COMMENT

AMENDING THE *PEELER* DOCTRINE: HOW TO PROVIDE CONVICTED PLAINTIFFS AN EQUITABLE OPPORTUNITY TO PURSUE LEGAL MALPRACTICE CLAIMS*

The criminally accused are entitled to capable lawyering without regard to their guilt or innocence, for only by the competent representation of all criminally accused can society rest assured that the innocent are not unfairly criminalized.[1]

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1. Meredith J. Duncan, *Criminal Malpractice: A Lawyer's Holiday*, 37 GA. L. REV. 1251, 1305 (2003).

I. INTRODUCTION

For over two decades, the *Peeler* doctrine has kept nonexonerated convicts from recovering for legal malpractice claims.[2] Originally, its scope was narrow.[3] Its primary justification was to keep criminals from profiting from their crimes.[4] But over the years, courts have expanded the doctrine, allowing criminal defense attorneys to use it as a shield when they fail to meet their contractual obligations to clients.[5] Today, application of the doctrine frequently undermines public policy objectives and makes it harder for plaintiffs with legitimate claims to succeed in court.[6]

This Comment is meant to provide attorneys and policymakers the tools they need to roll back the overextension of this doctrine, thus providing convicts a more equitable opportunity to pursue legal malpractice claims.[7] Part II sets *Peeler* in context

2. *See* John G. Browning & Lindsey Rames, *Proof of Exoneration in Legal Malpractice Cases: The Peeler Doctrine and Its Limits in Texas and Beyond*, 5 ST. MARY'S J. ON LEGAL MALPRACTICE & ETHICS 50, 65–66 (2014).

3. *See id.* at 62 ("Since *Peeler*, courts have continued to extend the criminal malpractice bar to all phases of criminal prosecutions—from pre-trial investigations to appeal and even to parole. As a result, criminal defense attorneys have enjoyed a blanket of protection not afforded to other lawyers in the State of Texas.").

4. *See* Peeler v. Hughes & Luce, 909 S.W.2d 494, 497 (Tex. 1995) (plurality opinion) (quoting State *ex rel.* O'Blennis v. Adolf, 691 S.W.2d 498, 504 (Mo. Ct. App. 1985)).

5. *E.g.*, Shepherd v. Mitchell, No. 05-14-01235-CV, 2016 WL 2753914, at *1–2 (Tex. App.—Dallas May 10, 2016, pet. dism'd w.o.j.) (mem. op.) (barring a claim against an attorney who did not represent the plaintiff at trial but failed to file a writ of habeas corpus on his behalf—work the plaintiff's family paid him $10,000 to perform); Falby v. Percely, No. 09-04-422 CV, 2005 WL 1038776, at *2–3 (Tex. App.—Beaumont May 5, 2005, no pet.) (mem. op.) (affirming summary judgment barring a claim against an attorney who did not represent the plaintiff at trial but was hired to submit a writ of habeas corpus on his behalf—something he did not do). *Peeler* has been cited over 200 times in Texas and by courts in at least twenty-four other states.

6. *See* Gonyea v. Scott, 541 S.W.3d 238, 247–48 (Tex. App.—Houston [1st Dist.] 2017, pet. denied) (outlining *Peeler*'s four public policy concerns and noting that none would be advanced by applying the doctrine to shield the attorney from responsibility in that case); *infra* Section III.A (listing competing public policies that exoneration rules and other approaches advance or undermine). Data on legal malpractice claims is limited, but anecdotally speaking, data from Missouri indicates that criminal defense malpractice claims succeed less than 10% of the time. *See* Herbert M. Kritzer & Neil Vidmar, *When the Lawyer Screws Up: A Portrait of Legal Malpractice Claims & Their Resolution*, DUKE L. SCH. PUB. L. & LEGAL THEORY SERIES, June 29, 2015, at 1, 37, https://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=6182&context=faculty_scholarship [https://perma.cc/DM7X-ULQX].

7. U.S. CONST. amend. VI (setting out rights related to criminal prosecutions); *see*

by describing the doctrine's evolution, some of its criticisms, and corresponding rules in other states. Part III considers ways to better advance the public policy concerns implicated by *Peeler*.

II. THE *PEELER* DOCTRINE

A. Peeler v. Hughes & Luce

Carol Peeler came under IRS investigation for forging illegal tax write-offs for wealthy investors.[8] Before she was convicted, she signed a plea deal with federal prosecutors in exchange for a lighter sentence for herself and dropped charges against her husband.[9] Three days after pleading guilty, a journalist allegedly informed Peeler that the government had offered her transactional immunity in exchange for further cooperation with the investigation.[10] Her attorney had not disclosed this offer to her before she signed the plea agreement, and the offer would have let her go free so long as she agreed to testify against her colleagues.[11] Peeler sued the attorney and his firm, claiming that this omission violated the Texas Deceptive Trade Practices Act and constituted legal malpractice, breach of contract, and breach of warranty.[12] But the Texas Supreme Court denied her claims, holding that convicts must be exonerated before bringing suit for legal malpractice.[13]

To reach this decision, the court held that one's criminal conduct is "the sole proximate cause" of one's conviction as a matter of law.[14] The court also observed that a majority of state courts had already adopted this rule[15] and determined that four

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Mashaney v. Bd. of Indigents' Def. Servs., 355 P.3d 667, 686–87 (Kan. 2015) (quoting Mashaney v. Bd. of Indigents' Def. Servs., 313 P.3d 64, 89 (Kan. Ct. App. 2013) (Atcheson, J., dissenting) ("Criminal defendants regardless of guilt or innocence have a right to competent legal representation."), *aff'd in part* and *rev'd in part*, 355 P.3d 667 (Kan. 2015)). States that have yet to adopt an approach to these types of cases—including Connecticut, Hawaii, Maine, South Dakota, Vermont, and Wyoming—will need to undertake a similar analysis. *See infra* Section II.D.12; *see also infra* Appendix.

8. *Peeler*, 909 S.W.2d at 495–96.

9. *Id.* at 496.

10. *Id.* "Transactional immunity" refers to a witness's protection from government prosecution over anything the witness testifies about. *See* 32 C.F.R. § 719.112 (2018).

11. *Peeler*, 909 S.W.2d at 496 ("In other words, the United States Attorney had offered to not prosecute Peeler for her crime, if she would become a witness and testify against her colleagues.").

12. *Id.*

13. *Id.* at 497–98, 500.

14. *Id.* at 497–98. Proximate cause is one of four elements of legal malpractice claims; namely, duty, breach, causation, and damages. *Id.* at 496.

15. *Id.* at 497–98 (citing illustratively cases applying this rule in Illinois, Florida,

public policy concerns compelled this result[16]:

- prohibiting convicts from profiting indirectly from their illegal acts;[17]
- prohibiting convicts from shifting the costs and consequences of their crimes to the attorneys who represent them;[18]
- prohibiting convicts from diminishing the consequences of criminal activity;[19] and
- prohibiting convicts from pursuing legal remedies that would undermine the criminal justice system.[20]

The court concluded that to allow Peeler to sue the attorneys who represented her would mean allowing her a chance to profit financially from the criminal activity she pled guilty to.[21] On balance, the court found that this injustice outweighed the countervailing need to "hold[] defense attorneys responsible for their professional negligence . . . ."[22]

B. Criticism of Peeler

Peeler has been criticized since its inception.[23] Dissenting from the plurality, Chief Justice Phillips argued that *Peeler*'s exoneration requirement imposed an "extraordinary burden" on criminal defendants and would undermine the claims of those who would not have been convicted but for their attorney's negligence.[24] Concurring in *Owens v. Harmon*, Justice Grant from

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Alaska, California, Massachusetts, Nevada, New York, Pennsylvania, and Oregon); *see* Kevin Bennardo, Note, *A Defense Bar: The "Proof of Innocence" Requirement in Criminal Malpractice Claims*, 5 OHIO ST. J. CRIM. L. 341, 342 & n.3 (2007) (reporting that a majority of jurisdictions require proof that the plaintiff has secured "post-conviction relief, . . . actual innocence, or both . . . ."); Duncan, *supra* note 1, at 1266 & n.96 (listing cases in different states following a similar rule). Historically speaking, this doctrine is relatively new. A Colorado Supreme Court decision attributes the post-conviction relief requirement's origin to a 1974 law review article, and states began adopting it in the 1980s. *See* Browning & Rames, *supra* note 2, at 57–58, 58 n.20 (citing, among others, Rantz v. Kaufman, 109 P.3d 132, 135 (Colo. 2005) (en banc)).

16. *Peeler*, 909 S.W.2d at 497–98; *see* Gonyea v. Scott, 541 S.W.3d 238, 247–48 (Tex. App.—Houston [1st Dist.] 2017, pet. denied) (outlining *Peeler*'s four public policy concerns).

17. *Peeler*, 909 S.W.2d at 497 (quoting State *ex rel*. O'Blennis v. Adolf, 691 S.W.2d 498, 504 (Mo. Ct. App. 1985)).

18. *Peeler*, 909 S.W.2d at 498.

19. *Id.*

20. *Id.*

21. *See id.* at 497–98.

22. *Id.* at 497–98, 500.

23. *See* Browning & Rames, *supra* note 2, at 56 (listing sources of criticism).

24. *Peeler*, 909 S.W.2d at 500–01 (Phillips, J., dissenting). "The public morality is thus protected," he wrote, "at the expense of shielding all criminal defense attorney

the Sixth Court of Appeals observed that, under *Peeler*, "[i]f a criminal lawyer can bungle a case sufficiently so that his client will never get out of prison, then the attorney can never be responsible for malpractice."[25] "With no threat of sanction," another commentator wrote, "there may be no need . . . *not* to breach the duty of care owed to one's clients."[26] Some have accordingly called the *Peeler* doctrine "the incompetent criminal lawyer defense act"[27] or a "lawyer's holiday."[28]

Addressing the exoneration rule and its corollaries in other states, Professor Vincent Johnson has written that "these obstacles to recovery . . . are simply doctrinal overkill."[29] As he explains, they merely add to the hurdles that a malpractice claim must overcome to be successful:

> The difficulty of finding an attorney to initiate a malpractice action, the nature of the jury system, the demanding requirements of the "trial within a trial" causation analysis, and the rules that protect a lawyer's exercise of discretion, all conspire to defeat a malpractice claim raised by one charged with or convicted of a crime.[30]

The extra hurdles for criminal defense legal malpractice claims may explain why, in some jurisdictions, they are brought less frequently than malpractice claims against civil defense attorneys and why the success rates and payouts are lower.[31]

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malpractice, no matter how egregious, from any redress in the civil justice system." *Id.* at 500.

25. *See* Browning & Rames, *supra* note 2, at 56 (quoting Owens v. Harmon, 28 S.W.3d 177, 179 (Tex. App.—Texarkana 2000, pet. denied) (Grant, J., concurring)).

26. *See* Duncan, *supra* note 1, at 1269–70.

27. *Owens*, 28 S.W.3d at 179.

28. Bailey v. Tucker, 621 A.2d 108, 124 (Pa. 1993); Duncan, *supra* note 1, at 1251, 1306 ("It is holiday time for criminal defense attorneys, a time during which criminal defense lawyers are exempt from the usual responsibility of their jobs, namely their professional obligation to provide competent legal representation.").

29. VINCENT R. JOHNSON, LEGAL MALPRACTICE LAW IN A NUTSHELL 297 (2d ed. 2016).

30. *Id.*

31. *See* Kritzer & Vidmar, *supra* note 6, at 16–19, 25, 37, 45, 50 (listing the frequency of malpractice claims across practice areas and providing more targeted information on Florida and Missouri based on uniquely available insurance claim documentation). That said, the overall success rate of legal malpractice claims has risen since the late 1990s. *See Legal Malpractice Claims Costing More, Settling Sooner, Research Shows*, MORGAN & MORGAN BUS. TRIAL GROUP (Oct. 27, 2016), https://www.businesstrialgroup.com/news/legal-malpractice-claims-costing-more-settling-sooner-research-shows/ [https://perma.cc/Q3BW-JBXL] (citing a more recent ABA study that found "[c]laims that ended with no payout to malpractice claimants decreased from almost 60 percent in 2011 to 43 percent in 2015"); Smart Money, *10 Things Your Lawyer Won't Tell You*, FOX NEWS (Aug. 29, 2005), http://www.foxnews.com/story/2005/08/29/10-things-your-lawyer-wont-tell.html [https://perma.cc/7R5P-7JMU] (according to a 2001 ABA survey, "[s]ome 68% of malpractice claims from 1996 through 1999 closed without the client receiving payment from the

As Kevin Bennardo who now teaches at the University of North Carolina School of Law notes, courts tend to justify the exoneration rule because it (1) conserves judicial resources, (2) avoids inconsistent judgments, (3) sidesteps having to consider whether the convict or the defense attorney was responsible for the conviction, and (4) enforces rules that further penalize criminal acts.[32] In response, Bennardo argues that individual rights and justice are more important than cost savings.[33] He also notes that many judicial proceedings can lead to inconsistent judgments—wrongful death suits and murder prosecutions, for example—meaning that this risk is not unique.[34] Addressing the difficulty of proving whether the convict or the attorney caused the conviction, Bennardo explains that requiring post-conviction relief under the exoneration rule does not avoid these causation challenges.[35] For instance, if the criminal defendant achieved post-conviction relief through an ineffective-assistance-of-counsel claim, that judgment would say nothing about whether the defendant committed the crime.[36] Bennardo contends that those wrongfully convicted deserve "compensat[ion] for the wrongful conviction itself, the time wrongly spent in prison, and the cost of seeking post-conviction relief."[37] He concludes that the *Peeler* doctrine ultimately "allows the *lawyer* to escape responsibility for *her* wrongful conduct and [to] shift[] the burden of the malpractice onto her client."[38]

C. The Peeler *Doctrine's Evolution Post-1995*[39]

Peeler has evolved in two ways. First, courts have applied it

lawyer's insurance company. . . .").

