

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

JOHN DAVID MOONEY,

Respondent,

Case No.: 35224

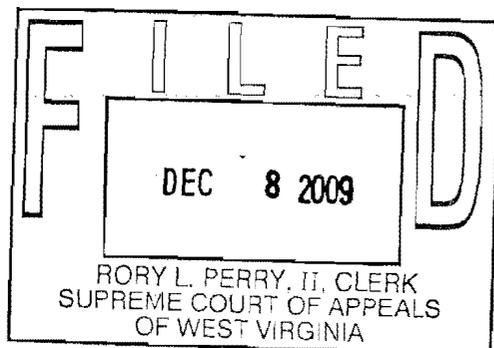
vs.

Petitioners' Reply 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 REPLY
BRIEF REGARDING CERTIFIED QUESTIONS**



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I. INTRODUCTION

On October 22, 2009, defendant/petitioners Michael Frazier and Frazier & Oxley, L.C. (“Frazier defendants”) submitted their Opening Brief Regarding Certified Questions to this Honorable Court. On November 23, 2009, plaintiff John David Mooney (“plaintiff”) submitted his Response to the Frazier defendants Opening Brief. Pursuant to this Court’s Order dated September 24, 2009 and Rule 10(c) of the West Virginia Rules of Appellate Procedure, the Frazier defendants, by counsel, submit the instant Reply Brief Regarding Certified Questions.

II. REPLY ARGUMENT

A. Plaintiff’s faulty premise.

1. Plaintiff’s public policy arguments are misplaced.

Plaintiff begins his Response Brief by asserting that the Circuit Court and the Petitioner overlooked “an obvious and important distinction” between this Court’s decision in *Vansickle v. Kohout*, 599 S.E.2d 856 (W.Va. 2004) and the instant action, namely that *Vansickle* arose in the context of an underlying civil proceeding while the instant action deals with an underlying criminal proceeding. Pl’s Response Brief at p. 9. Plaintiff continues that “this [distinction] 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,” and for that proposition plaintiff cites *Belk v. Cheshire*, 583 S.E.2d 700 (N.C. 2003). *Id.* [emphasis in original]. Continuing to cite to the *Belk* decision, the plaintiff next represents to this Court that:

The different statute of limitations standard for criminal malpractice actions is base 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.

Pl's Response Brief at pp. 9 – 10.

The petitioner has carefully reviewed the North Carolina Appeals' Court's decision in *Belk v. Chesire*, and contrary to the representations of the plaintiff, **that case does not in any way deal with the statute of limitations.** Instead, the court's entire analysis in *Belk* deals with the proximate causation element of a legal malpractice claim, and in particular whether the typical proximate causation test that is applied in legal malpractice actions arising from civil matters should also apply in legal malpractice actions arising from criminal matters. Contrary to the plaintiff's representations, the court in *Belk* actually stated that **"the overwhelming majority of states ... have concluded that public policy [] dictates an augmented proximate causation standard in criminal malpractice actions."** *Belk v. Chesire*, 583 S.E.2d 700, 705 (N.C. 2003) [emphasis added]. And after conducting a survey of the law in other jurisdictions, the court in *Belk* ultimately held that **"the burden of proof required to show proximate cause in an action for legal malpractice arising in the context of a criminal proceeding is, for public policy reasons, necessarily a high one."** *Id.* at 706 [emphasis added].

Accordingly, while the plaintiff relies on *Belk* to support his contention that public policy requires a different statute of limitations for criminal malpractice actions, the statute of limitations was not at issue in *Belk*, and in fact none of the supposed public policy rationales listed in *Belk* support the plaintiff's statute of limitations argument. The Court in *Belk* outlined three public policy principles that support an augmented proximate cause analysis for legal malpractice actions stemming from an underlying criminal case. The first public policy principle outlined in *Belk* is that the criminal justice system affords individuals charged with

