A Defense Bar: The "Proof of Innocence" Requirement in Criminal Malpractice Claims

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I. INTRODUCTION

In most states, a civil plaintiff must prove her innocence of criminal wrongdoing in order to recover in a legal malpractice suit against her former criminal defense attorney. The reasoning behind such requirements is faulty and, instead, a criminal defendant-cum-malpractice-plaintiff should not have to prove her innocence to bring such a malpractice claim.

Part II lays out the current landscape of the law in this developing area. Although some states require no proof of innocence on the part of a malpractice plaintiff, most require either proof of post-conviction relief, proof of actual innocence, or both. Parts III and IV argue against justifications offered for the proof of post-conviction relief and proof of actual innocence requirements, respectively. Only the numerousness of these rationalizations rivals their unpersuasiveness. Often similar for both incarnations of the proof-of-innocence requirement, these justifications range from efficiency-based concerns to difficulty-of-proof arguments and manifest hostility toward convicted persons. Part V illustrates the affirmative harm visited upon convicted persons by compelling post-conviction relief when it is not in their best interest and concludes that no proof of innocence requirement should be imposed.

II. SURVEY OF CURRENT LAW

The "innocence" many jurisdictions require criminal malpractice[1] plaintiffs to demonstrate falls into two categories: (1) "actual innocence" (the malpractice plaintiff must prove by a preponderance of the evidence that she did not actually commit the underlying crime); and (2) "legal innocence" (the malpractice plaintiff must prove by a preponderance of the evidence that but for the lawyer's negligence, the malpractice plaintiff would not have been convicted in the

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[1] "Criminal malpractice" is a term used to refer to a malpractice claim arising from legal representation in a criminal trial. No criminality is implied on the part of the attorney. *See* Otto M. Kaus & Ronald E. Mallen, *The Misguiding Hand of Counsel—Reflections on "Criminal Malpractice,"* 21 UCLA L. REV. 1191, 1191 n.2 (1974).

underlying criminal trial by proof beyond a reasonable doubt). Jurisdictions professing to require proof of legal innocence do so by requiring the criminal malpractice plaintiff to prove that she has been exonerated of the underlying criminal conviction through post-conviction relief. Therefore, proof of "legal innocence" is a misnomer because demonstration of legal innocence is insufficient to fulfill the requirement. A criminal malpractice plaintiff could be legally innocent of the crime for which she was convicted while failing to pursue (or, for procedural reasons, to obtain) post-conviction relief. Accordingly, jurisdictions claiming to require proof of "legal innocence" are described in this Note as requiring proof of post-conviction relief, as that is the true requirement.

The majority of jurisdictions require that criminal malpractice plaintiffs prove attainment of post-conviction relief,[2] their actual innocence,[3] or both[4] to successfully bring a criminal malpractice lawsuit. A minority of jurisdictions require no showing of innocence in litigating such a malpractice claim: three state

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[2] *See* Glaze v. Larsen, 83 P.3d 26 (Ariz. 2004); Steele v. Kehoe, 747 So.2d 931 (Fla. 1999); Trobaugh v. Sondag, 668 N.W.2d 577 (Iowa 2003); Canaan v. Bartee, 72 P.3d 911 (Kan. 2003); Berringer v. Steele, 758 A.2d 574, 604 (Md. Ct. Spec. App. 2000); Noske v. Friedberg, 670 N.W.2d 740 (Minn. 2003); Stevens v. Bispham, 851 P.2d 556 (Or. 1993); Gibson v. Trant, 58 S.W.3d 103 (Tenn. 2001) (withholding ruling on whether proof of actual innocence is required as well); Peeler v. Hughes & Luce, 909 S.W.2d 494 (Tex. 1995). Two states have ruled that a guilty plea bars a criminal malpractice suit without ruling that post-conviction relief is required in all cases. *See* Gomez v. Peters, 470 S.E.2d 692 (Ga. Ct. App. 1996); Alampi v. Russo, 785 A.2d 65 (N.J. Super. Ct. App. Div. 2001).

[3] *See* Lamb v. Manweiler, 923 P.2d 976 (Idaho 1996); Ray v. Stone, 952 S.W.2d 220 (Ky. Ct. App. 1997); Brewer v. Hagemann, 771 A.2d 1030 (Me. 2001); Glenn v. Aiken, 569 N.E.2d 783 (Mass. 1991); State *ex rel* O'Blennis v. Adolf, 691 S.W.2d 498 (Mo. Ct. App. 1985); Rodriguez v. Nielsen, 650 N.W.2d 237 (Neb. 2002); Dove v. Harvey, 608 S.E.2d 798 (N.C. Ct. App. 2005) (stating that actual innocence is not required as a "bright line rule," but ending inquiry with the determination that the plaintiff had not alleged actual innocence); Smith v. Harvey, No. COA09-1211, 2004 N.C. App. LEXIS 1017, at *6 (N.C. Ct. App. June 1, 2004) ("Fatally absent . . . is any allegation that plaintiff is innocent"); Laurence v. Sollitto, 788 A.2d 455 (R.I. 2002) (stating that failure to assert actual innocence is fatal to the causation requirement in the criminal malpractice claim, while declining to decide whether proof of actual innocence is a separate requirement to the malpractice claim); Brown v. Theos, 550 S.E.2d 304 (S.C. 2001) (requiring proof of actual innocence even though conviction had been reversed for ineffective assistance of counsel); Hicks v. Nunnery, 643 N.W.2d 809 (Wis. Ct. App. 2002).

[4] *See* Levine v. Kling, 123 F.3d 580 (7th Cir. 1997) (applying Illinois law despite the fact that the court was unable to locate a single Illinois case addressing the issue); Shaw v. State Dep't of Admin., 816 P.2d 1358 (Alaska 1991) [hereinafter, *Shaw I*] (requiring proof of legal innocence); Shaw v. State Dep't of Admin., 861 P.2d 566 (Alaska 1993) [hereinafter, *Shaw II*] (requiring actual innocence, but mitigating the requirement by placing burden on defendant in legal malpractice action to prove that plaintiff was actually guilty of the underlying charge); Coscia v. McKenna & Cuneo, 25 P.3d 670 (Cal. 2001); Morgano v. Smith, 879 P.2d 735 (Nev. 1994); Therrien v. Sullivan, 891 A.2d 560 (N.H. 2006); Carmel v. Lunney, 511 N.E.2d 1126 (N.Y. 1987); Robinson v. Southerland, 123 P.3d 35 (Okla. Civ. App. 2005); Bailey v. Tucker, 621 A.2d 108 (Pa. 1993); Adkins v. Dixon, 482 S.E.2d 797 (Va. 1997).

supreme courts have explicitly rejected any innocence requirement;[5] in two states lower courts have done so, but have found in different cases that denial of an ineffective assistance of counsel petition bars a criminal malpractice claim;[6] and one state lower court has expressed "preliminary doubts" about any proof of innocence requirement.[7] A significant minority of states appear to have no opinions discussing the topic.[8] Case law on criminal malpractice suits in two jurisdictions are internally inconsistent or are in a questionable state.[9]

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[5] *See* Rantz v. Kaufman, 109 P.3d 132 (Colo. 2005); Gebhardt v. O'Rourke, 510 N.W.2d 900 (Mich. 1994); Krahn v. Kinney, 538 N.E.2d 1058 (Ohio 1989). *See also* Schwehm v. Jones, 872 So.2d 1140 (La. App. 2004) (declining to adopt a rule requiring exoneration); Drury v. Fawer, 527 So.2d 423 (La. App. 1988) (considering malpractice suit even though plaintiff was convicted, lost appeal, and lost ineffective assistance of counsel claim—stating that while the ineffective assistance of counsel ruling was not binding on the court, that decision reinforced the court's judgment to find against plaintiff).

[6] *See* Miller v. Barber, No. 455605, 2005 WL 1633996, at *2 n.4 (Conn. Super. Ct. May 20, 2005) (stating that Connecticut has not adopted any proof-of-innocence requirement for criminal malpractice actions); Gray v. Weinstein, No. X02CV010175974S, 2004 WL 3130552, at *5 (Conn. Super. Ct. Dec. 22, 2004) (finding that denial of habeas corpus relief on the ground of ineffective assistance of counsel bars malpractice claim because ineffective assistance of counsel standard and malpractice standard are functionally identical); Silvers v. Brodeur, 682 N.E.2d 811 (Ind. Ct. App. 1997); Godby v. Whitehead, 837 N.E.2d 146 (Ind. Ct. App. 2005) (stating that while neither post-conviction relief or proof of actual innocence is a prerequisite for a legal malpractice claim, a post-conviction ruling that counsel was not ineffective can bar a subsequent legal malpractice claim). *See also* Rose v. Modica, No. 285, 2002 WL 31359867 (Del. 2002) (barring plaintiff's malpractice claim because of failed ineffective assistance of counsel claim, without ruling on whether post-conviction relief is a prerequisite to a malpractice suit).

[7] *See* Duncan v. Campbell, 936 P.2d 863 (N.M. Ct. App. 1997) (declining to decide whether proof of innocence is necessary, but expressing "preliminary doubts" as to proof of innocence requirements).

[8] Research through March 2007 revealed no case on the issue in Arkansas, Georgia, Hawaii, Mississippi, Montana, North Dakota, South Dakota, Utah, Vermont, West Virginia, or Wyoming.

