

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

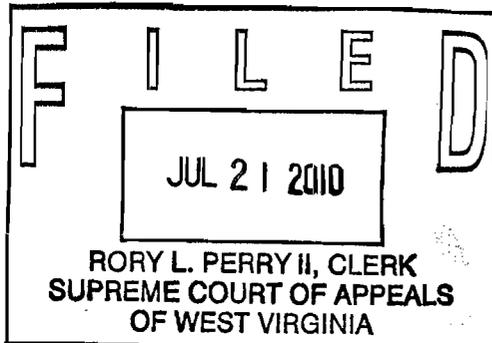
CARROLL EUGENE HUMPHRIES,
Appellant,

Supreme Court No. 35649

v.

PAUL S. DETCH, ESQ.,
Appellee.

APPELLANT'S BRIEF



William C. Forbes Esquire (WVSB#1238)
W. Jesse Forbes, Esquire (WVSB #9956)
FORBES LAW OFFICES, PLLC
1118 Kanawha Blvd., East
Charleston, WV 25301
Phone: (304) 343-4050
Fax: (304) 343-7450
Counsel for the Appellant

TABLE OF CONTENTS

TABLE OF CONTENTS 2

..... 2

INTRODUCTION 3

.....

KIND OF PROCEEDING AND NATURE OF RULING BELOW 12

.....

STATEMENT OF FACTS 13

.....

ASSIGNMENTS OF ERROR 15

.....

STANDARD OF REVIEW 16

.....

DISCUSSION 16

.....

.....

CONCLUSION 41

.....

.....

REQUEST FOR RELIEF 41

.....

**TO THE HONORABLE JUSTICES OF THE
WEST VIRGINIA SUPREME COURT OF APPEALS**

INTRODUCTION

American courts should not force a plaintiff, or any party, to prove his own innocence. It cuts against the Rules of Criminal Procedure, the Rules of Evidence, the presumption of innocence established by the Federal and State Constitutions, the rule of law, and the general principles of our society's system of justice. Carroll Eugene Humphries, a man nearly 80 years old, was deprived of effective assistance of counsel, by Paul S. Detch, in his criminal trial, as found and held as a matter of law by this Honorable Court in **State ex rel. Humphries v. McBride**, 220 W.Va. 362, 647 S.E.2d 798, (2007).

The Circuit Court, by Order entered December 18, 2009, granted the defendant, Appellee herein, Paul S. Detch's, Rule 12(b)(6) motion to dismiss, finding that Mr. Humphries could not maintain a legal malpractice action against Detch, because Humphries had entered a nolo contendere plea to the lesser included offense of accessory before the fact to murder in the second degree, and that such nolo contendere plea barred any claim that Mr. Humphries had for Detch's ineffective assistance of counsel in the earlier criminal trial. The lower Court's ruling ignores the purpose of nolo contendere pleas, and the mandates of the West Virginia Rules of Evidence, and relevant case law, providing that evidence of a nolo cotendere plea is not admissible in

any civil or criminal proceeding against the defendant who made the plea in order to prove the facts in issue.

The Circuit Court of Putnam County's ruling in this matter would require Mr. Humphries to prove his actual and complete innocence of the crime(s) for which he was tried, totally ignoring the negligence and ineffective assistance of counsel, which this Honorable Court held that Paul S. Detch committed presenting Mr. Humphries at trial, and effectively allowing Paul S. Detch to dodge all responsibility for failing his client and failing to uphold the Rules of Professional Conduct. This Honorable Court granted Mr. Humphries a Writ of Habeas Corpus due to the ineffective assistance of Paul S. Detch in representing him at his criminal trial, therefore, the result of the lower court's ruling, which denies Mr. Humphries any recovery, is unfounded, and undermines the legal profession as a whole. Mr. Humphries, in all likelihood, would have never been convicted and imprisoned for nine years, in the first place, but for the ineffective assistance of Paul S. Detch at Mr. Humphries' trial. Thus, the lower Court's ruling denying Mr. Humphries access to a potential civil remedy to redress the wrongs against him by Paul S. Detch, sends a dangerous message to all criminal lawyers, similar to Mr. Detch, to-wit: that they can fail their clients at trial; provide ineffective assistance of counsel to their clients; fail to uphold the standards established by this Honorable Court in the Rules of Professional Conduct; and yet despite all these failings, not be held accountable to this Honorable Court and the clients that they failed. Mr. Humphries submits that these reasons, alone, should persuade

this Honorable Court that the Circuit Court's ruling in this matter is clearly wrong and should be overturned.

A wronged party should not bear the burden of proving criminal innocence in a civil case as a threshold issue to redress the wrongs done to him. To do so, we close the doors of justice on plaintiffs who have legitimate damages in need of adjudication and allow wrongdoers freedom without even a scintilla of civil penalty. Humphries is being twice punished for the ineffective assistance of Detch by the Circuit Court's reliance on the "actual innocence" rule, which does not even exist under West Virginia law, to bar Humphries' civil claim of legal malpractice due to a nolo contendere plea.

In 2007, this Honorable Court granted Humphries a Writ of Habeas Corpus releasing Humphries from wrongful incarceration due to the ineffective assistance of his counsel Paul S. Detch during his underlying criminal trial. **State ex rel. Humphries**, *supra*. As a result of this ineffective assistance, Humphries served 9 years in prison—losing his freedom, peace of mind, enjoyment of life, income, and the pursuit of happiness. By the time the 2007 Habeas was granted and the conviction reversed, Humphries had already served that 9 years—time never to be regained. After the 2007 reversal, Humphries was again charged for the same 1978 events. Considering his options in 2007—factoring in his time served due to wrongful conviction as a result of the ineffective assistance of counsel, Detch, and his failing health—Humphries accepted a nolo contendere plea, for the sole purpose of securing his prompt release from his wrongful incarceration—rather than await a

second lengthy trial that would clear his name but prolong his time in prison and risk severe challenges to his feeble health. Mr. Humphries, therefore, has never admitted guilt to the crimes for which he was charged. The lower court's ruling not only ignores the purpose and function of a legal malpractice claim, but also ignores the purpose of nolo contendere pleas and the mandates of the West Virginia Rules of Criminal Procedure, Rule 11(e)(6)(B) and the West Virginia Rules of Evidence, Rules 410, 1101(b)(3), which provide that evidence of a nolo contendere plea is not admissible in any ***civil or criminal proceeding against the defendant who made the plea. (emphasis supplied herein).*** Moreover, the lower court's order granting the defendant's motion to dismiss totally ignores this Honorable Court's holding in **State ex rel. Humphries**, *supra*, which held that the Defendant herein had provided ineffective assistance of counsel to Mr. Humphries, and reversing his convictions due to that ineffective assistance.

