

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

CARROLL EUGENE HUMPHRIES,

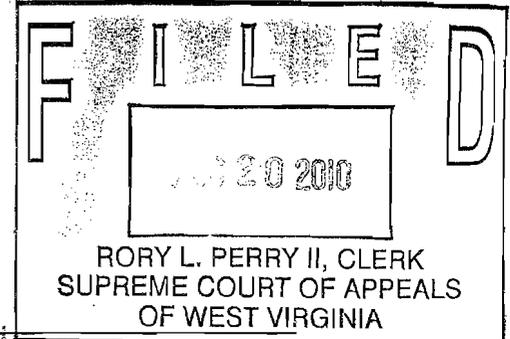
Petitioner,

Case No.: 35649

v.

PAUL S. DETCH, ESQ.,

Respondent.



**APPELLEE PAUL S. DETCH'S RESPONSE TO
APPELLANT'S BRIEF**

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INTRODUCTION

Plaintiff Carroll Eugene Humphries (“plaintiff” or “Humphries”) has filed a legal malpractice action against his former attorney, Paul S. Detch (“defendant” or “Detch”), stemming from an underlying criminal action in which Humphries was convicted of being an accessory before the fact to commit murder in the first degree and conspiracy to commit murder. On December 18, 2009, the Circuit Court of Putnam County, West Virginia dismissed Humphries’ legal malpractice complaint against Detch pursuant to Rule 12(b)(6) of the West Virginia Rules of Civil Procedure, holding that it failed to state a claim upon which relief can be granted.

The Circuit Court’s Order dismissing the complaint is premised on its finding that “in order for a criminal defendant to sue his attorney for legal malpractice based on an underlying criminal matter, such criminal defendant must be able to establish that he was actually innocent of the criminal conduct involved in the underlying matter,” and here the plaintiff could not do that because after his conviction was overturned, he pled *nolo contendere* or no contest to the lesser included offense of being an accessory before the fact to commit murder in the second degree. *See* Order dated December 18, 2009 at p. 4. The Circuit Court correctly held that a contrary “holding would lead to absurd results and violate the public policy of the State of West Virginia.” *Id.*

The plaintiff has appealed the Circuit Court’s Order granting Detch’s motion to dismiss, asserting that the so-called “actual innocence” rule, thoroughly examined in the Circuit’s Court’s December 18, 2009 Order, is not and should not be the law in West Virginia. The plaintiff asserts that criminal defendants should be able to file suit against the attorney who represented them in their criminal proceeding regardless of whether the criminal defendant is

actually innocent of the criminal conduct at issue. Plaintiff cites virtually no authority supporting his position, nor does he offer any response to the overwhelming majority of jurisdictions who refuse to adopt a law that would permit an individual who has been convicted of a crime to profit from that conviction via damages in a legal malpractice action. In contrast, Detch offers multiple reasons, echoed and adopted by virtually every jurisdiction to address the issue, outlining why the rule of law the plaintiff advocates would lead to absurd results and undermine the public policy and the criminal justice system in the State of West Virginia.

As alternative arguments, plaintiff asserts that (1) his plea agreement is inadmissible and he should therefore be permitted to assert his actual and complete innocence despite being convicted of accessory before the fact to murder; and (2) that with regard to a criminal defendant who enters into a plea agreement after his conviction is overturned for ineffective assistance of counsel, courts should consider the alleged “reasons” why that criminal defendant entered into the plea agreement when determining whether to allow him to sue his attorney. Plaintiff’s arguments are untenable.

First, plaintiff’s conviction is clearly admissible in this case, and it clearly acts as a bar to his claim herein. Any other holding would lead to the absurd result of allowing an individual who has been convicted of a crime to profit from that conviction. Furthermore, plaintiff’s assertion that courts should consider the alleged “reasons” why a criminal defendant enters into a plea agreement after his conviction is overturned would lead to a floodgate of senseless litigation surrounding the asserted “reasons” why a plea agreement was entered into, and once again, also open the door to allowing one to profit from a criminal conviction. Under plaintiff’s approach every convicted criminal in West Virginia would file a claim against his

counsel—“my attorney committed error, and that, not my criminal conduct, is the real reason I am in jail.”

Detch advocates for a simple, just, bright line rule that would not lead to uncertainty and further litigation—a rule that is consistent with the rules adopted by the overwhelming majority of jurisdictions, including state and federal courts within the federal Fourth Circuit: (1) that a convicted criminal defendant will not be permitted to profit from his criminal activity by filing a legal malpractice action against the attorney who represented him in his criminal trial, and (2) that when a criminal conviction is overturned for ineffective assistance of counsel, and such criminal defendant is subsequently convicted of the original crime or any lesser included offense, by plea agreement or otherwise, he will not be permitted to profit from that conviction via a legal malpractice action. This is the foundation of the “actual innocence” rule, and Detch respectfully requests that this Honorable Court follow the overwhelming majority of jurisdictions, adopt the actual innocence rule, and affirm the Circuit Court’s December 18, 2009 Order.

ISSUES PRESENTED

1. Whether a convicted criminal defendant will be permitted to profit from his criminal activity by filing a legal malpractice action against the attorney who represented him in his criminal trial?

2. When a criminal conviction is overturned for ineffective assistance of counsel, and the criminal defendant is then subsequently convicted of the original crime or any lesser included offense, by plea agreement or otherwise, will such criminal defendant be permitted to profit from that criminal conviction via a legal malpractice action against the attorney who represented him in his criminal trial?

STATEMENT OF FACTS

On August 27, 1998, plaintiff was indicted and charged with being an accessory before the fact to commit murder in the first degree, conspiracy to commit murder, and conspiracy to inflict injury in connection with the 1976 murder of one Billy Ray Abshire. *See* Docket Sheet at Line 1, attached to Detch's Response to Petition for Appeal at Exhibit 1. Plaintiff hired Detch to represent him in the criminal action styled *State of West Virginia v. Carrol Eugene Humphries*, Case No. 98-F-54 ("underlying criminal case"). On August 20, 1999, after a full criminal trial, Humphries was found guilty of being an accessory before the fact to murder in the first degree (Count 1) and conspiracy to commit murder (Count 2). *Id.* at Line 324.¹ Humphries was sentenced to 1 to 5 years in prison for the conspiracy to commit murder charge and life in prison with the possibility of parole after 10-years for the accessory before the fact to commit murder charge. *Id.* at Line 330.

Humphries appealed his conviction, but this Court refused to take his Petition for Appeal on October 3, 2000. *Id.* at Line 378. Thereafter, on March 28, 2001, Humphries filed a Petition for Writ of Habeas Corpus with this Court, claiming he suffered ineffective assistance of counsel in the underlying criminal case. *Id.* at Line 380. This Court accepted Humphries' habeas petition, and on April 23, 2007, reversed his conviction in the underlying criminal case and remanded the matter for a new criminal trial. *Id.* at Line 392; *Humphries v. McBride*, 647 S.E.2d 798, 810 (W.Va. 2007).