crimes a panoply of protections against abuses of the system, all of which are designed to ensure that a criminal defendant is not wrongfully convicted. Because the criminal justice system is designed to prevent wrongful convictions, the presumption is that one who is convicted of a crime was properly convicted of that crime. But regardless of that, the fact that the criminal justice system is designed to prevent wrongful convictions does not, and should not, result in a tolling of the statute of limitations to allow criminal defendants to prosecute stale legal malpractice claims where memories have faded and evidence has been lost. Moreover, contrary to the plaintiff's suggestions, requiring a criminal defendant who has formed the belief that his lawyer's negligence led to his wrongful conviction to file suit within the standard statutory time period (two-years from the date he believes he has a claim) does not in any way undermine the public policies of preventing wrongful convictions. One simply has nothing to do with the other.

Similarly, the second public policy principle outlined in *Belk*—prohibiting guilty criminal defendants from profiting from criminal behavior—should not result in a total undermining of the principles surrounding statutes of limitation. The petitioners agree that a guilty criminal defendant should never be permitted to profit from his criminal acts, which is precisely why the defendants advocate, as set forth more fully their Opening Brief, that this Court adopt the two-track approach to lawyer malpractice actions stemming from underlying criminal proceedings. Under the two-track approach, the legal malpractice claim can always be stayed pending the outcome of any habeas or other post-conviction relief proceedings, which would of course prevent the *properly* convicted criminal defendant from profiting from his crime while at the same time preserving the principles underlying statutes of limitation. *See Vansickle v. Kohout*, 599 S.E.2d 856, 861 (W.Va. 2004) (holding that legal malpractice actions can always be stayed “**in order to await the conclusion of some other proceeding that might establish a client's damages**”) (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”).

The third and final public policy principle discussed in *Belk*—that there is a desire to protect the pool of legal representation available to indigent criminal defendants—is also not in any way served by tolling the statute of limitations and giving criminal defendants the ability to prosecute stale claims against their lawyers. Plaintiff asserts that if this Court were to adopt the two-track approach to criminal legal malpractice actions, it would “have a chilling effect on counsel willing to represent defendants.” Pl’s Response at p. 11. In support of this argument the plaintiff opines that “[i]f 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 legal judgment . . .” *Id.*

The defendants not only disagree with the plaintiff in this regard, but in fact believe that it is the plaintiff’s approach that would have a chilling effect on a lawyer’s willingness to represent criminal defendants because it opens the door for severely prejudicing lawyers by requiring them to defend stale claims. The plaintiff is asking this Court to extend indefinitely the statute of limitations for criminal lawyer malpractice actions, which will undeniably result in situations where West Virginia lawyers are called upon to defend malpractice claims many years after the representation where memories have faded, evidence has been lost, and in some circumstance where the attorney may not even have a file to look back on to defend his or her interests.

When a criminal defendant believes that he was wrongfully convicted due to his lawyer’s negligence, such lawyer is entitled to be put on notice of that claim in order to do that which is necessary to preserve evidence and otherwise defend his or her interest. *See Smith v. Stacy*, 482 S.E.2d 115, 122 (W.Va. 1996) (noting that “the purpose of the statute of limitations

... is to prevent stale claims and enable the defendant to preserve evidence"). By requiring a criminal defendant who believes he was wrongfully convicted due to his lawyer's negligence to file suit against his lawyer within two-years from the time he forms that belief, the lawyer is protected against surprise claims, which would serve to protect, rather than impair, the quality of legal representation available to indigent criminal defendants. Thus, contrary to the plaintiff's assertions, the defendants' approach would not have a chilling effect on lawyers willing to represent indigent criminal defendants.