After the reversal of his conviction and release from incarceration, due to the near decade of incarceration resulting from Detch's ineffective assistance, Humphries sought redress by civil action against Detch for legal malpractice. Originally, the Putnam County Circuit Court, Judge Eagloski presiding at a hearing held on December 5, 2007, denied a motion by Defendant to dismiss under West Virginia Rule of Civil Procedure 12(b)(6), but no written Order was entered reflecting the Court's decision. Thus, the Rule 12(b)(6) motion had already been denied by the Putnam County Circuit Court, prior to Judge Spaulding's written order of December 18, 2009; and therefore, it is the

Defendant, Detch, who should be collaterally estopped from re-litigating this motion to dismiss, and Judge Spaulding's order should be ruled void ab initio. The Defendant, Detch, in his "renewed memorandum in support of his previously filed 12(b)(6) motion to dismiss," on page (1) thereof, admits that Judge Eagloski indicated from the bench that said motion was denied. On page 2 of Spaulding's December 18, 2009, Order, the lower court also acknowledges that the transcript of the hearing held in the Putnam County Circuit Court, the Honorable Judge Edward Eagloski presiding, denied the defendant's initial motion to dismiss at a hearing held in December, 2007, but no written order was entered. The Appellant, herein, submits that Judge Eagloski's Order denying the defendant's motion to dismiss should be honored as it was made in open court, a transcript exists of the hearing, and the entry of a formal written order is a technical formality. Further, Humphries submits that Judge Spaulding had no authority to reverse Judge Eagloski's denial of the motion, and therefore, the December 18, 2009, Order is invalid as it constitutes a substantial abuse of discretion, and its entry exceeded the legitimate powers of the lower court.

After Detch renewed the motion to dismiss in 2009, the Putnam County Circuit Court, reversed Judge Eagloski's prior order, denying said motion which was made in open court, and Judge Spaulding, despite his lack of authority to reverse the prior order, granted the defendant's 12(b)(6) motion because of the so-called "actual innocence rule." However, the "actual innocence rule" is not recognized law in West Virginia. Despite the Rules of

Evidence and case law prohibiting use of nolo pleas in subsequent actions, and although a nolo plea is, as a matter of law, an alternative to pleading guilty, the Circuit Court ruled that accepting the nolo plea was proof of actual guilt and barred Humphries from proving "actual innocence," which the Circuit Court considered an element of a legal malpractice claim. However, no West Virginia authority was cited that added "actual innocence" as an element of a legal malpractice claim, nor was any West Virginia authority cited that stated a nolo contendere plea barred proving one was innocent. The West Virginia Supreme Court of Appeals has never listed "actual innocence" in its enumeration of the elements necessary to succeed in a legal malpractice action. Indeed, such a rule barring actions because of the background of the plaintiff would allow legal malpractice actions to go unpunished in our justice system. When, as herein, the highest Court of this State has found that an attorney has provided ineffective assistance of counsel to his client in a criminal trial, that client, whether innocent or guilty of the criminal offense(s), should be afforded the opportunity to recover damages from that attorney in a civil action for legal malpractice; since the criminal defendant's innocence or guilt is not the relevant issue in a legal malpractice suit; rather the relevant issue is whether or not the attorney in question breached his legal duties of advocacy to his client, and that client should have the opportunity to recover damages if said duties were breached by the attorney. "In the matters of negligence, liability attaches to a wrongdoer ... because of a breach of duty which results in an

injury to others." Syllabus Point 2, in part, Sewell v. Gregory, 179 W.Va. 585, 371 S.E.2d 82 (1988).

Consider the following example: A person steals a paper clip and is charged with some minor crime. The accused hires a lawyer who shows up drunk and for some reason thinks the accused is charged with murder. The drunk lawyer strongly recommends that the accused accept a plea to first degree robbery without explaining that first degree robbery carries a minimum sentence of 10 years. If the accused—who does not know the legal system—thinks he has no option, accepts the nolo plea, and is sentenced to 10 years in prison, then the accused would not be able to bring a malpractice claim against the obviously negligent lawyer because the accused accepted a plea bargain. The law would offer no equitable redress for the clear negligence of the lawyer, and the function of civil punishment to curb negligent conduct by attorneys would be lost. Such a result clearly cuts against the foundation of the rule of law. Although, a plea of nolo contendere may not be entered into at all if such pleas are made as admissible and fatal in subsequent actions as they were in this case. The use of nolo contendere pleas will cease to be as effective because they will lose their intended effect.

Furthermore, a legal principle that disregards any extenuating circumstances for accepting a plea of nolo contendere does not fairly allow just outcomes. When Humphries accepted his plea offer, he did not accept it in a vacuum. Humphries had once taken his matter to trial. In light of his time served at the hands of his inadequate counsel, his options had changed.

Accepting the plea was the quickest way for Humphries to be physically released from prison, and it was his best alternative because of his time already served. Viewing the plea bargain in a vacuum, without regard to the change in circumstances, would create a distant separation between the law and the reality on the ground. In cases where a person's conviction has been reversed and the charges reinstated, the plea acceptor considers his time wrongfully served when making decisions. Nolo pleas are especially attractive because the legal problem can end without having to admit guilt.

Here, Humphries was barred by the Circuit Court from bringing his legal malpractice action against Detch because Humphries leveraged his time served under his wrongful incarceration due to Detch's ineffective assistance in the first place, into a plea of nolo contendere to expedite and end the process, for himself and for the state, that had already so affected his life—the very purpose of plea bargains. Mr. Humphries' plea of nolo contendere actually served to release him from incarceration sooner than awaiting a new trial. The Circuit Court is ignoring the fact that this Honorable Court held that Detch was ineffective at Humphries' trial, and that the nolo plea was used to release Mr. Humphries from his wrongful incarceration, sooner rather than later. The Circuit Court's logic is fatally flawed in that the person Mr. Humphries has a claim against, is not the lawyer who handled the nolo plea, but the lawyer, Detch, who ineffectively represented him at his criminal trial, as decided by this Honorable Court, and which lawyer, Detch, caused Humphries to be convicted and sentenced to life in prison. Detch did not handle a plea hearing,

that Mr. Humphries agreed to, instead Detch ineffectively assisted him at trial, causing Mr. Humphries to spend 9 years in prison, and causing him to spend years, and considerable money, hiring an attorney and litigating a habeas corpus proceeding to ultimately see the improper ineffective representation of Detch, acknowledged, and his convictions reversed. Mr. Humphries did not simply lose the time spent in prison, he also was forced to hire an attorney and litigate the matter to right the wrong of the initial convictions he received under the defendant, Detch's ineffective watch as trial counsel. As it stands now, Humphries' very damages at issue in this action (the years served for the ineffective assistance conviction and the various losses suffered due to those years) are the reason he is barred from bringing suit (because he used that time served to expedite the process with a plea of nolo contendere, and be released as quickly as possible to avoid problems such as potential health risks). Humphries is being twice punished for the ineffective assistance of Detch.

This Honorable Court must not let Appellant be punished for correcting the wrongs done him; the damages here asserted should not themselves provide a basis that bars recovery. Such a resolution is absurd. In this matter, apparently of first impression in West Virginia, this Court should allow Humphries' case to be heard on its merits, and it should not set precedent that would curtail the plea bargain system and would run contrary to the Federal and State Constitutions that criminal defendants are entitled to competent

counsel, and public policy that civil suits for legal malpractice serve to prevent future negligence by attorneys hired to represent criminal defendants.

Carroll Eugene Humphries strongly requests reversal of the circuit court's Order dismissing his case under Rule 12(b)(6) and asks that this matter be allowed to move forward for trial on the merits of Humphries claims of legal malpractice against Detch.

KIND OF PROCEEDING AND NATURE OF RULING BELOW

In 2007, the West Virginia Supreme Court overturned the conviction of Carroll Eugene Humphries due to ineffective assistance of counsel by Paul S. Detch. **State ex rel. Humphries**, supra. That same year, Humphries filed suit against Detch for legal malpractice. Humphries asserted that his 1999 conviction to life with mercy for accessory before the fact in first-degree murder and 1 to 5 years for conspiracy to commit murder was the result of Detch's negligence.