Humphries did not, however, move forward with another trial. Instead, he voluntarily elected to enter into a plea agreement with the State of West Virginia wherein he pled *nolo contendere* or no contest to the crime of accessory before the fact to murder in the second

¹ Count 3 was dismissed prior to trial. *Id.* at Line 256.

degree. *See* Judgment Order, attached to Detch's Response to Petition for Appeal at Exhibit 2.² On July 23, 2007, after thoroughly questioning Humphries and ensuring that he fully understood the nature of the plea agreement, including the fact that by entering into the plea agreement he would be incriminating himself as being an accessory before the fact to commit the murder of Billy Ray Abshire, the Circuit Court of Greenbrier County accepted the plea agreement. *Id.* at pp. 4 – 5. Humphries was therefore adjudged guilty of the crime of accessory before the fact to murder in the second degree and sentenced to 5 to 18-years imprisonment. *Id.* at pp. 5-6. Humphries was remanded to custody of the Sheriff of Greenbrier County, West Virginia. *Id.* at p. 6. Humphries received credit for the 8 years, 7 days he had already spent in prison, and after serving an additional 7 months in order to complete his sentence for his conviction under the no contest plea, he was released in February 2008, and he remains free today.

Despite entering a plea of *nolo contendere* and thus being adjudged guilty of the crime of accessory before the fact to murder in the second degree, plaintiff filed a legal malpractice action against Detch claiming he was innocent in the underlying criminal case, and therefore wrongfully convicted as a proximate result of Detch's alleged malpractice. *See* Plaintiff's Amended Complaint. Detch responded to the plaintiff's complaint with a Rule 12(b)(6) motion to dismiss, which was argued before the Hon. Edward Eagloski on December 5, 2007. Although Judge Eagloski indicated from the bench that the Court would deny Detch's motion to dismiss, no such order was ever entered. Following that hearing, plaintiff took no action whatsoever to prosecute this case until Detch filed his Renewed Memorandum in Support of Previously filed Rule 12(b)(6) Motion to Dismiss on October 2, 2009. Detch's renewed motion to dismiss proceeded to hearing on December 3, 2009, and on December 18, 2009, the

² As part of the plea agreement, the remaining charges pending against Humphries were dismissed.

Hon. O.C. Spaulding entered a detailed Order granting Detch's motion to dismiss. *See* Order of the Putnam County Circuit Court, attached to Detch's Response to Petition for Appeal at Exhibit 3.

STANDARD OF REVIEW

Rule 12(b)(6) of the West Virginia Rules of Civil Procedure gives courts the authority to dismiss claims that cannot be established as a matter of law. *See Haines v. Hampshire County Com'n*, 607 S.E.2d 828 (W.Va. 2004), . This Court has noted that a motion to dismiss is particularly appropriate "to weed out unfounded suits." *Harrison v. Davis*, 478 S.E.2d 104 (W.Va. 1996). Finally, this Court's review of a "circuit court's order granting a motion to dismiss a complaint is *de novo*." *Hill v. Stowers*, 680 S.E.2d 66, 70 (W.Va. 2009)

ARGUMENT

Regardless of how the plaintiff attempts to characterize his claim, the indisputable fact remains that he is seeking to have this Honorable Court adopt law that permits an individual who has been convicted of a crime to profit from that conviction in a subsequent legal malpractice action—law that improperly shifts the ultimate responsibility for a crime away from the convicted individual. As set forth more fully below, plaintiff offers no valid justification for adopting such a law, which would lead to absurd results, is contrary to strong public policy principles, and has been rejected by nearly every jurisdiction to address the issue.

1. **The plaintiff improperly asserts that he should be relieved of establishing his actual innocence in this civil lawsuit despite the fact that after his original conviction was overturned, he was again convicted of being an accessory before the fact to the murder of Billy Ray Abshire.**

Plaintiff begins his brief by asserting that “American courts should not force a *plaintiff* ... to prove his own innocence.” *See* Appellant’s Brief at p. 3 [emphasis added]. Plaintiff then goes on to assert that such a rule “cuts against the Rules of Criminal Procedure, the Rules of Evidence, the presumption of innocence ... the rule of law, and general principles of our society’s system of justice.” *Id.* Nothing could be further from the truth, because requiring a *plaintiff in a civil lawsuit* to meet his burden, to establish the applicable elements of this professional negligence cause of action, is as basic and well settled as any legal principle in American jurisprudence.

Plaintiff improperly and incorrectly attempts to take one basic principle of law, that a criminal defendant who is being prosecuted by the State of West Virginia in a *criminal action* is presumed innocent until proven guilty, and shift that principle to this *civil action* where the burden is his and his alone. The plaintiff received the properly recognized remedy under the law for ineffective assistance of counsel—a new criminal trial—and he was subsequently adjudged guilty of accessory before the fact to the murder of Billy Ray Abshire and sentenced accordingly. He has now filed a civil lawsuit where he is attempting to obtain money damages from Detch; he offers no support for his assertion that he should be relieved of meeting his burden in this *civil* case, and this Court should reject the plaintiff’s argument and adopt the actual innocence rule.

It is the plaintiff who filed this civil lawsuit, and the overwhelming majority of jurisdictions, including both state and federal courts within the federal Fourth Circuit, require a plaintiff asserting legal malpractice arising from the defense of a criminal action to plead and

prove that he was actually innocent of the both the crimes for which he was convicted and any lesser included offenses. See e.g., Ronald Mallen and James Smith, Legal Malpractice § 27.13 (2010 Edition) (noting that most courts examining the situation where a criminal defendant who obtains exoneration of a crime and then pleads to a lesser included offense agree that such criminal defendant must be able to show “complete innocence” in order to maintain an action against his former attorney); *Brown v. Theos*, 550 S.E.2d 304, 306 (S.C. 2001) (affirming lower court's decision to grant attorney's Rule 12(b)(6) motion to dismiss because the complaint did not allege plaintiff was actually innocent in the underlying criminal matter); *Jones v. Link*, 493 F.Supp.2d 765 (E.D. Va. 2007) (applying Virginia law); *Levine v. Kling*, 123 F.3d 580, 582 (3rd Cir. 1997); *Slaughter v. Burney*, 683 A.2d 1234, 1235 (PA 1996); *Wiley v. County of San Diego*, 966 P.2d 983, 984-85 (Cal. 1998); *Peeler v. Hughes*, 909 S.W.2d 494, 498 (Tex. 1995); *Wyatt v. Sanan*, 321 Fed.Appx. 499 (7th Cir. Nov. 13, 2008); *Rodriguez v. Nielsen*, 650 N.W.2d 237, 241 (Neb. 2002); *Paulsen v. Cochran*, 826 N.E.2d 526, 532 – 34 (Ill.App.3d 2005); *Owens v. Harrison*, 86 P.3d 1266, 1268 (Wash.App. 2004); *Harris v. Bowe*, 505 N.W.2d 159, 162 (Wis. 1993).

