STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT II

Thomas P. Jasin,

Plaintiff-Appellant,

v. Appeal No. 006AP002647

Michael Best & Friedrich LLP,

Defendant-Respondent.

ON APPEAL FROM THE CIRCUIT COURT
FOR WAUKESHA COUNTY, THE HONORABLE
MARK R. GEMPELER, PRESIDING

BRIEF OF *AMICUS CURIAE*, THE INNOCENCE NETWORK

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SUMMARY OF ARGUMENT

The central issue presented by this appeal is whether Wisconsin should adopt a rule which provides that malpractice claims by criminal defendants against their former defense counsel accrue only after the criminal defendant has been exonerated. Such an approach – and the one adopted by the majority of states that have considered the issue – is commonly referred to as the "one-track exoneration rule," whereby a criminal malpractice claim does not accrue, and therefore cannot be commenced, unless and until the wrongfully convicted defendant is exonerated.

The alternative approach – adopted by the Court below – is known as the "two-track exoneration rule" and requires the convicted criminal defendant to proceed along "two tracks" simultaneously: one the pursuit of post-conviction relief and the other filing a complaint for legal malpractice before exoneration. This rule is contrary to well-settled legal principles prohibiting collateral attacks on convictions and undermines the very policy objectives it purports to serve – namely, protection of the rights of criminal defendants, on one hand, and the rights of criminal defense attorneys who are sued for malpractice, on the other.

As discussed below, the Circuit Court erred in adopting the two-track exoneration rule.

As a threshold matter, the decision below is inconsistent with federal and Wisconsin law prohibiting collateral attacks on unreversed convictions. It is a longstanding principle of federal law that civil rights claims brought by convicted criminals under 42 U.S.C. § 1983 that seek to challenge the validity of the underlying conviction – claims which are closely analogous to state law criminal malpractice claims – do not accrue until the conviction has been invalidated. This principle is deeply rooted in the doctrine of collateral estoppel as well as strong public policy concerns: it would be both inefficient and repugnant to the criminal justice system to permit convicted criminals to challenge their convictions in a civil proceeding, the outcome of which could undermine the integrity of an existing criminal court judgment.

Likewise, it is the well-settled law of this State that a standing criminal conviction has collateral estoppel effect on a legal malpractice claim. Indeed, Wisconsin courts have embraced the federal accrual principle described above and have held that a criminal defendant cannot maintain a

cause of action in tort (*e.g.*, a malicious prosecution claim, which, like a criminal malpractice claim, necessarily implies the invalidity of the underlying conviction) unless the criminal proceeding has terminated in the criminal defendant's favor. The basic premise underpinning this rule is the fundamental principle that a convicted criminal does not have a legally-protected interest unless his conviction has been invalidated.

While the Circuit Court correctly held that exoneration should be a required element of a criminal malpractice claim, it failed to apply these federal and Wisconsin law principles to the statute of limitations issue – the issue now before this Court. As shown below, the one-track exoneration rule should be adopted as the law of this State because, unlike the two-track approach, it promotes the finality and sanctity of criminal judgments and provides a more efficient bright-line rule, while still preserving the right of criminal defendants to bring their claims after exoneration has been achieved.

Further, from a public policy standpoint, the one-track rule provides greater protection to wrongfully convicted defendants, whose resources are typically

consumed by the post-conviction relief process and whose ability to investigate the bases of a potential malpractice claim is extremely limited during incarceration. The one-track rule also strikes a fair balance between the rights of criminal defendants and the goal of protecting defense attorneys from meritless malpractice suits and the resulting threat of prohibitively expensive insurance premiums – a threat that could discourage (if not prevent) competent attorneys from taking on criminal defense representations, including pro bono work on behalf of the indigent.

Moreover, adoption of the one-track rule would significantly decrease the burden on state court dockets by limiting the number of frivolous claims filed. Removal of all pre-exoneration claims from the docket would dramatically reduce the number of claims to be adjudicated and would narrow the universe to claims more likely to succeed on the merits, thereby preserving judicial resources. These reasons weigh heavily in favor of the one-track exoneration rule.