32. *See* Bennardo, *supra* note 15, at 345–56 (citing cases in support of each category). At the time this piece was published, Professor Bennardo was a law clerk and recent graduate of the Ohio State University.

33. *Id.* at 347.

34. *Id.* at 347–48. He also argues that reversed convictions, which are necessary for criminal malpractice claims, can undermine the public's view of the justice system at least as much as apparently inconsistent judgments in the criminal and civil arenas. *Id.* at 348.

35. *Id.* at 352–53.

36. *Id.* at 353.

37. *Id.* at 355, 362 ("Criminals can be harmed just as innocent people can be harmed, and criminals should be compensated for their harms just as innocent people are compensated.").

38. *Id.* at 362. Professor Meredith Duncan from the University of Houston Law Center has identified additional shortcomings of the exoneration rule. *See* Duncan, *supra* note 1, at 1268–70 (critiquing both the exoneration and actual innocence rules).

39. For a more in-depth review of particular cases applying the *Peeler* doctrine, see Browning & Rames, *supra* note 2, at 66–125.

to bar a wider variety of claims than it originally addressed.[40] Second, courts have applied it to protect a wider variety of individuals than it originally protected.[41] Recently, however, one court refused to apply the doctrine, possibly signaling a new phase in *Peeler*'s evolution.[42]

1. Peeler *bars more claims*. In *Peeler*, the Texas Supreme Court held that the exoneration rule barred the first four of the following claims. State appellate courts have held that *Peeler* bars the remaining claims as well,[43] though they have observed that the Texas Supreme Court has yet to apply the doctrine so expansively[44]:

- violations of the Deceptive Trade Practices Act;[45]
- legal malpractice;
- breach of contract;
- breach of warranty;[46]
- breach of fiduciary duty;[47]
- civil fraud;[48]
- negligent misrepresentation;[49] and

40. *See infra* Section II.C.1.

41. *See infra* Section II.C.2.

42. Gonyea v. Scott, 541 S.W.3d 238, 247–48 (Tex. App.—Houston [1st Dist.] 2017, pet. denied); *see infra* Section II.C.3.

43. *E.g.*, Westmoreland v. Turner, No. 07-12-0018-CV, 2012 WL 4867574, at *2 (Tex. App.—Amarillo Oct. 15, 2012, pet. denied) (per curiam) (mem. op.) (citations omitted) ("Whether allegations labeled as breach of fiduciary duty, fraud, or some other cause are actually claims for professional negligence is a question of law. As long as the crux of the complaint is inadequate legal representation, it is a claim for legal malpractice."); *see* Browning & Rames, *supra* note 2, at 65–87 (providing a detailed overview of Texas cases applying and expanding *Peeler*).

44. *Gonyea*, 541 S.W.3d at 245 (citation omitted) ("The Texas Supreme Court has not expanded the rule beyond the malpractice context. But intermediate appellate courts have."); Futch v. Baker Botts, LLP, 435 S.W.3d 383, 391 (Tex. App.—Houston [14th Dist.] 2014, no pet.) ("Since the *Peeler* case, the Supreme Court of Texas has not granted review in a case involving this doctrine. Nonetheless, in a series of opinions, this court has adopted and applied an expansive interpretation of the doctrine articulated in the plurality opinion in *Peeler*."); Wooley v. Schaffer, 447 S.W.3d 71, 77 (Tex. App.—Houston [14th Dist.] 2014, pet. denied).

45. *See generally* David J. Beck, *Legal Malpractice in Texas: Second Edition*, 50 BAYLOR L. REV. 547, 761–73 (1998) (providing more details on these claims).

46. Peeler v. Hughes & Luce, 909 S.W.2d 494, 496–98 (Tex. 1995) (plurality opinion).

47. *See, e.g.*, *Westmoreland*, 2012 WL 4867574, at *1–2.

48. *See* Dugger v. Arredondo, 408 S.W.3d 825, 833 (Tex. 2013) ("While some courts of appeals have extended [*Peeler*'s] reasoning to civil defendants bringing legal malpractice actions, we have not directly addressed that issue."); *see, e.g.*, Meullion v. Gladden, No. 14-10-01143-CV, 2011 WL 5926676, at *4–5 (Tex. App.—Houston [14th Dist.] Nov. 29, 2011, no pet.) (mem. op.) (holding that the plaintiff's fraud claim was subsumed by his legal malpractice claim and thus barred by *Peeler*).

49. *See* Garcia v. Garcia, No. 04-09-00207-CV, 2010 WL 307880, at *1–3 (Tex. App.—

- fee forfeiture.[50]

2. Peeler *shields nonattorneys.* In *Falby v. Percely*, a convict's mother hired an unlicensed law graduate named William Satterwhite to compose a writ of habeas corpus on behalf of her son.[51] Satterwhite visited the convict once but never produced the writ, and the federal deadline came and went.[52] The convict sued Satterwhite and argued that *Peeler* did not apply because Satterwhite did not represent him at trial.[53] But the Ninth District Court of Appeals in Beaumont disagreed, holding that *Peeler* barred the convict's claims because "[t]he habeas corpus application, regardless of who filed it, relates to and flows from the conviction."[54] Thus, this appellate court extended *Peeler* to claims against unlicensed legal assistants who were not involved with the

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San Antonio Jan. 27, 2010, no pet.) (mem. op.) (holding that the plaintiff did not satisfy the *Peeler* doctrine's requirements for establishing a claim of negligent misrepresentation because the plaintiff failed to show that she was free from all fault); Johnson v. Odom, 949 S.W.2d 392, 393–94 (Tex. App.—Houston [14th Dist.] 1997, pet. denied) (finding that *Peeler*'s holding barring convicts from suing their attorneys for malpractice similarly barred the appellant's negligent misrepresentation claim against his defense counsel).

50. Futch v. Baker Botts, LLP, 435 S.W.3d 383, 392 (Tex. App.—Houston [14th Dist.] 2014, no pet.).

51. Falby v. Percely, No. 09-04-422 CV, 2005 WL 1038776, at *1 (Tex. App.—Beaumont May 5, 2005, no pet.) (mem. op.).

52. *Id.*

53. *Id.* at *1–2.

54. *Id.* at *2–3. *Meullion v. Gladden* addressed a similar circumstance in which an inmate claimed that his attorney never filed the writ of habeas corpus after the inmate's mother paid the attorney $10,000 to do so. No. 14-10-01143-CV, 2011 WL 5926676, at *1 (Tex. App.—Houston [14th Dist.] Nov. 29, 2011, no pet.) (mem. op.). The court adopted *Falby*'s reasoning and held that the *Peeler* doctrine barred the inmate's claims even though the defendant did not represent him at trial. *Id.* at *3–4. But the court also said that a convict might bring a breach of fiduciary duty or fraud claim against his or her attorney should the convict successfully differentiate those claims from a legal malpractice claim. *See id.* at *4; *see also* Browning & Rames, *supra* note 2, at 96–97 (providing additional commentary on *Meullion*). Several other cases have similarly applied *Peeler* to bar claims against attorneys who did not represent the defendant at trial. *E.g.*, Shepherd v. Mitchell, No. 05-14-01235-CV, 2016 WL 2753914, at *1–2 (Tex. App.—Dallas May 10, 2016, pet. dism'd w.o.j.) (mem. op.); Rhodes v. George L. Preston & Assocs., No. 06-14-00057-CV, 2014 WL 7442682, at *2–3 (Tex. App.—Texarkana Dec. 31, 2014, no pet.) (mem. op.); Butler v. Mason, No. 11-05-00273-CV, 2006 WL 3747181, at *1–2 (Tex. App.—Eastland Dec. 21, 2006, pet. denied) (per curiam) (mem. op.); *see* Self v. Emblem, No. D044728, 2005 WL 1926704, at *1–3, *5 (Cal. Ct. App. Aug. 12, 2005) (affirming a judgment against a plaintiff suing a defense attorney appointed on his behalf to assist with post-conviction relief because the plaintiff failed to assert actual innocence as required by *Peeler*). Like the *Falby* court, Texas's Fourteenth District Court of Appeals has "extended *Peeler* to apply to assertions of poor-quality legal representation at the pre- and post-trial stages of representation." Gonyea v. Scott, 541 S.W.3d 238, 245 n.6 (Tex. App.—Houston [1st Dist.] 2017, pet. denied) (first citing McLendon v. Detoto, No. 14-06-00658-CV, 2007 WL 1892312, at *1–2 (Tex. App.—Houston [14th Dist.] July 3, 2007, pet. denied) (mem. op.); and then citing *Meullion*, 2011 WL 5926676, at *3–4).

convict's original conviction proceedings. Unlike the Beaumont Court of Appeals, however, courts in several other states have held that their interpretations of the *Peeler* doctrine do not protect those hired *after* the plaintiff's original conviction.[55]

Similar to *Falby*, Houston's Fourteenth District Court of Appeals held in *Golden v. McNeal* that *Peeler* barred claims against a court-appointed investigator named Shirley Johnson.[56] Johnson was hired to assist with the convict's defense, but the convict sued him along with his court-appointed attorney after he was sentenced to forty years for possession of a controlled substance.[57] The trial court granted the investigator's summary judgment motion, and the appellate court affirmed.[58] Relying on *Peeler*, the appellate court stated that "[c]onvicts may not shift the consequences of their crime to a third party" and said this "language . . . is certainly broad enough to encompass claims of negligence or malpractice on the part of nonattorneys."[59]

3. Peeler *now has a limit—at least in the eyes of one court. Gonyea v. Scott* offers a rare example of a Texas appellate court asserting a limit on *Peeler*'s application.[60] In *Gonyea*, the First District Court of Appeals held that the exoneration rule does not apply when a convict contracts with an attorney for legal services

55. *See, e.g.*, Costa v. Allen, No. WD67378, 2008 WL 34735, at *7 (Mo. Ct. App.), *vacated*, 274 S.W.3d 461 (Mo. 2008) (considering a suit against an attorney who did not represent the client at trial); Dushane v. Acosta, No. 68359, 2015 WL 9480185, at *1–2 & n.1 (Nev. Ct, App. Dec. 16, 2015) (dismissing a legal malpractice claim against an attorney who did not directly represent the plaintiff at trial because the plaintiff failed to allege that the attorney's actions caused him damages without regard to whether the plaintiff had attained post-conviction relief); Hilario v. Reardon, 960 A.2d 337, 344–45 (N.H. 2008) (allowing an exception to the state's requirement that the plaintiff offer proof of actual innocence when the attorney's alleged negligence occurred *after* the convict's plea and sentencing).

56. *See* Golden v. McNeal, 78 S.W.3d 488, 491–92 (Tex. App.—Houston [14th Dist.] 2002, pet. denied).

57. *Id.* at 491.

58. *Id.* at 491, 496.

59. *Id.* at 492 (internal quotation marks omitted) (quoting Peeler v. Hughes & Luce, 909 S.W.2d 494, 498 (Tex. 1995) (plurality opinion)).

60. *See* Gonyea v. Scott, 541 S.W.3d 238, 247–48 (Tex. App.—Houston [1st Dist.] 2017, pet. denied) (refusing to extend *Peeler* because doing so would not serve the policy goals *Peeler* advanced); Byrd v. Phillip Galyen, P.C., 430 S.W.3d 515, 525–26 (Tex. App.—Fort Worth 2014, pet. denied) (declining to extend *Peeler* in the civil context). In *Satterwhite v. Jacobs*, the First District Court of Appeals said a malpractice claim against an attorney representing a convict at a pre-trial bond hearing was "materially different" from *Peeler* largely because the representation at issue "did not involve the issue of Satterwhite's ultimate guilt or innocence." Satterwhite v. Jacobs, 26 S.W.3d 35, 36 (Tex. App.—Houston [1st Dist.] 2000), *aff'd in part*, *rev'd in part*, 65 S.W.3d 653 (Tex. 2001). The court reversed the trial court's grant of the attorney's summary judgment motion and remanded for further proceedings. *Id.* at 37.

that the attorney does has yet to provide.[61] Going forward, this rule would require criminal defense attorneys to prove that they performed at least some work on the client's behalf in order for *Peeler* to bar the claims asserted against them.[62]

The *Gonyea* case concerned Orian Scott, who hired attorney William Gonyea to investigate and file a writ of habeas corpus regarding several of Scott's convictions.[63] By accident, Scott overpaid Gonyea, but the attorney never returned the extra money.[64] Nor did Gonyea file the writ of habeas corpus.[65] The attorney claimed that he met with Scott once and performed initial research, but the trial court found that he never conducted an investigation, outlined the issues to address in the writ, or composed a draft of the petition.[66] Consequently, the trial court ruled against Gonyea, awarding Scott $25,000 for the legal representation he never received, $15,000 for theft damages, and $76,800 for attorney's fees.[67] On appeal, Gonyea contended that *Peeler* barred Scott's breach-of-contract claim and that the statute of limitations barred Scott's theft claim.[68]

The appellate court held that *Peeler* did not bar Scott's breach-of-contract claim for four reasons.[69] First, Scott's complaint was "not that the legal services he received fell below a . . . standard of care or contributed to his conviction, but that, instead, he received *no* representation."[70] Second, a decision in the attorney's favor

61. *See Gonyea*, 541 S.W.3d at 247–48.

