IN THE

SUPREME COURT OF VIRGINIA

Record No. 141239

JUDY GAYLE DESETTI,
Appellant-Plaintiff,

v.

FRANCIS CHESTER, et al.,
Appellees-Defendants.

BRIEF OF APPELLANT

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TO: THE HONORABLE CHIEF JUSTICE AND JUSTICES OF THE SUPREME COURT OF VIRGINIA

STATEMENT OF THE CASE

A. SUMMARY

Reversal of a conviction through post-conviction relief does not remedy the harm of a wrongful conviction caused by negligent representation, does not compensate a wrongfully-convicted person for her time wrongfully spent in prison, and does not erase substantial prejudices caused by faulty advice and malpractice at trial. A legal malpractice plaintiff who has received post-conviction relief for ineffective assistance of counsel has suffered a real harm and legally-cognizable claim. Indeed, such a plaintiff has almost certainly incurred additional damages in the process of righting the wrong that led to the wrongful conviction. A civil pleading standard that disregards such harm and requires every Plaintiff to prove "actual innocence" of any conceivable type of criminal culpability to even survive demurrer is illogical and unsound public policy. It ignores the damage done to the claimant to the benefit of the attorney who has been deemed ineffective by one court but evades any real accountability for such ineffectiveness walks away with the profits of his misfeasance.

The central question on this appeal is whether the trial court applied

the proper legal standard in sustaining defendants' demurrer by requiring that the plaintiff plead “actual innocence” of any crime to state a claim for legal malpractice arising from criminal representation. This standard immunizes criminal defense lawyers whose representation is so defective that their client’s conviction is vacated for ineffective assistance of counsel. This standard prevents casualties of deficient legal representation from recovering the costs of obtaining post-conviction relief among the myriad additional collateral harms caused by malpractice. This standard ignores the reality that an “innocent” criminal defendant may have no choice but to accept a guilty plea after her conviction is vacated because defective representation irrevocably marred her ability to fairly conduct her legal defense.

B. NATURE OF CASE AND MATERIAL PROCEEDINGS

Erroneous application of an ambiguous legal standard compelled Desetti[1] to seek this appeal. This is a legal malpractice case arising from deficient legal representation committed by an attorney during the course of criminal proceedings.

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[1] Throughout this Brief, the undersigned will refer to Appellant as “Desetti” and to Appellees collectively as “Chester” unless otherwise indicated.

Appellee, Chester, represented Appellant, Desetti, in criminal proceedings in the Augusta County Circuit Court, the result of which was her conviction for assault and battery of a law enforcement officer, a mandatory minimum six-month sentence of incarceration, and the loss of her nursing license, employment, and civil. She filed a habeas corpus petition while serving her sentence of incarceration

After Desetti had endured her sentence of incarceration, lost her nursing license, pursued—at significant cost—post-conviction relief, and suffered other harms accompanying a felony conviction, the Augusta County Circuit Court vacated her conviction. The court found on multiple grounds that Chester's representation was so lacking that Desetti was deprived of her constitutional right to counsel. Shortly after her conviction was vacated, the Augusta County Commonwealth's Attorney Office reinitiated prosecution of the matter, and then resolved the matter upon a plea to misdemeanor simple assault. The agreed disposition had terms consistent with a plea offer that Chester failed to convey to Desetti in the initial proceeding. His failure to convey the offer was one of the grounds upon which the court based its decision on the habeas petition.

Building upon the favorable decision achieved in post-conviction

relief, Desetti filed a legal malpractice action in the same court that vacated her conviction. Chester filed a demurrer to Desetti's Complaint and the Court heard from both parties on Chester's demurrer. After argument, the Court sustained the demurrer, finding that Desetti failed to plead a cause of action against Chester because she failed to allege that she was "actually innocent" of any criminal culpability. Desetti noted her objection to the court's holding and appealed the matter to this Court.

ASSIGNMENTS OF ERROR

1. The trial court erred in sustaining Defendants' Demurrer because it thereby decided, as a matter of law, that Desetti could not prove that Chester's negligence was the proximate cause of Desetti's harm when the trial court had already established by prior order granting Desetti's Petition for Writ of Habeas Corpus that it was reasonably probable that Chester's ineffective assistance of counsel caused Desetti harm. (Preserved by Order of May 18, 2014, Plaintiff's Objection thereto, Opinion Letter of April 7, 2014, and Plaintiff's Motion for Reconsideration, R 101-103, 88-90, 91-95, J.A. 20-22, 17-19.[2])

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2 Citations to pages of the Record appear as "(R. ___.)." Citations to pages of the Appendix appear as: "(J.A ___.)."

