It would also put substantial

pressure on the State's limited judicial resources.” Therrien v. Sullivan, 2005 DNH 40 (N.H. 2005).

Thus, the two-track approach to criminal malpractice claims is overly burdensome, wasteful, unnecessary, reckless, duplicative, and in violation of public policy. In its simplest form, the two-track approach encourages the mass filing of meritless legal malpractice claims by convicted criminals. If it is adopted by this Court, every inmate in every jail in every county throughout this State will file a malpractice claim against their attorney. Attorneys will stop defending criminal clients based upon the near guaranteed result of being sued for malpractice. In addition, the criminal defendant is going to have a very difficult time obtaining counsel to represent him in the civil proceeding unless his conviction is overturned. Few, if any, attorneys would be willing to represent a criminal defendant in a civil malpractice claim unless the underlying conviction was overturned. As a result, not only will there be an increase of malpractice claims filed, there will be a significant spike in the number of *pro se* litigants filing these claims.

One final and very important point must be made. An attorney may face Rule 11 sanctions for filing a claim for legal malpractice prior to his client obtaining post conviction relief. For example, just like malicious prosecution, in order to succeed in a criminal legal malpractice claim the claimant must first have been absolved of the underlying charges. The only court Respondent found that has ruled on this issue upheld the issuance of Rule 11 sanctions against an attorney that filed suit for malicious prosecution before the underlying suit was resolved. Doe v. Maywood Housing Authority, 71 F.3d 1294 (7th Cir. 1995). Therefore, this Honorable Court should overrule the lower court and answer the second certified question in the alternative.

D. If This Court Adopts The Minority Position, It Should Not Be Applied Retroactively.

In the event this Court should rule for the Petitioners and find that either the statute of limitations begins to run upon the filing of the habeas petition, or that the doctrine of collateral estoppel does not apply, it should not apply its decision retroactively.

In Ereth v. Cascade County, 318 Mont. 355; 81 P.3d 463 (2003), the Montana Supreme Court adopted the minority position. However, because its decision: 1) created a new rule of law that was not clearly foreshadowed; 2) would retard its application if applied retroactively; and 3) would be inequitable to the plaintiff who was unaware of the new rule, the Court decided it was appropriate to apply its decision prospectively only. Therefore, in the event that this Honorable Court should uphold the circuit court's ruling on the first two certified questions, Mr. Mooney respectfully requests that the decision be applied prospectively only and that he be allowed to proceed with his cause of action against petitioners.

III. THE CIRCUIT COURT CORRECTLY DETERMINED THAT PETITIONERS ARE NOT IMMUNE FROM LIABILITY AS APPOINTED COUNSEL PURSUANT TO W.VA. CODE § 29-21-20

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

Petitioners cite *W.Va. Code* § 29-21-20 for the proposition that they are entitled to immunity. *W.Va. Code* § 29-21-20 states in its entirety:

Any attorney who provides legal representation under the provisions of this article under appointment by circuit court or by the Supreme Court of Appeals, and whose only compensation therefor [sic] 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. (emphasis added).

Although this section could not be clearer and more unambiguous, Petitioners want this Court to ignore and misread the plain language of *W.Va. Code* § 29-21-20.

To be immune from liability, the following must be applicable to the attorney seeking immunity: 1) the attorney provided legal representation as defined under *W.Va. Code* § 29-21-1, *et seq.*; 2) the attorney must have been appointed by a circuit court or by the Supreme Court of Appeals; and 3) the attorney's only compensation is paid under the provisions of *W.Va. Code* § 29-21-1, *et seq.* The plain language of *W.Va. Code* § 29-21-20 requires an attorney meet all three conditions to be immune from liability.

Even more telling and contrary to Petitioners' position is that legal representation as contemplated in *W.Va. Code* § 29-21-20 is representation of an eligible client in an eligible proceeding, that does not include felony cases in the U.S. District Court for the Southern District of West Virginia. See *W.Va. Code* §§ 29-21-2(2), 2(3) and 9. *W.Va. Code* § 29-21-2(2) most importantly states "**Legal representation provided pursuant to the provisions of this article [§ 29-21-1 *et seq.*] is limited to the court system of the State of West Virginia.**" (emphasis added). *W.Va. Code* §§ 29-21-2(2) specifically excludes appointed counsel's legal representation in matters not within the court system of the State of West Virginia. Nothing could be clearer and more unambiguous.