62. *See id.* at 247.

63. *Id.* at 240.

64. *Id.* at 241–42.

65. *Id.* at 242.

66. *Id.* at 242–43. Instead, Gonyea apparently relabeled memos drafted by others and placed them in Scott's file to make it appear that he had performed work on Scott's behalf. *Id.*

67. *Id.* at 243.

68. *Id.* at 242–43.

69. *Id.* at 246–48. California appellate courts have reached similar results under similar circumstances. *See, e.g.*, Brooks v. Shemaria, 50 Cal. Rptr. 3d 430, 431, 436 (Ct. App. 2006) (holding that a plaintiff suing for the return of an unused retainer was not required to establish actual innocence before bringing that claim); Bird, Marella, Boxer & Wolpert v. Superior Court, 130 Cal. Rptr. 2d 782, 788–90 (Ct. App. 2003) (holding that a plaintiff claiming that he was not billed according to his contract did not need to first establish actual innocence before bringing his malpractice claim).

70. *Gonyea*, 541 S.W.3d at 246. In order to reach this conclusion, the court had to distinguish *Shepherd v. Mitchell*. *See id.* at 247. *Shepherd* also involved a claim against an attorney who failed to file a writ of habeas corpus, but the client in *Shepherd* received payment in a restitution order from the State Bar of Texas. Shepherd v. Mitchell, No. 05-14-01235-CV, 2016 WL 2753914, at *1 (Tex. App.—Dallas May 10, 2016, pet. dism'd w.o.j.) (mem. op.). *Gonyea* distinguished *Shepherd* by noting, first, that *Shepherd* was a suit for negligent legal representation—as opposed to breach of contract—and second, that the client in *Shepherd* was not a client seeking contract damages or fee restitution because he

would advance none of the policy justifications that *Peeler* first identified[71]—after all, the suit would not profit Scott financially because he only sought a return of the cash he paid for services never received.[72] Third, deciding in favor of the attorney "might create a disincentive to diligent representation of criminal defendants."[73] Fourth, "requiring some evidence of active representation to invoke *Peeler* defensively recognizes that the constitutional right to assistance of counsel is foundational to our criminal-justice system."[74]

Whether *Gonyea v. Scott* marks a new trend in Texas jurisprudence remains to be seen. But the *Gonyea* court's requirement that defense attorneys present "some evidence of active representation to invoke *Peeler*" sets a reasonable boundary around the *Peeler* doctrine.[75] It imposes some accountability on criminal defense attorneys without allowing criminals to profit from their crimes or reduce the consequences of their actions.

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had already received restitution for the legal services he never received—unlike Scott who never received a refund from Gonyea. *See Gonyea*, 541 S.W.3d at 247.

71. *Gonyea*, 541 S.W.3d at 247; *see supra* Section II.A. The court also noted that other Texas appellate courts had applied the doctrine more expansively than the Texas Supreme Court. *Gonyea*, 541 S.W.3d at 245 (observing that Texas intermediate appellate courts have applied the doctrine beyond the realm of legal malpractice claims, while the Texas Supreme Court has applied it only in the context of legal malpractice).

72. *Gonyea*, 541 S.W.3d at 247. The court also noted that ruling in favor of Scott "would not shift responsibility for the crime away from the client or diminish the consequences of the client's acts. Nor would it undermine our criminal-justice system." *Id.*

73. *See id.* at 248.

74. *Id.* at 247–48 (first citing U.S. CONST. amend. VI; and then citing Strickland v. Washington, 466 U.S. 668, 685 (1984)) ("If anything, requiring some evidence of active representation to invoke *Peeler* defensively recognizes that the constitutional right to assistance of counsel is foundational to our criminal-justice system."). This allusion to constitutional rights signaled that, if *Peeler* allowed attorneys to do absolutely nothing for their clients, the doctrine might be unconstitutional. *See Gonyea*, 541 S.W.3d at 247. Whether the Supreme Court's interpretation of the Sixth Amendment would align with that of the appellate court is open to debate. The Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence." U.S. CONST. amend. VI. But in *Coleman v. Thompson*, the United States Supreme Court determined that "[t]here is no constitutional right to an attorney in state post-conviction proceedings." 501 U.S. 722, 727, 752 (1991) (involving an attorney's failure to file a notice of appeal on time for a habeas corpus petition). The Supreme Court offered an exception to the *Coleman* rule in *Martinez v. Ryan*, but the rule would not be applicable here. *See* 566 U.S. 1, 9 (2012) ("Inadequate assistance of counsel at initial-review collateral proceedings may establish cause for a prisoner's procedural default of a claim of ineffective assistance at trial."). As a result, Scott would likely have an uphill battle proving that his claim against Gonyea had constitutional support. *Cf.* Pennsylvania v. Finley, 481 U.S. 551, 555 (1987) (citation omitted) ("We have never held that prisoners have a constitutional right to counsel when mounting collateral attacks upon their convictions, and we decline to so hold today. Our cases establish that the right to appointed counsel extends to the first appeal of right, and no further.").

75. *See Gonyea*, 541 S.W.3d at 247.

Furthermore, it enhances the criminal justice system by encouraging criminal defense attorneys to fulfill their contractual obligations to criminal defendants.

D. Corresponding Rules in Other Jurisdictions

Peeler requires plaintiffs in Texas, who pursue criminal legal malpractice claims, to show evidence of "exonerat[ion] by direct appeal, post-conviction relief, or otherwise" before suing their attorneys.[76] This is known as a "legal innocence" requirement[77] and is one of eleven approaches for a standard of criminal malpractice claims adopted by different states.[78] These approaches are listed below, roughly organized on a scale of least to most stringent. The *Peeler* doctrine is an example of the sixth approach.

1. Equivalent civil and criminal malpractice standards. Some states have the same requirements for convicted and unconvicted plaintiffs to sue their attorneys.[79] Both must prove duty, breach, causation, and damages.[80] These states include

76. Peeler v. Hughes & Luce, 909 S.W.2d 494, 495 (Tex. 1995) (plurality opinion).

77. *See* Browning & Rames, *supra* note 2, at 55.

78. *See* Brewer v. Hagemann, 771 A.2d 1030, 1032–33 (Me. 2001) ("Some courts have required criminal malpractice plaintiffs to prove actual innocence of the criminal charge, while other courts have required that the conviction be overturned, or that the malpractice plaintiff be exonerated of the criminal charge. A minority of courts have rejected the addition of the element of innocence or exoneration to a malpractice action and have held that a criminal malpractice plaintiff must prove the same elements as a civil malpractice plaintiff."). The Appendix following this comment provides a complete list of the approach taken by every state to legal malpractice claims in the criminal arena.

79. *See* Tim Gavin & Ken Carroll, *Exoneration as a Prerequisite to a Criminal Defendant's Legal Malpractice Claim*, CARRINGTON COLEMAN (Apr. 12, 2016), http://www.ccsb.com/wp-content/uploads/2016/05/Exoneration-as-a-Prerequisite-to-a-Criminal-Defendant_s-Legal-Malpractice-Claim.pdf. [https://perma.cc/X63N-55AY].

80. *See* Cort Thomas, *Criminal Malpractice: Avoiding the Chutes and Using the Ladders*, 37 AM. J. CRIM. L. 331, 332–33 (2010).

Arkansas,[81] Colorado,[82] Delaware,[83] Indiana,[84] Louisiana,[85] Michigan,[86] Montana,[87] New Mexico,[88] North Dakota,[89] Ohio,[90] and Utah.[91]

2. Higher proximate cause standard in criminal defense malpractice actions. North Carolina justifies this rule on the basis that (1) the criminal justice system already provides special protections for criminal defendants, (2) the guilty should not profit from their crimes, and (3) the supply of criminal defense attorneys should be protected.[92]

3. Legally cognizable injury. Some states and the District of Columbia require that the plaintiff either show that (1) he or she would not have been convicted but for the attorney's negligence or (2) the attorney caused a different legally cognizable harm. These

81. Arkansas appears to have no special requirement for bringing criminal malpractice claims. *See, e.g.*, Smothers v. Clouette, 934 S.W.2d 923, 924 (Ark. 1996). That said, Arkansas ordinarily requires, in civil cases, proof that but for the attorney's malpractice, the results at trial would have been different. *See* Davis v. Bland, 238 S.W.3d 924, 926 (Ark. 2006).

82. Rantz v. Kaufman, 109 P.3d 132, 136 (Colo. 2005) (en banc); *see* Michael McDermott, *Colorado*, *in* A SURVEY OF THE LAW OF LEGAL MALPRACTICE (2016), https://www.primerus.com/wp-content/uploads/2016/03/PRI_0216_PDICompendium_LegalMalpractice_FNLR3v1.pdf [https://perma.cc/7BEE-3J9M].

83. Rose v. Modica, No. 285,2002, 2002 WL 31359867, at *1 (Del. Oct. 18, 2002); Sanders v. Malik, 711 A.2d 32, 34 (Del. 1998) ("The standards for proving ineffective assistance of counsel in a criminal proceeding are equivalent to the standards for proving legal malpractice in a civil proceeding."). Note that, as discussed below, Delaware does have special rules for public defenders and court-appointed attorneys. *See infra* Section II.D.11.

84. Godby v. Whitehead, 837 N.E.2d 146, 151 (Ind. Ct. App. 2005); *see* Silvers v. Brodeur, 682 N.E.2d 811, 818 (Ind. Ct. App. 1997).

85. Schwehm v. Jones, 872 So. 2d 1140, 1147 n.7 (La. Ct. App. 2004).

86. Gebhardt v. O'Rourke, 510 N.W.2d 900, 906 (Mich. 1994).

87. *See* Spencer v. Beck, 245 P.3d 21, 23–24 (Mont. 2010) (allowing a legal malpractice claim against an attorney who failed to pursue post-conviction relief that might have led to the overturning of the plaintiff's conviction); Hauschulz v. Michael Law Firm, 30 P.3d 357, 360 (Mont. 2001) (holding that an attorney's "failure to consult with his client prior to entering a guilty plea on his behalf could clearly be construed as a failure to use reasonable care and skill").

88. Duncan v. Campbell, 936 P.2d 863, 865–66 (N.M. Ct. App. 1997).

89. *See* Klem v. Greenwood, 450 N.W.2d 738, 743 (N.D. 1990).

90. *See* Krahn v. Kinney, 538 N.E.2d 1058, 1061 (Ohio 1989); Amy L. Leisinger, *A Criminal Defendant's Inability to Sue His Lawyer for Malpractice: The Other Side of the Exoneration Rule*, 44 WASHBURN L.J. 693, 707 (2005).

91. *See* Willey v. Bugden, 318 P.3d 757, 761 n.5 (Utah Ct. App. 2013) (noting that other states require post-conviction relief or actual innocence but acknowledging no such rule in Utah).

92. *See* Dove v. Harvey, 608 S.E.2d 798, 801–02 (N.C. Ct. App. 2005) (quoting Belk v. Cheshire, 583 S.E.2d 700, 706 (N.C. Ct. App. 2003)).

include Alabama,[93] District of Columbia,[94] Georgia,[95] Nebraska,[96] and Rhode Island.[97]

4. Actual innocence. Some states do not require post-conviction relief as a prerequisite to bringing suit but do require the plaintiff to prove by a preponderance of the evidence that he or she was innocent of the crime charged.[98] These include Illinois,[99] Kentucky,[100] Massachusetts,[101] Missouri,[102] New York,[103] Oklahoma,[104] South Carolina,[105] and Wisconsin.[106]

5. Legal innocence with actual guilt as an affirmative defense. Alaska requires post-conviction relief as a prerequisite to bringing a malpractice suit. But the state also allows criminal defense attorneys to raise the former client's actual guilt as an affirmative defense established by a preponderance of the evidence.[107]

6. Legal innocence or exoneration. Many states require that

93. The law in Alabama is in flux and unsettled, but the Alabama Supreme Court has suggested that convicts asserting legal malpractice claims must establish that but for their attorneys' negligence, the outcome at trial would have been different. *See* Bennardo, *supra* note 15, at 343 n.9 (citing contradicting cases imposing this standard and a stricter variant in the state).

94. *See* McCord v. Bailey, 636 F.2d 606, 611 (D.C. Cir. 1980).