The Putnam County Circuit Court, Judge Eagloski presiding, held a hearing in December, 2007 to weigh the Defendant's motion to dismiss under 12(b)(6) for failure to state a claim for which relief can be granted. At the hearing, Judge Eagloski denied the motion, but no written Order was entered reflecting that denial.

Unfortunately, the attorney working on Humphries' case, Michael Allen, suffered serious health problems in 2008, postponing the prosecution of Mr. Humphries' litigation. In the meantime, Judge Eagloski left his judgeship, and the subsequent judge, Judge Stowers, recused himself from the case due to a

conflict of interest with Defendant's attorney and the case was transferred to Judge Spaulding. In 2009, with no written Order from Judge Eagloski's original hearing, the Defendant renewed his motion to dismiss under 12(b)(6) under Judge Spaulding. By Order, entered December 18, 2009, Judge Spaulding granted the motion to dismiss, and the case was dismissed without Humphries having a chance to be heard on the merits of the claim.

This is an appeal from the December 18, 2009, Order granting Defendant's motion to dismiss under West Virginia Rule of Civil Procedure 12(b)(6).

STATEMENT OF FACTS

In 1998, Carroll Eugene Humphries was charged in connection with a 22-year-old unsolved murder case. Humphries demanded a fair trial and took the matter to court to prove his innocence. Humphries hired Paul S. Detch, Esq., to defend him at trial. With Detch at the helm, Humphries was convicted and sentenced to life with mercy and an indeterminate 1 to 5 years in prison.

In 2007, Humphries filed a Petition for Habeas Corpus in this Honorable Court claiming that Defendant's representation was ineffective. This Honorable West Virginia Supreme Court of Appeals agreed. Among other conflicts and problems, this Honorable Court found that Detch had a conflict of interest because he had worked for the alleged victim and should have either removed himself as counsel or been removed by the trial court. Detch's many failures in his representation of Humphries are well chronicled in the Supreme Court's 2007 decision. **State ex rel. Humphries**, *supra*.

After reversal of the 1999 conviction due to ineffective assistance of Detch as trial counsel, Humphries was again charged with crimes connected with the now 31-year-old murder. Humphries was then in his 70s. Considering his time-served and health issues, Humphries accepted a nolo contendere plea to a lesser included offense that would ensure his release from prison mere months after the 2007 reversal—rather than await more time in prison and a lengthy and emotionally/physically tolling trial. A trial would likely have taken longer to release Humphries, than release from a nolo plea due to scheduling conflicts, and tracking down witnesses who may have long since disappeared, —extending both Humphries' prison stay and a waste on the system's resources. It is important to note that Humphries did not accept the nolo plea bargain in a vacuum—factors such as time-served and health risks were part of the equation, unlike when he demanded a fair trial originally in 1997-1998, which he was denied said fair trial due to the ineffective assistance of counsel of Detch.

In 2007, due to the length of time he spent in prison at the hands of the ineffective assistance of Detch, Humphries sued Detch for legal malpractice. Detch filed a motion to dismiss under West Virginia Rule of Civil Procedure 12(b)(6). A hearing was held on the motion in December of 2007, in which the Putnam County Circuit Court denied the motion. However, a written Order was never issued by the court. In 2008, Humphries' attorney suffered serious health problems, which pushed back the timeframe for prosecuting the case. In 2009, Detch renewed his motion to dismiss. A different Putnam County

Circuit Judge, Judge O.C. Spaulding, granted the motion, reasoning essentially that Humphries had not fulfilled the "actual innocence rule," due to his plea of nolo contendere to a lesser included offense. Mr. Humphries submits that the Putnam County Circuit Court's dismissal of his claim of legal malpractice is clearly erroneous, and that said Order should be reversed, and this case should be tried on the merits of the legal malpractice claim.

Humphries now appeals the Circuit Court's dismissal under Rule 12(b)(6) of his civil claim of legal malpractice.

ASSIGNMENTS OF ERROR

- I. The Circuit Court erred in granting the Defendant's 12(b)(6) Motion to Dismiss because the "actual innocence rule" is not an element of legal malpractice under West Virginia law and would violate the public policy that West Virginians should have redress and legal protection against ineffective counsel.**
- II. The Circuit Court erred in granting Defendant's 12(b)(6) Motion to Dismiss because Defendant's actions were the proximate cause of Plaintiff's damages.**
- III. The Circuit Court erred in granting the Defendant's 12(b)(6) Motion to Dismiss because a nolo contendere plea is not and should not be an admission of "actual" guilt.**
- IV. The Circuit Court erred in allowing the nolo contendere plea to affect its decision—violating West Virginia Rule of Evidence 410.**
- V. The Circuit Court erred in granting the Motion to Dismiss under collateral estoppel because plaintiff does not need to prove innocence to succeed in a legal malpractice action, and even if so, a nolo plea in a criminal matter should not collaterally estop proof of innocence in a civil action.**
- VI. The Circuit Court substantially abused its discretion and exceeded its legitimate powers of authority by reversing an earlier order of that Court made in open Court by Judge Eagloski, which denied Detch's Rule 12(b)(6) motion to dismiss.**

STANDARD OF REVIEW

“Appellate review of a circuit court’s order granting a motion to dismiss a complaint is reviewed *de novo*.” Syllabus point 2, State ex rel. McGraw v. Scott Runyan Pontiac-Buick, Inc., 194 W.Va. 770, 461 S.E.2d 516 (1995). In reviewing challenges to the findings and conclusions of a circuit court, the West Virginia Supreme Court of Appeals applies a two-prong standard of review:

We review the final order and the ultimate disposition under an abuse of discretion standard, and we review the circuit court's underlying factual findings under a clearly erroneous standard. Questions of law are subject to a *de novo* review.

Phillips v. Fox, 458 S.E.2d 327 (W.Va. 1995). Moreover, the Fourth Circuit Court of Appeals has held that the findings of a trial court are entitled to great weight, but they are never conclusive. *Kibert v. Blankenship*, 611 F.2d 520 (4th Cir. 1979) *rev'g* 454 F.Supp. 400 (W.D.Va. 1978).

Since the preference is to decide cases on their merits, courts presented with a motion to dismiss for failure to state a claim construe the complaint in the light most favorable to the plaintiff, taking all allegations as true. *John W. Lodge Distrib. Co. v. Texaco, Inc.*, 161 W.Va. 603, 604-05, 245 S.E.2d 157, 158-59 (1978).

With these standards of review in mind, the Appellant now addresses each assignment of error below.

DISCUSSION

I. The Circuit Court erred in granting Defendant's 12(b)(6) Motion to Dismiss.

The West Virginia Supreme Court has stated that “[t]he trial court, in appraising the sufficiency of a complaint on a Rule 12(b)(6) motion, should not dismiss the complaint unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief. *Conley v. Gibson*, 355 U.S. 41, 45-46, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957).’ Syllabus Point 3, *Chapman v. Kane Transfer Co., Inc.*, 160 W.Va. 530, 236 S.E.2d 207 (1977).” Syllabus Point 1, *Hill v. Stowers*, 680 S.E.2d 66 (W.Va. 2009). Given that this Honorable Supreme Court of Appeals has already found and held that Detch provided ineffective assistance of counsel to Mr. Humphries in granting his writ of habeas corpus, (**State ex rel. Humphries, supra**), Humphries submits that he can clearly establish the necessary elements of legal malpractice against Detch, if the Circuit Court’s order is reversed and his claim is allowed to proceed to trial.