2. The trial court erred in sustaining Defendants' Demurrer by concluding that, after Desetti's felony conviction was vacated by Writ of Habeas Corpus for ineffective assistance of counsel based, in part, on failure to convey a plea offer, her guilty plea to that plea offer was equivalent to being convicted of the original charge. (Preserved by Order of May 18, 2014, Plaintiff's Objection thereto, Opinion Letter of April 7, 2014, and Plaintiff's Motion for Reconsideration, R 101-103, 88-90, 91-95, J.A. 20-22, 17-19.)

3. The trial court erred in granting Defendants' Demurrer by concluding that a plaintiff must allege "actual innocence" of any criminal culpability to state a cause of action for legal malpractice arising out of criminal representation. This holding fails to consider the underlying public policy rationale or determine whether plaintiff's criminal conduct or defendant's negligence proximately caused the criminal sentence imposed. (Preserved by Order of May 18, 2014, Plaintiff's Objection thereto, Opinion Letter of April 7, 2014, and Plaintiff's Motion for Reconsideration, R 101-103, 88-90, 91-95, J.A. 20-22, 17-19.)

STATEMENT OF FACTS

This is the appeal of an Order granting a Demurrer which dismissed Desetti's Complaint for legal malpractice. The facts relevant to this appeal are contained in Desetti's Complaint, to wit:

On July 20, 2009, Desetti engaged Chester, who was working on behalf of his law firm, Defendant Chester-Cestari Law, P.C., to provide her with legal representation in a criminal proceeding in Augusta County, Virginia. (Complaint at ¶5; J.A. 2.)

On June 2, 2010, Desetti was convicted of felony assault of a law enforcement officer. She was thereupon sentenced to a mandatory minimum sentence of six months incarceration. (Complaint at ¶12, 19, and 20; J.A. 3-5.)

On August 17, 2012, after exhausting her appeals, Desetti filed a Petition for Writ of Habeas Corpus claiming that Defendant Chester's representation of her was so deficient that she was deprived of her basic constitutional rights to effective assistance of counsel. (Complaint at ¶24; J.A. 5.)

On August 30, 2013, the Augusta County Circuit Court with the Honorable Jay Swett presiding, agreed with Desetti, granted her Petition for

Writ of Habeas Corpus, vacated her felony conviction, and found that Chester rendered ineffective assistance of counsel to the prejudice of Desetti. (Complaint at ¶25; J.A. 5-6.)

As bases for his finding, Judge Swett concluded that:

(1) Chester's "concurrent representation of [Desetti] and her two co-defendants created a conflict of interest that adversely affected [Chester's] performance and resulted in performance that fell below an objective standard of how an attorney should represent and advise a client;"

(2) Chester "failed to communicate the strengths and weaknesses of [Desetti's] case and to adequately convey and explain plea offers made by the Commonwealth's Attorney, and there is a reasonable probability that but for ineffective advice, the conviction and sentence under the offers' terms would have been less severe than under the actual judgment and sentence imposed;" and

(3) Chester's "performance was deficient when he failed to fully inform and discuss with [Desetti] the possibility of including a lesser-included offense jury instruction, which was offered by the Commonwealth but rejected by [Chester] without consultation or explanation with [Desetti],

and that there is a reasonable probability that but for [Chester's] deficient performance, the results of the proceeding would have been less severe than the judgment and sentence imposed." (Complaint at ¶25; J.A.5-6.)

The Commonwealth elected to re-indict Desetti after her conviction was vacated, and on September 13, 2013, she pled guilty to misdemeanor assault with a suspended sentence of ten days incarceration. (Complaint at ¶26; J.A. 6.)

On October 17, 2013, Desetti filed a Complaint in the Augusta County Circuit Court alleging that Chester's representation constituted legal malpractice. (J.A. 1-11.) Specifically, the Complaint alleged that but-for Chester's malpractice, including rejecting a plea offer without consultation with Desetti, the results of the felony criminal proceeding would have been less severe than the judgment and sentence imposed.

On November 6, 2013, Defendants filed a Demurrer to Plaintiff's Complaint which argued that Desetti failed to set forth a viable cause of action for malpractice because she pled guilty to misdemeanor assault after her felony assault conviction was vacated. (J.A. 11-16.) Defendants' Demurrer was argued on March 25, 2014. The trial court issued an opinion letter on April 7, 2014. (J.A. 17-19.) A sketch order endorsed by counsel

was mailed to the trial court on May 13, 2014 with Plaintiff's objections and a Motion for Reconsideration attached thereto. (R. 91-100.) The trial court entered the Order granting Defendants' Demurrer on May 18, 2014. (J.A. 20-22.) It is from this Order of May 18, 2014 that Desetti makes the instant appeal.