95. *See* Gomez v. Peters, 470 S.E.2d 692, 695 (Ga. Ct. App. 1996). Note that the state also denies convicts who have admitted guilt the right to sue for legal malpractice. *See id.*

96. McVaney v. Baird, Holm, McEachen, Pedersen, Hamann, & Strasheim, 466 N.W.2d 499, 507 (Neb. 1991); Eno v. Watkins, 429 N.W.2d 371, 372 (Neb. 1988).

97. *See* Laurence v. Sollitto, 788 A.2d 455, 459 (R.I. 2002).

98. *E.g.*, Glenn v. Aiken, 569 N.E.2d 783, 788 (Mass. 1991); *see* Bennardo, *supra* note 15, at 342 & n.3 (listing cases mentioning this requirement); Browning & Rames, *supra* note 2, at 61–62 (noting that Massachusetts, Washington, Wisconsin, and Illinois have adopted this rule).

99. Paulsen v. Cochran, 826 N.E.2d 526, 530 (Ill. App. Ct. 2005). An exception to actual innocence requirement applies if the attorney intentionally sought his client's conviction. *Id.* at 531.

100. Ray v. Stone, 952 S.W.2d 220, 224 (Ky. Ct. App. 1997) (noting in dicta that attaining post-conviction relief could help establish the convict's innocence but holding that it was the convict's guilty plea at the trial court that precluded him from claiming he was actually innocent).

101. Marchetti v. Atwood, No. 17-00749, 2017 WL 5760936, at *3 (Mass. Super. Ct. Nov. 21, 2017).

102. *See* Costa v. Allen, 323 S.W.3d 383, 387 (Mo. Ct. App. 2010).

103. Britt v. Legal Aid Soc'y, Inc., 741 N.E.2d 109, 110 (N.Y. 2000); Carmel v. Lunney, 511 N.E.2d 1126, 1128 (N.Y. 1987).

104. *See* Robinson v. Southerland, 123 P.3d 35, 43–44 (Okla. Civ. App. 2005).

105. Brown v. Theos, 550 S.E.2d 304, 306–07 (S.C. 2001).

106. Tallmadge v. Boyle, 730 N.W.2d 173, 181 (Wis. Ct. App. 2007).

107. Shaw v. State, 861 P.2d 566, 569, 572 (Alaska 1993) (stating that the statute of limitations for a malpractice suit does not begin until the criminal defendant obtains post-

convicts establish legal innocence via proof of exoneration or other post-conviction relief before suing their criminal defense attorneys for malpractice.[108] These states include Arizona,[109] California,[110] Idaho,[111] Iowa,[112] Kansas,[113] Maryland,[114] Minnesota,[115] Mississippi,[116] New Jersey,[117] Tennessee,[118] and Texas.[119]

7. Different standards for suing trial and post-conviction counsel. The Oregon Supreme Court requires that a plaintiff, who sues their trial counsel, allege harm by showing that the plaintiff "has been exonerated of the criminal offense through reversal on direct appeal, through post-conviction relief proceedings, or otherwise."[120] In contrast, to sue post-conviction counsel, "prior exoneration, by means of appeal, post-conviction proceedings, or otherwise, is not a prerequisite . . . ."[121]

8. Post-conviction relief plus proof that the attorney acted

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conviction relief); *see* Bruce Gagnon & Christopher Slottee, *State of Alaska*, *in* THE LAW OF LAWYERS' LIABILITY 13 (Merri A. Baldwin et al. eds., 2012).

108. *See* Bennardo, *supra* note 15, at 341–42 (defining "legal innocence" as "prov[ing] by a preponderance of the evidence that but for the lawyer's negligence, the malpractice plaintiff would not have been convicted in the underlying criminal trial by proof beyond a reasonable doubt"); Browning & Rames, *supra* note 2, at 61 & nn.53–60 (noting that forms of this rule have been applied in Tennessee, Iowa, West Virginia, Georgia, Idaho, Kentucky, New Hampshire, and California).

109. Glaze v. Larsen, 83 P.3d 26, 32–33 (Ariz. 2004) (en banc) (citation omitted) (stating that "'any post-conviction relief suffices,' . . . as long as the underlying criminal proceedings are thereby terminated favorably to the defendant").

110. Coscia v. McKenna & Cuneo, 25 P.3d 670, 673–74 (Cal. 2001); Wiley v. Cty. of San Diego, 966 P.2d 983, 987 (Cal. 1998).

111. *See* Molen v. Christian, 388 P.3d 591, 595–96 (Idaho 2017).

112. Barker v. Capotosto, 875 N.W.2d 157, 166 (Iowa 2016); Trobaugh v. Sondag, 668 N.W.2d 577, 583 (Iowa 2003).

113. Canaan v. Bartee, 72 P.3d 911, 913 (Kan. 2003).

114. Berringer v. Steele, 758 A.2d 574, 597 (Md. Ct. Spec. App. 2000).

115. Noske v. Friedberg, 670 N.W.2d 740, 744 (Minn. 2003).

116. Trigg v. Farese, No. 2015-CA-00045-SCT, 2018 WL 6241322, at *8 (Miss. Nov. 29, 2018) ("To be clear, when we say a defendant must be 'exonerated,' we mean he must obtain a more favorable disposition of his conviction or sentence through direct appeal, postconviction relief, habeas corpus, or similar means within the criminal justice process.3 At that point, the malpractice suit may be initiated even if the underlying criminal case has not yet been finally resolved." (footnote omitted)).

117. Rogers v. Cape May Cty. Office of the Pub. Def., 31 A.3d 934, 939–40 (N.J. 2011).

118. *See* Gibson v. Trant, 58 S.W.3d 103, 108 (Tenn. 2001).

119. *See* Peeler v. Hughes & Luce, 909 S.W.2d 494, 497–98 (Tex. 1995) (plurality opinion).

120. Stevens v. Bispham, 851 P.2d 556, 557, 560 (Or. 1993) (en banc).

121. Drollinger v. Mallon, 260 P.3d 482, 490 (Or. 2011) (en banc). If the plaintiff's alleged harm is suffering brought about by continued incarceration, however, the plaintiff "must plead and prove that, if defendants had performed competently in the post-conviction proceeding, plaintiff would have obtained relief in that proceeding, that he would have

recklessly or in wanton disregard for the plaintiff's interest. Pennsylvania has this requirement.[122]

9. Actual innocence plus legal innocence. Some states require both. These include Florida,[123] Nevada,[124] New Hampshire,[125] Virginia,[126] and Washington.[127]

10. Innocence of both the charge and lesser offenses. West Virginia requires that plaintiffs prove by a preponderance of the evidence not only that they were innocent of the crime for which they were convicted but also that they were innocent of the lesser charges brought against them.[128]

11. No legal malpractice suits against protected groups. Under Delaware's qualified immunity laws, plaintiffs may not sue public defenders and court-appointed attorneys without first overcoming the state presumption of qualified immunity.[129] Minnesota and Nevada do not allow suits against public defenders.[130] Nevada does not allow suits against court-appointed,

avoided reconviction in any subsequent proceeding on remand, and that he would have been released from prison." *Id.*

122. *See* Bailey v. Tucker, 621 A.2d 108, 114–15 (Pa. 1993).

123. *See* Schreiber v. Rowe, 814 So. 2d 396, 398–400 (Fla. 2002) (per curiam); *see* Steele v. Kehoe, 747 So. 2d 931, 932–33 (Fla. 1999); Cocco v. Pritcher, 1 So. 3d 1246, 1248 (Fla. Dist. Ct. App. 2009) ("The [plaintiff] must also 'establish [that] the final disposition of the underlying criminal case [was] in his or her favor.'"); Cira v. Dillinger, 903 So. 2d 367, 370–71 (Fla. Dist. Ct. App. 2005).

124. *See* Clark v. Robison, 944 P.2d 788, 790 (Nev. 1997) (per curiam) (finding that post-conviction relief is required for a malpractice suit); Morgano v. Smith, 879 P.2d 735, 737–38 (Nev. 1994) (per curiam) (adding the requirement that the plaintiff prove actual innocence as an element of a malpractice suit).

125. *See* Therrien v. Sullivan, 891 A.2d 560, 563–64 (N.H. 2006) (requiring proof of actual innocence and post-conviction relief). The criminal malpractice claim begins to accrue when the plaintiff attains and establishes by a preponderance of the evidence actual innocence to bring the claim. Mahoney v. Shaheen, Cappiello, Stein & Gordon, P.A., 727 A.2d 996, 998–1000 (N.H. 1999).

126. Adkins v. Dixon, 482 S.E.2d 797, 800–02 (Va. 1997).

127. Ang v. Martin, 114 P.3d 637, 640–41 (Wash. 2005) (en banc).

128. Humphries v. Detch, 712 S.E.2d 795, 801 (W. Va. 2011).

129. Browne v. Robb, 583 A.2d 949, 950–51 (Del. 1990).

130. Dziubak v. Mott, 503 N.W.2d 771, 773 (Minn. 1993); Morgano v. Smith, 879 P.2d 735, 736–37 (Nev. 1994) (per curiam).

private defense attorneys.[131]

12. Undecided. Connecticut,[132] Hawaii,[133] Maine,[134] South Dakota,[135] Vermont,[136] and Wyoming[137] have yet to hear criminal legal malpractice claims at the appellate level and decide what standard to apply.

E. Exonerations in Texas

If exonerations never occurred in Texas, legal malpractice suits under *Peeler* would be uniformly dismissed.[138] But in the last few years, the Texas legislature has passed several laws meant to protect against wrongful convictions.[139] For example, a May 2017 bill implemented tougher regulations on the use of jailhouse informants in prosecutions, special requirements for audio recorded interrogations in some felony cases, and tighter

131. *See* NEV. REV. STAT. ANN. §§ 41.0307(4)(b), 41.032 (LexisNexis 2012 & Supp. 2016); *Morgano*, 879 P.2d at 737.

132. The Connecticut Supreme Court has not yet considered the issue, but a federal court ruling determined that a convicted plaintiff would need to seek appellate or post-conviction relief before bringing a malpractice suit. *See* McCurvin v. Law Offices of Koffsky & Walkley, No. CIV.A.3:98CV182(SRU), 2003 WL 223428, at *3–4 (D. Conn. Jan. 27, 2003).

133. *See* Jeffrey S. Portnoy & Peter W. Olson, *State of Hawaii*, *in* THE LAW OF LAWYERS' LIABILITY, *supra* note 107, at 118 ("Hawaii does not have any reported cases requiring a criminal defendant/legal malpractice plaintiff to prove innocence in order to prove causation.").

134. *See* William C. Saturley & Holly E. Russell, *State of Maine*, *in* THE LAW OF LAWYERS' LIABILITY, *supra* note 107, at 205 ("We have not yet had occasion to determine whether legal malpractice based on negligent representation in a criminal case should be treated differently from legal malpractice arising from representation in a civil matter." (citing Brewer v. Hagemann, 771 A.2d 1030, 1031–33 (Me. 2001))).

135. *See* Thomas J. Welk & Jason R. Sutton, *State of South Dakota*, *in* THE LAW OF LAWYERS' LIABILITY, *supra* note 107, at 455 ("There are no South Dakota cases addressing whether the plaintiff must prove innocence to recover in legal malpractice actions arising out of a criminal case.").

136. *See* Herbert G. Ogden, *State of Vermont*, *in* THE LAW OF LAWYERS' LIABILITY, *supra* note 107, at 505 (noting that in 2006 the Vermont Supreme Court "declined to decide whether to require actual innocence." (citing Bloomer v. Gibson, 912 A.2d 424, 431 (Vt. 2006))).

137. *Cf.* Scott E. Ortiz, *State of Wyoming*, *in* THE LAW OF LAWYERS' LIABILITY, *supra* note 107, at 558 ("Wyoming does not have an innocence requirement for legal malpractice plaintiffs in criminal cases.").

138. *See* Peeler v. Hughes & Luce, 909 S.W.2d 494, 497–98 (Tex. 1995) (plurality opinion) (holding that a criminal defendant does not have a malpractice action unless the guilty verdict is a result of the attorney's illegal conduct and the conviction has been overturned).

139. Jolie McCullough & Justin Dehn, *How Some See Texas as the "Gold Standard" Against Wrongful Convictions*, TEX. TRIB. (Sept. 20, 2017), https://www.texastribune.org/2017/09/20/texas-lawmakers-hope-prevent-wrongful-convictions/ [https://perma.cc/DA8Y-4BFU].

procedures for eyewitness identifications in police lineups.[140] As a result of these and other efforts, Texas leads the nation in total exonerations[141]—a fact that has been increasingly important since *Peeler*'s pronouncement in 1995. With at least 40,000 annual convictions, however, the chances of exoneration remain slim.[142]

III. STRATEGIES FOR REIGNING IN THE *PEELER* DOCTRINE

Peeler warned that "[n]othing in [the] opinion should be construed as relieving criminal defense attorneys of their responsibility to maintain the highest standards of ethical and professional conduct."[143] But some attorneys have used *Peeler* to do just that.[144] Many states do not have exoneration or actual innocence requirements,[145] and some scholars have vigorously criticized the rule,[146] which suggests that modifying, removing, or

140. *Id.*; *Texas Governor Signs Landmark Comprehensive Legislation to Prevent Wrongful Convictions*, INNOCENCE PROJECT (June 15, 2017), https://www.innocenceproject.org/texasgovernorsignslandmarkbill/ [https://perma.cc/M3X7-792E] ("Texas now has the most comprehensive statute in the nation to regulate the use of jailhouse informants, which played a role in nine wrongful convictions in the state and is a leading contributor to wrongful convictions nationally."); *Bill Texts: TX HB34 | 2017-2018 | 85th Legislature*, LEGISCAN, https://legiscan.com/TX/drafts/HB34/2017 [https://perma.cc/CV4D-UKT6] (last visited Mar. 19, 2019) (showing that the bill was passed on June 12, 2017, and became effective on September 1, 2017). These reformations were inspired, in part, by the stories of people recently exonerated. McCullough & Dehn, *supra* note 139.