There are many public policy and legal principles supporting the actual innocence rule, which include, but are not limited to (1) the rule is necessary to prevent a criminal from profiting or taking advantage of his own wrong; (2) allowing civil recovery for convicts would impermissibly shift responsibility for the crime away from the convicted criminal defendant, and insofar as civil recovery is concerned, only an *innocent* person *wrongfully* convicted due to inadequate representation has suffered a compensable injury; (3) that guilty defendants who receive ineffective assistance of counsel have adequate remedies in the form of post conviction relief, which include appeal and habeas corpus; (4) that the rule is necessary to avoid retrying

criminal prosecutions as tort actions where conflicting outcomes could arise; and (5) that a contrary rule might result in attorneys representing criminal defendants in a “defensive” manner in order “to insulate” their decisions, which would “encourage the additional expenditure of resources merely to build a record against a potential malpractice claim.” *See e.g., Wiley v. County of San Diego*, 966 P.2d 983, 985 – 91 (Cal. 1998).

For these reasons, the vast majority of jurisdictions are in agreement that the actual innocence rule is necessary to preserve the integrity of the criminal justice system, and that a different rule would result in poor public policy contrary to well settled principles of law. *See e.g., Levine v. Kling*, 123 F.3d 580, 582 (3rd Cir. 1997). In *Levine*, the Third Circuit Court of Appeals explained that without the “actual innocence” rule, “there would be cases in which a defendant guilty in fact of the crime with which he had been charged ... would nevertheless obtain substantial damages for the loss of his liberty during the period of his rightful imprisonment.” *Id.*

The Court logically reasoned that “not only would this be a paradoxical result, depreciating and in some cases wholly offsetting the plaintiff’s criminal punishment, but it would also be contrary to fundamental principles of both tort and criminal law.” *Id.* In this regard the Court explained that “tort law provides damages only for harms to the plaintiff’s legally protected interests, and the liberty of a guilty criminal is not one of them.” *Id.* Finally, with regard to criminal law, the Court in *Levine* noted that while a guilty criminal defendant may get lucky and obtain an acquittal through skillful representation, he certainly has no right to such a result, and the law obviously does not afford the guilty man any type of relief when he does not obtain an acquittal. *Id.*

Other courts have followed a similar line of reasoning in adopting and applying the actual innocence rule. *See, Jones v. Link*, 493 F.Supp.2d 765 (E.D. Va. 2007) (noting that the rationale behind requiring a legal malpractice plaintiff complaining about his criminal conviction to plead and prove his actual innocence is that the courts will not assist one who participates in an illegal act to profit from the act's commission); *Wiley v. County of San Diego*, 966 P.2d 983, 984-85 (Cal. 1998) (in conducting a thorough survey of the law regarding legal malpractice actions stemming from underlying criminal cases, the Court noted that the **overwhelming majority** of jurisdictions require proof of innocence because a contrary rule would “shock the public conscience, engender disrespect for courts and generally discredit the administration of justice.”) [emphasis added]; *Slaughter*, 683 A.2d at 1235 (PA 1996) (noting that when a criminal has been convicted due to the inadequacy of his counsel, the remedy is a new trial, and it is only when an innocent person is wrongfully convicted due to his attorney's negligence that the law will allow compensation for the wrong that has occurred); *O'Blennis v. Adolf*, 691 S.W.2d 498, 504 (Mo.Ct.App. 1985) (permitting criminal defendant who pled guilty to crime after conviction was overturned to sue his original attorney would permit him to “profit by his own fraud, or to take advantage of his own wrong, or to found a claim upon his iniquity, or to acquire property by his own crime”); *Rodriguez v. Nielsen*, 650 N.W.2d 237, 241 (Neb. 2002).

These same principles apply in cases such as this where the plaintiff entered into a plea agreement prior to filing his legal malpractice claim. *See Howarth v. Public Defender Agency*, 925 P.2d 1330, 1333 (AK 1996) (“a defendant convicted of a felony—including a defendant who goes free after making a salubrious plea bargain [such as *nolo contendere*]—should not be allowed to claim in court in subsequent litigation that the elements essential to his conviction did not exist. Allowing such a claim trivializes both the conviction and the criminal

process”); *Ray v. Stone*, 952 S.W.2d 220, 224 (KY 1997) (finding that public policy mandates that one cannot profit from his criminal conduct, regardless of whether the conviction is the result of a guilty verdict or a plea bargain); *Gomez v. Peters*, 470 S.E.2d 692, 695-96 (GA 1996); *Coscia v. McKenna*, 25 P.3d 670, 680 (Cal. 2001) (noting that public policy mandates that a “conviction, regardless whether it follows a plea of guilty (or *nolo contendere*) or a trial, bars proof of actual innocence in legal malpractice action”); *Wilkinson v. Zelen*, 83 Cal.Rptr.3d 779, 787 – 88 (Cal.App.4th 2008).

Despite the strong public policy reasons and overwhelming case law supporting the “actual innocence” rule, the plaintiff in this case asserts that when a criminal defendant is found to have received ineffective assistance of counsel, he “should be afforded the opportunity to recover damages from that attorney” regardless of “whether [he is] innocent or guilty of the criminal offense(s).” Appellant’s Brief at p. 8 [emphasis added]. The plaintiff’s position in this regard is absolutely untenable. It cuts flatly against all the deeply rooted public policy and legal principles discussed above, and would lead to the absurd result of permitting an individual who is in fact guilty of committing a crime to profit from that crime.

The plaintiff is in essence asserting that this Court should create an *additional* remedy—the pursuit of money damages in a legal malpractice action regardless of guilt or innocence—for an individual who is found to have received ineffective assistance of counsel. It has long been the law in West Virginia and elsewhere that upon a finding of ineffective assistance of counsel, “the proper remedy [is] to vacate the conviction and [] retry the defendant on the original indictment.” *Schofield v. West Virginia Dept. of Corrections*, 406 S.E.2d 425, 430 (W.Va. 1991); *Levine*, 123 F.3d at 582 (1997) (remedy for ineffective assistance of counsel is a new trial, not an acquittal).

In this case the plaintiff received the one recognized remedy under the law for ineffective assistance of counsel—his original conviction was reversed and the matter was remanded for a new criminal trial. *Humphries v. McBride*, 647 S.E.2d 798, 810 (W.Va. 2007). While the plaintiff asserts that he should also receive the additional remedy of being able to pursue money damages against Detch regardless of whether he is innocent or guilty of the lesser included offense of accessory before the fact to the murder of Billy Ray Abshire, the law does not, and should not, afford him such a remedy. *Slaughter*, 683 A.2d at 1235 (PA 1996) (noting that when a criminal has been convicted due to the inadequacy of his counsel, the remedy is a new trial, and it is only when an innocent person is wrongfully convicted due to his attorney’s negligence that the law will allow compensation for the wrong that has occurred).

Accordingly, in order to protect the integrity of the criminal justice system, and to prevent an individual who has been convicted of a crime from profiting from that conviction, this Honorable Court should follow the overwhelming majority of jurisdictions, adopt the actual innocence rule, and affirm the Circuit Court’s December 18, 2009 Order.

2. The plaintiff’s assertion that the “actual innocence” rule is not a recognized element for legal malpractice, and therefore should be disregarded entirely.