[9] Alabama has a wealth of Supreme Court cases on this issue, but unfortunately the court has stated two contradictory rules. One line of cases states that to win a malpractice claim based on representation in a criminal case, a plaintiff must prove that, but for the lawyer's negligence, the outcome of the case would have been different. *See* Herring v. Parkman, 631 So.2d 996, 1002 (Ala. 1994); Lightfoot v. McDonald, 587 So.2d 936 (Ala. 1991); Hall v. Thomas, 456 So.2d 67, 68 (Ala. 1984). However, two cases go further and require the plaintiff to prove that she would not have been convicted to prevail in a criminal malpractice claim. *See* Streeter v. Young, 583 So.2d 1339 (Ala. 1991); Hines v. Davidson, 489 So.2d 572 (Ala. 1986). It does not appear that the court was merely imprecise in its language (i.e., by requiring a different outcome in the first line of cases, the court really required a showing that the plaintiff would have been acquitted), because in *Lightfoot* the court held that the plaintiff must show that, but for the attorney's negligence, he would have been acquitted, or *at least* the outcome of the case would have been different. A "different" outcome short of acquittal seemingly includes conviction for a lesser offense or imposition of a shorter sentence. Also, in another case, the court held that the fact that counsel was deemed ineffective does not automatically entitle a criminal defendant to malpractice damages, and dismissed the lawsuit because there was no averment that defendant would have received a more favorable result but for the negligence of the attorney. Mylar v. Wilkinson, 435 So.2d 1237 (Ala. 1983).

Although some jurisdictions require both proof of actual innocence and post-conviction relief as elements of a criminal malpractice claim, no jurisdiction has opted for an "either/or" approach in which the criminal defendant would be permitted to bring a malpractice suit in which she could prove that she has been granted post-conviction relief *or* was actually innocent of the crime.[10] While most criminal malpractice plaintiffs would find it easier to prove post-conviction relief than actual innocence, an "either/or" approach in lieu of a post-conviction relief requirement would give those criminal malpractice plaintiffs who decide not to pursue post-conviction relief an opportunity to plead their case (albeit a case stacked in the malpractice defendant's favor).

III. PROOF OF POST-CONVICTION RELIEF

The jurisdictions that call for proof of post-conviction relief do so by requiring a criminal malpractice plaintiff to have sought and been granted post-conviction relief as an element of a criminal malpractice claim.[11]

Assuming that the plaintiff in a criminal malpractice suit was convicted of a crime, her criminal case will be in one of three possible postures: (1) she may have sought and obtained post-conviction relief; (2) she may have sought, but been denied, post-conviction relief; or (3) she may not have sought post-conviction relief at all. For plaintiffs in the first situation, the added proof-of-post-conviction

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The situation in the District of Columbia is clearer than Alabama, although this jurisdiction seems to have sliced the bologna so thinly as to call its case law into question. *See* Brown v. Jonz, 572 A.2d 455, 457 n.7 (D.C. 1990) (stating that denial of an ineffective assistance of counsel petition does not preclude the convict from bringing a malpractice claim against former attorney); Smith v. Public Defender Serv. for the Dist. of Col., 686 A.2d 210 (D.C. 1996) (denying malpractice suit because of earlier denial of ineffective assistance of counsel petition). The court in *Smith* distinguished the *Brown* decision by stating that a finding that counsel was not ineffective is not a total bar to a later criminal malpractice claim, but that collateral estoppel works to preclude claims made at the ineffectiveness hearing from being raised in the malpractice suit.

[10] However, the Virginia Supreme Court has recognized an exception from requiring the criminal malpractice plaintiff to prove post-conviction relief. If the criminal malpractice plaintiff can show that "the purported offense for which he was convicted did not constitute a crime," no proof of post-conviction relief is necessary. Taylor v. Davis, 576 S.E.2d 445, 447 (Va. 2003) (criminal malpractice plaintiff had been convicted of driving with a suspended license; however, he had been driving a moped, which is expressly permitted by statute during periods of license suspension). This exception is not the same as showing actual innocence—for the Virginia exception to apply, the plaintiff does not show that she did not commit the crime alleged; she must instead show that her alleged action did not constitute a crime at the relevant time.

[11] Jurisdictions that have addressed the issue have ruled that the post-conviction relief does not have to be premised on an ineffective-assistance-of-counsel claim to allow the criminal malpractice plaintiff to recover. *See, e.g.*, Coscia v. McKenna & Cuneo, 25 P.3d 670, 676 n.4 (Cal. 2001); Berringer v. Steele, 758 A.2d 574, 597 (Md. Ct. Spec. App. 2000). The idea of requiring proof of post-conviction relief as an element of a criminal malpractice claim had its genesis in a law review article: Otto M. Kaus & Ronald E. Mallen, *The Misguiding Hand of Counsel—Reflections on "Criminal Malpractice,"* 21 UCLA L. REV. 1191 (1974).

relief requirement does not affect the outcome of the lawsuit. In the other two categories, the added element is outcome-determinative.

Courts offer a cornucopia of rationales for creating the often outcome-determinative requirement of proof of post-conviction relief, but no explanation is satisfactory. The multitude of justifications proffered for requiring proof of post-conviction relief fall into three categories: (1) efficiency- and consistency-based arguments; (2) difficulty-of-proof arguments; and (3) arguments rooted in frank hostility toward criminal defendants-turned-criminal-malpractice plaintiffs.

A. *Efficiency- and Consistency-Based Arguments*

Some justifications for requiring proof of post-conviction relief are rooted in efficiency and consistency concerns. Many courts hold that proof of post-conviction relief is required because effectiveness-of-counsel rulings at post-conviction hearings work to preclude the same claims or issues from being relitigated during a criminal malpractice lawsuit. Conservation of judicial resources and avoidance of inconsistent judicial resolutions are two related rationales used to support the proof of post-conviction relief requirement. Courts also state that such a requirement stems the tide of frivolous criminal malpractice suits (with a concomitant benefit of encouraging criminal defense representation). Lastly, courts raise the efficiency argument that requiring proof of post-conviction relief creates an easily identifiable starting point for the criminal malpractice claim's statute of limitations.

1. Claim and Issue Preclusion

Courts use claim- and issue-preclusion as support for the post-conviction relief requirement.[12] The argument is framed as follows: Since the criminal malpractice plaintiff has litigated the ineffectiveness of her trial attorney in the post-conviction relief proceedings, a denial of post-conviction relief bars her from relitigating the issue in a criminal malpractice lawsuit.

Commentators have thoroughly rebutted this line of reasoning by illustrating that the ineffective-assistance-of-counsel standard (used in post-conviction proceedings) has different elements than a criminal malpractice lawsuit.[13] A

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[12] *See* Levine v. Kling, 123 F.3d 580, 583 (7th Cir. 1997); *Shaw I*, *supra* note 4, at 1361; Coscia v. McKenna & Cuneo, 25 P.3d 670, 675–76 (Cal. 2001); Therrien v. Sullivan, 891 A.2d 560, 564 (N.H. 2006); Gibson v. Trant, 58 S.W.3d 103, 110 (Tenn. 2001).

[13] *See* Meredith J. Duncan, *Criminal Malpractice: A Lawyer's Holiday*, 37 GA. L. REV. 1251, 1270–73 (2003); Meredith J. Duncan, *The (So-Called) Liability of Criminal Defense Attorneys: A System in Need of Reform*, 2002 BYU L. REV. 1, 32–37 (2002); Joseph H. King, Jr., *Outlaws and Outlier Doctrines: The Serious Misconduct Bar in Tort Law*, 43 WM. & MARY L. REV. 1011, 1058 (2002); Susan P. Koniak, *Through the Looking Glass of Ethics and the Wrong with Rights We Find There*, 9 GEO. J. LEGAL ETHICS 1, 8–9 (1995); David H. Potel, Comment, *Criminal Malpractice: Threshold Barriers to Recovery Against Negligent Criminal Counsel*, 1981 DUKE L.J. 542, 551–56 (1981). *But see* Susan M. Treyz, *Criminal Malpractice: Privilege of the Innocent Plaintiff?*, 59

finding that counsel was not ineffective under the standard set forth by the United States Supreme Court in *Strickland v. Washington*[14] should not preclude a convict from recovering from her trial attorney in a criminal malpractice claim[15] because the standards for the two determinations are not coterminous.

The burdensome presumptions of effectiveness built into the *Strickland* standard have no analog in legal malpractice tort actions. Since the *Strickland* standard starts with a proverbial thumb on the scales, it is inappropriate to use collateral estoppel to preclude a criminal malpractice lawsuit (where no such scale-tipping occurs). Since this trek is otherwise well-trodden by other commentators, I will not further traverse it.

Furthermore, a finding of collateral estoppel is inappropriate when the criminal defendant did not seek post-conviction relief or did not argue ineffectiveness of counsel. One quite plausible explanation for neglecting to raise an ineffectiveness-of-counsel claim is that the criminal defendant retained the same (ineffective) attorney for her post-conviction work as for the trial itself. By making post-conviction relief a required element of a criminal malpractice claim, courts give counsel a perverse incentive not to raise the issue of ineffectiveness (or any issue that could possibly get the client's conviction reversed, since without a reversal the client can never successfully sue for malpractice).