141. McCollough & Dehn, *supra* note 139 ("Texas has long led the nation in the number of people it exonerates . . . . Since 2010, more than 200 people have been exonerated in Texas, according to the National Registry of Exonerations. That's more than twice as many as any other state during the same period."). The National Registry of Exonerations tracks the number of exonerations by state, recording the alleged crime, number of years lost in prison, and more. *Exonerations by State*, NAT'L REGISTRY EXONERATIONS, http://www.law.umich.edu/special/exoneration/Pages/Exonerations-in-the-United-States-Map.aspx [https://perma.cc/V9WC-CE4Q] (last visited Mar. 19, 2019). The registry was the result of coordinated efforts by the Newkirk Center for Science & Society at the University of California Irvine, University of Michigan Law School, Michigan State University College of Law, and the Center on Wrongful Convictions at Northwestern University School of Law. *Id*. As of February 21, 2019, Texas has exonerated 359 people since 1989. The state with the second highest number of exonerations is Illinois with 281. *Id*.

142. *Conviction Rates for Concealed Handgun License Holders*, TEX. DEP'T PUB. SAFETY, http://www.dps.texas.gov/rsd/ltc/reports/convrates.htm [https://perma.cc/3XT3-2R8Q] (last visited Mar. 19, 2019) (listing total convictions annually from 2001 to 2017, which range from 40,624 in 2001 to 73,914 in 2010).

143. *Peeler*, 909 S.W.2d at 500.

144. Many states reference *Peeler* as justification for embracing an approach to criminal defense legal malpractice cases that makes it more difficult to hold attorneys accountable for negligent representation. *See, e.g.*, Coscia v. McKenna & Cuneo, 25 P.3d. 670, 674 (Cal. 2001) (quoting *Peeler*, 909 S.W.2d at 498).

145. *See supra* Section II.D; *see also infra* Appendix.

146. *See supra* Section II.B; Duncan, *supra* note 1, at 1292–93 ("Lawyers practicing without accountability present the very real risk of routinely providing substandard legal representation.").

replacing it would be justified. Before considering alternatives to the doctrine, however, it is important to understand the public policy interests at issue so that lawmakers, judges, and others can more easily evaluate alternatives to the exoneration rule that might lead to a more just and fair system in Texas and elsewhere.

A. Competing Public Policies

The four public policies that *Peeler*'s plurality considered persuasive[147] are only a few among the many raised by courts and scholars addressing criminal legal malpractice claims:

- ensuring Sixth Amendment protections for criminal defendants by maintaining representation standards;[148]
- seeking equitable representation for all—including alleged lawbreakers;[149]
- treating attorneys equally instead of providing special protections to criminal attorneys;[150]
- denying criminals the opportunity to profit financially from their crimes;[151]
- preventing criminals from shifting responsibility for their crimes to third parties;[152]
- maintaining severe consequences for criminal activity;[153]
- advancing the war on crime;[154]
- protecting the credibility of the justice system;[155]
- holding criminal defense attorneys responsible for their negligence;[156]

147. The four policies advanced in *Peeler* include: prohibiting a convict from profiting from his illegal conduct, prohibiting a convict from shifting responsibility for the crime to a third party, protecting convicts from shirking from the consequences of their actions, and prevent the undermining of the criminal justice system. *Peeler*, 909 S.W.2d at 497–98.

148. *See Peeler*, 909 S.W.2d at 501 (Phillips, C.J., dissenting).

149. Duncan, *supra* note 1, at 1305.

150. *Id.* at 1287. *See also* Mahoney v. Shaheen, Cappiello, Stein & Gordon, P.A., 727 A.2d 996, 999 (N.H. 1999).

151. *In re* Estate of Laspy, 409 S.W.2d 725, 730 (Mo. Ct. App. 1966).

152. Gonyea v. Scott, 541 S.W.3d. 238, 245 (Tex. App—Houston [1st Dist.] 2017, pet. denied) (citing *Peeler*, 909 S.W.2d at 497–98).

153. *Id*. (citing *Peeler*, 909 S.W.2d at 497–98).

154. *See* JOHNSON, *supra* note 29, at 298 (suggesting that the "war on crime" policy justification for limiting criminal legal malpractice claims may be explained by a different underlying concern that criminal defense attorneys could be at risk of receiving a deluge of malpractice suits).

155. *See Peeler*, 909 S.W.2d at 498.

156. *Id*. at 500; *see Gonyea*, 541 S.W.3d at 245.

- protecting future plaintiffs from bad lawyers;[157]
- providing attorneys the freedom to do what is best for their clients instead of incentivizing the satisfaction of every client request;[158]
- avoiding an influx of criminal legal malpractice cases that might overburden courts;[159]
- avoiding circumstances that might discourage criminal defense attorneys from accepting new clients;[160] and
- avoiding redundancy in a system already safeguarded by protections against mistaken convictions.[161]

B. Alternatives to the Status Quo

Seven alternatives to the *Peeler* doctrine are considered below.

1. Equal standards for convicted and unconvicted plaintiffs. Eleven states have rejected special requirements for legal malpractice claims brought by convicts.[162] This approach arguably (1) protects individual rights by placing criminal defendants on a more level playing field when asserting legal malpractice claims;[163] (2) sees criminal defendants as innocent until proven

157. Duncan, *supra* note 1, at 1291–92.

158. *See* Browning & Rames, *supra* note 2, at 55.

159. *See id.* at 55–56; JOHNSON, *supra* note 29, at 298. *See also* Leisinger, *supra* note 90, at 706 ("Prisoners have a lot of time and little else to do, and if prisoners must obtain post-conviction relief before maintaining a legal malpractice action, a great deal of litigation can be avoided." (citation omitted)).

160. Mahoney v. Shaheen, Cappiello, Stein & Gordon, P.A., 727 A.2d 996, 999–1000 (N.H. 1999) ("[T]he pool of legal representation available to criminal defendants, especially indigents, needs to be preserved . . . . Setting the standard at a lower level may well dampen counsels' willingness to enter the criminal defense arena.").

161. *See* Browning & Rames, *supra* note 2, at 55; Susan M. Treyz, Note, *Criminal Malpractice: Privilege of the Innocent Plaintiff?*, FORDHAM L. REV. 719, 731–33 (1991). In *Mahoney*, the court argued that public policy favors a "stricter standard for criminal malpractice actions" because, among other policy considerations, "the criminal justice system affords individuals charged with crimes a panoply of protections against abuses of the system and wrongful conviction . . . ." 727 A.2d at 999. The court proceeded to list safeguards for criminal defendants including "the right to constitutionally effective defense counsel, ... [T]he law governing search and seizure, the probable cause requirement for arrest, the beyond a reasonable doubt standard for conviction, and post-conviction relief not afforded civil litigants." *Id.* (citations omitted).

162. *See supra* Section II.D.1.

163. *See* Duncan, *supra* note 1, at 1296 (arguing that guilty criminal defendants and innocent criminal defendants alike should be entitled to a tort remedy "by means of a criminal malpractice action").

guilty;[164] (3) prohibits criminal defense attorneys from shifting the costs or responsibility for their mistakes onto criminal defendants;[165] (4) allows criminal defendants to seek refunds when their attorneys do not do what they promised;[166] (5) helps protect future criminal defendants from negligent attorneys;[167] (6) helps ensure adequate criminal defense counsel for all under the Constitution; [168] (7) places criminal defense attorneys on an equal playing field with other attorneys subject to the traditional standard;[169] and (8) avoids other shortcomings of the exoneration rule previously addressed.[170]

On the other hand, some might be concerned that this approach would (1) allow criminals a financial return made possible by their crimes,[171] (2) shift responsibility for the crimes to their defense counsel,[172] (3) increase caseloads, [173] (4) discourage criminal defense attorneys from taking on new clients, and (5) encourage defense attorneys to do "what makes [their] client[s] happy" instead of what best serves their interests.[174] But not all of these concerns are valid.

Though convicted plaintiffs who prevail against their attorneys in malpractice suits may receive payment, that payment will only serve to offset the additional jail time, fines, and other harms that their attorney's acts or omissions brought upon them.[175] Regarding the potential for responsibility-shifting, this risk cuts both ways. Removing the exoneration rule might force

164. *See id.* at 1268.

165. *See id.* at 1287, 1306.

166. *See* Gonyea v. Scott, 541 S.W.3d 238, 241–42 (Tex. App.—Houston [1st] 2017, pet. denied).

167. *See* Duncan, *supra* note 1, at 1291.

168. *Cf. Gonyea*, 541 S.W.3d at 247–48.

169. *See* Duncan, *supra* note 1, at 1287.

170. *See supra* Section II.C.

171. Peeler v. Hughes & Luce, 909 S.W.2d 494, 498 (Tex. 1995) (plurality opinion).

172. *Id.* at 498.

173. Duncan, *supra* note 1, at 1272.

174. *See* Browning & Rames, *supra* note 2, at 55–56.

175. *See* Bennardo, *supra* note 15, at 362. And the opportunity to recover financially from a criminal legal malpractice suit may not fully offset the jail time, fines, and other consequences of conviction that criminal defendants face. For instance, Carol Peeler was fined a total of $250,000 in addition to other penalties under her plea deal, and she paid her defense counsel at least another $250,000 to represent her. *Peeler*, 909 S.W.2d at 496. If her malpractice suit had allowed her a $500,000 recovery minus attorney's fees, she still would have to serve her prison sentence and five years on probation, as well as the reputational harm and other consequences of her conviction. *See id.* Whether this result "would allow the criminal to profit [from her] own fraud" or to "escap[e] the consequences of" her crime is questionable. *See id.* at 497, 500 (quoting State *ex rel.* O'Blennis v. Adolf, 691 S.W.2d 498, 504 (Mo. Ct. App. 1985)).

some attorneys to lose revenue made possible by their client's crimes, but the current rule forces convicts to bear the financial and other consequences of their attorneys' negligence.[176] Addressing the caseload concern, it is likely that more convicts would bring criminal defense legal malpractice actions if the standard were lower.[177] But the current system arguably incentivizes convicts to pursue every form of post-conviction relief imaginable if they believe their attorney made a mistake, even if the evidence against them is strong. While a lower standard might encourage criminal defense attorneys to be more cautious about accepting new clients, this would not be anathema in a profession with high standards of professional conduct.[178] Every attorney must weigh the risks of taking on a new client, and the potential for a malpractice claim serves to encourage attorneys to do what other reasonable attorneys would do for their clients. Furthermore, it is unclear whether imposing higher standards would noticeably affect the number of criminal defense attorneys practicing in the state.[179] But if Texas and other states with exoneration rules are concerned about ensuring the supply of criminal defense attorneys, they could temper a more relaxed standard with special protections for public defenders and court-appointed defense attorneys, as some other states have done.[180]

2. Follow Gonyea *by refusing to rule in favor of criminal defense attorneys when doing so would not align with* Peeler*'s public policy objectives.* This approach would allow convicts to pursue claims that could not result in financial gain, shift responsibility for their criminal activity to someone else, reduce the consequences of their crimes, or otherwise undermine the justice system.[181] Though this option would arguably be an

176. Duncan, *supra* note 1, at 1287 ("[T]here is no public policy favoring allowing [sic] a negligent attorney to shift the responsibility for that attorney's negligence onto his client simply because his client may have committed a criminal offense. Yet, that is precisely the effect of the present standard.").

177. *See* Leisinger, *supra* note 90, at 706.

178. *See* Duncan, *supra* note 1, at 1288–89.

179. *Id.* at 1290.

180. *See, e.g.*, *supra* Section II.D.11.