As recently as 2005, the West Virginia Supreme Court recited the general elements necessary to prove legal malpractice: “(1) the attorney’s employment; (2) his/her neglect of a reasonable duty; and (3) that such negligence resulted in and was the proximate cause of loss to the plaintiff.” Syllabus Point 1, *Calvert v. Scharf*, 619 S.E. 2d 197 (W.Va. 2005).

In this case, the claim to be proven is that Paul S. Detch, Esq., was negligent in his representation of Carroll Eugene Humphries resulting in Humphries spending years in prison, loss of his freedom, loss of enjoyment of life, loss of his pursuit of happiness, and loss of income, mental anguish, the necessity of hiring a lawyer to litigate a successful writ of habeas corpus, and

other general damages. If allowed to move forward to trial on the merits, facts could be established that would fulfill the three elements of legal malpractice enumerated above by this Court. Indeed, this Honorable Court's opinion in **State ex rel. Humphries**, *supra*, sets forth many of the facts that show Detch provided ineffective assistance of counsel, and that but for his negligent representation, Mr. Humphries would not have spent nine years in prison, thus proximate causation is proven. Additionally, this Honorable Court has found that Detch provided ineffective assistance of counsel, and although this legal malpractice action against Detch is a separate cause of action from Mr. Humphries earlier writ of habeas corpus granted by this Court, the Appellant submits that the legal issues between the two cases are so entwined that this Honorable Court's holdings with respect to second appeals of actions is instructive:

The general rule is that when a question has been definitely determined by this Court its decision is conclusive on parties, privies and courts, including this Court, upon a second appeal or writ of error and it is regarded as the law of the case. Syllabus Point 6, **Hatfield v. Painter**, 222 W.Va. 622, 671 S.E.2d 453, (W.Va. 2008), citing **Mullins v. Green**, 145 W.Va. 469, 115 S.E.2d 320 (W.Va. 1960).

Thus, it is not "beyond doubt" that Humphries can prove these three elements of a legal malpractice claim, and proof of these elements would entitle Humphries to relief. Additionally, this Court has held that "[w]hen a court is considering a motion to dismiss, the complaint must be construed in the light most favorable to the plaintiff, and its allegations should be considered as true." **McClure v. McClure**, Syllabus Pt. 3, 184 W.Va. 649, 403 S.E.2d 197

(W.Va. 1991). The Circuit Court below, obviously did not consider the allegations in Mr. Humphries to be true, and therefore, the decision of the Circuit Court to grant the motion to dismiss was clearly erroneous at law and should be reversed by this Honorable Court.

Moreover, the Circuit Court in this case imposed an additional element of legal malpractice, "an actual innocence rule," which is not recognized law in this State, nor should it become so. The Circuit Court concluded, that facts could not be established to show actual innocence and the Circuit Court ordered that Humphries claim failed as a result. The Circuit Court imposed "actual innocence" as an additional threshold element for criminal legal malpractice.

A. The "actual innocence rule" is not an element of legal malpractice under West Virginia law.

"Actual innocence" is not an element of legal malpractice enumerated by the law of this state. Again, the three elements to be proven for legal malpractice are employment, neglect of a reasonable duty, and proximate cause resulting in damages. *Id.*

In this case, the Circuit Court did not rely on West Virginia law for the additional threshold element of "actual innocence." The Circuit Court expressly notes in its Order that this Court has never before addressed the issue; Therefore, this Honorable Court has never added this element to legal malpractice, and the Appellant urges this Honorable Court to decline to do so.

Humphries should bear no burden to prove an element that is not a recognized element of the tort alleged. The Circuit Court erroneously dismissed

this action under Rule 12(b)(6) by consideration of an additional element not contemplated and enumerated by this esteemed Court. In light of this Court's clearly stated elements of legal malpractice, adding an additional element is not within the purview of the lower courts.

Therefore, the Circuit Court substantially abused its discretion and exceeded its legitimate powers by imposing the "actual innocence rule." As the Circuit Court's Order rests on this element of "actual innocence," the Order should be reversed because no such element exists in this jurisdiction. The Circuit Court's Order is thus in contradiction to the well established law of this State relating to legal malpractice, and as such it is clearly erroneous and should be reversed, allowing this matter to continue to trial on the merits.

B. The "actual innocence rule" should not be adopted because it violates the public policy that West Virginians should have redress and legal protection against ineffective counsel.

Adopting the "actual innocence rule" would violate the public policy that West Virginians have *the opportunity* of redress and legal protection against negligent legal representation, just as West Virginians should have the opportunity of redress and legal protection against other forms of negligent conduct in our society. Civil lawsuits function to both make an injured plaintiff whole and to punish wrongful conduct so as to prevent that conduct in the future. If a claim for negligence has the potential to fulfill the enumerated legal elements, instead of putting the plaintiff on trial for a second time, a judge/jury should decide the case **on its merits**. Adoption of the actual innocence rule allows negligent attorneys to escape justice without any regard

to the negligent conduct of the attorney itself. For example, what if a lawyer willfully and maliciously breaches his fiduciary duty to the defendant, but the defendant cannot prove his innocence? The conduct goes unanswered by our courts, which should afford justice to individuals who have been denied their Constitutional rights to effective assistance of counsel. Negligent attorneys would be rewarded with immunity for their dereliction of duty, their failure to adhere to the Rules of Professional Conduct, and be given no incentive to improve their standards of representation if this Honorable Court should add "actual innocence" as an element to legal malpractice. Our civil system of justice should not place burden on a plaintiff to prove his innocence; it should assess the alleged negligence of the attorney defendant. The New Jersey Superior Court, Appellate Division, in rejecting adoption of the "actual innocence rule," and in rejecting all the so-called public policy doctrines used as a basis therefor, noted that:

In addition to finding little substance in the three policy reasons cited in support of an actual innocence rule, we question the fairness of barring the claims of all criminal defendants except those who are actually innocent. Take for example, John Doe, a fictional person who has actually committed only a simple theft but has been indicted for more serious offenses, such as robbery. If Doe's defense counsel negligently handles the matter, and Doe is convicted of robbery and sentenced accordingly—when a competent performance by an attorney would only have resulted in a conviction for a simple theft—then the elements of professional negligence, in our view, have been breached. His attorney negligently failed to obtain a result that a competent performance would have obtained, and, as a result, John Doe will spend many more years in prison than he would have if convicted of theft. The equal application of our common law would suggest that John Doe should have an actionable claim against his attorney. But John Doe cannot claim his innocence. He is guilty of theft. In a jurisdiction that requires proof of actual innocence, we presume that John Doe would have

no actionable claim, even if he is later granted post-conviction relief based upon the ineffective assistance of counsel. And yet, the damage he has suffered is very real, measured by the extra years he will serve in prison. *footnote omitted herein*. In light of potential outcomes such as this, we conclude that insistence upon proof of actual innocence as an element of criminal malpractice will have a tendency to bar the commencement of otherwise meritorious actions and would vindicate only a misguided policy that guilty persons are not entitled to be represented by competent attorneys—a policy entirely at odds with the Sixth Amendment. *McKight v. Office of Public Defender*, 936 A.2d 1036, 1047-1048 (N.J. Super 2007), *rev'd on other grounds*, *McKight v. Office of Public Defender*, 962 A.2d 482, 483 (N.J. 2007).