2. Conservation of Judicial Resources

Proponents of the proof-of-post-conviction relief requirement state that such a requirement will serve to promote judicial economy and conserve judicial resources.[16] Yet "conservation of judicial resources," as a goal, cannot reasonably be considered in isolation—it must be balanced against the right that is being compromised in order to conserve those judicial resources. Otherwise, the

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FORDHAM L. REV. 719, 725–27 (1991) (arguing that the *Strickland* standard and the elements of a malpractice claim are equivalent, and therefore collateral estoppel is appropriate).

[14] 466 U.S. 668 (1984). Under *Strickland*, for a finding of ineffective assistance of counsel, a convict must prove that (1) counsel was ineffective and (2) counsel's ineffectiveness prejudiced the defense. *Id.* at 687. The prejudice prong is met when the convict demonstrates that a reasonable probability exists that the result of the proceeding would have been different but for the counsel's error. *Id.* at 694. Motions for relief because of ineffectiveness of counsel come to the court with a "strong presumption" that the attorney was in fact effective. *See* Rantz v. Kaufman & Levinson, 109 P.3d 132, 139–40 (Col. 2005).

[15] To win a basic case of legal malpractice, a plaintiff must prove by a preponderance of the evidence (1) the existence of an attorney-client relationship giving rise to a duty; (2) the attorney violated or breached that duty; (3) the attorney's breach of duty proximately caused injury to the client; and (4) the client sustained actual injury, loss, or damage. *See e.g.*, Ruden v. Jenk, 543 N.W.2d 605, 610 (Iowa 1996).

[16] *See Shaw I*, *supra* note 4, at 1361; *Coscia*, 25 P.3d at 675; Trobaugh v. Sondag, 668 N.W.2d 577, 583 (Iowa 2003); Steele v. Kehoe, 747 So.2d 931, 933 (Fla. 1999); Canaan v. Bartee, 72 P.3d 911, 916 (Kan. 2003); *Therrien*, 891 A.2d at 563.

judiciary could be shut down, and the interest of judicial economy would be served completely.

"Conservation of judicial resources" only functions as a valid policy justification when the shortcut that conserves judicial resources does not compromise rights or alter outcomes in the process. It is beneficial to society for justice to be served in the most economical way possible, but the focus must be on justice, not economy. Collateral estoppel, judicial notice, and summary judgment are doctrines that can properly conserve judicial resources. These doctrines permit a court to circumvent drawn-out presentations of evidence[17] and determine the outcome with certainty without indulging in time-consuming presentations.[18]

However, in the criminal malpractice context, requiring a claimant to prove post-conviction relief as an element of the claim is not a proper shortcut. This additional element does not function to allow courts to determine earlier in the process what the outcome of the lawsuit would have been if proof of post-conviction relief was not an element of the case. Proof of post-conviction relief is an *added element* to recovery. Since proof of post-conviction relief will be outcome-determinative in some cases, it functions as an improper shortcut, and if it lightens judicial loads at all, it does so to the detriment of justice.

Indeed, the post-conviction-relief requirement will do the opposite—it results in expending more judicial resources—in cases in which malpractice plaintiffs had no intention of pursuing post-conviction relief in the first place. Those plaintiffs are forced to seek post-conviction relief (expending judicial resources) and then may be subjected to an entirely new criminal trial (expending more judicial resources). Allowing malpractice plaintiffs to pursue their criminal malpractice claim without jumping through the post-conviction-relief hurdle would actually conserve judicial resources in some cases. Adding an element to criminal malpractice actions that, by its very nature, requires the expenditure of judicial resources, does not serve the goal of judicial economy.

3. Inconsistent Resolutions

Two jurisdictions requiring proof of post-conviction relief state that such a requirement prevents conflicting resolutions.[19] The fear is that a denial of post-conviction relief on the grounds of ineffectiveness-of-counsel appears to conflict with a judgment in civil court for malpractice, thus damaging the public's perception of the judicial system.[20]

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[17] Or, in some cases, conduct a trial at all.

[18] When used correctly, each of these tools results in the same outcome as would have occurred even if it had not been utilized. For example, if the system works properly, every case dismissed on a summary judgment motion for failure to state a claim would be found in favor of the defendant if allowed to proceed to trial. Therefore, summary judgment is a legitimate tool to conserve judicial resources—it shortens trials without affecting outcomes.

[19] *See* Glaze v. Larsen, 83 P.3d 26, 32 (Ariz. 2004); *Coscia*, 25 P.3d at 675.

[20] *See Glaze*, 83 P.3d at 32; *Coscia*, 25 P.3d at 675.

This fear does not justify the rule. First, other occurrences are tried in more than one type of court, which can (and often does) lead to disparate rulings. A murder can be tried in a criminal court and a civil court (under a wrongful death claim) and, because of differences in the burdens of proof and procedure, a person acquitted in the criminal trial can be found liable in the civil action (just ask O.J. Simpson). Allowing for separate determinations in the motion for ineffective assistance of counsel and malpractice lawsuits is no different; while conflicting results may occur, those results are understandable because of the different standards and burdens of proof in the two actions.[21]

Secondly, requiring post-conviction relief as an element of a criminal malpractice claim itself undermines the public's confidence in the legal system. Such a rule requires malpractice plaintiffs to get their convictions *reversed*. Reversals of criminal convictions reflect poorly on the judicial system, more so than do seemingly (but not actually) disparate rulings in criminal and civil courts. Reversals through post-conviction relief undermine the finality of judgments and should not be required of any court wishing to avoid weakening the public's confidence in the American system of justice. Furthermore, if convicts were not required to attain post-conviction relief before bringing their criminal malpractice claims and chose not to seek such relief, no conflicting rulings would exist (since there would be only one ruling on the issue).

4. Nuisance Litigation and Criminal Defense Representation

Numerous jurisdictions state that requiring proof of post-conviction relief will prevent frivolous malpractice lawsuits[22] and encourage criminal defense representation.[23] In one way this is correct: if a claim is frivolous, post-conviction relief probably will not have been obtained, so the claim, if brought, will be disposed of easily. However, such a system favors efficiency at the expense of just results.

A frivolous lawsuit is a "lawsuit having no legal basis, often filed to harass or extort money from the defendant."[24] A criminal malpractice lawsuit would be frivolous if the plaintiff had no legal basis to assert the claim. However, "lack of post-conviction relief" does not mean the plaintiff has "no legal basis" to assert the claim. Some who have not obtained post-conviction relief can prove all of the required elements of criminal malpractice. Therefore, their suits are not only non-frivolous, but can be meritorious. Requiring post-conviction relief as an element

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[21] *See supra* Part III.A.1.

[22] *See Shaw I*, *supra* note 4, at 1361; *Coscia*, 25 P.3d at 676; Falkner v. Foshaug, 29 P.3d 771, 776 (Wash. Ct. App. 2001).

[23] *See Coscia*, 25 P.3d at 676; Canaan v. Bartee, 72 P.3d 911, 916 (Kan. 2003); Bailey v. Tucker, 621 A.2d 108, 114 (Pa. 1993); Gibson v. Trant, 58 S.W.3d 103, 110 (Tenn. 2001); *Falkner*, 29 P.3d at 776.

[24] BLACK'S LAW DICTIONARY (8th ed. 2004) (definition under "suit").

of criminal malpractice does not serve merely to weed out frivolous claims; it changes the elements of the tort so that some malpractice claims that would have been victorious without the new element become frivolous.[25] Criminal malpractice plaintiffs should not be barred from bringing their otherwise valid claims on the ground that the requirement of post-conviction relief might deter other convicted defendants from bringing frivolous lawsuits.[26] In any case, it is unclear if "frivolous" claims *are* deterrable, for, by definition, plaintiffs file such suits with no expectation of legal success.

Next is the other half of the argument: Requiring proof of post-conviction relief will encourage criminal defense representation (both generally[27] and specifically of indigent persons[28]). Even assuming that creating an added element to the criminal malpractice tort will encourage worthwhile representation,[29] the argument is problematic.

Proof of post-conviction relief is not the proper tool to promote criminal defense representation of the indigent. The post-conviction-relief requirement is generally applicable and shields both well-paid criminal defense lawyers and good-hearted attorneys working *pro bono*. A proper incentive for representing indigent criminal defendants would have to provide a benefit only to those representing the indigent.[30] Making it more difficult for all criminal defendants to bring malpractice suits does not encourage lawyers to represent the indigent because paying clients and *pro bono* clients have the same barriers from bringing criminal malpractice lawsuits.

As for the claim that requiring proof of post-conviction relief encourages criminal defense generally, making malpractice lawsuits more difficult for plaintiffs may encourage lawyers to engage in criminal defense work. The problem, though, is that the line drawn is irrational. Post-conviction relief status is unrelated to whether a criminal defendant suffered at the hands of a negligent attorney. It is an arbitrary standard. *Any* capricious method of barring some

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[25] In this way, requiring post-conviction relief actually *increases* the possibility that a claim will be frivolous.

[26] The requirement of post-conviction relief does nothing to discourage those criminal defendants who have obtained post-conviction relief from bringing frivolous criminal malpractice claims.

[27] *See supra* note 23.