181. *See* Gonyea v. Scott, 541 S.W.3d 238, 247–48 (Tex. App.—Houston [1st Dist.] 2017, pet. denied). It would also allow others who paid for unreceived or inadequate legal services to pursue their own claims against criminal defense attorneys, such as the parents of convicts who hire defense counsel to defend their children facing criminal charges or seeking post-conviction relief. *See, e.g.*, Manderscheid v. Cogdell, No. 01-99-00930-CV, 2000 WL 233154, at *1–2 (Tex. App.—Houston [1st Dist.] Mar. 2, 2000, no pet.) (not designated for publication) (applying *Peeler* to bar claims by the convict's parents against a defense attorney whom they hired to defend their son). Allowing these claims would certainly not

improvement, it would not fully address the fundamental problems posed by the exoneration and actual innocence requirements.[182]

3. Provide alternative remedies that discipline attorneys without allowing criminals to receive financial gain. Peeler was decided under the assumption that successful plaintiffs in malpractice actions would receive a financial recovery.[183] Courts might consider different equitable remedies to avoid allowing criminals financial gain but still allow suits that discourage poor performance, such as the following:

- allow convicts to recover what they paid for the deficient representation;[184]
- allow modest reductions in convicts' sentences based on what effect courts believe the attorney's subpar performance had;[185]
- force negligent attorneys to pay a fine to an organization that seeks to overturn wrongful convictions or to a fund that sponsors criminal defense for the indigent;
- temporarily or permanently suspend an attorney's bar license; or
- impose a system of comparative responsibility to reduce the plaintiff's recovery in a malpractice suit.[186]

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allow convicts to profit from their crimes.

182. *Cf. supra* Section III.B (discussing alternatives to the *Peeler* doctrine).

183. *See* Peeler v. Hughes & Luce, 909 S.W.2d 494, 497–99 (Tex. 1995) (plurality opinion) (making multiple references to the policy goal of keeping convicts from profiting from their crimes).

184. This rule would allow convicts to receive a refund on money spent in contract with attorneys for services that were never provided, as in *Gonyea*. *See Gonyea*, 541 S.W.3d at 241–42.

185. Alternatively, courts could allow convicted plaintiffs financial compensation for punishments the convict would likely not have received had the plaintiff received better representation. The Colorado Supreme Court allowed a similar argument in *Rantz v. Kaufman*; while rejecting the exoneration rule, it established the "legally cognizable harm" standard in its place. 109 P.3d 132, 137–38 (Colo. 2005) (en banc); *see also infra* Section III.B.6 (discussing a requirement of proof of a legally cognizable injury as an alternative to the *Peeler* doctrine). Responding to the argument that criminals should not be allowed to profit from their crimes, the court ruled that

> [P]reventing an individual from profiting from criminal conduct is better addressed at the individual case level. Before recovering damages, a criminal defendant will have to demonstrate that the negligence of his or her attorney caused legally cognizable harm. A criminal defendant who prevails in a malpractice action is receiving compensation for an injury suffered, in the form of time spent in prison or the burden of a criminal record, not a windfall.

Rantz, 109 P.3d at 137–38.

186. *See* Duncan, *supra* note 1, at 1293–94. This alternative remedy would be similar

Remedies like these could discourage attorney wrongdoing—thereby protecting future clients while reducing the chance that criminals might profit from their crimes.

4. Allow convicts special exceptions if, through their attorneys' negligence, they miss a deadline. This could provide targeted relief for plaintiffs who prove that their attorneys were solely responsible for missing a deadline to file an important document.[187]

5. Different standards for suing trial and post-trial counsel. Many safeguards exist to protect criminal defendants from faulty convictions.[188] Because these safeguards could protect criminal defendants from the consequences of poor defense counsel performance at trial, the ability to sue post-conviction counsel is arguably more pressing.[189] For this reason, some states have different rules for suing post-conviction counsel. Oregon, for example, allows convicts to sue their attorneys who were not involved in their original conviction proceedings without special prerequisites like proof of exoneration.[190]

6. Require proof of a legally cognizable injury. Some states have adopted a rule similar to the legally cognizable injury rule.[191] According to this rule, as described in the Restatement (Third) of the Law Governing Lawyers, "[a] convicted criminal defendant suing for malpractice must prove both that the lawyer failed to act properly and that, but for that failure, the result would have been

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to that in *Dugger v. Arredondo* in which the Texas Supreme Court considered a proportionate responsibility statute for tort claims and ruled that application of the common law unlawful acts doctrine, which barred recovery for plaintiffs who were engaged in unlawful acts, was no longer a viable affirmative defense in wrongful death suits. *See* 408 S.W.3d 825, 831–32 (Tex. 2013); Browning & Rames, *supra* note 2, at 124–26 (suggesting that *Dugger v. Arredondo* may one day be applied in the legal malpractice context); JOHNSON, *supra* note 29, at 299–300. Application of a proportionate responsibility statute in the context of criminal legal malpractice suits would allow malpractice claims to proceed but would treat the criminal's misconduct that gave rise to the situation as partially responsible for any penalty imposed on the attorney. *See* Browning & Rames, *supra* note 2, at 125.

187. This was the point of contention at issue in *Falby*, the case that first extended *Peeler* in Texas to bar claims against attorneys who agreed to represent convicts after their original conviction proceedings had concluded. *See* Falby v. Percely, No. 09-04-422 CV, 2005 WL 1038776, at *2–3 (Tex. App.—Beaumont May 5, 2005, no pet.) (mem. op.).

188. *See* Duncan, *supra* note 1, at 1291 & n.175 (listing safeguards designed to protect criminal defendants from negligent representation).

189. *See, e.g.*, *Falby*, 2005 WL 1038776, at *2–3 (affirming summary judgment that barred a claim against an attorney who did not represent the plaintiff at trial).

190. Drollinger v. Mallon, 260 P.3d 482, 489–90 (Or. 2011) (en banc).

191. *See supra* Section II.D.3 (discussing six states that have adopted this approach).

different . . . ."[192] The rule is less stringent than the exoneration rule because it does not require legal innocence. And it would help hold attorneys responsible for their negligence while providing compensation for the harm their negligence caused.[193]

7. Leave Peeler *alone and allow the state bar to penalize negligent criminal defense attorneys.* According to the Texas State Bar, the number of attorneys disciplined in all practice areas is marginal at best. During the 2014–2015 bar year, Texas had 86,494 active in-state attorneys.[194] During that time, Texas's Office of Chief Disciplinary Counsel issued only 7 disbarments and sanctions in 318 cases.[195] This means, at most, 0.37% of in-state Texas attorneys received a reprimand, and less than 1 in 10,000 were disbarred.[196] Unless changes are made to the Texas State Bar's disciplinary system, these numbers indicate that the state bar is inadequate to protect plaintiffs from bad attorneys.[197]

C. Methods for Reigning in the Exoneration Rule

The Texas legislature could replace the doctrine.

192. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 53 cmt. d (AM. LAW INST. 2000).

193. *See* Duncan, *supra* note 1, at 1296–97 (arguing in favor of the legal injury rule and explaining that "[c]ourts need to recognize that a person convicted of criminal charges may have suffered harm by virtue of his attorney's negligent conduct even if, without the negligent conduct, the person may have been convicted and punished to some extent").

194. *See* DEP'T OF RESEARCH & ANALYSIS, STATE BAR OF TEX., 2014 ATTORNEY POPULATION DENSITY BY METROPOLITAN STATISTICAL AREA 2 (2014–15), https://www.texasbar.com/AM/Template.cfm?Section=Archives&Template=/CM/ContentDisplay.cfm&ContentID=30865 [https://perma.cc/3BUU-XNB9].

195. OFFICE OF CHIEF DISCIPLINARY COUNSEL, STATE BAR OF TEX., https://www.texasbar.com/Content/NavigationMenu/ForThePublic/ProblemswithanAttorney/GrievanceEthicsInfo1/OfficeOfCDC.htm [https://perma.cc/N25G-KDK5] (last visited Mar. 19, 2019).

196. According to professors Hazard and Dondi, "[t]here are no reliable figures on the effectiveness of professional policing of incompetence, and a reliable measure of the incidence of incompetence would be difficult or impossible to construct. However, we believe that disciplinary response to lawyer incompetence is weak everywhere." GEOFFREY C. HAZARD JR. & ANGELO DONDI, LEGAL ETHICS: A COMPARATIVE STUDY 136 (2004). Professor Duncan has similarly noted that "ethics opinions and decisions alike have indicated that the disciplinary process should not be used to ensure that clients receive competent lawyering." Meredith J. Duncan, *The (So-Called) Liability of Criminal Defense Attorneys: A System in Need of Reform*, 50 BYU L. REV. 1, 43 (2002) (citations omitted). Professor Duncan further argued that "an automatic referral system should be implemented" that subjects "the conduct of any lawyer who is the subject of an ineffective assistance of counsel claim or a criminal malpractice claim to [an] appropriate disciplinary body." *Id.* at 46.

197. *See* Duncan, *supra* note 1, at 1291 & n.178 (arguing that neither the criminal justice system nor the disciplinary system provides criminal defendants adequate protections against incompetent representation). The same is likely true outside of Texas. Nationally speaking, "[d]isciplinary sanctions against errant criminal defense lawyers are

Alternatively, the Texas Supreme Court should have little difficulty restricting the doctrine or replacing it with something else—especially considering that *Peeler*'s holding was reached by a mere plurality. The court might justify its decision based on *Peeler*'s unintended consequences, Texas intermediate appellate courts' recent expansion of the doctrine, or reasoning from other jurisdictions that have considered and rejected the exoneration rule. Texans could also consider an amendment to the state constitution, though this would require more votes than ordinary legislation.[198]

IV. CONCLUSION

To correct *Peeler*'s misapplication and avoid the fundamental problems with the exoneration rule, Texas courts and lawmakers should consider adopting a different rule that better protects individual rights and ensures that the protections of the civil system are available to hold criminal defense attorneys accountable for their actions.[199] Several alternatives to the present system would advance worthy policy goals and ameliorate the effects of the *Peeler* doctrine, but removing the exoneration rule entirely would provide the most equitable, straightforward path forward.[200]

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a rarity." JOHNSON, *supra* note 29, at 297.

198. *See* TEX. CONST. art. XVII, § 1(a) (stating that the legislature may submit proposed amendments to voters with the support of two-thirds of the Texas House and Senate).

199. *See* Duncan, *supra* note 1, at 1254–55 (stating that existing obstacles render "the civil system . . . essentially unavailable as a means of monitoring—and thereby improving—criminal defense lawyering").

200. *See supra* Section III.B.1.

V. APPENDIX: EVERY STATE'S APPROACH TO CRIMINAL DEFENSE LEGAL MALPRACTICE CLAIMS

The chart below provides a concise overview of the rule in all fifty states and the District of Colombia on criminal defense legal malpractice claims.

State or Territory[201]	**Rule on Post-Conviction Relief**
Alabama	Alabama has imposed different requirements in different cases, but it seems to require—at a minimum—proof that but for the negligence of the convict's attorney, the outcome at trial would have been different.[202]
Alaska	Post-conviction relief is required before bringing a malpractice claim, but criminal defense attorneys may raise their former clients' actual guilt as an affirmative defense.[203] If an attorney raises actual guilt as a defense, he or she must prove it by a preponderance of the evidence.[204] Proof of a plaintiff's actual innocence is not required to succeed on a claim.[205]
Arizona	The plaintiff must prove that the underlying criminal conviction has been set aside.[206]
Arkansas	Arkansas has no post-conviction, actual innocence, or exoneration prerequisites for criminal malpractice suits.[207]
California	The criminal plaintiff must establish actual

201. See Johanna M. Hickman, *Recent Developments in the Area of Criminal Malpractice*, 18 GEO. J. OF LEGAL ETHICS 797, 797–98 (2005), for a list of states rejecting the exoneration rule.

202. *See* Bennardo, *supra* note 15, at 343 n.9 (citing contradicting cases imposing this standard and a stricter variant within the state).

203. Shaw v. State (*Shaw II*), 861 P.2d 566, 569, 572 (Alaska 1993); *see* Gagnon & Slottee, *supra* note 107, at 13 ("A plaintiff convicted of a crime 'must obtain post-conviction relief before pursuing an action for legal malpractice against his or her attorney.'" (quoting Shaw v. State (*Shaw I*), 816 P.2d 1358, 1360 (Alaska 1991))).

204. *Shaw II*, 861 P.2d at 572.

205. *Id.*

206. Glaze v. Larsen, 83 P.3d 26, 32–33 (Ariz. 2004) (en banc).

207. Arkansas ordinarily requires proof that but for the attorney's malpractice, the results at trial would have been different. *See* Davis v. Bland, 238 S.W.3d 924, 926 (Ark. 2006).

	innocence by proving a reversal of his or her conviction or other post-conviction relief.[208]
Colorado	Proof of innocence is *not* required for a convict to prove causation in a legal malpractice action.[209]
Connecticut	The Connecticut Supreme Court has not yet considered the issue, but a federal court ruling on its judgment regarding state law determined that a convicted plaintiff would likely need to seek appellate or post-conviction relief before beginning a malpractice suit.[210]
Delaware	If a criminal defendant has sued his attorney for ineffective assistance of counsel, he cannot then follow suit with a claim for malpractice.[211] Actual innocence or post-conviction relief are not prerequisites for legal malpractice suits.[212]
District of Columbia	Convicts must show that their counsels' negligent "actions caused a legally cognizable injury."[213]

208. Coscia v. McKenna & Cuneo, 25 P.3d. 670, 673–74 (Cal. 2001) (holding that reversal of a conviction or other exoneration is required to prove actual innocence); Wiley v. City of San Diego, 966 P.2d 983, 987 (Cal. 1998) (declining to allow a malpractice claim without proof of actual innocence).