In further support of his argument that the actual innocence rule does not bar his claim, the plaintiff asserts that because this Honorable Court has not previously delineated “actual innocence” as a required element in a criminal legal malpractice action, it is not the law in this State and should be disregarded entirely. *See* Appellant’s Brief at pp. 19 – 20. In support of this argument the plaintiff simply outlines the required elements for a legal malpractice claim—duty, breach, cause, and harm—and then asserts that because “actual innocence” is not specifically delineated as an element, it must be disregarded. Plaintiff fails to mention, however,

that the long recognized elements for legal malpractice in West Virginia (duty, breach, cause, and harm) are the very same elements that virtually every jurisdiction in the United States has adopted for legal malpractice, including those vast majority of jurisdictions that adopted the actual innocence rule when given the opportunity. *See e.g. Brown v. Theos*, 550 S.E.2d 304, 306 (S.C. 2001).

Like every other jurisdiction that had not yet been confronted with a convicted criminal defendant seeking money damages in a legal malpractice action, this Honorable Court has not specifically opined on the actual innocence rule.³ Contrary to the plaintiff's arguments, many courts do not treat actual innocence as an *additional* element for legal malpractice, but rather as being subsumed as part of proximate causation, meaning it is simply a portion of the causation analysis and there is no need to carve out "actual innocence" as a separate and distinct element. *See e.g., Brown v. Theos*, 550 S.E.2d 304, 306 (S.C. 2001) (criminal malpractice plaintiff's no contest plea, not his former attorney's alleged negligence, proximately caused his conviction); *Ang v. Martin*, 114 P.3d 637, 642 (Wash. 2005) (holding that "proving actual innocence ... is essential to proving proximate causation" in a criminal legal malpractice action);

³ It is worth noting, however, that this Honorable Court has previously refused to accept a Petition for Appeal in circumstances not dissimilar to the instant action. *See* Order dated March 15, 2005, *John V. Marino, II, Plaintiff Below, Petitioner v. David A. Sims, Defendant Below, Respondent* (No. 041211), attached to Detch's Response to Petition for Appeal at Exhibit 4. *Marino* involved a legal malpractice action in which plaintiff sued the attorney who represented him in an underlying criminal case, specifically alleging that the defendant/attorney failed to object at crucial times in the underlying criminal action, which allegedly resulted in an improper sentencing after the defendant was convicted of the crimes for which he was charged.

The defendant/attorney in *Marino* moved to dismiss, asserting in part that because the plaintiff "has not proven, or even alleged, his innocence" in the underlying criminal matter, the plaintiff should not be entitled to obtain damages from his attorney through a collateral attack on his conviction. *See* Sims' Motion to Dismiss at ¶ 5, attached to Detch's Response to Petition for Appeal at Exhibit 5.³ Part of the defendant/attorney's argument in *Marino* was also that the actual innocence rule precluded the plaintiff from establishing that the attorney's alleged negligence proximately caused the harm, just as Detch argued in the instant action. After the Circuit Court of Randolph County granted the attorney's Rule 12(b)(6) motion to dismiss, the plaintiff appealed that ruling to this Court. *See* Order attached to Detch's Response to Petition for Appeal at Exhibit 6. On March 15, 2005, this Honorable Court denied the plaintiff's Petition for Appeal, thereby refusing to hear the plaintiff's appeal. Detch respectfully requests that this Honorable Court follow the approach it adopted in *Marino* by formally adopting the actual innocence rule.

Gomez v. Peters, 470 S.E.2d 692, 695-96 (GA 1996), ; *Harris v. Bowe*, 505 N.W.2d 159, 162 (Wis. 1993), .

Accordingly, this Court should give no consideration to plaintiff's argument that because "actual innocence" has not been previously delineated as an additional element in a criminal legal malpractice action, it should somehow be disregarded herein.

3. **The plaintiff's discussion of *Brown v. Theos* is wholly inaccurate, and the Circuit Court correctly held that it was the plaintiff's no contest plea, not Detch's alleged negligence, that proximately caused his damages.**

In its December 18, 2009 Order granting Detch's Rule 12(b)(6) motion to dismiss, the Circuit Court of Putnam County cited to various cases, among them *Brown v. Theos*, 550 S.E.2d 304 (S.C. 2001), to support its holding that it was Humphries' criminal conviction of the felony offense of accessory before the fact to murder in the second degree, not Detch's alleged negligence, that proximately caused Humphries' incarceration. *See* Order at pp. 5 – 8, attached to Detch's Response to Petition for Appeal at Exhibit 3. Although the Circuit Court of Putnam County found the *Brown* decision to be "highly analogous" to the instant action, the plaintiff attempts to attack the Circuit Court's order by asserting that *Brown* is "significantly different" from this case. Appellant's Brief at p. 26. The plaintiff is wrong.

Just as in this case, a jury convicted the plaintiff in *Brown* ("Mr. Brown") of multiple felonies for which he was sentenced accordingly. *Brown*, 550 S.E.2d at 305. Just as in this case, Mr. Brown appealed his conviction, which was denied on direct appeal. *Id.* Mr. Brown was represented by two attorneys at trial, and on direct appeal, he was represented by the same two attorneys as well as an additional attorney. *Id.* Just as in this case, after his appeal was denied and his conviction affirmed, Mr. Brown filed a habeas petition alleging that he received ineffective assistance of counsel, both at trial and on direct appeal. *Id.* Just as in this case, Mr.

Brown was successful in getting his conviction overturned for ineffective assistance of counsel, and although he was granted a new criminal trial, he instead opted to enter into a no contest plea, which resulted in an 8 year sentence (much less than the 25 year sentence he originally received). *Id.*

Just as in this case, after Mr. Brown's conviction was overturned and he entered his no contest plea, he sued his trial attorneys alleging that but for their alleged negligent representation, he "would have faired better at trial" and would not have been convicted. *Id.* [emphasis added]. Mr. Brown also sued the three attorneys that represented him on direct appeal (two of which were also his trial attorneys), alleging that but for their negligent representation, the conviction would have been reversed on direct appeal, and that he would not have entered into the no contest plea after his conviction was eventually overturned. *Id.* Like the Circuit Court in the instant action, the Supreme Court of South Carolina held that Mr. Brown's no contest plea, which operates as a legal conviction of the crimes at issue, breaks the chain of causation as to any alleged negligence of either the trial attorneys or the attorneys that represented Mr. Brown on direct appeal. *Id.* at 306.

The plaintiff incorrectly asserts that *Brown* is distinguishable because Mr. Brown was suing for "his conviction under the plea, not the time served under the prior trial conviction." Appellant's Brief at p. 26 [caps omitted]. The plaintiff has misread the facts in *Brown*. The plaintiff's assertion that Mr. Brown was not suing for the "time [he] served under [his] trial conviction" would mean that Mr. Brown didn't believe he was wrongfully convicted at trial—clearly and incorrect statement.

The facts in *Brown* unequivocally state that Mr. Brown's case proceeded to trial; that a "jury convicted [him] in December 1993;" that he was sentenced to 25 years

imprisonment; that his direct appeal was denied on May 19, 1995; and that after his conviction was overturned, he sued his trial attorneys, asserting that but for their negligent representation, the jury would not have found as it did, and he would not have been convicted, through a plea agreement or otherwise. *Brown*, 550 S.E.2d at 305 (2001). Thus, Mr. Brown was undeniably and unequivocally suing his trial attorneys alleging wrongful conviction at trial, and claiming damages as a result of the time he served in prison as a result of the alleged wrongful conviction at trial. *Id.* The plaintiff's assertion to the contrary has no merit.