In rejecting the actual innocence rule that Court further noted the following:

Insulating criminal defense attorneys from malpractice suits brought by former clients—through the heavy burden of requiring proof of plaintiff's actual innocence—may have an insidious tendency to lower professional standards. Just as their colleagues who practice in other areas are held to high professional standards of care through, in part, the potential for monetary judgments based on their negligence, criminal defense attorneys should also be subject to the same liability so that they have the same incentive to meet the professional standards of care required by our court rules and the Sixth Amendment. We, thus, reject the actual innocence standard adopted by other jurisdictions because it does little more than provide immunity from negligence actions for those who practice in this area. *Id.* at 1047-1048.

Other courts have expressly rejected the "actual innocence rule" and "exoneration rule" restrictions on legal malpractice claims. *Rantz v. Kaufman*, 109 P.3d 132 (Colo. 2005) (former clients are not required to obtain post-conviction relief before bringing a malpractice action against their criminal defense attorneys); *Smith v. Truman*, 115 P.3d 1279 (Colo. 2005) ("...we find that Smith's failure to seek or obtain postconviction relief is not a bar to

bringing a malpractice suit against Truman."); *Gebhardt v. O'Rourke*, 510 N.W.2d 900 (Mich. 1994); *Krahn v. Kinney*, 538 N.E.2d 1058 (Ohio 1989).

The Circuit Court, herein, cited a Third Circuit Court of Appeals case for the policy barring convicted persons from bringing malpractice claims against their allegedly negligent attorneys. *Levine v. Kling*, 123 F.3d 580, 582 (7th Cir. 1997) (applying Illinois law although the Illinois Supreme Court had never addressed the issue). However, the *Levine* court did not bar EVERY convicted person from bringing a legal malpractice claim. Despite having to show actual innocence, the *Levine* court concluded that "[s]hould [Levine] succeed in getting his conviction overturned, he can bring a new malpractice suit." For this proposition, sometimes called the "exoneration rule," the *Levine* court analogized to the U.S. Supreme Court case of *Heck v. Humphrey*, 512 U.S. 477, 114 S.Ct. 2364 (1994). In *Heck*, a man convicted of voluntary manslaughter sued two prosecutors and an investigator for violations under § 1983 of the U.S.C. The *Heck* court, Justice Scalia writing for the majority, held that "a §1983 plaintiff must prove that the conviction or sentence has been reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal authorized to make such determination, *or called into question by a federal court's issuance of a writ of habeas corpus.*" *Id.* at 486-487 (emphasis added). Therefore, under *Heck* and *Levine*, not all convicted persons are barred from bringing suit. A convicted person could bring suit if the underlying conviction "is impugned by the grant of a writ of habeas corpus," among other things. *Id.* at 489.

Furthermore, the *Levine* policy argument would allow negligent attorneys as wrongdoers to escape justice. According to *Levine* and the Circuit Court here, allowing a convicted person to sue his attorney would undermine the justice system. To the contrary, this theory itself undermines the justice system. If anyone, even a convicted person, can prove that someone else breached a reasonable duty of care causing damages, then why should the negligent party escape our system of justice because of a plaintiff's prior wrongdoing? Two wrongs really do not make a right. Conversely, if a case has no merit, then the system will not afford anyone--including a convicted person--to, in the words of the *Levine* court, "nevertheless obtain substantial damages." *Id.* (For a more detailed discussion of the fallacies of this and other arguments for adopting the "actual innocence rule" and "exoneration rule" see Kevin Bennardo's Note "A Defense Bar: The 'Proof of Innocence' Requirement in Criminal Malpractice Claims," 5 Ohio St. J. of Crim. L. 341, 2007.)

In this case, Humphries' original conviction *was* called into question by a writ of habeas corpus. This Honorable Court overturned the conviction due to Detch's ineffective assistance of counsel. ***State ex rel. Humphries***, *supra*. Moreover, several jurisdictions have noted the virtually identical standards of a habeas for ineffective assistance of counsel and legal malpractice. *McCord v. Bailey*, 636 F.2d 606, 609 (D.C.Cir.1980); *U.S. v. James*, 915 F.Supp. 1092, 1099 (S.D.Cal.1995); *Gray v. Weinstein* 2004 WL 3130552 (unreported). In these cases where ineffective assistance of counsel has already been decided, legal malpractice will and should often follow. West Virginians deserve and are

constitutionally entitled to effective assistance of counsel, and lawyers bear a fiduciary duty to provide clients competent and effective assistance if the lawyers take or are appointed the case.

Humphries took the matter to trial the first time, but circumstances change after a near-decade of imprisonment—circumstances changed for Humphries and would for any future person placed in the same position. Time-served, even wrongfully, will often make a plea the best alternative in these cases, especially a nolo or no contest plea. Humphries accepted the nolo plea to best salvage the rest of his life. Protecting your own best interests by accepting a nolo plea after so many years in prison should not allow negligent representation by attorney, Detch, to escape justice—or even the chance at justice, since under this case the merits have not been weighed.

If this rule is adopted and Humphries' case allowed to be dismissed, then it would force persons whose convictions are reversed to choose between their best alternative to salvage a wrecked life and bringing negligent legal representation to justice through our American justice system. Society, and this Honorable Court, should not as a general matter of law allow negligent attorneys to escape justice at the expense of an already wronged individual.

II. The Circuit Court erred in granting Defendant's 12(b)(6) Motion to Dismiss because Defendant's actions were the proximate cause of Plaintiff's damages.

The Circuit Court incorrectly analogized the non-binding case *Brown v. Theos* to conclude that Humphries' no contest plea "establishes that it was plaintiff's own criminal conduct, not Detch's alleged negligence, that

proximately caused his imprisonment." [Order of the Putnam County Circuit Court, 6 (Dec. 18, 2009)]. The Circuit Court relied on *Brown v. Theos*, 550 S.E.2d 304 (S.C.2001), for the proposition that a nolo contendere plea precludes proof of proximate cause in any malpractice action. However, *Theos* is a significantly different case than the one at bar. The differences in the legally significant facts in these cases warrant different outcomes.

In *Theos*, the plaintiff (Brown) sued his trial and appellate attorneys for the imprisonment he received from his conviction under a plea bargain. At trial, Brown received 40 years in prison (not 25 as the Order states). After his first conviction was overturned due to ineffective assistance, Brown accepted a no contest plea for eight years. Brown then brought a malpractice action alleging that his original attorneys' negligence caused him to enter into the plea. According to the *Theos* Court, Brown alleged two wrongs in that malpractice action: 1) that "but for their grossly negligent representation, [Brown] would have fared better at trial and would not have been convicted through a plea of no contest or otherwise," and 2) that "but for the grossly negligent representation on his direct appeal, [brown's] convictions would have been reversed, and he would have not entered a no contest plea to the charges or otherwise been convicted." *Id.* at 305. In both allegations, the conviction under the plea, NOT THE TIME SERVED UNDER THE PRIOR TRIAL CONVICTION, was the alleged damage. So, in *Theos*, of course the plea caused the incarceration at issue; entering the plea caused Brown to be convicted under that plea.