ARGUMENT

I. It was error for the trial court to determine, as a matter of law, that Desetti could not prove that Chester's negligence was the proximate cause of Desetti's harm when his negligence was specifically and sufficiently pled in her Complaint (Assignment 1).

A court has already determined that Chester's negligence proximately caused Desetti harm, finding that Chester's representation of Desetti was "deficient" and "fell below an objective standard of how an attorney should represent and advise a client." (Complaint at ¶25, J.A. 5-6.) The court also found that "there is a reasonable probability that but for [Chester's] deficient performance, the results of the proceeding would have been less severe than the judgment and sentence imposed." (Id.)

Yet, in sustaining the Defendant's demurrer in a malpractice action, on the very same fact, the same court found that Desetti, as a matter of law, cannot prove that Chester's deficient representation caused her harm.

That paradox can be resolved by rejecting the trial court's "actual innocence" standard and adopting the legal standard advocated by Desetti in this case.

A. The standard of review is de novo because a demurrer presents an issue of law.

A demurrer tests the legal sufficiency of the facts properly alleged in the challenged pleading and the inferences fairly drawn from those facts, all of which are accepted as true. The trial court's grant of a demurrer is reviewed de novo because a demurrer presents an issue of law. Va. Code Ann. §8.01-273 (1977); Jared and Donna Murayama 1997 Trust v. NISC Holdings, LLC, 284 Va. 234 (2012).

B. Culpability of criminal defendants is a material consideration in malpractice claims—not an absolute bar to recovery

Legal malpractice generally requires four elements of proof: (1) the existence of an attorney-client relationship giving rise to a duty, (2) the breach of that duty, (3) proximate causation, and (4) harm. Rutter v. Jones, Blechman, Woltz & Kelly, P.C., 264 Va. 310 (2002). Desetti pleads all four elements in her Complaint.

In the context of malpractice committed in representation of a criminal defendant, however, a plaintiff must also plead that he has obtained

favorable post-conviction relief. Adkins v. Dixon, 253 Va. 275, 282 (1997). Desetti, again, pleads that she has obtained favorable post-conviction relief.

Adkins also states that the particular criminal defendant's "actual guilt is a material consideration since courts will not permit a guilty party to profit from his own crime." Adkins, 253 Va. at 282. (citing Zysk v. Zysk, 239 Va. 32, 34 (1990)). Further, "Adkins's guilt, not [his prior criminal defense attorney's] alleged failure to assert the speedy trial defense, was the proximate cause of the convictions." Id. The instant trial court misapplied this "material consideration" language in consideration of proximate causation. Mr. Adkins' established guilt and life sentence of incarceration logically preclude additional harm caused by malpractice. The issue of proximate causation is entirely different for Desetti because the difference between the penalty she wrongfully suffered and her legally-warranted penalty is the difference between six months' incarceration and probation. Desetti suffered six months' incarceration proximately caused by Chester's malpractice—not caused by criminal culpability.

Mr. Adkins sued his former criminal defense attorney for malpractice while he was incarcerated because some of his convictions had been

reversed for his attorney's failure to assert a speedy trial defense. Arising from the same episode as the reversed convictions, Mr. Adkins was convicted of two counts of abduction, two counts of abduction with the intent to defile, aggravated sexual battery, and illegally wearing a mask. He was sentenced to two life terms plus forty-five years incarceration for this set of convictions. Mr. Adkins neither sought nor obtained post-conviction relief related to these convictions—nor did he argue that they were the result of attorney malpractice. Adkins v. Commonwealth, 13 Va.App. at 519 (fn. 1).

Adkins's claim of attorney malpractice was flawed, and Adkins is easily distinguished from the instant case. Adkins' Complaint was dismissed by Demurrer because his attorney's failure to effectively assert a speedy trial defense did not constitute ineffective assistance of counsel meriting habeas corpus relief. In contrast, Desetti successfully obtained post-conviction relief for ineffective assistance of counsel, on multiple bases, each one of which entails different harm and attendant damages.

Adkin's claim was also faulty because he was incarcerated for a period exceeding his natural life regardless of whether his attorney's representation constituted "malpractice." Adkins v. Dixon does not hold

that “actual innocence” or any form of innocence is required to state a claim for malpractice by an attorney during a criminal engagement. To the contrary, Mr. Adkins’s particular guilt was “a material consideration” because that guilt “was the proximate cause of the convictions.” Adkins, 253 Va. at 282.