Continuing with his faint attempts to distinguish the decision in *Brown*, the plaintiff asserts that in this case, he was "originally sentenced to 5 to 18 years in prison due to the trial where Detch represented him, whereas under [his no contest] plea, [he] was only sentenced to an additional 6 months." Appellant's Brief at p. 27. The plaintiff asserts that because his "damages [] herein are the years [he spent] in prison prior to taking the plea," and not for the 6 additional months he had to serve under the nolo plea, "the nolo plea could not have caused the damages alleged here." *Id.* at pp. 27 – 28. For this reason, the plaintiff asserts that the Circuit Court's reliance on the *Brown* decision is misplaced. *Id.* This argument fails for several reasons.

First, the plaintiff is incorrect that he was "originally sentenced to 5 to 18 years in prison due to the trial," because the reality is that under his trial conviction he was sentenced to 1 to 5 years in prison for conspiracy to commit murder and life in prison for accessory before the fact to commit murder. *See* Docket Sheet at Line 330, attached to Detch's Response to Petition for Appeal at Exhibit 1. Furthermore, as plainly stated in the record, the plaintiff pled no contest to accessory before the fact to murder in the second degree and was sentenced to 5 to 18 years in prison for that conviction. *See* Judgment Order at pp. 4 – 5, attached to Detch's Response to Petition for Appeal at Exhibit 2. Finally, contrary to the plaintiff's statements, the plaintiff

received credit for the 8 years 7 days he had already spent in prison, obviously meaning he was permitted to apply the time he had already spent in prison to his conviction under the plea. *Id.* The plaintiff then served an additional 7 months, and was thereafter released.

The plaintiff simply can't have it both ways—he can't be permitted to apply the time he spent in prison under the trial conviction to his conviction under the plea, and at the same time be permitted to collect money damages for that very time in prison. This is especially so when, as here, the plaintiff's voluntary conviction under the plea arises out of the same conduct as the prior trial conviction—the murder of Billy Ray Abshire. Allowing the plaintiff to collect such damages would be to improperly compensate the plaintiff for his conviction under the plea.

Accordingly, just as in *Brown*, it was the plaintiff's no contest plea that proximately caused conviction and incarceration. *Brown*, 550 S.E.2d at 306 (2001). Public policy mandates such a result. *See Coscia v. McKenna*, 25 P.3d 670, 680 (Cal. 2001) (noting that public policy mandates that a “conviction, regardless whether it follows a plea of guilty (or *nolo contendere*) or a trial, bars” subsequent legal malpractice action); *Howarth v. Public Defender Agency*, 925 P.2d 1330, 1333 (AK 1996) (legal malpractice plaintiff who pled *nolo contendere* after his conviction was overturned was barred from claim against original attorney); *Ray v. Stone*, 952 S.W.2d 220, 224 (KY 1997) (criminal legal malpractice plaintiff who pled guilty to the crimes, and the court held that “public policy compels us to conclude that any acts or omissions by [the attorney] are not the cause of [the plaintiff's] alleged damages,” and the plaintiff “must accept as the sole, proximate, and producing cause of the indictment, conviction, and resultant incarceration, his own unlawful conduct”); *Gomez v. Peters*, 470 S.E.2d 692, 695-96 (GA 1996).

For these reasons, the Circuit Court of Putnam County very accurately analogized *Brown* to the instant action, and properly held that it was the plaintiff's no contest plea, not Detch's alleged negligence, that proximately caused his damages.

4. The plaintiff incorrectly asserts that the actual innocence rule violates the public policy of West Virginia.

The plaintiff asserts that the actual innocence rule would violate the public policy of this State because it would deny West Virginians "redress ... against negligent legal representation." Appellant's Brief at p. 20. Plaintiff argues that the actual innocence rule would allow "negligent attorneys to escape justice without any regard to the negligent conduct of the attorney itself," and that this would contradict the purpose of civil lawsuits, which are designed to "make an injured plaintiff whole and to punish wrongful conduct ..." *Id.* Such arguments are without merit.

The plaintiff's arguments completely ignore the well founded public policy and legal principles behind the actual innocence rule. While the plaintiff believes a convicted criminal should be able to sue his attorney regardless of guilt or innocence, the law does not, and should not, afford a *convicted criminal defendant* the opportunity to profit from that conviction. The plaintiff's arguments also overlook the fact that the actual innocence rule does not bar *all* individuals from pursuing a legal malpractice action based on an underlying criminal case, just those individuals who have been convicted of the crime at issue, and cannot otherwise establish that the attorney's alleged negligence, rather than the antecedent criminal conduct, proximately caused the harm. Every innocent person has full redress.

Furthermore, the plaintiff's assertion that the actual innocence rule contradicts the purpose of civil lawsuits is incorrect, as numerous jurisdictions have found just the opposite to be true. Many courts have noted that the actual innocence rule is necessary to preserve the

integrity of the civil justice system because the rule denies the guilty individual the ability to profit from his crime by shifting the ultimate responsibility for the crime to a third-party. *See e.g. Levine v. Kling*, 123 F.3d 580, 582 (3rd Cir. 1997); *Wiley v. County of San Diego*, 966 P.2d 983, 988 – 89 (Cal. 1998). These courts also note that there are numerous safeguards built into the criminal justice system designed to protect against wrongful conviction or any other due process violation (such as the exclusionary rule and proof beyond a reasonable doubt), and that there are adequate remedies available to a convicted criminal defendant who believes he has been denied any of his due process rights (such as appeal and habeas relief). *Id.* Thus, the integrity of the civil justice system is in fact preserved with the actual innocence rule, and in fact the civil justice system is not necessary to protect or provide remedies to a convicted criminal defendant, because all such protection and rectification is available in the criminal justice system.

In further support of his public policy arguments, the plaintiff poses the hypothetical situation of an attorney acting “willfully and maliciously” in representing his client, and then argues that if the Court were to adopt the actual innocence rule, such “willful” and “malicious” intent would go unpunished. Appellant’s Brief at p. 21. The plaintiff is incorrect, because if an attorney representing a criminal defendant were to act with malice or willful intent, he would breach a litany of his professional responsibilities, and thereby put in license to practice law, his reputation, and his very livelihood in great jeopardy. Thus, contrary to plaintiff’s assertions, such conduct would not go unanswered and unpunished. Furthermore, any such willful or malicious conduct would not go unanswered in the civil context so long as the criminal defendant didn’t commit the criminal conduct, or was not otherwise convicted of the crime at issue.