Much of the plaintiff's brief is premised on his assertion that public policy requires that the statute of limitations for criminal legal malpractice actions be tolled pending the outcome of any post-conviction relief proceedings, yet none of the public policy principles outlined in *Belk*, which had nothing to do with the statute of limitations, is served by tolling the statute of limitations. While the plaintiff wants this Court to adopt a law that completely erases and undermines the principles surrounding statutes of limitations, the two-track approach that the defendants' advocate strikes the proper balance between upholding the principles underlying the statute of limitations while at the same time providing a civil remedy for the individual who believes he was wrongfully convicted due to his lawyer's negligence. This Court has previously held 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." *Vansickle v. Kohout*, 599 S.E.2d 856, 861 (W.Va. 2004). The defendants respectfully request that this Court follow its reasoning in *Vansickle* and adopt the two-track approach to criminal legal malpractice actions.¹

¹ In keeping with the long standing principles of the statute of limitations jurisprudence of this State, including *Vansickle*, this Court recently clarified the so-called discovery rule to the statute of limitations, and in so doing, articulated a five step approach to the statute of limitations. See Syl Pt. 5, *Dunn v. Rockwell*, --- S.E.2d ---, 2009 WL 4059061 (W.Va. November 24, 2009). "A five-step analysis should be applied to determine whether a cause of action is time-barred. First, the court should identify the applicable statute of limitation for each cause of action. Second, the court (or, if questions of material fact exist, the jury) should identify when the requisite elements of the

2. Plaintiff's comparison to malicious prosecution is inaccurate.

Next plaintiff argues that 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.” Pl’s Response at p. 13. Therefore, plaintiff argues, “if Mr. Mooney had filed his malpractice action against Petitioners prior to having his conviction overturned, he would have been subject to a Rule 12(b)(6) motion to dismiss.” *Id.* Finally, plaintiff asserts that it “is important to note that West Virginia has already adopted this requirement for [malicious prosecution claims] ... [because a] plaintiff cannot maintain a suit for malicious prosecution [unless] he can show that the criminal prosecution was terminated in his favor.” *Id.* Plaintiff’s argument is misplaced for several reasons.

First, not only is the case the plaintiff relies on (*Wyatt v. Gridella*, 95 S.E.2d 956 (W.Va. 1918)), nearly 100-years old and almost never been cited by this Court, the decision also fails to address that which is at issue in the instant action. The issue before this Court is whether the statute of limitations for a civil legal malpractice action based on an underlying criminal conviction should be tolled during the pendency of any post-conviction appeal proceedings, and the decision in *Wyatt* did not address either the statute of limitations or involve any appeal

cause of action occurred. Third, the discovery rule should be applied to determine when the statute of limitation began to run by determining when the plaintiff knew, or by the exercise of reasonable diligence should have known, of the elements of a possible cause of action, as set forth in Syllabus Point 4 of *Gaither v. City Hosp., Inc.*, 199 W.Va. 706, 487 S.E.2d 901 (1997). Fourth, if the plaintiff is not entitled to the benefit of the discovery rule, then determine whether the defendant fraudulently concealed facts that prevented the plaintiff from discovering or pursuing the cause of action. Whenever a plaintiff is able to show that the defendant fraudulently concealed facts which prevented the plaintiff from discovering or pursuing the potential cause of action, the statute of limitation is tolled. And fifth, the court or the jury should determine if the statute of limitation period was arrested by some other tolling doctrine ...” *Id.* Applying these steps to the instant action, it is clear that plaintiff’s claim is time barred. First, the statute of limitations for this claim is two-years. W.V. Code § 55-2-12. Second, the elements of the alleged malpractice claim would have of course occurred when the alleged malpractice occurred (i.e. sometime during the underlying representation which ended in 2003). *See* Syl. Pt. 5, *Vansickle v. Kohout*, 599 S.E.2d 856 (W.Va. 2004) (noting that a cause of action for malpractice accrues when the malpractice occurs, or when the plaintiff knows or should know of the malpractice). Third, it is undisputed that the plaintiff had formed the belief that the defendants’ conduct caused his wrongful conviction no later than the time he filed his habeas petition alleging ineffective assistance of counsel. Fourth, there is no allegation of fraudulent concealment in this case. Fifth, at the time of the events in question, and as of the present date, this Court has not recognized any tolling exception that would apply to this case.

proceedings. Instead, the decision in *Wyatt* merely opined that in order to succeed on a malicious prosecution claim, the underlying action must be terminated, and the Court ultimately held that because there was no indication that the underlying criminal matter was disposed of, the plaintiff's malicious prosecution claim failed. *Wyatt v. Gridella*, 95 S.E.2d 956 (W.Va. 1918) (malicious prosecution action failed because "it [did] not appear that the warrant upon which the plaintiff was arrested has ever disposed of, and for aught the record shows the plaintiff may yet be arrested thereon and tried for the offense charged").