209. Rantz v. Kaufman, 109 P.3d 132, 136 (Colo. 2005) (en banc) (rejecting the notion that a criminal must acquire post-conviction relief to bring or establish proximate cause in a criminal malpractice suit); *see* Khan, *supra* note 82, at 22–23.

210. *See* McCurvin v. Law Offices of Koffsky & Walkley, No. Civ.A.3:98CV182(SRU), 2003 WL 223428, at *2 (D. Conn. Jan. 27, 2003) (stating that the Connecticut Supreme Court would likely require the plaintiff seek appellate or post-conviction relief prior to a malpractice suit). The decision fails to clarify whether such a plaintiff would need to *prevail* in his post-conviction relief suit. *See id.* A state appellate court *has* ruled, however, that ineffective assistance of counsel is not the same as a malpractice claim. *See* Schiff v. Williams, No. 267512, 1991 WL 29349, at *4–5 (Conn. Super. Ct. Feb. 7, 1991).

211. *See* Rose v. Modica, No. 285, 2002, 2002 WL 31359867, at *1 (Del. Oct. 18, 2002) (upholding dismissal of legal malpractice claim filed after denial of ineffective assistance of counsel claim); Sanders v. Malik, 711 A.2d 32, 34 (Del. 1998) (barring legal malpractice claim because plaintiff previously litigated an ineffective assistance of counsel claim).

212. *See* Tanya E. Pino, *State of Delaware*, *in* THE LAW OF LAWYERS' LIABILITY, *supra* note 107, at 80 (citing Sanders v. Malik, 711 A.2d 32, 34 (Del. 1998)).

213. *See* McCord v. Bailey, 636 F.2d 606, 610–11 (D.C. Cir. 1980) (holding that a prior hearing for an ineffective assistance of counsel claim is not required for collateral estoppel to bar a later malpractice claim); Smith v. Pub. Def. Serv. for D.C., 686 A.2d 210, 211–12 (D.C. 1996) (holding that collateral estoppel barred a malpractice suit following a failed ineffective assistance of counsel suit but stating that failed ineffective assistance of counsel claims do not "automatically" bar subsequent malpractice claims because the standards for each differ.); Bennardo, *supra* note 15, at 343 n.9 (citing Brown v. Jonz, 572 A.2d 455, 457

Florida	The plaintiff must prove legal and actual innocence[214] and prove that the final disposition of the underlying criminal case was in the plaintiff's favor.[215]
Georgia	Legal malpractice claims require proof that the plaintiff would have prevailed but for the defendant's alleged negligence.[216] As a result, a client who has admitted guilt cannot sue his or her attorney for malpractice.[217]
Hawaii	No reported cases require the plaintiff to prove innocence before bringing suit.[218]
Idaho	The Idaho Supreme Court recently rejected the actual innocence requirement[219] while simultaneously embracing the exoneration rule, meaning that a convict's cause of action for malpractice does not accrue until he has received post-conviction relief.[220]
Illinois	The plaintiff must prove actual innocence, which requires that his or her conviction

n.7 (D.C. 1990).

214. *See* Schreiber v. Rowe, 814 So. 2d 396, 398–400 (Fla. 2002) (upholding a rule that criminal defendants must prove innocence for a viable legal practice claim); Steele v. Kehoe, 747 So. 2d 931, 932–33 (Fla. 1999) (holding that a "convicted criminal defendant must obtain appellate or post-conviction relief as a precondition to maintaining a legal malpractice action").

215. Cocco v. Pritcher, 1 So. 3d 1246, 1248 (Fla. Dist. Ct. App. 2009) (requiring "final disposition of the underlying criminal case in [the defendant's] favor" (citing Cira v. Dillinger, 903 So. 2d 367, 371 (Fla. Dist. Ct. App. 2005))).

216. *See* Gomez v. Peters, 470 S.E.2d 692, 695 (Ga. Ct. App. 1996) ("[A] plaintiff must show that he would have prevailed in the underlying litigation if the defendant had not been negligent . . . ." (citing McDow v. Dixon, 226 S.E.2d 145, 146 (1976) ("[T]he plaintiff's proof of damages effectively requires proof that he would have prevailed in the original litigation.")).

217. *See Gomez*, 470 S.E.2d at 695.

218. *See* Portnoy & Olson, *supra* note 133, at 118.

219. *See* Molen v. Christian, 388 P.3d 591, 596 (Idaho 2017). In reaching this decision, the court reasoned as follows:

> Requiring a criminal malpractice plaintiff to prove actual innocence is contrary to the fundamental principle that a person is presumed innocent until proven guilty beyond a reasonable doubt. Further, a criminal defendant can be harmed separately from the harm he or she incurs as a result of being guilty of a crime. Additionally, as a practical matter, requiring actual innocence would essentially eliminate a defense attorney's duty to provide competent counsel to a client he or she knows to be guilty.

Id. at 596 (citation omitted).

220. *See id.* at 595–96 (reasoning that adoption of the exoneration rule can help in avoiding multiple lawsuits and wasting judicial resources).

	has been overturned.[221] An exception to the actual innocence requirement applies if the attorney intentionally sought his client's conviction.[222]
Indiana	A convict's legal malpractice action accrues upon discovery of counsel's malpractice; post-conviction relief or exoneration is irrelevant.[223]
Iowa	A plaintiff must secure relief from a conviction before bringing a legal malpractice claim.[224]
Kansas	Actual innocence is not required,[225] but post-conviction relief is a requirement.[226]
Kentucky	Post-conviction relief is required, and the criminal must prove innocence by a preponderance of the evidence.[227]
Louisiana	Exoneration is not required;[228] criminal defense attorneys are held to the same standard to which ordinary defense

221. Paulsen v. Cochran, 826 N.E.2d 526, 530 (Ill. App. Ct. 2005) (citing Kramer v. Dirksen, 695 N.E.2d 1288, 1290 (Ill. App. Ct. 1998)).

222. *Id*. at 531 (quoting Morris v. Margulis, 718 N.E.2d 709, 720–21 (Ill. App. Ct. 1999)).

223. *See* Godby v. Whitehead, 837 N.E.2d 146, 151 (Ind. Ct. App. 2005) ("[A] criminal defendant does not have to prove his innocence before he files a legal practice claim." (citing Silvers v. Brodeur, 682 N.E.2d 811, 818 (Ind. Ct. App. 1997) (holding that a malpractice action must be filed "within two years of discovering the malpractice"))); Leisinger, *supra* note 90, at 707 (citing *Silvers*, 682 N.E.2d at 818); Hickman, *supra* note 201, at 799–800 (citing *Silvers*, 682 N.E.2d at 818).

224. *See* Barker v. Capotosto, 875 N.W.2d 157, 166 (Iowa 2016) ("We find the approach taken by the Restatement and like-minded jurisdictions to be persuasive. The prerequisite that the malpractice plaintiff obtain judicial relief from her or his conviction, which the Restatement endorses and which we adopted in *Trobaugh* after 'considering all of the issues presented and the wealth of commentary on this issue,' serves as an important screen against unwarranted claims and 'preserves key principles of judicial economy and comity.' But we do not think an additional actual innocence screen is appropriate. Such a prerequisite goes beyond respecting the criminal process—i.e., 'judicial economy and comity'—and interposes an additional barrier to recovery that other malpractice plaintiffs do not have to overcome." (citation omitted) (quoting Trobaugh v. Sondag, 668 N.W.2d 577, 583 (Iowa 2003))).

225. Mashaney v. Bd. of Indigents' Def. Servs., 355 P.3d 667, 687 (Kan. 2015).

226. Canaan v. Bartee, 72 P.3d 911, 913 (Kan. 2003) (adopting a rule that post-conviction relief is a prerequisite to a malpractice action).

227. *See* Ray v. Stone, 952 S.W.2d 220, 224 (Ky. Ct. App. 1997) (quoting Peeler v. Hughes & Luce, 868 S.W.2d 823, 832 (Tex. App.—Dallas (1993), *aff'd*, 909 S.W.2d 494 (Tex. 1995))).

228. *See* Schwehm v. Jones, 872 So. 2d 1140, 1147 n.7 (La. Ct. App. 2004) (declining to adopt the exoneration rule).

	attorneys are held.[229]
Maine	Unsettled.[230] At least the civil malpractice requirements must be met,[231] and one court has suggested that the state supreme court would require actual innocence if a case arose before it.[232]
Maryland	Post-conviction relief is required before recovery in a malpractice suit. However, the "criminal plaintiff need not obtain [post-conviction] relief prior to the initiation of a criminal malpractice action, so long as the criminal plaintiff has initiated a [post-conviction] action."[233]
Massachusetts	Actual innocence is required,[234] but exoneration is not yet required.[235] If the plaintiff pled guilty in the preceding suit, the "claimant should be precluded from proclaiming his innocence and his lawyer's negligence in a legal malpractice action unless he has succeeded in withdrawing or

229. *See id*. at 1144 (stating that an attorney who does not meet "the standard of competence and expertise usually exercised by other attorneys in handling such matters" is liable for his actions).

230. *See* Saturley & Russell, *supra* note 134, at 204–05 ("Whether criminal-malpractice plaintiffs in Maine must prove innocence is an unsettled question of law." (citing Brewer v. Hagemann, 771 A.2d 1030, 1031–32 (Me. 2001) ("We have not yet had occasion to determine whether legal malpractice based on negligent representation in a criminal case should be treated differently from legal malpractice arising from representation in a civil matter."))).

231. *See Brewer*, 771 A.2d at 1033 ("The situation presented by this case does not require us to consider departing from the standard elements that every legal malpractice plaintiff must prove.").

232. Whitmore v. O'Brien, No. CV-09-224, 2010 Me. Super. LEXIS 52, at *15–16 (Me. Super. Ct. May 14, 2010) (citing Hilario v. Reardon, 960 A.2d 337, 344–45 (N.H. 2008)).

233. Berringer v. Steele, 758 A.2d 574, 597 (Md. Ct. Spec. App. 2000) (emphasis omitted).

234. Marchetti v. Atwood, No. 17–00749, 2017 WL 6210752, at *5 (Mass. Super. Ct. Nov. 21, 2017) (mem. op.) ("[C]ivil recovery by a guilty plaintiff is not warranted without proof of innocence." (quoting Correia v. Fagan, 891 N.E.2d 227, 233 n.13 (Mass. 2008))). This actual innocence requirement imposes a higher standard on the plaintiff than a legal innocence requirement would. *See* Browning & Rames, *supra* note 2, at 61 (arguing that proof of actual innocence "set[s] the bar even higher" than post-conviction relief). Indeed, "[b]ecause of the heavy burden of proof in a criminal case [in another Massachusetts court ruling which also applied the actual innocence standard], an acquittal did not suffice to satisfy the actual innocence requirement." *Id.*

235. *See* Labovitz v. Feinberg, 713 N.E.2d 379, 384 n.11 (Mass. App. Ct. 1999) ("We do not consider whether a criminal defendant must also be exonerated before being permitted to bring a civil malpractice action . . . .").

	vacating his guilty plea on direct appeal or through [post-conviction] proceedings."[236]
Michigan	Securing post-conviction relief is not a prerequisite for initiating a malpractice suit over the actions of criminal defense counsel.[237] If the plaintiff pled guilty to the underlying offense, the plaintiff may still sue for malpractice, assuming the claims "allege injuries other than . . . incarceration."[238]
Minnesota	Post-conviction relief is a prerequisite for a convict's malpractice suit.[239] Also, public defenders may not be sued for legal malpractice.[240]
Mississippi	As of November 29, 2018, exoneration is a prerequisite for bringing a criminal malpractice action.[241]
Missouri	Actual innocence is required for a convict to bring a legal malpractice claim.[242]
Montana	Innocence is not required for a convicted

236. *Id*. at 383–84.

237. *See* Gebhardt v. O'Rourke, 510 N.W.2d 900, 906 n.13 (Mich. 1994) (Unis, J., concurring) (remarking tongue in cheek that "persons convicted of a crime will be astonished to learn that, even if their lawyers' negligence resulted in their being wrongly convicted and imprisoned, they were not harmed when they were wrongly convicted and imprisoned but, rather, that they are harmed only if and when they are exonerated" (quoting Stevens v. Bispham, 851 P.2d 556, 566 (Or. 1993))).

238. *See* Schlumm v. Terrence J. O'Hagan, P.C., 433 N.W.2d 839, 847 (Mich. Ct. App. 1988) (affirming the denial of summary judgment for the plaintiff's breach of contract and fraudulent misrepresentation claims against his former attorney).

239. *See* Noske v. Friedberg, 670 N.W.2d 740, 744 (Minn. 2003) (noting that a legal malpractice claim cannot withstand a motion to dismiss unless the plaintiff receives post-conviction relief prior to the claim).