The plaintiff's argument in this regard is also legally misplaced because it *presumes* that an attorney, an officer of this Honorable Court, will breach his professional obligations by acting with malice or willful intent. This Court has previously refused to adopt law based on the presumption that an attorney in this State would breach the Rules of Professional Conduct. *See Means v. King*, 520 S.E.2d 875, 883 (W.Va. 1999) (in holding that an attorney may confer with his client during a break in a discovery deposition, this Court noted that a contrary finding "would seem to presume lawyers will not adhere to the Rules of Professional Conduct," and that this Court "presume[s] ... that lawyers will follow the ethical tents of [the] profession"). Pursuant to its decision in *Means*, this Court should not adopt law that presumes an officer of this Court will breach the Rules of Professional Conduct.

Plaintiff also cites to the questionable case of *McKnight v. Office of Public Defender*, 936 A.2d 1036 (N.J. 2007) wherein that court posed another hypothetical situation that it believed may lead to an unfair result if it were to strictly adhere to the actual innocence rule. In *McKnight*, the Court noted that there may be a situation where an individual "has actually committed only a simple theft but [is] indicted ... [for] robbery," which carries a much higher sentence. *Id.* at 1048. The Court in *McKnight* then noted that if counsel is negligent and the defendant is convicted of robbery when in fact he only committed theft, and therefore has to spend "many more years in prison than he would have if convicted of theft," then "the elements of professional negligence ... have been breached." *Id.*

The *McKnight* hypothetical is irrelevant to the instant action. In this case the plaintiff was sentenced to 5 to 18 years in prison as a result of the plea agreement he entered into after his conviction was overturned, and he in fact had to spend more time in prison for his plea agreement than he had already spent for his trial conviction. Thus, while the *McKnight*

hypothetical contemplates a situation where an attorney's negligence results in *more time in prison* than the offense that was actually committed carries, that is not what occurred in this case, which renders the *McKnight* hypothetical irrelevant for purposes of the causation/damages analysis herein.

Furthermore, at least one court that favors the actual innocence rule has considered a situation similar to the *McKnight* hypothetical, and noted as follows:

Regardless of his asserted reasons for doing so, Gomez pled guilty to [child molestation], and the time he had to serve for this offense was the time he has already served for the prior conviction which he blames on [his attorney]. It follows that Gomez' damages were the result of his acknowledged guilt, and he is unable to show any damage proximately caused by any alleged negligence of [his attorney]. In other words, a client who has acknowledged his guilt cannot assert that his attorney's poor performance caused his incarceration. Moreover, this is true even in a situation like this one where the plaintiff pled guilty to a lesser included offense, as long as the "damage" (i.e., the time he already served on the initial conviction) is no greater than what he would have had to sustain for the offense to which he pled anyway.

Gomez v. Peters, 470 S.E.2d 692, 695-96 (GA 1996) [emphasis added].

While the Georgia Appeals Court in *Gomez* appears to take the position that a plaintiff may be able to state cognizable damages if he has spent more time in prison than the offense to which he pled to carries, other courts, as discussed above, adhere to a more pure interpretation of the actual innocence rule. See e.g., *Howarth v. Public Defender Agency*, 925 P.2d 1330, 1335 – 1337 (AK 1996). Under the latter approach, the courts hold that the *sole remedy available to a convicted criminal who has suffered ineffective assistance of counsel* is a new criminal trial, and recovery in the civil court system will be afforded only to the *innocent* person who was *wrongfully* convicted due to his attorney's negligence. But under either approach, *Humphries* has suffered no damages, because the crime for which he was convicted of

under his no contest plea (accessory before the fact to murder in the second degree) carried more time in prison than what he had previously spent. As such, plaintiff can state no damages proximately caused by Detch, and his claims are barred as a matter of law.

Finally, in another attempt to attack the December 18, 2009 Order granting Detch's motion to dismiss, the plaintiff misinterprets the Third Circuit Court of Appeals' decision in *Levine v. Kling*, 123 F.3d 580 (3rd Cir. 1997), a decision which was cited in the December 18, 2009 Order at issue. The plaintiff first asserts that the Court in *Levine* "did not bar every convicted person from bringing a legal malpractice claim" because the Court concluded that "should Levine succeed in getting his conviction overturned, he can bring a new malpractice suit." Appellant's Brief at p. 23 [emphasis omitted]. Therefore, the plaintiff asserts, a convicted person can state a claim for legal malpractice so long as the underlying conviction is overturned by the grant of a writ of habeas corpus. *Id.*

The plaintiff misstates the discussion in *Levine*. While the plaintiff is correct that the Court in *Levine* did state that "should [Mr. Levine] succeed in getting his conviction overturned, he can bring a new malpractice suit," the plaintiff fails to mention that in the very next sentence in *Levine*, the Court further stated that in any such malpractice case, Mr. Levine will have to prove "that he was in fact innocent, and not just lucky" in getting his conviction overturned. *Levine*, 123 F.3d at 583 (1997). *Levine* clearly stands for the proposition that a convicted criminal defendant must not be afforded the opportunity to profit from his conviction, and any assertion to the contrary has no merit. The Circuit Court of Putnam County accurately cited to the decision in *Levine*, and the plaintiff's attempt to attack the order granting Detch's motion to dismiss by misstating the holding in *Levine* has no merit.

For these reasons, the plaintiff's public policy arguments have no merit.

5. The plaintiff incorrectly asserts that his no contest plea, and resultant conviction, are inadmissible in this case.

As an alternative argument, the plaintiff asserts that even if this Court were to adopt the “actual innocence” rule, his claim can nevertheless go forward because his *nolo contendere* plea is not an admission of guilt and is otherwise inadmissible in this case. In support of his argument that his *nolo contendere* plea is inadmissible in this case, the plaintiff relies on Rule 410 of the West Virginia Rule of Evidence and Rule 11 of the West Virginia Rule of Criminal Procedure. Plaintiff’s arguments are without merit.

First, it is well settled that a plea of *nolo contendere* or no contest, insofar as the consequences of the criminal case are concerned, is equivalent to a plea of guilty. *See State v. Evans*, 508 S.E.2d 606, 610 (W.Va. 1998) (noting that once an individual is “convicted, whether as a result of a plea of guilty, *nolo contendere*, or ... trial, convictions stand on the same footing”). With regard to the plaintiff’s arguments that Rule 410 of the W.V. Rules of Evidence and Rule 11 of the W.V. Rules of Criminal Procedure establish that his *nolo contendere* plea is inadmissible in this case, this Court’s decision *Evans* speaks directly to this issue.

In *Evans*, this Court considered the admissibility of a *nolo contendere* or no contest plea in light of Rule 410 of the W.V. Rules of Evidence and Rule 11 of the W.V. Rules of Criminal Procedure, holding as follows:

Upon analysis then, 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. The rules, however, do not proscribe the use of a conviction premised on such a *nolo* plea.

Id. at 610 [emphasis added].

Thus, in accordance with this Court's decision in *Evans*, the undisputed fact that Humphries was *convicted*, pursuant to his *nolo contendere* plea, of being an accessory before the fact to murder in the second degree is admissible in this legal malpractice action. His nolo plea establishes his conviction, and pursuant to the actual innocence rule, he cannot profit from his conviction under the plea. Moreover, as discussed above, Humphries' conviction of accessory before the fact to murder in the second degree resulted in a sentence of 5 to 18 years in prison. Humphries then received credit for the time he had served in prison under the trial conviction and then had to spend more time in prison for his plea conviction than he had previously spent for his previous trial conviction, which undeniably and unequivocally establishes that his no contest plea, not Detch's alleged negligence, proximately caused Humphries' incarceration. *Brown*, 550 S.E.2d at 306 – 07; *Howarth*, 925 P.2d at 1334 – 1336 (1996).