In addition to relying on case law that fails to address the central issue in this action, the plaintiff also failed to recognize that this Court has actually addressed, and rejected, an argument similar to the one plaintiff makes in the instant action, and it did so in the context of a malicious prosecution claim. See *McCammon v. Okdaker*, 516 S.E.2d 38 (W.Va. 1999). The petitioner fully discussed the comparisons between the instant action and the decision in *McCammon* in his Opening Brief, so he will not repeat the comparisons herein, other than to state that like the plaintiff in this case, the plaintiff in *McCammon* argued that the statute of limitations for a malicious prosecution claim should be tolled during the pendency of the appeal process, an argument that this Court rejected. *McCammon*, 516 S.E.2d at 45 – 47 (1999) (in refusing to toll the statute of limitations, the Court noted that it favored a "stringent" approach to statutes of limitations, and that any risk of inconsistent judgments could be avoided by simply staying "the malicious prosecution proceedings until the appeal is disposed of").

Further, to the extent plaintiff is trying to draw some fundamental distinction between a criminal and a civil malicious prosecution claim, any such attempt would be incorrect, because the elements for both are identical. See e.g., Syl Pts. 1 and 2, *Morton v. Chesapeake and Ohio Railway Co.*, 399 S.E.2d 464 (W.Va. 1990); *Davis v. Wallace*, 565 S.E.2d 386, 398 (W.Va. 2002) (Davis, Chief Justice, dissenting opinion) (noting that criminal defendants who are

wrongly prosecuted are free to file a civil suit for malicious prosecution so long as they can establish the elements set forth in *McCammon v. Oldaker, supra*). This Court has made it clear that there is no tolling of the statute of limitations for malicious prosecution claims during the pendency of the appeal process, that malicious prosecution actions must therefore be filed within the statutory time frame, and that when appropriate, should be stayed pending the outcome of appellate proceedings that may determine the plaintiff's damages. Thus, contrary to the plaintiff's assertions, this Court's malicious prosecution jurisprudence actually favors an adoption of the two-track approach to criminal legal malpractice actions.

B. Plaintiff's proximate cause and collateral estoppel arguments.

Although the plaintiff's collateral estoppel (and related proximate cause) arguments have for the most part already been fully addressed in the petitioners' Opening Brief, the petitioners deem it necessary to make a few brief points herein. While the plaintiff appears to treat these arguments as separate, they are in fact very closely related. Plaintiff first argues that his underlying criminal conviction would have prevented him from proving that his lawyer's alleged negligence proximately caused his conviction, and for that reason the plaintiff advocates that this Court toll the statute of limitations until his conviction was overturned. Similarly, the plaintiff also asserts that his underlying criminal conviction collaterally estopped him from even filing or pursuing his legal malpractice claim, and for that reason the plaintiff asserts that this Court should toll the statute of limitations until his conviction was overturned.

The plaintiff's arguments in this regard are inter-related inasmuch as both are premised on the assertion that a required element of a legal malpractice claim stemming from an underlying criminal conviction is that the plaintiff must establish that he was actually innocent of the underlying crime (e.g. that he can't establish the proximate cause element because his conviction prevents him from establishing he was actually innocent, and/or that his conviction

collaterally estoppes him from establishing that he was actually innocent). What cannot be stressed enough in this case is that both the defendants as well as the jurisdictions that adopt the two-track approach that the defendants advocate agree that in order for the plaintiff to ultimately prevail on his legal malpractice claim, he must establish that he was actually innocent. Thus, the defendants are in agreement with the plaintiff that he must establish he was actually innocent in order to prevail.