Respondent does not argue a strict and hypertechnical construction of *W.Va.* § 29-21-20 as Petitioners suggest, but rather gives effect to the statutes' plain meaning that is clear and unambiguous. "When a statute is clear and unambiguous and the legislative intent is plain, the statute should not be interpreted by the courts, and in such case it is the duty of the courts not to

construe but to apply the statute.” Syl. pt. 5, State v. General Daniel Morgan Post No. 548, 144 W.Va. 137, 107 S.E.2d 353 (1959); *accord*, Syl. pt. 2, State v. Elder, 152 W.Va. 571, 165 S.E.2d 108 (1968) (“Where the language of a statute is clear and without ambiguity the plain meaning is to be accepted without resorting to the rules of interpretation.”).

Petitioners additionally cite Ferri v. Ackerman as support for the assertion that since Respondent has filed a malpractice claim under state law then the state law defense of immunity is immediately applicable. 444 U.S. 193, 198, 100 S. Ct. 402, 62 L. Ed. 2d 355 (1979) (“when state law creates a cause of action, the State is free to define the defenses to that claim, including the defense of immunity”). Petitioners ignore the guiding principle of *Ferri’s* statement, that the State is free to **define** the defenses. Just because immunity may be available in one instance, does not necessarily mean it is available in all similar instances. For example, Maryland’s law affords immunity to court appointed counsel in one instance but not another. *See, Ackerman v. McRory*, 1994 U.S. App. LEXIS 27802 (*per curiam*) (Fourth Circuit upholds district court’s interpretation of Maryland law affording appointed counsel immunity from liability arising from counsel’s representation in a state guardianship proceeding); Fox v. Wills, 390 Md. 620, 890 A.2d 726 (2006) (Maryland Court of Appeals holds that attorneys appointed by the court to represent children in actions where custody, visitation or support is contested are not entitled to immunity).

As such, *W.Va. Code* § 29-21-20 is not automatic in its application to all court appointed attorneys and its plain meaning is to be applied. Petitioners want this Court to ignore the statute’s plain meaning and make the illogical leap from immunity for appointed counsel in enumerated state cases (as clearly defined by *W.Va. Code* § 29-21-1, *et seq.*) to immunity for appointed counsel in federal cases (as clearly excluded by *W.Va. Code* § 29-21-2(2)). Petitioners

attempt this leap because the clear, plain and unambiguous language of *W.Va. Code* § 29-21-1, *et seq.* does not apply to Petitioners.

West Virginia has defined the defense of immunity. As part of that definition, the State of West Virginia limited immunity to attorneys providing legal representation in the court system of West Virginia only. No where does the definition provide for immunity to those appointed in federal cases. *Ferri* left it up the states to define the defenses and the State of West Virginia did so. Unfortunately for Petitioners, West Virginia's clear and unambiguous definition of the defense of immunity specifically **excludes** federally appointed criminal counsel.

Petitioners further try to get beyond the statute's clear and unambiguous denial of immunity by asserting that the State of West Virginia has an interest in providing quality legal counsel and therefore immunity is a necessity. Respondent does not dispute that West Virginia has an interest in providing high quality legal assistance to indigent persons. However, Petitioners' arguments are misplaced and ignore the realities of appointed counsel in West Virginia.

First, payment by the state for counsel's appointed work is minimal. In fact, attorneys appointed in federal cases are paid twice as much for out of court work and forty-five dollars more per hour for in-court work. "While some attorneys may specialize in such cases and find them rewarding, all face a limited financial recovery for this serious and demanding work. It may be that part of the reason attorneys take such cases is that our law protects them from personal liability." *Powell v. Wood County Commission*, 209 W.Va. 639, 642, 550 S.E.2d 617 (2001).

Second, several circuits within the State of West Virginia require attorneys to accept appointments on behalf of indigent clients. Contrary to this practice, to be appointed as counsel

for an indigent federal defendant, an attorney must volunteer *and* be appointed to the Criminal Justice Act panel (the panel of attorneys eligible for appointment formed pursuant to 18 U.S.C. § 3006A, the Criminal Justice Act of 1964). Since attorneys can be compelled to represent indigent state defendants, it only follows that the State should and does provide those attorneys protection. The same cannot be said for attorneys that voluntarily take on federal appointments who can simply avoid the risks of being sued by not volunteering.