Once again, the plaintiff simply can't have it both ways—he can't be permitted to apply the time he spent in prison under the trial conviction to his conviction under the plea, and at the same time be permitted to collect money damages for that very time in prison. This is especially so when, as here, the plaintiff's voluntary conviction under the plea arises out of the same conduct as the prior trial conviction—the murder of Billy Ray Abshire. Allowing the plaintiff to collect such damages would be to improperly compensate the plaintiff for his conviction under the plea.

Furthermore, and regardless of this Court's holding in *Evans*, Detch submits that under this unique set of circumstances, which have not heretofore been before this Court, plaintiff's no contest plea must act as a bar to his claim. *Brown*, 550 S.E.2d at 306 – 07; *Coscia v. McKenna*, 25 P.3d 670, 680 (Cal. 2001) (noting that public policy mandates that a “conviction, regardless whether it follows a plea of guilty (or *nolo contendere*) or a trial, bars” subsequent

legal malpractice action); *Howarth*, 925 P.2d at 1333 – 1335 (AK 1996) (legal malpractice plaintiff who pled *nolo contendere* after his conviction was overturned was barred from claim against original attorney).

Finally, as set forth in the Circuit Court’s December 18, 2009 Order granting Detch’s motion to dismiss, other courts have been faced with the same arguments that Humphries makes relating to the admissibility of a plea agreement, and the courts have simply refused to interpret the rules in such a way as to permit a legal malpractice plaintiff from profiting from a criminal conviction. *See* Order at pp. 6 – 8. Detch respectfully asks that this Court do the same.

For these reasons, as well as those set forth in the December 18, 2009 Order, the Circuit Court correctly relied on plaintiff’s no contest plea when it found that the plaintiff’s conviction under that plea, not Detch’s alleged negligence, caused his incarceration.

6. The plaintiff’s assertion that this Court should consider the alleged “reasons” why he entered into the no contest plea when considering the viability of his claim has no merit.

Plaintiff asserts that courts should consider the alleged “reasons” why his plea agreement was entered into when determining whether his conviction under the plea agreement bars his legal malpractice claim. Plaintiff alleges that because he entered into the plea agreement for various “personal reasons” only, and in reality he “emphatically denied guilt,” he should be able to assert his innocence in this case. Appellant’s Brief at p. 32.

First, the plaintiff’s assertion that he “emphatically denied his guilt” is in stark contrast to the plain language of the July 23, 2007 Judgment Order, which recites a litany of items relating to Humphries’ understanding of the effect of his *nolo contendere* plea, including: (i) that Humphries agreed to the terms of the written plea agreement, (ii) that Humphries had not

been forced, threatened, or coerced to enter into the plea agreement, and that he voluntarily entered into the plea agreement, (iii) that Humphries fully understood the nature of the charges set forth in the indictment, (iv) that Humphries did not wish to proceed to trial, (v) that Humphries **understood** that by entering the plea of *nolo contendere*, he would be **incriminating himself**, (vi) and that **he was being convicted** of the crime of accessory before the fact to murder and **waiving all rights to appeal** that conviction. See Judgment Order at pp. 2 – 5, attached to Response to Petition for Appeal at Exhibit 2. The phrase “Do you read, write, and speak the English language” comes to mind here.

After the Circuit Court of Greenbrier County made all of the above affirmative findings, the Circuit Court found that Humphries entered into the plea agreement freely, voluntarily and upon his own free will, and it therefore adjudged him to be **guilty** of the crime of being an accessory before the fact to murder. *Id.* at p. 5. This is hardly an emphatic denial of guilt—in fact it is just the opposite. Humphries clearly understood he was incriminating himself, he clearly understood he was being convicted of being an accessory before the fact to the murder of Billy Ray Abshire. Whatever his “reasons” for doing so, this Honorable Court should not allow the plaintiff to pretend he was not convicted of accessory before the fact to murder for purposes of the instant legal malpractice action.

The plaintiff claims that he entered into the plea agreement because he did not want to “await a second lengthy trial that would clear his name but prolong his time in prison and risk severe challenges to his feeble health.” Appellant’s Brief at pp. 5 – 6. This is not the first time a legal malpractice plaintiff has urged a court to consider such subjective reasons when opining on the viability of a criminal legal malpractice claim. See *O’Blennis v. Adolf*, 691 S.W.2d 498 (Mo. 1985).

The plaintiff in *Adolf* was originally convicted of certain felonies for which he was sentenced to twenty years in prison, and after his conviction was overturned for ineffective assistance of counsel, he pled guilty to the felonies at issue and was released on time served. *Id.* at 499. In determining whether to accept the guilty plea, the court at the plea hearing made numerous inquiries of the defendant's understanding of the plea, including that he knew his rights, that he was entering the plea voluntarily, and that by entering the plea he was incriminating himself. *Id.* at 499 – 500.

After entering into the guilty plea, the plaintiff filed a legal malpractice action against his original attorney, and when the attorney responded with a motion for summary judgment asserting that the guilty plea barred the claim, the plaintiff filed an affidavit claiming that he pled guilty “only to avoid the mental anguish of a second jury trial on these charges and to eliminate the possibility of returning to prison.” *Id.* at 500. The Court in *Adolf* refused the plaintiff's asserted subjective reasons for entering into the plea agreement, holding that they could not serve as a valid collateral attack on the plea:

[Plaintiff's] subjective reasons for entering the plea do not form a basis for a collateral attack on the judgment of conviction which his malpractice suit is [sic]. It would be a dangerous precedent indeed to allow civil litigation premised upon an improper conviction to proceed on the basis of a collateral attack upon that conviction[,] particularly where that attack is based on subjective reasons for entering a guilty plea.

Id. at 503 – 04 [emphasis added].

Regardless of Humphries' alleged subjective reasons for entering his plea, the fact remains that the plea was entered and Humphries was convicted of being an accessory before the fact to the murder of Billy Ray Abshire. The Circuit Court of Greenbrier County accepted Humphries' plea only after ensuring that he fully understood the consequences of his plea, and to

now consider Humphries' alleged reasons for entering into the plea agreement would be to undermine and contradict the plain findings set forth in July 23, 2007 Judgment Order accepting the plea. *See* Detch's Response to Petition for Appeal at Exhibit 2. It would be a dangerous precedent indeed to direct courts to consider such subjective reasons in an attempt to collaterally attack criminal convictions, one that would provide very little guidance to lower courts and result in further litigation surrounding the alleged reasons a convicted criminal enters into a plea.

This Court should therefore refuse to consider the plaintiff's asserted subjective reasons for entering into the plea, and hold that the plaintiff must live with the fact that he voluntarily entered into the plea after a full understanding of his rights.