But the defendants respectfully disagree with the plaintiff's assertion that the statute of limitations should be completely ignored, undermined, and effectively erased simply because the plaintiff must establish that he was actually innocent in order to prevail on his malpractice claim. The defendants believe that the far better approach is to adopt the two-track approach in order to preserve the policies underlying statutes of limitations while at the same time providing a civil remedy to the criminal defendant who believes he has been wrongfully convicted due to his attorney's alleged negligence. The defendants' approach strikes the proper balance between the competing interests, while the plaintiff's approach opens the door for severely prejudicing lawyers in the state of West Virginia.

Courts adopting the two-track approach likewise agree that although "appellate, post conviction, or habeas relief ... [is] a predicate to *recovery* in a criminal malpractice action," it is not a predicate to the "*initiation* of a criminal malpractice action." *Berringer v. Steele*, 133 Md.App 442, 484 (Md.App. 2000) [emphasis in original]. The Court in *Berringer* further noted that the issue 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." *Id.* The defendants agree with the court in *Berringer* that a criminal plaintiff's innocence is subsumed within the proximate cause element of the legal malpractice, and further agree that when a criminal defendant has to file his malpractice claim prior to obtaining post-conviction relief in order to

comply with the statute of limitations, the trial 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.* at 497.

And with regard to the plaintiff’s collateral estoppel argument, as set forth more fully in the defendants’ Opening Brief, this discretionary doctrine should not be utilized to subvert “the statute of limitations by allowing a criminal defendant to first obtain post-conviction 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). It is simply indisputable that if this Court would adopt the plaintiff’s approach and toll the statute of limitations until after the conviction is vacated, which can last several, several years, it would extend indefinitely the statute of limitations and open the door for severely prejudicing lawyers by forcing them to defend stale claims. The defendants respectfully request that this Court not do that, and instead strike the proper balance between the competing interests involved by adopting the two-track approach to criminal legal malpractice actions.

Finally, the plaintiff spends a fair amount of time in his Response brief discussing that the majority of jurisdictions appear to adopt the one-track approach that the plaintiff favors. With all due respect to the plaintiff, this is not a numbers game. This is about whether this Court is going to adopt a rule that strikes the proper balance between the policies of the statute of limitations and providing a civil remedy to those who believe they have been wronged by their attorney (two-track approach), versus a rule that ignores, undermines, and erases the statute of limitations and opens to the door for the prosecution of stale claims and unfair surprise to attorneys (one-track approach); a rule that is consistent with the long standing statute of limitations jurisprudence of the state of West Virginia (two-track approach), versus a law that is

creates a completely new statute of limitations for criminal legal malpractice actions in West Virginia (one-track approach).

C. Plaintiff's assertion that the "two-track" approach is "ludicrous."

Plaintiff asserts that the two-track approach, which has been adopted in numerous jurisdictions throughout the United States and appears to be the favored approach of this Court with regard to malicious prosecution claims,² is "ludicrous." Plaintiff's Response at p. 21. In support of this contention, plaintiff asserts that the two-track approach would squander scarce judicial resources because "every inmate in every jail in every county throughout this State [would] file a malpractice claim against their attorney." *Id.* at p. 23. The defendants strongly dispute that the two-track approach would even come close to such a result.

First, courts in other jurisdictions have been consistently adopting some variation of the two-track approach for the past 20 years (*see e.g. Gebhardt v. O'Rourke*, 510 N.W.2d 900 (Mich. 1994); *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)), yet insofar as the undersigned is aware none of these jurisdictions have changed their law due to any "floodgate" of litigation as a result. Furthermore, the plaintiff cites no empirical data whatsoever to support his bold predictions. In any event the much more likely fact is that notwithstanding any habeas or other proceedings that a criminal defendant may institute in an attempt to get released from prison, it will only be those individuals who genuinely believe that they were wrongfully convicted as a result of their attorney's negligence that will file a legal malpractice action.