The proximate cause of an event, of course, is the act or omission producing the event and “without which that event would not have occurred.” Beale v. Jones, 210 Va. 519, 522 (1970), See Kellermann v. McDonough, 679 S.E.2d 203, 210 (Va., 2009). Although issues of proximate causation are typically reserved for a jury, the harm that Mr. Adkins justifiably suffered because of his guilt was inextricable from any harm caused by malpractice. Necessarily, the penalty he suffered because of his criminal conduct would have occurred without malpractice. His incarceration, therefore, was not caused by malpractice as a matter of law.

In stark contrast, in the instant case, not only did Desetti obtain favorable post-conviction relief but that relief established a causal connection between Chester’s malpractice and the harm she suffered. Desetti, unlike the Plaintiff in Adkins, wrongfully suffered a sentence of six months’ incarceration when the result of her criminal proceeding would

have been no incarceration but-for Chester's malpractice. Particularly with regard to the habeas court's findings about Chester's failure to convey a plea offer—a plea offer Desetti later accepted—the causality is not only extant, but unassailable.

In vacating her felony conviction, the Augusta County Circuit Court found two separate instances of deficient representation by Chester expressly linked to proximate causation, stemming from his concurrent representation of Desetti and two co-defendants, despite warnings about the conflict that even included a disqualification hearing initiated by the Commonwealth's Attorney.

First, after prejudicing Desetti's case by instructing her to testify in proceedings against her husband and son while her own trial was pending, while Chester was representing all three co-defendants simultaneously, Chester argued *against* inclusion of a misdemeanor assault jury instruction in her felony trial without notifying her or consulting her on such a significant issue. In granting Desetti's Petition for Writ of Habeas Corpus, the Augusta County Circuit Court found that:

> [Chester's] performance was deficient when he failed to fully inform and discuss with [Desetti] the possibility of including a lesser-included offense jury instruction, which was offered by the

> Commonwealth but rejected by [Chester] without consultation or explanation with [Desetti], and that *there is a reasonable probability that but for [Chester's] deficient performance, the results of the proceeding would have been less severe than the judgment and sentence imposed*. (Emphasis added)(Complaint at ¶25; J.A.5-6.)

Second, Chester failed to convey a plea offer to Desetti to resolve the case as a misdemeanor, and rejected the offer without consulting with his client. The habeas court, again, expressly found that this failure likely caused Desetti harm.

> [Chester] failed to communicate the strength and weaknesses of [Desetti's] case and to adequately convey and explain plea offers made by the Commonwealth's Attorney, and *there is a reasonable probability that but for ineffective advice, the conviction and sentence under the offers' terms would have been less severe than under the actual judgment and sentence imposed*... (Emphasis added)(Complaint at ¶25; J.A. 6.)

As part of its finding relating to Chester's failure to relate a plea offer, the court also found a "reasonable probability" that Desetti "would have accepted the earlier plea offer had [she] been afforded effective assistance of counsel," Missouri v. Frye, 132 S.Ct. 1399, 1409 (2012), thus satisfying the legal prerequisite for the granting of a Petition for Writ of Habeas Corpus for ineffective assistance of counsel in failure to convey a plea offer.

The trial court was mistaken for applying the proximate cause rationale of Adkins v. Dixon to Desetti's case. Desetti's "guilt" does not causally preclude additional harm caused by malpractice because the penalty Desetti actually suffered is distinguishable from the penalty she would have suffered absent malpractice. In declaring her conviction to be wrongful, the trial court, in the habeas proceeding, already found that Chester's deficient representation proximately caused Desetti harm. The rationale of Adkins does not apply to this case; and the trial court erred in finding that proximate causation could not be established as a matter of law when it clearly could, and was previously.

II. The trial court erred by erroneously conflating Desetti's misdemeanor plea after post-conviction relief with a conviction for a felony that was specifically vacated in the habeas proceedings (Assignment 2)

To vacate a conviction is to render that conviction a nullity. When the trial court granted Desetti's habeas corpus petition and the Commonwealth's Attorney extended the plea offer that Chester previously failed to convey, Desetti became legally and permanently not guilty of felony assault on a police officer. Desetti's Complaint establishes that she "pled guilty on September 13, 2013 to misdemeanor assault with a

sentence of ten (10) days--all of which were suspended."(Complaint at ¶26, J.A. 6.). Nowhere does Desetti allege in her Complaint that she assaulted a law enforcement officer. Yet, the trial court bases its order sustaining Chester's Demurrer on a finding that Desetti pled guilty to assaulting a police officer. This Court should reverse the trial court for basing its decision on allegations which are both factually inaccurate and inconsistent with the facts stated in a Complaint.