[28] *See Gibson*, 58 S.W.3d at 110.

[29] Other commentators have rejected this assumption. *See* Joseph H. King, Jr., *Outlaws and Outlier Doctrines: The Serious Misconduct Bar in Tort Law*, 43 WM. & MARY L. REV. 1011, 1058 (2002); Meredith J. Duncan, *Criminal Malpractice: A Lawyer's Holiday*, 37 GA. L. REV. 1251, 1290 (2003). Professor Duncan points out, moreover, that it is a *benefit*, not a detriment, if incompetent and negligent attorneys are deterred from representing criminal defendants. *See* Meredith J. Duncan, *Criminal Malpractice: A Lawyer's Holiday*, 37 GA. L. REV. 1251, 1290 (2003).

[30] An example, of which I am not necessarily in favor, would be to provide criminal defense lawyers immunity from criminal malpractice lawsuits in cases in which they received no fee. Lawyers would then have an incentive to represent the indigent.

criminal defendants from suing their attorneys for malpractice would arguably encourage criminal defense work.[31]

The claim that proof of post-conviction relief should be an element of any criminal malpractice suit on the ground that the requirement promotes criminal defense representation is incomplete reasoning. It is really arguing that *one effect* of requiring post-conviction relief is beneficial without inquiring into whether it makes any sense to impose the requirement in the first place. More lawyers working in the criminal defense field is an arguable effect of requiring proof of post-conviction relief; it is not a justification for the requirement.

5. A Clearly Defined Statute of Limitations

A handful of courts have reasoned that the requirement of proof of post-conviction relief is beneficial because it creates a bright line for determining when the statute of limitations on the criminal malpractice action begins to run.[32] In these jurisdictions, the statute of limitations begins when the criminal defendant is exonerated through post-conviction relief.

First, starting the statute of limitations when the criminal defendant is exonerated indulges in the legal fiction that a person is not harmed (or should not reasonably discover the harm done to her) by negligent legal representation until she is exonerated. In actuality, the harm occurs well before exoneration,[33] and the criminal defendant who petitions for relief on the basis of ineffective assistance of counsel is acutely aware of the harm before her petition for post-conviction relief is granted.

Starting the statute of limitations at the point of exoneration ignores the purpose of the statute of limitations—to put defendants on notice that they are being sued within a reasonable time period after their alleged improper act in order for them to better defend themselves. Exoneration by post-conviction relief can occur years after the attorney's allegedly negligent representation; commencing the statute of limitations period at this late time may make lawyers more susceptible to questionable criminal malpractice claims because the alleged misconduct occurred so far in the past they cannot adequately defend themselves.

The statute of limitations in criminal malpractice actions should start at the traditional time—when the plaintiff discovers (or should discover) the harm.[34]

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[31] For instance, allowing only those convicted on a Tuesday to sue for criminal malpractice would also promote representation of criminal defendants.

[32] *See* Steele v. Kehoe, 747 So. 2d 931, 933 (Fla. 1999); Canaan v. Bartee, 72 P.3d 911, 916 (Kan. 2003); *Shaw I*, *supra* note 4.

[33] The harm of negligent representation usually occurs before or at the trial phase.

[34] *See* RESTATEMENT (SECOND) OF TORTS § 899 (1977). The statute of limitations does not usually begin to run until the tort is complete, which occurs in cases of negligence when the harm occurs. *Id.* at cmt. c. Although some states begin the running of the statute of limitations even though the injured party had no knowledge (or ability to gain knowledge) of the harm, this rule is not

This time is readily cognizable in other tort actions and determining the start of the statute of limitations should be no more difficult in a criminal malpractice action than in any other lawsuit.

An approach that satisfies all concerns is the "two-track approach" in which the statute of limitations begins to run at the time the harm occurred (or when the plaintiff should have realized the harm). If the plaintiff brings the malpractice lawsuit before seeking post-conviction relief, the criminal malpractice lawsuit is automatically stayed until after relief is sought.[35] This approach allows the defendant-attorney to be put on notice of the pending lawsuit and preserve pertinent evidence.[36] Jurisdictions that require proof of post-conviction relief,[37] and those that do not,[38] utilize the two-track approach.

Secondly, creating a bright line start of the statute of limitations for a tort is not a proper justification for creating a new element that bars many (if not most)

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strictly applied, and exceptions are often made for malpractice cases, including legal malpractice. *Id.* at cmt. e.

[35] Here is where the "two-track" moniker originates: the post-conviction relief proceeding is the first track and the criminal malpractice suit is the second track. If post-conviction relief is not sought, the criminal malpractice lawsuit can go forward immediately (although in that circumstance, there would not truly be "two tracks"). For further explanation and analysis of the two-track approach, *see* Duncan *supra* note 29, at 1299–1302; Meighan A. Rowe, Digest, *Exoneration by Post-Conviction Relief*, 4 J. LEGAL ADVOC. & PRAC. 268, 271 (2002).

[36] The two-track approach works to quell other concerns as well. The requirement of initial post-conviction relief is said to be beneficial because it guards against the attorney who, in the course of defending against a malpractice action, might produce privileged or other evidence in his defense that might hurt a criminal defendant with a legitimate basis for post-conviction relief, and allows the criminal defendant to pursue post-conviction relief without the distraction of also filing a criminal malpractice claim. *Shaw I*, *supra* note 4, at 1361. The two-track approach alleviates the concern of the attorney who might harm the criminal defendant's bid for post-conviction relief through information that comes to light in the criminal malpractice trial because the malpractice action is automatically stayed until after post-conviction proceedings have concluded.

The two-track approach also alleviates the distraction of *litigating* a malpractice suit while simultaneously pursuing post-conviction relief (but not the court's interest in avoiding the distraction of *filing* a criminal malpractice action while pursuing post-conviction relief). While the two-track approach would still require the filing of the malpractice action during post-conviction relief proceedings, surely merely filing a lawsuit that will automatically be stayed until after the post-conviction relief proceedings have concluded cannot be so great a disturbance as to justify the imposition of proof of post-conviction relief as a necessary element of a criminal malpractice lawsuit.

[37] In jurisdictions requiring proof of post-conviction relief, the criminal malpractice lawsuit is dismissed if post-conviction relief is not obtained. *See* Coscia v. McKenna & Cuneo, 25 P.3d 670, 680 (Cal. 2001); Berringer v. Steele, 758 A.2d 574, 597 (Md. Ct. Spec. App. 2000); Bailey v. Tucker, 621 A.2d 108, 115 n.13 (Pa. 1993).

[38] *See* Rantz v. Kaufman, 109 P.3d 132, 136–37 (Colo. 2005); Gebhardt v. O'Rourke, 510 N.W.2d 900, 907 (Mich. 1994). Courts have also adopted the two-track approach without making a determination of whether post-conviction relief is a requirement of a criminal malpractice lawsuit as well. *See* Ereth v. Cascade County, 81 P.3d 463, 469 (Mont. 2003); Seevers v. Potter, 537 N.W.2d 505, 511 (Neb. 1995); Duncan v. Campbell, 936 P.2d 863, 868–69 (N.M. Ct. App. 1997) (adopting the two track approach and expressing "preliminary doubts" as to proof of innocence requirements) *cert. denied*, 936 P.2d 337 (N.M. 1997).

potential plaintiffs from proving their case. While having an easily ascertainable commencement of the statute of limitations is a worthy goal, it should not be achieved at the expense of the cause of action itself. What is the point of a well-defined statute of limitations if few who are harmed can prove the cause of action?

Courts relying on the statute-of-limitations justification indulge in burning down the house to roast the pig. Barring a large proportion of possible plaintiffs from proving their case is not justified by a desire to have a bright line start of the statute of limitations, especially when, as is the case with criminal malpractice, no special statute of limitations problem exists.

B. *Difficulty-of-Proof Arguments*

Some courts attempt to justify the post-conviction relief requirement on the basis of the alleged difficulty of proving causation and damages that would otherwise arise. As explained below, neither of these perceived difficulties is grounded in reality.

1. Difficulty of Proving Causation

Several courts state that proof of post-conviction relief is necessary to avoid the difficulties that would otherwise arise in proving causation.[39] These courts opine that the illegal act of the defendant is the sole proximate cause of her conviction, and, therefore, the defendant cannot prove that her attorney's negligence caused her conviction.[40]

This line of reasoning (even if it were true) does not lead to the conclusion that a defendant must attain post-conviction relief. These jurisdictions' argument can be broken down into cause and effect—the illegal act of the criminal defendant is the cause and the conviction is the effect. Post-conviction relief only wipes out the effect (the conviction), not the cause (the illegal act). Post-conviction relief says little about whether the criminal defendant actually committed the illegal act. If the illegal act is the sole cause of the conviction, then the threshold inquiry should be proof that the defendant did not commit the illegal act, not proof that she got her conviction reversed.[41]

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[39] *See* Canaan v. Bartee, 72 P.3d 911, 916 (Kan. 2003); Therrien v. Sullivan, 891 A.2d 560, 564 (N.H. 2006); Gibson v. Trant, 58 S.W.3d 103, 110 (Tenn. 2001).

[40] *See Coscia*, 25 P.3d at 674; Steele v. Kehoe, 747 So.2d 931, 933 (Fla. 1999); Peeler v. Hughes & Luce, 909 S.W.2d 494, 498 (Tex. 1995).