But regardless of any speculation on the part of either the plaintiff or the defendants, the law in

² *See McCammon v. Okdaker*, 516 S.E.2d 38 (W.Va. 1999); Petitioners' Opening Brief at pp. 7 – 14.

West Virginia has always been that the statute of limitations begins to run when the plaintiff forms the belief that he suffered damages as a result of his attorney's negligence, and there is simply no reason to change that long-standing law for criminal legal malpractice actions.

Plaintiff further asserts that this Court need not worry about the policies underlying the statute of limitations because when the alleged malpractice occurs during the course of litigation, a record will have been made of the actions which form the basis of the malpractice action. *See* Plaintiff's Response at p. 22. This narrow minded justification for writing off the statute of limitations and all its policy purposes is completely inaccurate. First, it fails to recognize that many criminal actions, including the instant action, do not ever go to trial, and are instead based off of the alleged negligent advice of the attorney. But regardless of whether the underlying action is actually tried, the dealings and understandings between a lawyer and his client that take place behind closed doors outside of a courtroom are highly relevant and in most circumstances crucial to a lawyer's defense in a malpractice case.

There are a plethora of circumstances that will almost always play into what course of action a lawyer opts to take with his or her client in a criminal action, almost all of which **will remain confidential between a lawyer and his client and never be shown on any transcript.** In order to allow the lawyer to preserve evidence, ensure that memories do not fade, and otherwise do that which is necessary to defend his interest, he must be put on notice of the claim in a timely manner. A contrary result will often deprive the lawyer of the ability to defend his-self.

Furthermore, plaintiff's argument fails to recognize that there are almost never any depositions taken in criminal actions, which means that even if the relevant witnesses to the alleged crime could be located, their memories would have faded and in some circumstances been completely erased, especially in a situation such as the instant action where the alleged

crime took place nearly a decade ago in 2002. And speaking of the instant action, the defendants direct the Court to Footnote 1 in the defendants' Opening Brief, which the defendants believe to be the reality of this case, for an example of what can happen over the course of time. *See* Defendants' Opening Brief at fn 1 (stating that the habeas petition went uncontested and without the knowledge of the defendants, that once the conviction was overturned some 5 years after the representation (in 2007), it was discovered that the gun at issue was returned to the victim, who can no longer be reached other than through relatives who state that the victim no longer wants to be part of any prosecution, that the 911 tapes at issue have been lost, and that very little witnesses testified and therefore almost no testimony was preserved when the events were fresh in the memories of the witnesses, all of which led to the United States Attorneys' Office opting not to prosecute the plaintiff a second time).

The statute of limitations and indeed the two-track approach to criminal malpractice actions are specifically designed to prevent the prosecution of stale malpractice claims to the severe prejudice of defendants. It is designed to strike the proper balance between the principles of the statute of limitations while still providing criminal defendants with a civil remedy. The plaintiff's assertion that this approach is "ludicrous" is disingenuous at best.³

D. Plaintiff's assertion that the two-track approach should be applied retroactively.

If an effort to avoid the application of the statute of limitations in this case, the plaintiff asserts that if this Court adopts the two-track approach to criminal malpractice actions or otherwise finds that the statute of limitations was not tolled, its decision should be applied prospectively only. Plaintiff's request is improper for several reasons.

³ In his Response Brief, plaintiff also asserts that the defendants "rely heavily upon Krahn v. Kinney, 43 Ohio St. 3d 103 (1989)." This is wrong. The defendants cited to *Krahn* one time in a string cite, and the decision is not discussed at all in the defendants' Opening Brief.

First, it is well settled that the “Supreme Court of Appeals of West Virginia, like all courts in the country, adhere[] to the common law principle that, as a general rule, judicial decisions are retroactive in the sense that they apply both to the parties in the case before the court and to all other parties in pending cases.” *Caperton v. A.T. Massey Coal Co., Inc.*, --- S.E.2d ---, 2009 WL 3806071 (W.Va. November 12, 2009).