A. The standard of review is de novo because a demurrer presents an issue of law.

A demurrer tests the legal sufficiency of the facts properly alleged in the challenged pleading and the inferences fairly drawn from those facts, all of which are accepted as true. The trial court's grant of a demurrer is reviewed de novo because a demurrer presents an issue of law. Va. Code Ann. §8.01-273 (1977); Jared and Donna Murayama 1997 Trust v. NISC Holdings, LLC, 284 Va. 234 (2012).

B. In sustaining the Defendants' demurrer, the trial court failed to give appropriate weight to the facts pled in the Complaint: both disregarding facts pled and inappropriately importing its own assumptions that were not pled.

In its opinion letter, the trial court erroneously found that "the

defendant, after the felony conviction was thrown out by the Habeas Corpus action, plead [sic] guilty *to assault of the police officer*." (Opinion Letter of April 7, 2014; J.A. 17-19.)(emphasis added). This finding is an incorrect statement of the facts as pled in Desetti's Complaint. The Complaint establishes that Desetti was initially convicted of felony assault of a law enforcement officer (Complaint at ¶19; J.A. 4.); her conviction was vacated (Complaint at ¶25; J.A. 6.); and after her conviction was vacated, "the Commonwealth elected to retry Desetti; and she pled guilty on September 13, 2013 to misdemeanor assault with a sentence of ten (10) days--all of which were suspended." (Complaint at ¶26; J.A. 6.)

The trial court mistakenly equates Desetti's vacated conviction of felony assault on a law enforcement officer with her subsequent plea to a different and lesser offense—misdemeanor assault. It is because of this misreading of the Complaint that the trial court cites Lewis v. Edwards, 54 Va.Cir. 257 (2000). The plaintiff in Lewis v. Edwards was convicted of eight felonies and argued that her attorney was negligent in representing her in pretrial matters and in failing to have her tax problems solely handled with civil penalties. Lewis obtained no post-conviction relief. The Court also found that "[b]y inference, [Lewis's] pleadings say that she committed, was

guilty of, and was convicted of eight felonies involving tax fraud matters." Id. In other words, Lewis was guilty of the exact same offenses for which she claimed her attorney negligently represented her.

The instant trial court distinguishes Lewis v. Edwards from Desetti's case by stating that Desetti obtained post-conviction relief where Lewis did not. The trial court then erroneously, and for a second time, states its apparent mistaken belief that Desetti plea guilty to the same charge for which she was convicted upon retrial.

> The present matter is distinguishable in that the plaintiff has obtained post-conviction relief attributable to ineffective assistance of counsel by the defendant. Thus, the original conviction of a felony was vacated in her Habeas Corpus action. However, Desetti has not and cannot allege actual innocence because she pled guilty upon retrial. Courts will not assist the petitioner in an illegal act who seeks to profit from the acts' commission. (Opinion Letter of April 7, 2014; J.A. 18.)

The trial court shows some awareness that Desetti's plea was to a different offense in its Order of May 18, 2014 when it acknowledges that Desetti "entered a guilty plea to misdemeanor assault arising from the same criminal episode for which she originally was charged with felony assault." (J.A. 20.) The trial court's opinion letter, however, is incorporated into its Order granting Defendants' Demurrer. The trial court, in a single

document, makes the opposite and incongruous findings that Desetti "plead [sic] guilty to assault of the police officer" and that Desetti "entered a guilty plea to misdemeanor assault arising from the same criminal episode for which she originally was charged with felony assault." (J.A. 18, 20.)

The result of the misdemeanor plea is that Desetti has not been adjudicated guilty of the offense vacated by post-conviction relief nor can she ever be found guilty of that offense. Rather than acting as a bar to a legal malpractice claim, the fact that Desetti pled guilty to a different and lesser offense after receiving her post-conviction relief should *vest* her malpractice cause of action. Because her habeas corpus petition was granted and her felony conviction was vacated, she is innocent of the crime of felony assault on a law enforcement officer, and she can never be charged with that offense, let alone convicted of it.

The trial court's reliance on Lewis v. Edwards is misplaced, and this Court should reverse the trial court for disregarding facts pled and relying on extrinsic, un-pled, and objectively false inferences in sustaining Chester's demurrer.

III. The rationale that a plaintiff must allege "actual innocence" of any criminal culpability to state a criminal malpractice claim is illogical and contrary to public policy (Assignment 3).

The imposition of additional requirements on plaintiffs making criminal defense malpractice claims is tied to proximate causation as well as public policy considerations. As discussed *supra*, any harm caused by malpractice is moot when the plaintiff in a malpractice action is already serving life sentences for convictions which were not vacated. When the harm suffered by a plaintiff in a legal malpractice action is the same as the harm which was legally-warranted because of the plaintiff's criminal conduct, there cannot be proof of proximate causation as a matter of law. By contrast, neither causation nor policy considerations should bar a plaintiff from recovery where the harm of malpractice is distinct from and additional to the penalty for any criminal conduct.