Even given the existence of an "actual innocence" or "exoneration" rules, other jurisdictions have found that failure to prove innocence or attain post-conviction relief does not bar causation. In *Rantz v. Kaufman*, the Supreme Court of Colorado acknowledges the "exoneration rule" and its interplay with causation in some courts, but the Colorado Court rejects it. Instead, it holds that a convicted plaintiff could bring a malpractice action against his criminal defense attorneys and no post-conviction relief, nor actual innocence because it is not discussed, was necessary to prove causation. 109 P.3d 132, 142.

According to *Rantz*, "Causation should be evaluated on the facts of a particular case, and we discern no reason for erecting a permanent barrier to malpractice claims with a blanket rule." *Id.* at 136.

Here, unlike *Theos* whose plea caused his alleged damages, Humphries' damages are the years spent in prison due to Detch's ineffective assistance—not his no contest plea that worked to get Humphries out of prison after those years incarcerated. In *Theos*, Brown only served a few years before accepting a plea for eight more. He sued for relief from those eight post-plea conviction years; Humphries sues for relief from the nine pre-plea years. Brown and Humphries claimed entirely different damages, thus have two entirely different causes.

The Circuit Court itself notes that Humphries was originally sentenced to 5 to 18 years in prison due to the trial where Detch represented him, whereas under the later plea, Humphries was only sentenced to an additional 6 months. Obviously, 6 months is considerably shorter than 5 to 18 years. As the

damages alleged herein are the years in prison prior to taking the plea, the plea could not have caused those years in prison. The Circuit Court's *Theos* argument that the plea caused Humphries' original nine years in prison must logically fail.

Therefore, the nolo plea could not have caused the damages alleged here—the nine years spent in prison, and the money spent to hire an attorney to litigate his successful writ of habeas corpus action. Detch's negligence, not the plea, did cause, and under the legal standard for 12(b)(6) motions can be proved to have caused, the years of imprisonment. The plea served as a means to correct the wrong and get Humphries out of prison. Additionally, Humphries, suffered the financial damages of spending money to hire an attorney and having to file a habeas corpus action to fix his unfounded convictions.

Furthermore, like the *Ranzt* Court, this Court should not adopt "a blanket rule" barring proof of causation due to ALL plea agreements. Instead, this Court should find that the Circuit Court erred in adopting such a "blanket rule" because facts can be proved here showing that Detch's actions caused Humphries years spent in prison after the original conviction and the damages of monies spent in hiring an attorney to litigate a writ of habeas corpus, which was granted and overturned the wrongful convictions.

III. Even given an "actual innocence rule," the Circuit Court erred in granting the Defendant's 12(b)(6) Motion to Dismiss because a nolo contendere plea is not an admission of actual guilt.

The Defendant in this instant case argued that the entry of a no contest plea (to be clear, it was a plea of *nolo contendere*) bars any action for legal malpractice, and the Circuit Court accepted and adopted this argument by its Order dismissing Humphries claim upon the defendant's Rule 12(b)(6) motion. The Circuit Court relied on the doctrine of collateral estoppel and various cases from different states. Nowhere, in its Order does the Circuit Court state that the Supreme Court of Appeals of West Virginia has made such a decision.

In the defendant's renewed memorandum in support of the 12(b)(6) motion, his most recently cited case of *State ex rel. Leach v. Shlagel*, 447 S.E.2d 1,3-4 (W.Va. 1994) the West Virginia Supreme Court of Appeals issued no opinion involving pleas of *nolo contendere* or no contest. The Leach case involved a person who pleaded **guilty** to battery. The Leach decision cited various jurisdictions that had adopted the principle "that a guilty plea is, for purposes of collateral estoppel, equivalent to a conviction subsequent to trial." *Id.* However, said adoption specifically dealt with pleas of **guilty** and nowhere mentioned pleas of *nolo contendere* or no contest.

Additionally, the case of *Walden v. Hoke*, 429 S.E.2d 504 cited in the Defendant's memorandum, below, has no bearing upon this proceeding. The *Walden* case involved a legal malpractice claim against an attorney after representation in a divorce proceeding. The Court in the *Walden* case utilized the doctrine of collateral estoppel to support denial of the legal malpractice claim. The *Walden* court noted that the divorce client had agreed to terms of a separation agreement and the Defendant equates this to Mr. Humphries

agreeing to the terms of the *nolo contendere* plea. This logic is fundamentally flawed in that the person Mr. Humphries has a claim against is not the lawyer that handled the plea for him, it is the lawyer that ineffectively represented him, as decided by the West Virginia Supreme Court of Appeals in its Opinion, and caused him to be convicted and sentenced to life in prison. The representation by the Defendant of Mr. Humphries did not handle a plea hearing that Mr. Humphries agreed to, like the client in *Walden*, instead it caused Mr. Humphries to spend years hiring an attorney and litigating a habeas corpus proceeding to ultimately see the improper and ineffective representation acknowledged and the case reversed. Mr. Humphries didn't simply lose the time spent in prison he also was forced to hire an attorney and litigate the matter to right the wrong of the initial convictions handed down on the Defendant, Mr. Detch's, ineffective watch. Thus, the Defendant's application of this case is misguided.

Defendant also relies upon the case of *Marino v. Sims*, Civil Action no. 04-C-30 in the Circuit Court of Randolph County. In the underlying federal criminal case Mr. Marino plead guilty to bank fraud. Mr. Marino served twelve months in prison and three days after he was released he sued his attorney for legal malpractice for failing to object to errors in the pre-sentence report and his failure to file evidence of mitigating factors within the statutorily mandated time period. Again, this case is dissimilar to the one before this Court. Mr. Marino sued the lawyer that represented him when he was sentenced for errors that he contended resulted in his sentence. However, Mr. Humphries is not

suing the lawyer that represented him at the *nolo contendere* plea hearing or sentencing on those charges, he is suing the lawyer that, according to the West Virginia Supreme Court of Appeals, inadequately represented him causing him to be sentenced to life in prison, which the court reversed, and caused him to expend funds for an attorney and otherwise suffer damages due to that ineffective representation. Clearly, this is an entirely different situation.

Moreover, it is extremely important to note that Mr. Marino did not allege his innocence. Not only does Mr. Humphries allege that he is innocent, he looks forward to proving his innocence at the trial in this case.

With regard to the plea of *nolo contendere*, Mr. Humphries is in his seventies and has serious health problems. He was offered a plea that would allow him to be released, due to discharging his sentence, in a very quick period of time. A criminal trial would have been extremely dangerous to his health as well as could have been prolonged past the release date the plea allowed for him to have. A plea of *nolo contendere* is not a plea of guilty. As a matter of fact, the plea is so different that it has its own special rule.

“A defendant may plead *nolo contendere* only with the consent of the court. Such a plea shall be accepted by the court only after due consideration of the views of the parties and the interest of the public in the effective administration of justice.” Rule 11 (b) West Virginia Rules of Criminal Procedure.

Thus, our laws have reflected that there are public policy considerations that support pleas in criminal cases other than guilty. Our rules allow for a

nolo contendere plea where the interests of the public and the effective administration of justice support acceptance of said pleas. These types of pleas are not the same as pleas of guilty and a person may maintain their actual innocence even when accepting such a plea and pleading *nolo contendere*. Such a person is in no way admitting guilt and in fact such a person enters that type of plea, and a court accepts that type of plea, understanding it is clearly not the same as admitting guilt or pleading guilty. In fact, the case law in West Virginia has accepted *Kennedy v. Frasier* pleas for some time noting that a criminal defendant may plead guilty though not in fact admitting guilt but instead recognizing it to be in their best interest to plead guilty even maintaining their innocence in some circumstances. These types of pleas are guilty pleas and do not have to have a judge determine whether to accept one on public policy grounds. To equate a *nolo contendere* plea with a guilty plea would be a very slippery slope to venture down.