Second, the principle that the statute of limitations begins to run at the time the plaintiff forms the belief that his lawyer’s negligence caused him harm is hardly a new legal concept. *See e.g., Sewell v. Gregory*, 371 S.E.2d 82, 84 (W.Va. 1988); *Casto v. Dupuy*, 515 S.E.2d 364, 368 (W.Va. 1999); Syl. Pt. 5, *Vansickle v. Kohout*, 599 S.E.2d 856 (W.Va. 2004). In fact, in *Schuch v. Cipriani*, Judge Stamp specifically noted in dicta that the statute of limitations for a criminal malpractice action begins to run no later than the time the criminal defendant files a habeas petition based on ineffective assistance of counsel. *Schuch v. Cipriani*, 2006 WL 1651023 at *2 (N.D. W.V. June 13, 2006). Here, the plaintiff filed his habeas petition on September 16, 2004, which means that the statute of limitations for his malpractice claim would have run September 16, 2006. Judge Stamp’s opinion in *Schuch* was rendered on June 13, 2006 (i.e. over 3 months before the limitations period ran on plaintiff’s claim under Judge Stamp’s reasoning), which even further establishes that the plaintiff was put on notice that the limitations period was running on his claim. The defendants are simply asking this Court to apply its long standing statute of limitations jurisprudence to the instant action—it is the plaintiff who is asking a new and different principle of law—namely a tolling exception to the statute of limitations.

Plaintiff also appears to assert that he would somehow be unduly prejudiced if this Court were to apply the long standing statute of limitations law to his legal malpractice claim. Plaintiff is not unduly prejudiced by the application of the long standing statute of limitations law in this case. Once again, for a preview of the prejudice these defendants will

suffer if this Court carves out a tolling exception to the statute of limitations, see Footnote 1 in the defendants' Opening Brief. In fact, because it is the plaintiff who is asking for a new law, the defendants believe, and in fact request, that if this Court carves out a new tolling exception to the long-standing statute of limitations, that such tolling not be applied to the instant action. This is clearly necessary to avoid undue prejudice to these defendants.

E. Plaintiff's immunity arguments are misplaced.

As predicted, the plaintiff asserts that this Court is not permitted to hold that the defendants are immune from the plaintiff's purely state law cause of action because W.V. Code §29-21-20 appears to apply only to attorneys who were appointed by a West Virginia state court. Plaintiff not only misinterprets the defendants' argument, he also fails to recognize the powers of this Court.

Plaintiff cites to the principle that as a general rule, when a statute is clear and unambiguous, it is the duty of the court to apply it in plain terms rather than construing the statute. Pl's Response at pp. 25 – 26. However, the plaintiff fails to recognize the well settled law that “it is the duty of a court to disregard a construction, though apparently warranted by the literal sense of the words in a statute, when such construction would lead to injustice and absurdity.” Syllabus, *Click v. Click*, 127 S.E. 194 (W.Va. 1925); *Hutchison v. Hutchison*, 479 S.E.2d 649, 660 (W.Va. 1996) (noting that the plain meaning of a statute is to be applied except when “the literal application of a statute will produce a result demonstrably at odds with the intentions of the drafters”).

The defendants are aware that W.V. Code §29-21-20, like any other West Virginia statute, is a statute outlining a provision of West Virginia law. The defendants believe that it is unreasonable and in fact absurd to state on the one hand that the West Virginia legislature **intended** to provide immunity to an attorney appointed by a **state court** in West

Virginia against a purely state law claim for legal malpractice that was filed by an indigent criminal defendant in West Virginia, and then on the other state that the West Virginia legislature **did not intend** to provide immunity to an attorney appointed by a **federal court** in West Virginia against a purely state law claim for legal malpractice that was filed by an indigent criminal defendant in West Virginia.