ARGUMENT

I. THE CIRCUIT COURT'S ADOPTION OF THE TWO-TRACK EXONERATION RULE CONTRAVENES WELL-SETTLED FEDERAL LAW AND WISCONSIN LAW PROHIBITING COLLATERAL ATTACKS ON CONVICTIONS

A. The Decision Below Is Inconsistent With Federal Law

The Circuit Court's adoption of the two-track exoneration rule is at odds with the longstanding federal law principle that a criminal defendant cannot state a cognizable claim for a civil rights violation unless and until the conviction has been invalidated. In *Heck v. Humphrey*, 512 U.S. 477 (1994), the U.S. Supreme Court held that "in order to recover damages for allegedly unconstitutional conviction or imprisonment, or for other harm caused by actions whose unlawfulness would render a conviction or sentence invalid, a [42 U.S.C.] § 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 … or called into question by a federal court's issuance of a writ of habeas corpus." *Id.* at 486-87 (footnote omitted). The rationale behind the holding in *Heck* – namely, that "civil tort actions are not appropriate vehicles for challenging the

validity of outstanding criminal judgments" (*id.* at 485) – applies with equal force to state law criminal malpractice claims, and supports adoption of the one-track exoneration rule here.

The *Heck* decision established a well-reasoned bright-line rule: a claim for damages relating to an unreversed conviction is not cognizable under § 1983. *Id.* at 487. That is, a federal civil rights claim "attributable to an unconstitutional conviction or sentence *does not accrue* until the conviction or sentence has been invalidated." *Id.* at 490 (footnote omitted) (emphasis added). Thus, in any case where "a judgment in favor of the plaintiff would necessarily imply the invalidity of his conviction or sentence," the civil claim "must be dismissed unless the plaintiff can demonstrate that the conviction or sentence has already been invalidated." *Id.* at 487.

This approach has been followed by state and federal courts across the country and was reaffirmed by the Supreme Court just two months ago in *Wallace v. Kato*, 127 S. Ct. 1091 (2007) (analyzing *Heck* in the context of a § 1983 claim for unlawful arrest). Indeed, state courts throughout the nation have applied *Heck* to criminal malpractice claims. *See,*

e.g., *Britt v. Legal Aid Soc'y, Inc.*, 741 N.E.2d 109, 112 (N.Y. 2000); *Day v. Zubel*, 922 P.2d 536, 539 (Nev. 1996).

B. The Policy Against Collateral Attacks Underlying The *Heck* Rule Has Been Embraced By Wisconsin Courts

The *Heck* rule has long been a part of Wisconsin jurisprudence. In *Robinson v. City of West Allis*, 239 Wis. 2d 595, 619 N.W.2d 692 (2000), the Wisconsin Supreme Court interpreted the *Heck* doctrine and stated unequivocally that "[i]f the [civil] action would imply the invalidity of the prior conviction or sentence, it must be dismissed unless the plaintiff can show that the conviction or sentence has already been invalidated." *Id.* at 619, 619 N.W.2d. at 703. Further, in *Gast v. Marquardt*, 209 Wis. 2d 602, 568 N.W.2d 38 (Ct. App. 1997), while not explicitly relying on *Heck*, this Court applied *Heck*'s reasoning and held that "litigants may not maintain lawsuits for malicious prosecution unless their criminal proceedings terminated in their favor." *Id.* at 602, 568 N.W.2d at 38.

The well-developed body of law in this State embracing *Heck* is entirely consistent with – and, indeed,

compels – adoption of the one-track exoneration rule.[1] Because criminal malpractice claims, like claims for malicious prosecution and other tort-based claims, necessarily call into question the validity of the underlying conviction (*see, e.g.*, *Doggett v. Perez*, 348 F. Supp. 2d 1169, 1176 (E.D. Wash. 2004)), they should be governed by the same accrual principles mandated by the Supreme Court in *Heck* and consistently followed by the courts of this State.

In light of the extensive body of Wisconsin law applying the *Heck* doctrine, the Circuit Court's adoption of the two-track rule, with its premise that the convicted defendant's malpractice claim accrues before exoneration, is thoroughly inconsistent with – and effectively undermines – Wisconsin's well-established prohibition against collateral attacks on convictions.[2] Indeed, the Circuit Court's adoption

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[1] Wisconsin's adoption of the *Heck* rule is complemented by another well-settled rule of Wisconsin law: that the criminal defendant must be able to prove "actual innocence" in order to prevail on a criminal malpractice claim. *See Hicks v. Nunnery*, 253 Wis. 2d 721, 643 N.W.2d 809 (Ct. App. 2002), *appeal denied*, 259 Wis. 2d 101, 657 N.W.2d 703 (2003); *see also* Brief of Plaintiff-Appellant ("App. Br.") at 16-19.

[2] The Circuit Court's adoption of the two-track approach also runs afoul of Wisconsin's collateral estoppel doctrine, which, like the federal principle embodied in *Heck*, precludes a convicted criminal from re-litigating his innocence until after the conviction has been invalidated. *See Harris v. Bowe*, 178 Wis. 2d 182, 505 N.W.2d 159 (Ct. App. 1993); *Crowall v. Heritage Mut. Ins. Co.*, 118 Wis. 2d 120, 346 N.W.2d 327 (Ct. App. 1984); *see also* App. Br. at 19.

of the two-track approach is fundamentally inconsistent with Wisconsin law, as it *encourages* criminal defendants to file malpractice claims before exoneration – an outcome that stands in direct conflict with *Heck* and Wisconsin's principles of collateral estoppel.