[41] Perhaps an illustration is helpful: Ms. X steals a car. A totally incompetent lawyer who sleeps during the entire trial and fails to provide any sort of defense represents her at her criminal trial. Ms. X is convicted. Ms. X is granted post-conviction relief because of her completely ineffective counsel. If these jurisdictions believe that a criminal's illegal act is the sole proximate cause of her conviction, then why should Ms. X now be permitted to sue her attorney if she could not sue without the post-conviction relief? The fact that she was granted post-conviction relief does not change the fact that she stole a car. She has still committed an illegal act, which these jurisdictions claim to be the sole proximate cause of her conviction.

Post-conviction relief based on ineffectiveness of counsel does not definitively demonstrate that the criminal defendant is guilty (either legally[42] or actually[43] guilty of the crime).[44] If the defendant's illegal acts are the sole cause of her conviction, then the test should not be whether she attained post-conviction relief; instead, the test should be whether she committed the illegal acts.[45]

2. Difficulty of Proving Damages

A few courts have ambiguously stated that one reason for the proof-of-post-conviction-relief requirement is the difficulty of proving damages in the absence of such a requirement.[46] While none of these courts explain the nature of the specific "difficulty," one possibility is that the courts are apprehensive of the challenges of converting wrongfully imposed criminal penalties into monetary damages.

While difficulties may arise in converting time served into damage awards, such "difficulty" in administering justice should not serve to bar a just result. Civil damages awards are imposed in all sorts of cases in which conversion of wrongs into dollar signs is difficult or uneasy work,[47] but, if nothing else, courts' abilities to award damages in false imprisonment cases show that time wrongly spent in prison can be calculated into a civil recovery.[48] Furthermore, requiring post-conviction relief in no way makes it easier for the court to assign a monetary value on time served for a wrongful conviction, and, therefore, is a nonsensical requirement.[49]

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[42] That is, the evidence is such that she would be convicted in a court of law beyond a reasonable doubt.

[43] That is, she actually committed the illegal acts (regardless of whether she could be convicted in a court of law).

[44] After post-conviction relief, the criminal defendant could be tried (with the assistance of a competent lawyer) and convicted again.

[45] However, even this line of reasoning (that a criminal defendant's illegal act is the sole proximate cause of her conviction) does not withstand scrutiny. *See* discussion *infra* Part IV.B.1. For purposes of this section, it is enough to demonstrate that since successful post-conviction relief does not show that the criminal defendant did not commit the illegal act, proof of post-conviction relief is unrelated to whether the defendant's own illegal acts were the proximate cause of her conviction.

[46] *See* Canaan v. Bartee, 72 P.3d 911, 917 (Kan. 2003); Therrien v. Sullivan, 891 A.2d 560, 564 (N.H. 2006); Gibson v. Trant, 58 S.W.3d 103, 110 (Tenn. 2001).

[47] *See* Duncan, *supra* note 29, at 1282–83.

[48] When the criminal defendant's punishment was a fine rather than prison time the calculations should be markedly easier.

[49] In a related line of reasoning, as a justification for requiring proof of post-conviction relief, the Florida Supreme Court has stated that monetary damages are inadequate to redress the harms of *incarcerated* defendants. *See* Steele v. Kehoe, 747 So. 2d 931, 933 (Fla. 1999). The court does *not* state that monetary damages are inadequate to redress improper incarceration, only that monetary damages are inadequate to redress those who are incarcerated.

The court is implicitly saying that somehow monetary damages are adequate to redress the harms of those who have been granted post-conviction relief (those who are no longer incarcerated),

C. *Hostility-Driven Arguments*

Other explanations offered by courts for the proof-of-post-conviction-relief requirement can sprout from no other seed than hostility toward convicted criminal defendants who attempt to sue their attorneys for criminal malpractice.

1. Existence of Post-Conviction Relief

A number of jurisdictions claim that post-conviction relief for ineffective assistance of counsel is an "adequate remedy" for negligent criminal defense lawyering.[50] These jurisdictions are, in essence, arguing that criminal defendants should not be able to sue for malpractice (since reversal of their conviction is remedy enough). Paradoxically, however, these jurisdictions rely on this "post-conviction-relief-is-an-adequate-remedy" claim to reach the conclusion that proof of post-conviction relief is a necessary element of a criminal malpractice claim.

If the reversal of a criminal defendant's conviction truly is an adequate remedy for negligent lawyering, then the criminal defendant no longer has any damages, and therefore should not win her criminal malpractice lawsuit. With her conviction erased, her damages are gone. Therefore, logically, post-conviction relief should *bar* a criminal defendant from bringing a criminal malpractice suit, not be a *requirement* of a criminal malpractice suit.

Of course, post-conviction relief is not itself an adequate remedy for negligent lawyering. First, post-conviction relief for ineffective assistance of counsel will not be available in some situations where the criminal defendant could prove criminal malpractice, since the standards for proving ineffective assistance of counsel and for making out a malpractice claim are not identical.[51] Reversal of a conviction does not vitiate the harm of a wrongful conviction because of negligent

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but not those who are still in prison. So, the argument goes, if a defense lawyer acts negligently, and the defendant is still in prison, she should not be allowed to sue because money is inadequate to redress her harm. On the other hand, if the lawyer acted negligently and the defendant has obtained post-conviction relief and is no longer incarcerated, then suing for monetary damages is appropriate.

Even taking for granted the reasoning that monetary damages are inadequate to redress the harms of incarcerated defendants (which is a lot to take for granted), this line of thinking leads to the conclusion that only those who are not incarcerated should be able to recover for criminal malpractice, not that only those who have obtained post-conviction relief may recover. If monetary damages are an adequate remedy to those free from prison it should not matter *how* the person left prison (e.g., through post-conviction relief, fulfillment of their sentence, a daring escape), only that she is now no longer in prison.

Under the Florida Supreme Court's rationale, an individual who was convicted of a crime because of her lawyer's malpractice and sentenced to pay a fine would be adequately made whole by winning monetary damages from her lawyer. However, requiring this person to obtain post-conviction relief would bar her from relief without furthering the court's justification, making it a self-contradictory requirement.

[50] *See* Coscia v. McKenna & Cuneo, 25 P.3d 670, 673–75 (Cal. 2001); *Steele* 747 So. 2d at 933; *Canaan* 72 P.3d at 916; *Therrien*, 891 A.2d at 564; *Gibson*, 58 S.W.3d at 110.

[51] *See supra* Part III.A.1.

representation. The wrongfully convicted person still should be compensated for the wrongful conviction itself, the time wrongly spent in prison, and the cost of seeking post-conviction relief.

What is really going on is that those who believe that post-conviction relief is an adequate remedy for ineffective assistance of counsel want to make it as hard as possible for criminal defendants to bring malpractice lawsuits. It therefore makes sense that such persons would advocate the post-conviction-relief requirement, since it does make it harder for criminal defendants to win malpractice claims. This line of reasoning is not a valid basis for the post-conviction-relief requirement.

2. Guilt-Driven Justifications

A number of other justifications for imposing the post-conviction-relief requirement can be similarly dismissed for missing the point. These justifications, in one form or another, state that a *guilty* person should not be able to sue her defense lawyer for criminal malpractice. Two common forms of this claim[52] are: prohibiting criminals from benefiting from their own bad acts;[53] and stopping criminals from impermissibly shifting the responsibility and consequences of their crime onto another.[54]

These arguments hinge on whether the criminal malpractice plaintiff actually committed the illegal act, not on whether she obtained post-conviction relief. Therefore, these justifications argue for proof that the criminal malpractice plaintiff did not commit the illegal act as an element of a criminal malpractice lawsuit.[55] These arguments in no way support the conclusion that proof of post-conviction relief should be an element of criminal malpractice lawsuits because

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[52] Less widely-cited justifications include: the paradoxical difficulties of awarding damages to a guilty person, *Canaan*, 72 P.3d at 916; the claim that the liberty interest of a guilty person is not a legally recognized interest that tort law protects, *Gibson*, 58 S.W.3d at 111; and preventing suits from criminal defendants who are guilty but could have gotten a better deal, Falkner v. Foshaug, 29 P.3d 771, 776 (Wash. Ct. App. 2001). The same problem mentioned in the text is present with these three justifications as well. Also, it is not immediately obvious why criminal defendants who could have gotten a "better deal" but for the negligence of their lawyer should be denied recovery for the difference between their actual sentence and the better deal that should have been available to them (after a showing that they would have, in fact, taken the better deal).

[53] *See Coscia*, 25 P.3d at 674; *Canaan*, 72 P.3d at 916; *Gibson*, 58 S.W.3d at 110; *Falkner*, 29 P.3d at 776.

[54] *See Coscia*, 25 P.3d at 673–74; *Canaan*, 72 P. 3d at 916; *Gibson*, 58 S.W.3d at 110; Peeler v. Hughes & Luce, 909 S.W.2d 494, 498 (Tex. 1995).