240. Dziubak v. Mott, 503 N.W.2d 771, 773 (Minn. 1993).

241. Trigg v. Farese, No. 2015-CA-00045-SCT, 2018 WL 6241322, at *8 (Miss. Nov. 29, 2018) ("To be clear, when we say a defendant must be 'exonerated,' we mean he must obtain a more favorable disposition of his conviction or sentence through direct appeal, postconviction relief, habeas corpus, or similar means within the criminal justice process. At that point, the malpractice suit may be initiated even if the underlying criminal case has not yet been finally resolved." (footnote omitted)). Before *Trigg*, Mississippi required that the plaintiff show that but for his attorney's negligence, "he would today be a free man." Singleton v. Stegall, 580 So. 2d 1242, 1246 (Miss. 1991).

242. *See* Costa v. Allen, 323 S.W.3d 383, 387 (Mo. Ct. App. 2010) (quoting State *ex. rel.* O'Blennis v. Adolf, 691 S.W.2d 498, 503 (Mo. Ct. App. 1985)); *see also* Scott. D. Hofer, *Missouri*, *in* A SURVEY OF THE LAW OF LEGAL MALPRACTICE, 71, 73 & n.3 (2016) (citing *Costa*, 323 S.W.3d at 387), https://www.primerus.com/wp-content/uploads/2016/03/PRI_0216_PDICompendium_LegalMalpractice_FNLR3v1.pdf [https://perma.cc/6L9Q-PX4C]

	plaintiff to bring a malpractice claim.[243]
Nebraska	The plaintiff must prove that he or she would have been successful in the underlying action but for the attorney's negligence.[244]
Nevada	Post-conviction or appellate relief is required,[245] and the plaintiff must also "prove actual innocence of the underlying charge."[246] Court-appointed private attorneys and public defenders are immune from legal malpractice claims,[247] but federal civil rights claims may be brought against public defenders for improper representation of criminal defendants when they "engage[] in a conspiracy with the state to deprive [a defendant in a criminal case] of his civil rights."[248]
New Hampshire	A criminal legal malpractice claim accrues once the criminal defendant receives post-conviction relief.[249] Convicted plaintiffs must "prove, by a preponderance of the evidence, actual innocence" of the underlying offense to bring criminal legal malpractice claims.[250] That is, unless: (1) the claim is based on representation after the plea and sentencing, (2) the claim has no bearing on the plaintiff's convictions,

243. See Spencer v. Beck, 245 P.3d 21, 24 (Mont. 2010) (allowing a legal malpractice claim against an attorney who failed to pursue post-conviction relief that might have led to the overturning of the plaintiff's conviction); Hauschulz v. Michael Law Firm, 30 P.3d 357, 360 (Mont. 2001) (holding that an attorney's "failure to consult with his client prior to entering a guilty plea on his behalf could" form a sufficient basis for a valid malpractice claim).

244. *See* McVaney v. Baird, Holm, McEachen, Pedersen, Hamann, & Strasheim, 466 N.W.2d 499, 507 (Neb. 1991) (citing Eno v. Watkins, 429 N.W.2d 371, 372 (Neb. 1988)).

245. Clark v. Robison, 944 P.2d 788, 790 (Nev. 1997) (citing Morgano v. Smith, 879 P.2d 735, 737 (Nev. 1994)).

246. *Morgano*, 879 P.2d at 738 (citing Glenn v. Aiken, 569 N.E.2d 783, 788 (Mass. 1991)).

247. NEV. REV. STAT. ANN. §§ 41.0307(4)(b), 41.032 (2016); *Morgano*, 879 P.2d at 736–37 (citing Ramirez v. Harris, 773 P.2d 343, 344–45 (Nev. 1989)).

248. *See Ramirez*, 773 P.2d at 345 (noting that civil rights claims against public defenders are not viable unless the complainant makes these allegations).

249. Therrien v. Sullivan, 891 A.2d 560, 564 (N.H. 2006).

250. Mahoney v. Shaheen, Cappiello, Stein & Gordon, P.A., 727 A.2d 996, 998–99 (N.H. 1999).

	and (3) "the plaintiff does not argue that but for his attorney's negligence he would have obtained a different result in the criminal case."[251]
New Jersey	Exoneration is required to bring a criminal malpractice claim.[252]
New Mexico	Post-conviction relief or exoneration are not required for initiation of criminal malpractice suits.[253]
New York	Actual innocence of the underlying offense is required, and a plaintiff's admission of guilt may undermine his or her ability to bring a malpractice suit.[254]
North Carolina	North Carolina requires a higher burden of proof to establish proximate causation in criminal legal malpractice claims.[255] An appellate court held that this standard was not met when there was strong circumstantial evidence of guilt; the plaintiff did not allege that the attorney's actions caused him damages or claim "actual innocence in his complaint."[256]
North Dakota	Innocence or post-conviction relief or exoneration is not required.[257]

251. Hilario v. Reardon, 960 A.2d 337, 345 (N.H. 2008) (citing *Mahoney*, 727 A.2d 996).

252. *See* Rogers v. Cape May, 31 A.3d 934, 939 (N.J. 2011) (affirming that a legal malpractice claim does not accrue until the plaintiff is exonerated (citing McKnight v. Office of Pub. Def., 962 A.2d 482, 483 (N.J. 2008) (per curiam))). Exoneration may include: (1) "vacation of a guilty plea and dismissal of the charges," (2) "entry of judgment on a lesser offense after spending substantial time in custody following conviction for a greater offense," or (3) "any disposition more beneficial to the criminal defendant than the original judgment." *See McKnight*, 962 A.2d at 483 (quoting McKnight v. Office of Pub. Def., 936 A.2d 1036, 1056 (N.J. Super. Ct. App. Div. 2007) (Stern, J., dissenting), *rev'd*, 962 A.2d 482 (2008)).

253. *See* Duncan v. Campbell, 936 P.2d 863, 865 (N.M. 1997) (holding that the statute of limitations for a legal malpractice claim begins upon discovery of the injury (citing Sharts v. Natelson, 885 P.2d 642, 645 (N.M. 1994))).

254. *See* Carmel v. Lunney, 511 N.E.2d 1126, 1128 (N.Y. 1987) (finding that failure to successfully challenge the underlying conviction by plea bars a legal malpractice claim (citing Claudio v. Heller, 463 N.Y.S.2d 155 (Sup. Ct. 1983))); Britt v. Legal Aid Soc., Inc., 741 N.E.2d 109, 110, 112 (N.Y. 2000) (citing *Carmel*, 511 N.E.2d at 1128).

255. Dove v. Harvey, 608 S.E.2d 798, 802 (N.C. Ct. App. 2005) (quoting Belk v. Cheshire, 583 S.E.2d 700, 706 (N.C. Ct. App. 2003)).

256. *Id*. at 802.

257. *See* Klem v. Greenwood, 450 N.W.2d 738, 743 (N.D. 1990) (listing the various elements of a legal malpractice claim—not including innocence or post-conviction relief

Ohio	Criminal defendants need not secure exoneration before pursuing legal malpractice claims.[258]
Oklahoma	Actual innocence is required.[259]
Oregon	For a convict to bring a legal malpractice claim against his or her criminal defense *trial* counsel, the convict must "allege 'harm' in that the person has been exonerated of the criminal offense through reversal on direct appeal, through post-conviction relief proceedings, or otherwise."[260] But to sue *post-conviction* counsel, "prior exoneration, by means of appeal, post-conviction proceedings, or otherwise, is not a prerequisite . . . ."[261] If the plaintiff's alleged harm is suffering brought on by continued incarceration, however, the plaintiff "must plead and prove that, if defendants had performed competently in the post-conviction proceeding, plaintiff would have obtained relief in that proceeding, that he would have avoided reconviction in any subsequent proceeding on remand, and that he would have been released from prison."[262]
Pennsylvania	Requiring post-conviction relief based on attorney error *and* proof that the attorney acted in "[r]eckless or wanton disregard of the defendant's interest . . . ."[263]
Rhode Island	The plaintiff must prove that, but for the attorney's negligence, the plaintiff would not have been convicted.[264]

(citing Wastvedt v. Vaaler, 430 N.W.2d 561, 564–55 (N.D. 1988))).

258. *See* Krahn v. Kinney, 538 N.E.2d 1058, 1061 (Ohio 1989); Leisinger, *supra* note 90, at 707 (citing *Krahn*, 538 N.E.2d at 1061).

259. Robinson v. Southerland, 123 P.3d 35, 43–44 (Okla. Civ. App. 2005).

260. Stevens v. Bispham, 851 P.2d 556, 566 (Or. 1993).

261. Drollinger v. Mallon, 260 P.3d 482, 489–90 (Or. 2011) (en banc). The Oregon Supreme Court justified the lesser standard for suing post-conviction counsel, in part, because the state legislature had provided unique protections at the trial level that are not present for those pursuing post-conviction civil claims. *Id.* at 488.

262. *Id*. at 490.

263. Bailey v. Tucker, 621 A.2d 108, 114–15 (Pa. 1993).

264. *See* Laurence v. Sollitto, 788 A.2d 455, 459 (R.I. 2002) (requiring the plaintiff

South Carolina	Actual innocence is required, but a no contest plea to the criminal charge is a bar to bringing a criminal malpractice claim.[265]
South Dakota	No cases have yet addressed the topic.[266]
Tennessee	Post-conviction relief is required.[267]
Texas	Exoneration is required before bringing a criminal malpractice claim.[268]
Utah	Post-conviction relief is not required.[269]
Vermont	Unsettled; actual innocence is not yet a prerequisite for criminal malpractice claims and neither is post-conviction relief.[270]
Virginia	Both post-conviction relief and actual innocence are prerequisites for criminal malpractice suits.[271]
Washington	Both post-conviction relief and actual innocence are prerequisites for criminal malpractice suits.[272]
West Virginia	The plaintiff must prove actual innocence of both "the underlying criminal offense for which he was originally convicted and/or

prove that his attorney proximately caused his injury (quoting Macera Brothers of Cranston, Inc. v. Gelfuso & Lachut, Inc., 740 A.2d 1262, 1264 (R.I. 1999))).

265. Brown v. Theos, 550 S.E.2d 304, 306–07 (S.C. 2001).

266. *See* Welk & Sutton, *supra* note 135, at 455.

267. Gibson v. Trant, 58 S.W.3d 103, 107 (Tenn. 2001).

268. *See* Peeler v. Hughes & Luce, 909 S.W.2d 494, 497–98 (Tex. 1995) (plurality opinion) (holding that a plaintiff must be exonerated to meet the proximate cause requirement).

269. *See* Willey v. Bugden, 318 P.3d 757, 761 n.5 (Utah Ct. App. 2013) (noting that other states require post-conviction relief or actual innocence but acknowledging no such rule in Utah).

270. *See* Bloomer v. Gibson, 912 A.2d 424, 433 (Vt. 2006) (declining to decide whether to adopt the actual innocence requirement for legal malpractice claims).

271. *See* Adkins v. Dixon, 482 S.E.2d 797, 801–02 (Va. 1997) ("[A]ctual guilt is a material consideration since courts will not permit a guilty party to profit from his own crime." (citing Zysk v. Zysk 404 S.E.2d 721, 722 (1990))). Virginia has also allowed a criminal to sue for malpractice over claims arising from a court's sentencing errors. JOHNSON, *supra* note 29, at 299. As Johnson notes, this approach was exemplified by a case in Virginia involving an attorney who did not object when his client was sentenced to a mistakenly enhanced punishment. *Id.*; *see* Jones v. Link, 493 F. Supp. 2d 765, 769 (E.D. Va. 2007). In *Jones*, the court reasoned that proof of actual innocence was not necessary because "the improper sentence was not the direct result of the plaintiff's criminal behavior, but rather, it was the proximate result of his attorney's negligence." 493 F. Supp. 2d at 770 (citing Powell v. Associated Counsel for the Accused, 129 P.3d 831, 833 (Wash. Ct. App. 2006)).

272. Ang v. Martin, 114 P.3d 637, 640–41 (Wash. 2005) (en banc). Actual innocence requires the plaintiff to establish by a preponderance of the evidence that he or she did not commit the crimes of which he or she was accused. *Id.* at 642.

	any lesser included offenses involving the same conduct by a preponderance of the evidence."[273]
Wisconsin	The plaintiff must show that, but for the attorney's negligence, the plaintiff would have succeeded in the underlying criminal suit in proving his or her innocence of all the charges of which the plaintiff was convicted.[274]
Wyoming	Undecided; Wyoming has apparently heard no criminal malpractice claims on appeal and thus has not yet required innocence or exoneration for criminal malpractice claims.[275]

273. Humphries v. Detch, 712 S.E.2d 795, 801 (W. Va. 2011); JOHNSON, *supra* note 29, at 298 (noting that some courts require proof of innocence of both the crime underlying the malpractice claim and the lesser included offenses). If the plaintiff's suit arises from a conviction over which the plaintiff was granted a new trial but in which the plaintiff pleaded nolo contendere, evidence of that plea may be admitted in the legal malpractice suit to evidence the plaintiff's conviction. *Id.* at 806.

274. *See* Tallmadge v. Boyle, 730 N.W.2d 173, 181 (Wis. Ct. App. 2007) ("[S]uccess here means proving to jury that the convicted criminal is innocent of all charges.").

275. *See* Ortiz, *supra* note 137, at 558 ("Wyoming does not have an innocence requirement for legal malpractice plaintiffs in criminal cases.").

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