Finally, Petitioners' expansive reading of *W.Va. Code* § 29-21-20 on the basis of the State's interests in providing high quality legal representation to indigent defendants would lead to the absurd conclusion that West Virginia should also pay attorneys for their work representing defendants in federally appointed cases. *W.Va. Code* § 29-21-20 grants immunity to those attorneys whose only compensation is paid under the provisions of *W.Va. Code* § 29-21-1, *et seq.* "A cardinal rule of statutory construction is that significance and effect must, if possible, be given to every section, clause, word or part of the statute." Syl. pt. 3, Meadows v. Wal-Mart Stores, Inc., 207 W.Va. 203, 530 S.E.2d 676 (1999). Therefore, accepting Petitioners' arguments, this part of the statute cannot be ignored and must also be read in light of the State's interests in providing legal representation. Hence, the only logical outcome is that if *W.Va. Code* § 29-21-20 provides immunity to federally appointed counsel, then so too must the State pay for that counsel's representation. The clear and unambiguous language of the statute would demand such. Surely, it was not the intent of the legislature for the State to provide compensation to attorneys that were appointed by the federal courts.

Petitioners' interpretation of *W.Va. Code* § 29-21-1, *et seq.*, and specifically *W.Va. Code* § 29-21-20, attempts to circumvent the clear and unambiguous language of the statute with absurd results. Petitioners are essentially asking this Court not to interpret an ambiguous statute,

but to create law by expanding a clear and unambiguous statute beyond its intent. Under *W.Va. Code* § 29-21-20, there is no doubt who is afforded immunity and who is not. A federally appointed attorney does not meet the requirements of *W.Va. Code* § 29-21-20 and is specifically excluded by *W.Va. Code* § 29-21-2(2). For the above-stated reasons, the plain meaning of the language of *W.Va. Code* § 29-21-1, *et seq.* should be accepted and the Circuit Court's answer in the negative to the certified question affirmed.

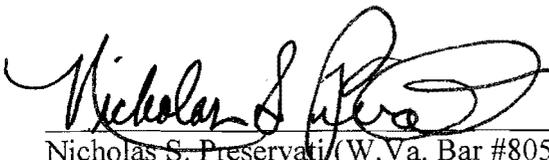
IV. CONCLUSION

WHEREFORE, the Respondent respectfully requests that this Honorable Court follow the lead of the thirty (30) other states that have held in one fashion or another, that a plaintiff cannot file a legal malpractice claim against his defense attorney until his underlying criminal conviction has been overturned, and reverse the circuit court's answer to Certified Question Number One and Number Two, and affirm the circuit court's answer to Certified Question Number Three.

V. REQUEST FOR ORAL ARGUMENT

The Respondent, John David Mooney, respectfully requests that the Court permit him to present oral argument in support of his position on the above Certified Questions.

Respectfully submitted,
JOHN DAVID MOONEY,
By counsel,



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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

JOHN DAVID MOONEY, an individual

Respondent,

v.

Case No. 35224

**Petition for Review of Certified Questions
from the Circuit Court of Cabell County,
West Virginia, Civil Action No. 08-C-1038
(Honorable F. Jane Husted)**

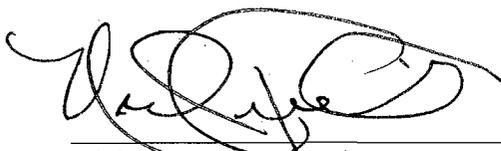
MICHAEL FRAZIER, an individual, and
FRAZIER & OXLEY, L.C., a West
Virginia legal corporation,

Petitioners.

CERTIFICATE OF SERVICE

I, Nicholas S. Preservati, do hereby certify that I have served a true and exact copy of the foregoing **Respondent John David Mooney's Response to Michael Frazier and Frazier & Oxley, L.C.'S Opening Brief Regarding Certified Questions**, upon all counsel of record by depositing the same in the United States mail, postage prepaid, on the 23rd day of November, 2009, addressed as follows:

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