[55] In *infra* Part IV.C.1, I will demonstrate that these justifications do not actually support a requirement of proof of actual innocence. In this section it is enough to show that these rationales do not justify an inquiry into proof of post-conviction relief.

proof of post-conviction relief does not speak directly to the question of whether or not the criminal malpractice plaintiff committed the illegal act.[56]

If the fear is that criminals are benefiting through their bad acts in criminal malpractice lawsuits, then make them prove they did not commit bad acts. If the fear is that criminal malpractice lawsuits allow criminals to shift responsibility for the consequences of their crimes, then make them prove they committed no crime. Proof of post-conviction relief is the incorrect proxy for justifications of this ilk.

IV. PROOF OF ACTUAL INNOCENCE

To succeed in a lawsuit for criminal malpractice, many jurisdictions require the plaintiff to prove that she was actually innocent of the charged offense in the criminal prosecution in which the allegedly negligent acts of her attorney occurred.[57] Courts offer a litany of reasons for this requirement, which are often similar (and similarly unpersuasive) to the reasons recited for the post-conviction-relief requirement. The justifications offered for the actual-innocence requirement are divided into virtually the same groupings: (1) efficiency- and consistency-based arguments; (2) difficulty or lack-of-proof arguments; and (3) arguments rooted in frank hostility toward criminal defendants-turned-criminal-malpractice plaintiffs.

A. *Efficiency- and Consistency-Based Arguments*

Two efficiency-based arguments courts use to support the actual-innocence requirement relate to criminal defense attorneys: (1) the requirement quells nuisance litigation and therefore removes disincentives for attorneys to take criminal defense work; and (2) the requirement alleviates the need for criminal defense attorneys to build a record to defend themselves from criminal malpractice claims. A third argument, consistency based, is that proof of actual innocence furthers the judicial policy against creating conflicting resolutions arising from the same transaction.

1. The Chilling Effect of Frivolous Lawsuits

As with the post-conviction-relief requirement, numerous jurisdictions claim that an actual innocence requirement in criminal malpractice cases works to curtail

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[56] In fact, after obtaining post-conviction relief, the criminal malpractice plaintiff could be convicted again for the illegal act and still bring a lawsuit if all that must be shown is proof of post-conviction relief in her first trial.

[57] *See supra* note 3.

frivolous lawsuits and thereby encourages criminal defense representation (both generally[58] and specifically of the indigent[59]).

The same problems that infect this justification in the proof-of-post-conviction-relief realm also make it a poor justification for the proof of actual-innocence requirement.[60] While requiring proof of innocence will create the *effect* of reducing criminal malpractice lawsuits overall,[61] it is not a rational *justification* for the requirement. Allowing the innocent but not the guilty to bring criminal malpractice lawsuits draws the line no more rationally than does allowing those who have obtained post-conviction relief to sue, but not those who have not obtained such relief. An actually guilty person can still be harmed by negligent representation and should be compensated for that harm.

The actual innocence requirement does little to speed dismissal of frivolous lawsuits, thus providing no shield for the attorney-defendants most deserving of protection.[62] Jurisdictions that require proof of actual innocence cannot make a quick determination of the plaintiff's guilt at the outset of the malpractice lawsuit so as to swiftly dismiss the lawsuit. Actual guilt or innocence is not easily ascertainable because it requires a fact-intensive inquiry that does not facilitate summary judgments of nuisance suits. Attempting to prove actual innocence at trial (in essence, holding a trial within a trial) may turn into a lengthy and tedious process, thereby forcing criminal malpractice defendants to spend more time and resources in their defense than if no proof of actual innocence was required.

2. Self-Preserving Recordkeeping

Two courts have justified the proof of actual innocence requirement by noting that it behooves no one to encourage the additional expenditure of resources by defense attorneys merely to build a record against a potential malpractice suit.[63] Taking this assertion as true, it does not lead to the conclusion that actually guilty plaintiffs should be barred from recovery in criminal malpractice suits.

Drawing the line between actually innocent and actually guilty clients is not a sensible delineation if the justification is the conservation of lawyer resources. Whether the defendant is actually innocent has no connection to the goal of

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[58] *See* Glenn v. Aiken, 569 N.E.2d 783, 788 (Mass. 1991); Bailey v. Tucker, 621 A.2d 108, 114 (Pa. 1993); Ang v. Martin, 114 P.3d 637, 642 (Wash. 2005); *Falkner*, 29 P.3d at 776.

[59] *See Glenn*, 569 N.E.2d at 788; Belk v. Cheshire, 583 S.E.2d 700, 706 (N.C. Ct. App. 2003).

[60] *See supra* Part III.A.4.

[61] Presumably the harder it is for plaintiffs to win criminal malpractice lawsuits, the more likely lawyers will be to take on criminal defense work. Other commentators remain unconvinced of this assumption. *See supra* note 29.

[62] As one court noted, incarcerated persons are especially prone to litigation, and, therefore the threat of frivolous litigation increases where convicts are plaintiffs. *Ang*, 114 P.3d at 642. While this generalization may be true, prisoners with valid malpractice claims should not be made to jump through unreasonable hoops because some of their brethren file unfounded lawsuits.

[63] *See* Wiley v. San Diego, 966 P.2d 983, 991 (Cal. 1998); *Bailey*, 621 A.2d at 114.

protecting defense lawyers from the need to make self-serving records. The rationale that lawyers should not expend resources on such protective records would be a justification to bar *all* criminal malpractice lawsuits, but not to bar only criminal malpractice lawsuits by actually guilty defendants. The guilt of the defendant has no relation to the goal of conserving resources.[64] Therefore, the conservation goal is not a valid justification for requiring proof of actual innocence in criminal malpractice actions.[65]

3. Conflicting Resolutions from a Sole Transaction

The Supreme Court of California has stated that requiring proof of actual innocence is consistent with the judicial policy against the creation of two conflicting resolutions arising out of the same or identical transaction.[66] The problem with this justification is that the *actual* guilt or innocence of the defendant is independent of both whether she has been convicted and whether or not the assistance of her counsel has been deemed ineffective. An actually innocent defendant may be convicted and fail in her attempt to get her conviction reversed on ineffective-assistance-of-counsel grounds, thereby allegedly creating "conflicting resolutions" when she recovers from her lawyer for criminal malpractice.[67] The actual-innocence distinction does not rationally further the judicial policy against creating conflicting resolutions.

B. *Difficulty and Lack of Proof Arguments*

Courts have identified two proof-based justifications for the actual-innocence requirement: (1) without a showing of actual innocence, proximate causation is lacking and therefore criminal malpractice can never be proven; and (2) without a showing of actual innocence, the complexities of the burden of proof would be too onerous for a jury. Neither of these justifications withstands scrutiny.

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[64] Just as with encouraging lawyers to do work in the criminal defense field, conservation of lawyer resources would be an *effect* of barring some class of criminal malpractice plaintiffs from bringing their case (here, plaintiffs who are actually guilty). However, it is not a *justification* for barring this specific class from bringing their criminal malpractice lawsuit.

[65] Moreover, if a criminal defense lawyer chooses to expend resources to create a record against a potential malpractice claim, she will most likely do so in every case regardless of whether she believes her client is innocent or guilty. Often, the attorney will not know whether her client is guilty or not, and even when the attorney knows her client is guilty, she may still build a record against a potential future malpractice claim for fear that a later decision-maker may find the client to be innocent. In this way, the actual innocence requirement would do little, if anything, to suppress a defensive-minded lawyer's need or desire to create a record of self-protection.

[66] *See Wiley*, 966 P.2d at 990.

[67] In reality, even the rejection of an ineffective assistance of counsel claim and an award of recovery for criminal malpractice does not create conflicting resolutions. *See supra* Part III.A.3.

1. Lack of Proximate Causation

Numerous courts have stated that an actually guilty defendant cannot properly prove that her attorney's negligence is the cause of her harm because the defendant's illegal acts are the sole proximate cause of her conviction.[68] As stated by Professor Prosser, "an act or omission is not regarded as a cause of an event if the particular event would have occurred without it."[69] If a defendant was inevitably going to be convicted anyway, then her attorney's malpractice caused no additional harm.

While it is true that if the attorney's negligence caused no harm there are no damages, the relevant inquiry regarding the attorney's negligence is not whether the defendant is *actually* guilty of the charged offense, but whether she is *legally* guilty of it. Many actually guilty criminal defendants represented by competent counsel are not convicted. The American criminal judicial system is rife with procedures that frustrate the truth-seeking function of the court in favor of other goals.[70]

The proper proximate causation inquiry is whether a criminal defendant would have received the same punishment had her attorney not acted negligently.[71] If a defendant would have received the same punishment whether or not her attorney was negligent, then she should not be compensated for the negligence. Using the inquiry of actual innocence as a proxy for whether the defendant would have received the same punishment in the absence of the lawyer's negligence jams a square peg in a round hole.[72]

Deciding whether a defendant would have been convicted if her attorney had not been negligent admittedly involves some uncertainty given the unpredictability of juries. Criminal malpractice suits, however, create no greater uncertainty than

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[68] *See Shaw II*, *supra* note 4, at 572; Ray v. Stone, 952 S.W.2d 220, 224 (Ky. Ct. App. 1997); *Wiley*, 966 P.2d at 987; Laurence v. Sollitto, 788 A.2d 455, 459 (R.I. 2002); Ang v. Martin, 114 P.3d 637, 642 (Wash. 2005).

[69] WILLIAM L. PROSSER, THE LAW OF TORTS, § 41, (4th ed. 1971).