II. THE CIRCUIT COURT'S DECISION IGNORES COMPELLING PUBLIC POLICY CONSIDERATIONS IN FAVOR OF THE ONE-TRACK EXONERATION RULE

As discussed below, numerous public policy concerns support adoption of the one-track rule, including: (i) the disadvantages suffered by criminal defendants who are required to file malpractice claims in the midst of fighting for post-conviction relief; (ii) the damaging consequences of frivolous malpractice claims for criminal defense counsel; (iii) the heavy burden imposed on judicial dockets by the filing of preemptive, often frivolous malpractice claims; and (iv) the depletion of judicial resources that occurs in the absence of a bright-line rule governing the dismissal of pre-exoneration malpractice claims. Indeed, while the Circuit Court's opinion ("Op.") points to *one* possible advantage of the two-track approach (namely, that attorneys who are sued for malpractice may be notified of pending claims earlier than

if exoneration is a pre-condition to filing) (Op. at 14-15), which in and of itself is a questionable justification for the rule, this sole "benefit" of the two-track rule is far outweighed by the numerous advantages of the one-track approach.

A. Application Of The Two-Track Rule Would Unduly Prejudice The Rights Of Criminal Defendants And Adversely Affect Criminal Defense Counsel

Adoption of the two-track approach poses significant risks to the rights of criminal defendants, even if the malpractice claim is stayed during the pendency of post-conviction proceedings. For one thing, adherence to the two-track system forces criminal defendants to wage battle on two fronts – attacking their convictions while also pursuing malpractice claims against their counsel – a daunting and inherently unfair proposition, particularly for those defendants whose lives and liberty are at stake. *See Shamaeizadeh v. Cunigan*, 182 F.3d 391, 398-99 (6th Cir.), *cert. denied*, 528 U.S. 1021 (1999).

In addition, criminal defense attorneys who are sued for malpractice will likely (and understandably) retreat from their roles as advocates to take on a defensive posture in reaction to the suit, thereby making it more difficult for

criminal defendants to vindicate their rights in post-conviction proceedings. *See Wiley v. County of San Diego*, 966 P.2d 983, 991 (Cal. 1998); *Gibson v. Trant*, 58 S.W.3d 103, 115 (Tenn. 2001). Indeed, on direct appeal, trial lawyers may be expected to help flesh out issues arising from the criminal proceedings, including their own missteps; yet a lawyer would be far more reluctant to cooperate in the post-conviction appeals process with a malpractice claim pending against him.

If the Circuit Court's decision stands, lawyers who represent defendants in post-conviction proceedings – including organizations like the Network – will be obligated to advise their clients to file civil suits against their trial lawyers (and assist them in doing so, if possible) in every case in which a claim of ineffective assistance of counsel or malpractice might be possible. These lawyers (or pro se defendants) are frequently neither positioned nor qualified to file such claims, yet will have to divert attention to potential civil suits. Failure to provide this advice under the two-track regime could result in the statute of limitations running on a criminal defendant's malpractice claim, and could itself constitute malpractice.

Further, contrary to the Circuit Court's view that the one-track rule could disadvantage criminal defense lawyers by exposing them to the threat of "stale or lost evidence" (Op. at 14), it is the Circuit Court's adoption of the two-track approach that will have a far more detrimental impact on the criminal defense bar and pro bono representation of indigent defendants. As an initial matter, the Circuit Court's assertion that the two-track approach would prevent stale claims is misplaced: defense attorneys are notified of ineffective assistance of counsel claims immediately after such claims are filed (*see State v. Machner*, 92 Wis. 2d 797, 804, 295 N.W. 2d 905, 908-09 (Ct. App. 1979)), and given that a civil claim for criminal malpractice is almost always preceded by an ineffective assistance of counsel claim, the likelihood that the lawyer would be blindsided by the malpractice claim is extremely small.[3] *See Glaze v. Larsen*, 83 P.3d 26, 34 (Ariz. 2004); *Noske v. Friedberg*, 670 N.W.2d 740, 746 (Minn. 2003).