In essence, the Circuit Court held and found that the plea of *nolo contendere* is the same as a plea of guilty. This is simply not true. Mr. Humphries reasons for the *nolo contendere* plea are obvious. The time it would take to try the case would have likely been more than the time he would spend in prison and considering his health, the trial would have been dangerous. The Court accepted his plea of *nolo contendere* upon the above cited public policy grounds. His plea was not one of guilt and was not pursuant to *Kennedy v. Frasier*, it was one where Mr. Humphries emphatically denied guilt and did not accept that the State could prove its case against him. Instead, it was a plea

where Mr. Humphries, for personal reasons chose to accept a speedy release in his elder years. Further, the laws of the State of West Virginia have long recognized these types of pleas but have indicated that Court must agree to them on public policy grounds due to the fact that they differ in nature from pleas of guilty. In fact, the historical nature of pleas of *nolo contendere* supports the ability of this Defendant to continue with this civil action. *Nolo Contendere* pleas are specifically not pleas of guilt and not the same as guilty verdicts. That is why they are not used as substantive evidence in civil proceedings. Furthermore, they have their own special set of rules and must be accepted by a court upon special grounds, since they carry special considerations that guilty pleas do not. Therefore, the law cited by the Defendant relating to pleas of guilty is not applicable to the case at bar.

Accordingly, considering the laws of the State of West Virginia and the findings of our Supreme Court in its written decision in the underlying habeas matter, the Circuit Court's Order should be reversed as it was clearly in error, and should have been denied as there are genuine issues of material fact that support the Plaintiff's case and the case law not only does not preclude the Plaintiff from bringing such a case, but in fact the historical nature of pleas of *nolo contendere* fundamentally supports such a case.

Black's Law Dictionary defines a *nolo* plea, or *nolo contendere* plea, as "[a] plea by which the defendant *does not contest or admit guilt.*" Bryan A. Garner, Ed. (9th edition). Under West Virginia Rule of Criminal 11(e)(6)(b) and West Virginia Rule of Evidence 410(2), *nolo* pleas are not admissible in ANY

civil or criminal proceeding against the person who entered the plea. Under West Virginia State Rule of Evidence 803(22), pleas of nolo contendere are inadmissible hearsay in all cases. The Committee Comments to Federal Rule of Criminal Procedure 11 state, "A plea of nolo contendere is, *for purposes of punishment*, the same as a plea of guilty. [...] Unlike a plea of guilty, however, it *cannot be used against a defendant as an admission* in subsequent criminal and civil cases [citing Wigmore and various other sources]" (emphasis added). In sum, the weight of the law stands against the use of nolo pleas as an admission of guilt. The Circuit Court erred in finding and concluding that by entering into a nolo plea the "plaintiff was therefore adjudged guilty of the crime of accessory before the fact to murder in the second degree." Order of the Putnam County Circuit Court, 2 (Dec. 18, 2009). A nolo plea functions as a CONVICTION for sentencing purposes, but it does not impute actual GUILT. Otherwise, why would our justice system have created separate pleas?

By holding that a nolo plea can be used in subsequent civil proceedings, the Circuit Court has undermined the very policy behind nolo pleas. Plea bargaining is necessary to weed out unnecessary trials and save the state its strained expenses. Nolo pleas are particularly attractive because they allow defendants who might otherwise defend their honor in an unnecessary trial to alleviate the system and move on with their own lives without admitting guilt in subsequent legal actions. To break these policies, allow introduction of a nolo plea in subsequent civil proceedings, and impose actual guilt on a plea-enterer through that nolo plea, will essentially unravel the nolo plea altogether. Nolo

pleas will become significantly less affective as a plea bargaining tool for prosecutors and defendants alike.

Therefore, the Circuit Court erred in assessing actual guilt from a nolo plea. A nolo plea is not an admission of "actual" guilt; it merely affords a criminal defendant and the state the expediency of not contesting charges and not having the matter impose actual guilt in subsequent legal proceedings. To hold otherwise acts too contrarily to our Rules of Criminal Procedure, Evidence, the Committees who enacted these rules, and the very definition of the nolo plea. A nolo plea is not a guilty plea. If a nolo plea engenders all the inherent traits, measures, and consequences of a guilty plea and can be used in civil litigation in exactly the same manner as a guilty plea, why would the separation exist in our legal system? The separation exists, nolo pleas exist, so that prosecutors and defendants who do not wish to belabor courts over matters of actual, factual guilt may expedite proceedings, move on with their lives, and not have it affect them in subsequent proceedings in the same way as actual, factual guilt.

IV. The Circuit Court erred in allowing the nolo contendere plea to affect its decision—violating West Virginia Rules of Criminal Procedure and Evidence.

Under West Virginia Rule of Criminal 11(e)(6)(b) and West Virginia Rule of Evidence 410(2), nolo pleas are not admissible in ANY civil or criminal proceeding against the person who entered the plea.

Despite, these clear rules, the Circuit Court, herein, found that the drafters of Rule 410(2) "did not intend for the rule to be used in order to allow

the plaintiff to use the rule in the offensive, rather than a defensive, manner." Order of the Putnam County Circuit Court, 7 (Dec. 28, 2009). Applying the clear letter of the law should not be a game divided into teams with offensive and defensive sides; instead, the laws of our state should be applied evenly and fairly. The laws say nolo pleas are inadmissible. They should be inadmissible, especially to impute guilt, which as discussed above in Assignment of Error III is not the intent of a nolo plea anyway.

Furthermore, this Honorable Court has held the West Virginia Rules of Evidence and Rules of Criminal Procedure bar the use of nolo pleas in subsequent proceedings as proof of actual guilt. The Court has said, "[a nolo] plea is not a reliable indication of guilt in subsequent litigation, including administrative proceedings. Therefore, [...] we hold that *nolo contendere* pleas are unreliable as evidence of particular acts in a subsequent grievance or other administrative proceeding." *University of West Virginia Board of Trustees on Behalf of West Virginia University v. Fox*, 197 W.Va. 91, 95, 475 S.E.2d 91, 95 (1996). The Court has also held that "what is prohibited by the rules of evidence and criminal rules of procedure is use of the fact of the plea of nolo contendere in subsequent civil or criminal proceedings to prove that the defendant committed the offense to which he entered the plea." *State v. Evans*, 203 W.Va. 446, 450, 508 S.E.2d 606, 610 (1998).

As also discussed above, one significant policy behind the exclusion of nolo pleas under Rule 410 and Rule 11 is to promote plea deals and promote efficiency in our justice system. The Circuit Court here used the nolo plea as

proof that the plaintiff actually committed the underlying offense. The Circuit Court ordered that Humphries was barred from bringing his malpractice claim because Humphries accepted the nolo plea to a lesser-included offense of the same underlying crime. Such a broad rule—dismissing all criminal malpractice claims because of subsequent nolo pleas—is contrary to efficiency and justice. Furthermore, it undermines the need for a nolo plea in the first place. This precedent would result in the law turning a blind eye to the negligent conduct of bad attorneys, and it would dissuade people from accepting plea bargains.

Therefore, the Circuit Court erred when it admitted Humphries nolo plea as evidence in this civil proceeding, in clear violation of the rules and laws of our state.