[70] For instance, the exclusionary rule keeps improperly seized evidence from the jury, thereby frustrating the truth-seeking function. A criminal defendant who was convicted on the basis of unconstitutionally seized evidence would have been actually guilty, but not legally guilty, of the crime—she committed the crime, but would not have been convicted if she had had competent representation. Therefore, she should now be able to sue her attorney for criminal malpractice, even though she did commit the crime.

[71] An actually guilty criminal defendant can prove that her defense counsel was a proximate cause of her conviction by showing that the attorney neglected to raise a defense that would have been effective. *See* David H. Potel, Comment, *Criminal Malpractice: Threshold Barriers to Recovery Against Negligent Criminal Counsel*, 1981 DUKE L.J. 542, 547 (1981).

[72] Many actually guilty defendants would be acquitted if represented by a non-negligent lawyer. Therefore when they are convicted as a result of malpractice, it is the malpractice that *caused* the harm. It is not the illegal act of the defendant that *caused* the conviction, because she would have escaped conviction but for her negligent attorney. Moreover, the illegal act of the defendant also did not *cause* the attorney's negligence; it merely gave the attorney an opportunity to be negligent.

do civil or medical malpractice actions.[73] Furthermore, the criminal malpractice plaintiff bears the burden of proof and must affirmatively persuade the decision-maker of her harm.

In other cases, the attorney's malpractice may not result in the defendant being convicted, but instead in the defendant receiving a harsher punishment than she would have received if the attorney had not been negligent.[74] In such cases, the defendant's illegal act is the sole cause of the punishment that the defendant *would have received* but for the negligence. However, the attorney's negligence is the sole cause of the *additional* punishment. Therefore, the defendant (although actually *and* legally guilty) should be able to recover for the additional punishment she received as a result of her attorney's negligence.

2. Confusing Convergence of Burdens of Proof

A few courts have stated that allowing guilty defendants to bring criminal malpractice claims will create the confusing situation in which the jury in the malpractice case will have to determine by a preponderance of the evidence whether the criminal defendant would have been found guilty beyond a reasonable doubt.[75]

This "complicated" inquiry is not confined to criminal malpractice cases brought by actually guilty defendants. The decision-maker will have to resolve the same issue whether or not the plaintiff is actually guilty. Therefore, the fact that the jury will have to make a difficult determination is an irrational justification for requiring the plaintiff to be actually innocent.[76] To succeed in their criminal malpractice lawsuits, actually innocent plaintiffs still must prove by a

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[73] Of course, in each variety of malpractice suit easy and difficult cases exist—the point is that determining causation in criminal malpractice cases is not more difficult per se than other types of malpractice suits.

[74] In this way, negligent attorneys can undoubtedly cause harm to their clients, even if their clients are actually guilty of the crime charged (for example, an attorney who fails to convey a favorable plea deal to her client who later is convicted at trial). Meredith J. Duncan, *The (So-Called) Liability of Criminal Defense Attorneys: A System in Need of Reform*, 2002 BYU L. REV. 1, 38 (2002); Joseph H. King, Jr., *Outlaws and Outlier Doctrines: The Serious Misconduct Bar in Tort Law*, 43 WM. & MARY L. REV. 1011, 1033 (2002); Susan M. Treyz, *Criminal Malpractice: Privilege of the Innocent Plaintiff?*, 59 FORDHAM L. REV. 719, 732–33 (1991).

[75] *See* Wiley v. San Diego, 966 P.2d 983, 990 (Cal. 1998); Glenn v. Aiken, 569 N.E.2d 783, 788 n.8 (Mass. 1991); Hicks v. Nunnery, 643 N.W.2d 809, 821 (Wis. Ct. App. 2002).

[76] Beyond the irrationality of the requirement, juries are called on to resolve all sorts of difficult and complicated issues. To presume that resolving the two burdens of proof is somehow beyond the pale of jurors' capabilities is conclusory and somewhat insulting. If it could be shown that resolving these issues was beyond the ability of a lay jury, then special "blue ribbon" juries or judges should decide criminal malpractice lawsuits.

preponderance of the evidence that a jury would not have found them guilty beyond a reasonable doubt.[77]

C. *Hostility-Based Arguments*

As with the post-conviction relief requirement,[78] some justifications proffered for the proof-of-actual-innocence requirement smack of little more than hostility towards convicts bringing criminal malpractice lawsuits.[79] Courts state that permitting actually guilty plaintiffs to recover would (1) impermissibly shift responsibility for the crime from themselves and allow them to benefit from their own wrongdoing and (2) engender disrespect for the courts and shock the public conscience. Courts have also stated that the underpinnings of tort liability—compensation and deterrence—do not support a rule that allows criminal malpractice recovery by one who is guilty of the underlying criminal charge. Each justification is discussed below.

1. Crime Should Not Pay

Two related reasons in favor of the imposition of the actual-innocence requirement are that, without it, criminals are able to benefit from their crimes and impermissibly shift responsibility for their illegal actions onto their attorneys.

Numerous courts claim that allowing a criminal defendant who actually committed the charged offense to recover from her defense lawyer in a malpractice suit would impermissibly allow her to profit from her own fraud, take advantage of her own wrongdoing, found a claim upon her iniquity, or acquire property by her own crime.[80] The basic gist of the argument is that actually guilty defendants

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[77] The decision-maker will not always be called upon to determine whether the plaintiff would have been found guilty beyond a reasonable doubt in criminal malpractice lawsuits. Some lawsuits will be brought by admittedly guilty defendants whose defense lawyers' negligence caused them to receive longer sentences.

[78] *See supra* Part III.C.

[79] According to the Seventh Circuit Court of Appeals, some courts have hinted that criminals are disfavored litigants. *See* Winniczek v. Nagelberg, 394 F.3d 505, 507 (7th Cir. 2005) (*citing* Kramer v. Dirksen, 695 N.E.2d 1288, 1290 (Ill. App. Ct. 1998); Peeler v. Hughes & Luce, 909 S.W.2d 494, 497 (Tex. 1995); and Labovitz v. Feinberg, 713 N.E.2d 379, 383 and n.9 (Mass. App. Ct. 1999)). To the extent that this bias is true, it has no place in the judicial system. While criminals have committed illegal acts, part of their punishment should not include hindered access to the courts. Where the actual innocence requirement is a result of courts "focusing not on the alleged injury, but on whether the victim deserves protection," it denies recovery not because a harm did not occur or because the defense attorney was not to blame, but because it deems the plaintiff unworthy. *See* David H. Potel, Comment, *Criminal Malpractice: Threshold Barriers to Recovery Against Negligent Criminal Counsel*, 1981 DUKE L.J. 542, 564 (1981). Such a determination is inappropriate—criminals do not give up their right to recover for their injuries upon commission of a crime.

[80] *See* Wiley v. San Diego, 966 P.2d 983, 986 (Cal. 1998); Ray v. Stone, 952 S.W.2d 220, 224 (Ky. Ct. App. 1997); O'Blennis v. Adolf, 691 S.W.2d 498, 504 (Mo. Ct. App. 1985). For the proposition that allowing a tort recovery would allow the criminal defendant to benefit from her own

should not be able to benefit, even indirectly, from anything stemming from their crime. Since the negligent representation would not have occurred but for the crime, these jurisdictions bar criminal malpractice lawsuits in such situations. A related justification for the actual-innocence requirement is that allowing a truly guilty criminal to recover from her lawyer impermissibly shifts responsibility for the crime away from the criminal.[81] To ensure that guilty parties take full responsibility for their crimes, these jurisdictions only permit actually innocent plaintiffs to recover for criminal malpractice.

These arguments fail to appreciate the *raison d'être* of the tort system—to compensate injured parties and make them whole.[82] Such a process does not "benefit" criminals or allow them to avoid responsibility for their wrongs. 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. If a criminal is sentenced to an extra five years in prison because of her attorney's negligence, the attorney should compensate her for the extra five years. The criminal has not "profited" in this transaction—she has merely been compensated for the time to which she was unnecessarily sentenced.[83] Also, the criminal has not shifted responsibility for her crime onto her lawyer—she is not compensated for the portion of her sentence that would have been rightly imposed had a non-negligent lawyer represented her. Disallowing a guilty defendant from recovering from her negligent lawyer allows the *lawyer* to escape responsibility for *her* wrongful conduct and shifts the burden of the malpractice onto her client.[84]

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misdeeds generally, see Rodriguez v. Nielsen, 650 N.W.2d 237, 240–41 (Neb. 2002); Belk v. Chesire, 583 S.E.2d 700, 706 (N.C. Ct. App. 2003); Bailey v. Tucker, 621 A.2d 108, 113 (Pa. 1993); Falkner v. Foshaug, 29 P.3d 771, 776 (Wash. Ct. App. 2001); Ang v. Martin, 114 P.3d 637, 642 (Wash. 2005). For the proposition that a tort recovery would "reward" the criminal defendant, see Glenn v. Aiken, 569 N.E.2d 783, 788 (Mass. 1991); Hicks v. Nunnery, 643 N.W.2d 809, 821–22 (Wis. Ct. App. 2002). *See also* Nick Hedding, *The Fine Line Between Strategic Miscalculation and Harmful Error: Consequences and Repercussions of Legal Malpractice to the Criminal Defense Attorney*, 4 J. LEGAL ADOV. & PRAC. 222, 225 (2002).