7. The plaintiff's discussion of *Walden v. Hoke* misses the point.

As alternative grounds for dismissing the plaintiff's legal malpractice action, the Circuit Court of Putnam County relied in part on this Court's decision in *Walden v. Hoke*, 429 S.E.2d 504 (W.Va. 1993). Although the Circuit Court relied on the *Walden* decision to support its collateral estoppel conclusion, which is separate and distinct from his proximate cause discussion, the plaintiff makes incorrect statements about the *Walden* decision that relate to both the collateral estoppel and causation analysis herein.

In *Walden*, of course, this Court barred the plaintiff's legal malpractice claim against the attorney who represented her in her divorce proceeding because such claim contradicted the plain terms of her separation agreement, which she entered into freely, knowingly, and without being subjected to fraud or duress. *Id.* at 507 – 08. Humphries contends that *Walden* has no bearing on the instant action because the plaintiff in *Walden* was suing the lawyer who was representing her at the time she entered into the separation agreement, and here

the plaintiff is not suing the attorney who was representing him when he entered into his no contest plea. Appellant's Brief at pp. 29 – 30. Plaintiff asserts that since he is suing the attorney who represented him at his initial criminal trial, rather than the attorney who handled his no contest plea, *Walden* is irrelevant.

The plaintiff misses the point entirely. As discussed above throughout this Response Brief, the point is that by virtue of the facts that after his conviction was overturned (1) the plaintiff pled no contest and was therefore convicted of accessory before the fact to the murder of Billy Ray Abshire, and (2) was sentenced to 5 to 18 years in prison and had to serve more time than he had already served under his trial conviction, he cannot as a matter of law establish that Detch's alleged negligence, rather than his no contest plea, proximately caused his incarceration. Plaintiff's continued attempt to draw some distinction and create some legal significance out of the fact that Detch did not represent the plaintiff when he was ultimately convicted of accessory before the fact to murder misses the point and has no bearing on this case.

As for the collateral estoppel aspect of *Walden*, for the reasons set forth in the Circuit Court's December 18, 2009 Order, the Circuit Court correctly held that the plaintiff is collaterally estopped from contradicting his valid conviction and asserting that he was really innocent of accessory before the fact to murder in the second degree. It is indisputable that the plaintiff had a full and fair opportunity to litigate his guilt or innocence after his initial conviction was overturned. With a full and complete understanding of the nature of the charges set forth in the indictment and the consequences of his plea, including that he would be incriminating himself, the plaintiff instead pled no contest and was therefore convicted of being an accessory before the fact to murder, and he waived all rights to appeal that conviction. *See* Judgment Order at pp. 2 – 5, attached to Response to Petition for Appeal at Exhibit 2. Plaintiff should be

collaterally estopped from denying or contradicting that conviction in this case, especially when the effect of permitting the plaintiff's claim to proceed would be to permit the plaintiff to profit from his conviction. See *Howarth v. Public Defender Agency*, 925 P.2d 1330, 1333 (AK 1996) (“public policy grounds [mandate] that a civil plaintiff is collaterally estopped from re-litigating any element of a criminal charge to which he has pled *nolo contendere*”).

The plaintiff may argue that this Court's decision in *University of West Virginia v. Fox*, 475 S.E.2d 91 (W.Va. 1996), where under the circumstances of that case a no contest plea did not have preclusive effect, leads to a different result. However, *Fox* is distinguishable from the instant action because it involved a grievance proceeding filed by an employee that was terminated from his employment; it did not involve a legal malpractice action filed by a *convicted criminal defendant* who was later seeking to profit from his conviction. It did not pose any of the unique public policy principles posed in the instant action—principles which have led many courts to conclude that a convicted criminal defendant will be collaterally estopped from attempting to establish that a valid and binding criminal conviction was proximately caused by his attorney's alleged negligence. See e.g., *Coscia v. McKenna*, 25 P.3d 670, 679 – 81 (Cal. 2001); *Adolf*, 691 S.W.2d at 503 – 05 (1985). *Brown*, 550 S.E.2d at fn 1.

In *Cosica*, the court specifically explained that even when the technical elements of collateral estoppel are arguably not present, public policy nevertheless mandates that an intact conviction, by plea agreement or otherwise, precludes one from attempting to establish actual innocence:

Like the majority of out-of-state cases on point, we hold that an intact conviction precludes recovery in a legal malpractice action even when ordinary collateral estoppel principles otherwise are not controlling ... the unique practical and policy considerations against permitting a criminal defendant with an intact conviction to recover on a malpractice claim against his or her former criminal

defense counsel [mandate that] such a conviction, regardless whether it follows a plea of guilty (or nolo contendere) or a trial, bars proof of actual innocence in a legal malpractice action.

Id.

Accordingly, pursuant to the Circuit Court's December 18, 2009 Order, as well as those courts that have examined the preclusive effect of an intact criminal conviction on a subsequent legal malpractice action, plaintiff is collaterally estopped from establishing his actual innocence in the instant action.

8. Regardless of all of the plaintiff's arguments herein, the fact remains that he has not been fully exonerated, which also bars his claim as a matter of law.

Although not directly addressed in the Circuit Court's December 18, 2009 Order, many courts note that in addition to having to establish actual innocence, the plaintiff must also establish that he has been exonerated from the criminal conduct at issue. *See e.g., Jones v. Link*, 493 F.Supp.2d 765 (E.D. Va. 2007); *Coscia*, 25 P.3d at 679 – 82 (2001). Here, of course, while the plaintiff's initial conviction was overturned, he subsequently pled no contest to accessory before the fact to murder in the second degree, and he remains a convicted criminal for that crime. As such, plaintiff has not been fully exonerated, which also bars his claims herein.

9. The plaintiff's argument that the Hon. O.C. Spaulding, as the presiding judge, had no authority to grant Detch's motion to dismiss is meritless.

As a final attempt to attack the Circuit Court's December 18, 2009 Order granting Detch's motion to dismiss, plaintiff argues that Judge Spaulding, as presiding judge, lacked the authority to grant Detch's motion because it was contrary to statements that Judge Eagloski made from the bench at an earlier time when he was presiding over this matter. Plaintiff cites no

authority whatsoever to support this assertion, and in fact there is absolutely no merit to plaintiff's argument. Judge Spaulding, as the presiding judge, had full and absolute authority to adjudicate this matter in accordance with the law. Judge Eagloski never entered an Order denying Detch's motion to dismiss. Detch properly renewed his motion to dismiss, and the Circuit Court properly dismissed the plaintiff's claim. Plaintiff's assertion that the presiding judge somehow lacked authority to rule on a motion is completely without merit.

CONCLUSION

For all of the foregoing reasons, as well as those set forth in the Circuit Court's December 18, 2009 Order, Detch respectfully requests that this Court adopt the actual innocence rule and affirm the December 18, 2009 Order.

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CERTIFICATE OF SERVICE

I, Ben M. McFarland, one of the attorneys for the respondent Paul S. Detch, do hereby certify that service of the attached **Appellee Paul S. Detch's Response to Appellant's Brief** was made upon the following counsel of record for the petitioner by forwarding a true and exact copy thereof in a properly stamped and addressed envelope, deposited in the regular course of the United States mail, on this 20th day of August, 2010:

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