V. The Circuit Court erred in granting the Motion to Dismiss under collateral estoppel because plaintiff does not need to prove innocence to succeed in a legal malpractice action, and even if so, a nolo plea in a criminal matter should not collaterally estop proof of innocence in a civil action.

In West Virginia, the law regarding motions to dismiss pursuant to Rule 12(b)6 of the West Virginia Rules of Civil Procedure is well established. The trial court, in appraising the sufficiency of a complaint on a Rule 12(b)6 motion, should not dismiss the complaint unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief. *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957). *Syl. Pt 2, Haines v. Hampshire County Commission*, 216 W.Va. 499, 607 S.E.2d 828 (2004). The Appellant submits that the Order granting said Rule 12(b)(6)

motion, was clearly in error, as the Appellant has substantial facts which support his claim for legal malpractice against Detch.

With regard to collateral estoppels, the law is much different than the law in other states. This is because in West Virginia the law requires that the defense establish four conditions, these are as follows:

In West Virginia, collateral estoppels will bar a claim if four conditions are met:

1. The issue previously decided is identical to the one presented in the action in question;
2. There is a final adjudication of the merit of the prior action;
3. The party against whom the doctrine is invoked was a party or in privity with a party to a prior action; and
4. The party against whom the doctrine is raised had a full and fair opportunity to litigate the issue in the prior action.

State v. Miller, 194 W.Va. 3, 459 S.E.2d 14 (1995). *Burch v. Nedpower*, WVSC 33201 (6/8/2007).

Moreover, in *State v. Miller, supra*, the Court stated, "In our view, for purposes of issue preclusion, issues and procedures are not identical or similar if the second action involves application of a different legal standard or substantially different procedural rules, even though the factual settings of both suits may be the same." *Id.* at 10. This is noteworthy in this case, as the plea of nolo contendere though arising out of the same allegations was to a

substantially different charge than the convictions that were overturned by this Court, despite the allegations arising from the same factual settings.

The Circuit Court decided that by accepting a nolo contendere plea Humphries had admitted guilt in the underlying criminal conduct and therefore was collaterally estopped from proving innocence and barred from bringing a legal malpractice claim. However, “actual innocence” is not an element of legal malpractice in West Virginia. Even if “actual innocence” were an element to be proved—with a burden on the plaintiff—why should a plaintiff be barred from attempting to prove innocence after accepting a plea of no contest?

VI. The Circuit Court substantially abused its discretion and exceeded its legitimate powers of authority by reversing an earlier order of that Court made in open Court by Judge Eagloski, which denied Detch’s Rule 12(b)(6) motion to dismiss.

Originally, the Putnam County Circuit Court, Judge Eagloski presiding at a hearing held in December of 2007, denied a motion by Defendant to dismiss under West Virginia Rule of Civil Procedure 12(b)(6), but no written Order was entered reflecting the Court’s decision. Thus, the Rule 12(b)(6) motion had already been denied by the Putnam County Circuit Court, prior to Judge Spaulding’s written order of December 18, 2009; and therefore, it is the Defendant, who should be collaterally estopped from re-litigating this motion to dismiss, and Judge Spaulding’s order should be ruled void ab initio. The Defendant, Detch, in his “renewed memorandum in support of his previously filed 12(b)(6) motion to dismiss,” on page (1) thereof, admits that Judge Eagloski indicated from the bench that said motion was denied. On page 2 of

Spaulding's December 18, 2009, Order, the lower court also acknowledges that the transcript of the hearing held in the Putnam County Circuit Court, the Honorable Judge Edward Eagloski presiding, denied the defendant's initial motion to dismiss at a hearing held in December, 2007, but no written order was entered. The Appellant, herein, submits that Judge Eagloski's Order denying the defendant's motion to dismiss should be honored as it was made in open court, a transcript exists of the hearing, and the entry of a formal written order is a technical formality. Further, Humphries submits that Judge Spaulding had no authority to reverse Judge Eagloski's denial of the motion, and therefore, the December 18, 2009, Order is invalid as it constitutes a substantial abuse of discretion, and its entry exceeded the legitimate powers of the lower court.

After Detch renewed the motion to dismiss in 2009, the Putnam County Circuit Court, reversed Judge Eagloski's prior order, denying said motion which was made in open court, and Judge Spaulding, despite his lack of authority to reverse the prior order, granted the defendant's 12(b)(6) motion because of the so-called "actual innocence rule." However, the "actual innocence rule" is not recognized law in West Virginia. Despite the Rules of Evidence and Criminal Procedure prohibiting use of nolo pleas in subsequent actions, and although a nolo plea is, as a matter of law, an alternative to pleading guilty, the Circuit Court ruled that accepting the nolo plea was proof of actual and absolute guilt and barred Humphries from proving "actual innocence," which the Circuit Court considered an element of a legal

malpractice claim. However, no West Virginia authority was cited that added "actual innocence" as an element of a legal malpractice claim. The West Virginia Supreme Court of Appeals has never listed "actual innocence" in its enumeration of the elements necessary to succeed in a legal malpractice action. Indeed, such a rule barring actions because of the background of the plaintiff would allow legal malpractice actions to go unpunished in our justice system.

CONCLUSION AND RELIEF REQUESTED

No one in our system of justice should be belabored with the task of proving their actual innocence, especially as a threshold issue for a claim of legal malpractice against a negligent criminal defense attorney. Carroll Eugene Humphries, as a plaintiff, should not have to prove innocence in a civil matter for the reasons delineated herein and others that may be apparent from the record of this proceeding, Humphries appeals from the judgment of the Circuit Court of Putnam County and prays that this Honorable Court will reverse the

December 18, 2009, Order of the Putnam County Circuit Court, and Order that
Humphries legal malpractice claim be allowed to continue to trial on the merits
thereof.

Respectfully Submitted,
Carroll Eugene Humphries
By Counsel,



William C. Forbes, Esquire (WVSB #1238)
W. Jesse Forbes, Esquire (WVSB #9956)
FORBES LAW OFFICES, PLLC
1118 Kanawha Blvd., East
Charleston, WV 25301
Phone: (304) 343-4050; Fax: (304) 343-7450
Counsel for the Appellant

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

CARROLL EUGENE HUMPHRIES,
Appellant,

v.

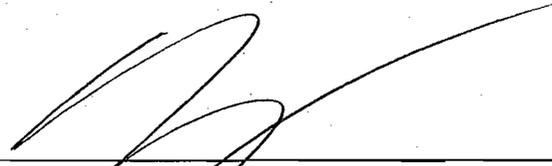
Supreme Court No. 35649

PAUL S. DETCH,
Appellee.

CERTIFICATE OF SERVICE

I, William C. Forbes, Counsel for the Appellant, CARROLL EUGENE HUMPHRIES, hereby certify that a true and exact copy of the foregoing "Appellant's Brief," was duly served upon counsel for the Appellee, Paul S. Detch, on this the 21st day of July, 2010, by depositing the same in the United States mail, postage pre-paid, addressed as follows:

Stephen R. Crislip, Esquire
Ben M. McFarland, Esquire
JACKSON KELLY, PLLC
1600 Laidley Tower
P.O. Box 553
Charleston, WV 25332



William C. Forbes, Esquire (WVSB ID#1238)
FORBES LAW OFFICES, PLLC
1118 Kanawha Boulevard, East
Charleston, WV 25301
Phone: 304-343-4050; Fax: 304-343-7450