A. The standard of review is de novo because a demurrer presents an issue of law.

A demurrer tests the legal sufficiency of the facts properly alleged in the challenged pleading and the inferences fairly drawn from those facts, all of which are accepted as true. The trial court's grant of a demurrer is reviewed de novo because a demurrer presents an issue of law. Va. Code Ann. §8.01-273 (1977); Jared and Donna Murayama 1997 Trust v. NISC

Holdings, LLC, 284 Va. 234 (2012).

B. Harm caused by malpractice and not attributable to criminal conduct should be compensable.

Adkins v. Dixon considers the plaintiff's prior guilt of offenses he did not contest and having a consequence of life incarceration to be a "material consideration" in determining whether he may sue his prior attorney for attorney malpractice because a "court will not permit a guilty party to profit from his own crime." Adkins v. Dixon, 253 Va. 275, 282 (1997). The plaintiff in Adkins did not allege that malpractice caused him to be incarcerated for the remainder of his life. Allowing Adkins to recover in malpractice for his incarceration would necessarily allow him to profit from his crime because the actual penalty for his criminal conduct and the legally-warranted penalty for his criminal conduct are the same.

This distinction between Adkins v. Dixon and the instant case is determinative. The offense and punishment Desetti accepted after post-conviction relief were significantly less than the felony conviction—along with its collateral consequences—and six-month sentence of incarceration she suffered as a result of legal malpractice. That difference is attributable to malpractice and not criminal conduct. Further, the sum she paid Chester in legal fees after he failed to convey the plea offer is a real, quantifiable

wrong that she would not have suffered but-for his malpractice. Without an avenue for Desetti to recover those fees, that sum constitutes a wrongful gain on Chester's part: legal fees he collected during a period a court determined that he rendering constitutionally-deficient legal services. Barring plaintiffs in Desetti's position from recovery gives deficient attorneys the freedom to accept the benefits of a contract for legal services without satisfying their obligations, and without recognizing the client's benefit of the bargain.

Desetti has stated a claim for damages which are not attributable to any criminal conduct. If a trier of fact finds that Desetti has met her burden of proof and should be awarded damages, such a recovery would not be a profit of criminal conduct. To the contrary, barring Desetti's claim would immunize an attorney who has failed to deliver contracted-for services and has already been adjudicated to have caused Desetti harm through deficient performance.

Jones v. Link, 493 F.Supp.2d 765 (2007), underscores the policy considerations raised in Adkins v. Dixon and interprets Virginia law opposite the interpretation of the trial court in this cause. A strict reading of the "actual innocence" requirement does not further the underlying public policy

rationale when the malpractice causes harm to a criminal defendant beyond any legally-justified penalty. In Jones, the plaintiff's sentence of incarceration was improperly lengthy because of malpractice. His "guilt" was not a bar to recovery based on the federal court's interpretation of Virginia law.

> ...[E]xcusing plaintiff from the actual innocence requirement does not permit plaintiff to "profit from the [crime's] commission" because plaintiff is still required to serve the legally warranted sentence....the improper sentence was not the direct result of plaintiff's criminal behavior, but rather, it was the proximate result of his attorney's negligence. In such circumstances, it is appropriate to permit plaintiff to assert a claim for legal malpractice without requiring him to allege actual innocence.
> Jones v. Link, 493 F.Supp.2d 765, 770 (2007)(*quoting* Adkins, 253 Va. at 281–82)(*citing* Powell v. Associated Counsel for the Accused,131 Wash.App. 810, 813, 129 P.3d 831 (2006); Johnson v. Babcock, 206 Or.App. 217, 219, 136 P.3d 77 (2006)).

The plaintiff in Jones was allowed to proceed with his attorney malpractice claim without alleging actual innocence. His claim ultimately failed, not because he was "innocent" or "guilty" but because his post-conviction relief cured the sentencing error before he served any additional unwarranted sentence caused by malpractice. In other words, his actual sentence was corrected to match his legally-justified sentence before he

served any legally unwarranted period of incarceration. By contrast, Desetti served her entire unwarranted sentence before her conviction was vacated.