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[3] In this regard, the Court should note the extremely unusual circumstances of the case at bar: unlike the typical federal criminal case, in which the median time between conviction and sentencing is 92 days, the period that elapsed between Mr. Jasin's conviction and his sentencing was *68 months*, or nearly six years. *See* App. Br. at 9; *see also* JUDICIAL BUSINESS OF THE UNITED STATES COURTS 2005, Table D-12, located at http://www.uscourts.gov/judbus2005/contents.html.

Moreover, while a criminal malpractice claim is stayed pending the outcome of post-conviction proceedings, the defendant-lawyer will likely be burdened with skyrocketing malpractice insurance premiums – a result that could have far-reaching consequences within the criminal defense bar and the pro bono community. *See Glaze*, 83 P.3d at 32; *Bailey v. Tucker*, 621 A.2d 108, 114 (Pa. 1993). This problem could be avoided, however, by using post-conviction relief as a filter for frivolous suits (*i.e.,* the one-track approach), which would result in substantially fewer claims being filed.

Finally, "a rule that encourage[s] the early filing of malpractice suits against counsel unsuccessful at trial would likely have a severe and negative impact on the functioning of the criminal justice system, which necessarily relies heavily on appointed counsel and public defenders' offices to provide indigent defense at trial and on direct appeal." *Glaze*, 83 P.3d at 32; *see also Schreiber v. Rowe*, 814 So. 2d 396, 399 (Fla. 2002). Under the two-track rule, there is a risk that more criminal defense attorneys or prospective new lawyers will avoid representing criminal defendants due to the constant threat of malpractice actions

that will sit idle on the docket. *See, e.g.*, *Bailey*, 621 A.2d at 114.

B. Judicial Economy Will Be Best Served By Adoption Of The One-Track Exoneration Rule

Adoption of the one-track exoneration rule would promote judicial economy by: (a) reducing the number of frivolous claims that are filed; (b) establishing a bright-line test to be applied by courts in determining whether a criminal malpractice claim should remain on the docket; and (c) allowing the courts to focus their resources on adjudication of the far smaller number of claims that satisfy the exoneration requirement.

It is undeniable that adoption of the two-track approach could have a negative impact on the dockets of Wisconsin courts, insofar as it "encourages the filing of malpractice suits that may be unnecessary." *Glaze*, 83 P.3d at 34. As a result of the Circuit Court's decision, there could be a sharp increase in the number of criminal malpractice claims filed – regardless of the merit of such claims – just to get "placeholder" actions on file, as required by the two-track rule.

The Circuit Court's proposed solution to the flaws inherent in the two-track approach is illusory. *See* Op. at 14-15. The concept that all premature claims should be stayed during post-conviction proceedings, or, alternatively, that such claims can be "summarily dismiss[ed]" (Op. at 15), is an unworkable plan that creates more problems than it solves. As a threshold matter, courts will be forced to expend significant resources in evaluating whether to stay or dismiss a claim at all, a process that "would squander scarce judicial resources." *Therrien v. Sullivan*, 891 A.2d 560, 564 (N.H. 2006). The Circuit Court's proposed solution fails to address *how* the courts will assess, in the context of a summary proceeding, whether a criminal malpractice claim is frivolous, and the *time* and *resources* that would be required to fairly and accurately make that determination.

The practical (and adverse) impact of the two-track system cannot be ignored. Implementation of a mechanical "just stay it or dismiss it" approach will do nothing to remedy the problem of overcrowded dockets; the automatic stay of some (mostly frivolous) claims will merely postpone their adjudication and leave the dockets flooded, while the immediate dismissal of still other (possibly well-

grounded) claims will cause undue prejudice to litigants with meritorious claims and lead to more litigation at the appellate level. On the other hand, the one-track approach empowers courts to quickly and easily remove pre-exoneration claims from the docket – eliminating the need for any other analysis or expenditure of resources – and focus on the far smaller number of claims that satisfy the rule. *See Griffin v. Goldenhersh*, 752 N.E.2d 1232, 1239 (Ill. App. Ct. 2001); *Steele v. Kehoe*, 747 So. 2d 931, 933 (Fla. 1999). Adoption of the one-track rule would also align Wisconsin with the majority of other states that have considered the issue. *See* App. Br. at 24, 29 & Appx. 1.

CONCLUSION

For the foregoing reasons and those set forth in Mr. Jasin's brief, the Innocence Network urges the Court to reverse the Circuit Court's decision and adopt the one-track exoneration rule as the law of Wisconsin.

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April 24, 2007

CERTIFICATION

I hereby certify that this brief conforms to the rules contained in §§ 809.19 (8) (b) and (c) for a brief produced with a proportional serif font: minimum printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of a minimum of 2 points, maximum of 60 characters per full line of body text. The length of this brief is 3,000 words.

Dated this 24th day of April, 2007.

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