Plaintiff suggests that the legislature specifically did not intend to provide immunity to West Virginia attorneys who were appointed by a federal court to represent an indigent criminal defendant because under the federal system an attorney must first volunteer to be appointed by a federal court. The defendants strongly dispute that the legislature intended to punish West Virginia attorneys for volunteering their time by taking away immunity for doing so. In fact, as set forth more fully in the Petitioners' Opening Brief, the West Virginia legislature has already recognized that providing immunity against state law claims for legal malpractice is necessary to increase the quality of legal representation afforded to indigent defendants, and refusing to extend immunity to appointed counsel against state law claims for legal malpractice simply because the defendants' were appointed by a federal court would completely undermine the intentions of the legislature. For the reasons set forth in the defendants' Opening Brief, logic dictates that immunity must be provided to West Virginia attorneys who are appointed to represent indigent criminal defendants, regardless of whether they are appointed by a state court in West Virginia or a federal court in West Virginia.

Plaintiff's also fails to recognize that regardless of the language of the statute, this Court has the authority to extend immunity to West Virginia lawyers against purely state law claims for legal malpractice pursuant to its well settled ability to adopt, amend, and create principles of tort law. *See e.g., Bradley v. Appalachian Power Co.*, 256 S.E.2d 879, 889 (W.Va. 1979) (stating that "[t]he issue falls within the field of tort law, which historically has not been a

settled area of the law such as property or contracts, but has been subject to continual change by the courts and legislatures to meet the evolving needs of an increasingly mobile, industrialized and technological society”); *State ex rel. Atkinson v. Wilson*, 332 S.E.2d 807, 810 (W.Va.1984) (noting that “Courts, in their common law capacity, have traditionally played a major role in evolving tort principles on a case-by-case basis”).

There are a plethora of examples where this Court has exercised its inherent authority to adopt, amend, or create principles of tort law. *See e.g., Baldwin v. Butcher*, 184 S.E.2d 428 (W.Va. 1971) (construing the wrongful death statute to allow for a cause of action on behalf of a viable unborn child); Syllabus, *Bower v. Westinghouse Electric Corp.*, 522 S.E.2d 424, 434 (W.Va. 1999) (recognizing “a cause of action for future medical monitoring costs” under West Virginia law); *Bradley v. Appalachian Power Co.*, 256 S.E.2d 879, 885 (W.Va. 1979) (modifying the judicially created defense of comparative negligence and holding that the modified rule was fully retroactive); *Hannah v. Heeter*, 584 S.E.2d 560 (W.Va. 2003) (recognizing the tort of spoliation of evidence under West Virginia law); Syl Pt. 3, *Johnson & Johnson v. Karl*, 647 S.E.2d 899, 914 (W.Va. 2007) (declining to adopt the learned intermediary defense).

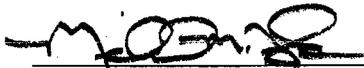
The issue before this Court is whether to provide civil immunity to an attorney who was appointed by a federal court in West Virginia and then subsequently sued for a purely state law claim for legal malpractice arising out of the court appointed representation. The West Virginia legislature took the first step by providing such immunity to attorneys who were appointed by a state court in West Virginia. In order to avoid an absurd and unreasonable result, and in keeping with spirit and principles of W.V. Code § 29-21-20, this Court should take the next logical step and hold that an attorney who was appointed by a federal court in West Virginia

and then subsequently sued for a purely state law claim for legal malpractice arising out of the court appointed representation is immune from such claim.

III. CONCLUSION

For all of the foregoing reasons, as well as those set forth in the Petitioners' Opening Brief, the Petitioners respectfully request that this Court answer Certified Question No. 1 in the affirmative, Certified Question No. 2 in the negative, and Certified Question No. 3 in the affirmative.

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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 Reply Brief Regarding Certified Questions~~
upon counsel of record this 8th day of December 2009, by placing a true and exact copy thereof
in the regular course of the United States mail, postage prepaid, addressed as follows:

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