The plaintiff in Jones could not prove attorney malpractice because he suffered no harm from malpractice. Jones points out, however, that barring the plaintiff's claim based on "actual innocence" is faulty public policy. In doing so, the Court describes a situation "where an attorney's negligence resulted in a legally impermissible sentence that is not corrected until after plaintiff has already served a longer sentence than legally warranted." Jones, 493 F.Supp.2d at 770. Post-conviction or habeas corpus remedies in such a circumstance "would not sufficiently redress plaintiff's injury." Id.

In explaining how guilt is a "material consideration" as stated in Adkins v. Dixon, Jones v. Link holds:

> In summary, the "issue of guilt or innocence is relevant, if the client's complaint is the fact of conviction, rather than the severity of the sentence or other consequences." But actual innocence is "not relevant if the attorney's error concerns the extent or severity of the sentence." Jones, 493 F.Supp.2d at 770-71.(quoting R. Mallen & J. Smith, Legal Malpractice § 26.13 (2007 Edition)).

The underlying public policy rationale that courts will not permit a guilty party to profit from his own crime is not furthered in a circumstance where the harm suffered by the plaintiff is proximately caused by malpractice and not by criminal conduct. A plaintiff whose sentence is legally unwarranted and too severe because of malpractice, therefore must not plead actual innocence, because innocence is irrelevant to the proximate causation inquiry. An alternate holding would be contrary to public policy because a plaintiff who actually served a longer sentence than legally warranted because of attorney malpractice could not obtain sufficient redress solely through post-conviction relief—as did the plaintiffs in Adkins v. Dixon and Jones v. Link.

C. The legal standard should distinguish Adkins from Desetti based on policy considerations

Of the fifty state jurisdictions this Court may view as persuasive authority, there are perhaps two dozen different, nuanced ways that state courts handle "post-conviction relief" and "innocence" requirements in criminal malpractice claims.[3]

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[3] For a compilation of various state approaches, see Bennardo, Kevin, A Defense Bar: The "Proof of Innocence" Requirement in Criminal Malpractice Claims (May 11, 2007). 5 Ohio State Journal of Criminal Law 341 (2007). Available at SSRN: http://ssrn.com/abstract=2257604

The one commonality is that where additional pleading requirements exist in malpractice cases arising in criminal representation, the requirements are buttressed by policy considerations. Virginia's stated policy rationale is that "courts will not assist the participant in an illegal act who seeks to profit from the act's commission." Adkins v. Dixon, 253 Va. 275, 281 (1997)(citing Zysk v. Zysk, 239 Va. 32, 34 (1990)).

The Zysk and Adkins rationale fails when applied to Desetti. The harm suffered by the plaintiff in Zysk was exposure to a sexually transmitted disease. The totality of this harm was caused by the illegal fornication of the plaintiff. The several other cases cited by Adkins v. Dixon relate to the holding that "a post-conviction ruling adverse to the defendant will prevent a recovery for legal malpractice." Adkins v. Dixon, 253 Va. 275, 282 (1997).

Public policy does not support a rule where Desetti cannot state a claim for legal malpractice once her criminal conviction has been vacated for ineffective assistance of counsel. The logical extension of the policy enunciated in Adkins v. Dixon is a rule where a criminal defendant cannot state a claim for legal malpractice when the actual penalty for his criminal conduct is the same as the legally-warranted penalty. Stated differently,

where an attorney's negligence results in a legally impermissible sentence that is not corrected until after plaintiff has already served a longer sentence than legally warranted, the plaintiff should be able to state a claim for legal malpractice. Questions of “actual innocence” or “legal innocence” are inferior benchmarks to a rule which succinctly adopts the logic behind the underlying policy rationale bracing the enhanced pleading standards in malpractice claims arising from criminal representation.

The purpose of the tort system is to compensate injured parties and make them whole. Whether “actually innocent,” “legally innocent,” or “guilty” of some different criminal culpability, an individual injured by her attorney’s malpractice should be compensated for her injury by the attorney. This approach does not shift responsibility to the defense attorney for criminal behavior. To the contrary, the trial court’s position in this case shifts the burden to the client who bears the entire consequence of malpractice in the form of a legally-unwarranted period of incarceration while her lawyer escapes responsibility entirely.

If a plea to a lesser offense after post-conviction relief necessarily bars a legal malpractice complaint, attorneys who fail in their professional and ethical obligations to inform clients of plea offers are completely

immunized from malpractice. Although failing to convey a plea offer constitutes malpractice and it necessarily entails harm to the criminal defendant, such victims of malpractice would have absolutely no ability to pursue a malpractice complaint under the trial court's rationale. Moreover, attorneys who commit malpractice in sentencing proceedings or during appeals would also be immunized from suit if this overbroad interpretation of the case-by-case “actual innocence” consideration is expanded to mean innocence of any and all criminal culpability.