[81] *See* Saecker v. Thorie, 234 F.3d 1010, 1014 (7th Cir. 2000); Winniczek v. Nagelberg, 394 F.3d 505, 509 (7th Cir. 2005); *Shaw II*, *supra* note 4, at 571; *Wiley*, 966 P.2d at 986; *Hicks*, 643 N.W.2d at 822.

[82] *See* Joseph H. King, Jr., *Outlaws and Outlier Doctrines: The Serious Misconduct Bar in Tort Law*, 43 WM. & MARY L. REV. 1011, 1044 (2002).

[83] To say that a criminal is benefiting from her crime by winning a criminal malpractice lawsuit is no different than saying that a criminal benefits from winning a lawsuit based on mistreatment in prison. If tort compensation is an inappropriate "benefit" when a criminal is mistreated during her trial (by her lawyer's negligence), tort compensation should also be an impermissible "benefit" to a criminal who is mistreated in prison. However, guilty criminals *are* allowed to recover for torts visited upon them in prison. Therefore, actually guilty criminals should also be permitted to recover for torts visited upon them at trial, such as the malpractice of their criminal defense lawyer.

[84] Through the actual innocence requirement, it is the attorney, not the client, who shifts the responsibility of her wrongdoing to another. *See* Meredith J. Duncan, *Criminal Malpractice: A Lawyer's Holiday*, 37 GA. L. REV. 1251, 1287 (2003).

2. Shocking the Public Conscience

Several courts claim that allowing the guilty to recover for criminal malpractice would "shock the public conscience, engender disrespect for courts, and generally discredit the administration of justice."[85] If criminals receiving justice shocks the public conscience, it only provides support for why the court system is presided over by well-trained jurists. As illustrated in the immediately preceding section,[86] compensating guilty criminals for the harms visited upon them by their negligent defense counsel in no way rewards them for their bad acts or facilitates an escape from justice. It merely ensures that criminals are punished to the proper extent—no more and no less. Further, it ensures that negligent attorneys are made to pay for their incompetence—no more and no less. If such justice shocks the public conscience, then the public should seek redress from their legislative representatives.

3. Of Compensation and Deterrence

Two jurisdictions have stated that the underpinnings of tort liability, compensation and deterrence, do not support a rule that allows recovery to one who is guilty of the underlying criminal charge.[87] The compensation argument is addressed above.[88]

The deterrence argument fails completely. Legal malpractice is certainly behavior that should be deterred. Malpractice by criminal defense lawyers, because of the especially high stakes involved, is less tolerable than malpractice by lawyers involved in civil litigation.[89] However, defendants in civil lawsuits can successfully sue their attorneys for malpractice even if they actually committed the tort alleged. Deterrence of criminal malpractice is inarguably necessary.

Other means of deterrence, such as reprimands for attorney misconduct, are insufficient to discourage negligent lawyering.[90] If other means of deterrence were effective, attorneys would no longer commit malpractice, which, unfortunately, is not the case. The actual-innocence requirement strikes a heavy blow against

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[85] *See Wiley*, 966 P.2d at 986; O'Blennis v. Adolf, 691 S.W.2d 498, 504 (Mo. Ct. App. 1985); *Hicks*, 643 N.W.2d at 822. *See also* Nick Hedding, *supra* note 80, at 225–26 (2002).

[86] *See supra* Part IV.C.1.

[87] *See* Glenn v. Aiken, 569 N.E.2d 783, 788 (Mass. 1991); *Wiley*, 966 P.2d at 990.

[88] *See supra* Part IV.C.1.

[89] *See* Roy Ryden Anderson, *Hey Walter: Do Criminal Defense Lawyers Not Owe Fiduciary Duties to Guilty Clients? An Open Letter to Retired Professor Walter W. Steele, Jr.*, 52 SMU L. REV. 661, 675 (1999) (suggesting that, if anything, criminal attorneys should act with a higher degree of ethical conduct).

[90] *See* Meredith J. Duncan, *The (So-Called) Liability of Criminal Defense Attorneys: A System in Need of Reform*, 2002 BYU L. REV. 1, 42–44 (2002) (arguing that the professional disciplinary system is an ineffective safeguard for ensuring the competence of criminal defense attorneys).

deterring negligence, because attorneys are free to commit malpractice without fear of a lawsuit whenever representing an actually guilty client.[91]

V. AFFIRMATIVE ARGUMENTS AND RECOMMENDATIONS

A. *No Proof of Innocence Requirement is Appropriate*

A criminal malpractice lawsuit should require neither proof of actual innocence nor proof of post-conviction relief. As illustrated above, no justification offered for either of the requirements withstands scrutiny. Therefore, both are arbitrary elements of the cause of action and unjustly deny recovery to some who deserve compensation. The elements of a criminal malpractice cause of action should not differ from those for legal malpractice arising out of civil representation. To maintain a criminal malpractice claim, the plaintiff should only have to prove: (1) the existence of an attorney-client relationship giving rise to a duty; (2) breach of that duty by the attorney; (3) proximate causation between the breach and the client's injury; and (4) injury to the client.

These four requirements plus the burden of proof that weighs on the criminal malpractice plaintiff sufficiently protect defense attorneys from ungrounded suits. Furthermore, holding negligent defense attorneys liable for their wrongdoing promotes competent representation of accused persons, upon which the criminal justice system is reliant.

B. *Compelled Post-Conviction Relief Harms Convicted Persons*

The post-conviction-relief requirement creates special injustice by forcing convicts to petition for post-conviction relief, even when such relief may be against their best interests. Courts requiring proof of post-conviction relief presuppose that every convict who suffered at the hands of ineffective counsel will petition for relief. First, that is simply not true.[92] Second, criminal malpractice

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[91] One court, somewhat naively, has stated that criminal defense attorneys are deterred from negligent representation by the possibility that their client may not be guilty. *See* Glenn v. Aiken, 569 N.E.2d 783, 788 (Mass. 1991). If this were the case then no criminal defense lawyer would ever be negligent (except when they knew *for certain* that their client was guilty). Obviously, some attorneys need more than the prospect of a wrongly accused client to deter them from negligent representation. Moreover, attorneys representing guilty clients have a duty to act competently as well.

[92] Take, for instance, the case of *Smith v. Truman*, 115 P.3d 1279 (Colo. 2005). Smith, the criminal malpractice plaintiff, had already been convicted and paroled and did not wish to bring a post-conviction motion that could have resulted in a new trial and possible reincarceration. *See* Rantz v. Kaufman, 109 P.3d 132, 137 n.4 (Colo. 2005). A criminal defendant should not be denied a malpractice claim against her former attorney because she decides that pursuing post-conviction relief is not in her best interest.

claimants should not, in any event, be compelled to seek post-conviction relief of their *criminal* conviction in order to succeed in their *civil* legal malpractice claim.[93]

Using the tort system to compel litigants to take certain action in their criminal case strays too far down a dangerous path. Criminal defendants have numerous reasons not to petition for post-conviction review of their conviction. Forcing them to submit to such review in order to seek civil compensation does not serve any proper function and creates unnecessary burdens.

The first burden is the cost of seeking post-conviction relief. For many defendants, seeking the relief will mean hiring an attorney. Criminal defendants wishing to sue their trial counsel for malpractice most likely will want a new attorney, rather than sticking with their previous negligent attorney. The post-conviction process imposes costs in the form of both time and energy as well.

Second, the most costly repercussion to criminal defendants of obtaining post-conviction relief is the possibility that they will be charged and tried again. A grant of post-conviction relief can be riskier for some criminal defendants than accepting their original conviction. True, some defendants will not be subjected to the trial process again, but even the threat or fear of charges being brought can be substantially burdensome. Also, criminal defendants have no way of knowing when they seek post-conviction relief whether the prosecutors will seek to re-try them.

Some convicts would no doubt rather stick with their current conviction than have it overturned and potentially stand trial again. The defendant might simply have run out of money and not be able to fund a sufficient defense the second time around. Therefore, the threat of a second trial might coerce the defendant into an unfavorable plea agreement. Also, the prosecution will be able to more effectively bring its case because of information that they gathered during the first trial (e.g., how to handle certain witnesses, which witnesses to call). Also, witnesses with information favorable to the defendant may no longer be available.[94]

VI. CONCLUSION

Neither proof of actual innocence nor legal innocence should be a prerequisite for a criminal defendant to bring a malpractice action against her lawyer for representation in her underlying criminal trial. Any benefit that arises from such a requirement can be created through other, less harmful, means. The proof-of-innocence requirements leave defense attorneys free to act negligently and leave

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[93] Of course, the defendant attorney in the malpractice lawsuit could offer that her former client should have sought post-conviction relief in order to mitigate her damages, thus relieving the attorney from having to pay compensation for harm the plaintiff could have avoided.

[94] While their prior testimony would presumably be admissible under evidentiary rules, a defendant would most likely rather have her witness present to testify than have her prior statements read aloud (unless, of course, the witness evokes a negative response from the decision-maker in a way that would not be reflected through the reading of her testimony).

their clients without recourse. Therefore, criminal defendants should be able to recover for any injuries caused by their negligent defense attorney.