Desetti's case is precisely the circumstance cited in Jones v. Link where strict interpretation of the actual innocence requirement is contrary to public policy. The sentence legally warranted for Desetti's conduct was ten days incarceration—all suspended. The sentence Desetti would have served but-for her prior attorney's malpractice in failing to convey a plea offer to her was ten days incarceration—all suspended. After Desetti was afforded her constitutional right to counsel, Desetti received a misdemeanor conviction and suffered a sentence of ten days incarceration—all suspended.

Desetti, however, served six months incarceration because of Chester's malpractice—not because of her own criminal culpability. She is

afforded no remedy for her unwarranted sentence through her post-conviction relief, because she had already served the entire six-month sentence before her conviction was vacated.

In a circumstance where a plaintiff pleads that she obtained post-conviction relief by the grant of a writ of habeas corpus for ineffective assistance of counsel based on failure to convey a plea offer, the plaintiff should not be barred from pursuing a malpractice cause against the same attorney because she accepts the plea offer on retrial. A contrary result requires the plaintiff to follow the footsteps of a former attorney who has been adjudicated prejudicially ineffective by proceeding to trial without consideration of the efficacy of plea offers. This result is particularly unjust where, as here, Chester's prior ineffective handling of Desetti's case with an obvious conflict of interest manifested itself in prejudice to Desetti. Recall that Chester inexplicably had Desetti testify as a witness in a case he was handling for a different client that she struck a police officer. (Complaint at ¶10; J.A. 3.) That prejudice was determined to be ineffective assistance; but it was not removed by post-conviction relief. Chester's handling of Desetti's case continued to prejudice Desetti through the retrial process.

Barring Desetti from suing Chester for malpractice, by demurrer, is inconsistent with the underlying policy rationale behind enhanced pleading requirements for plaintiffs like Desetti who are wrongfully incarcerated because of their attorney's negligence. The trial court erred when it took the position that a plaintiff must allege actual innocence of any criminal culpability to state a cause of action for legal malpractice arising out of criminal representation.

Conclusion

Desetti asks that the Order of the Augusta County Circuit Court of May 18, 2014 be reversed and that Defendants' Demurrer be denied.

The Augusta County Circuit Court, in its prior grant of Desetti's Writ of Habeas Corpus, has already determined that but-for Chester's ineffective assistance of counsel there is a reasonable probability that Desetti's conviction and sentence would have been less severe. Applying governing principals of law to the finding of ineffective assistance in failing to convey a plea offer, the Augusta County Circuit Court also previously determined that it was reasonably probable that Desetti would have accepted the plea offer had Chester conveyed it to her. It was error for the court to thereafter immunize Chester from malpractice under the rationale that Desetti's

criminal conduct, and not Chester's malpractice, caused her harm.

Neither Virginia jurisprudence nor fundamental policy considerations support the result that the trial court rendered by granting Defendants' demurrer.

Desetti seeks no benefit from her criminal conduct. This Court is not assisting criminal conduct in allowing Desetti to proceed in a malpractice action against a former attorney whose representation of her was so deficient that she was deprived of her constitutional right to counsel. To the contrary, Desetti has already served six months incarceration where she should have only suffered a suspended sentence.

In the narrow circumstances (1) where a plaintiff's post-conviction relief is based on ineffective assistance of counsel, (2) where part of the ineffective assistance is failure to convey a plea offer to plaintiff, and (3) where the plaintiff accepts the plea offer upon retrial, the rationale underlying a strict and inflexible “actual innocence” requirement does not apply. Accordingly, this Court should reverse the Order of the Augusta County Circuit Court of May 18, 2014 sustaining Defendants' Demurrer, should overrule Defendants' Demurrer, and should remand this case for further proceedings.

Respectfully submitted,
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CERTIFICATE OF SERVICE AND FILING

I certify compliance with Rule 5:26 as follows:

1. On January 27, 2015, one electronic version and fifteen printed copies of this Brief were filed by transmission, expense pre-paid, to the clerk of this Court by priority, express, registered, or certified mail via the United States Postal Service.

2. On January 27, 2015, one electronic version and three printed copies of this Brief were transmitted, expense pre-paid, to counsel of record for the Defendants in this matter by priority, express, registered, or certified mail via the United States Postal Service to:

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3. On January 27, 2015, fifteen printed copies of the Appendix were filed by transmission, expense pre-paid, to the clerk of this Court by priority, express, registered, or certified mail via the United States Postal and three copies of the Appendix were mailed to counsel of record for the Defendants at the address indicated above.

4. This Brief of Appellant complies with Rule 5:26 and the portion subject to Rule 5:26(b) does not exceed 50 pages.

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