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# CRIMINAL MALPRACTICE: PRIVILEGE OF THE INNOCENT PLAINTIFF?

## INTRODUCTION

Criminal malpractice, in which an attorney is accused of negligently defending his client in a criminal proceeding,<sup>1</sup> constitutes a small but increasing percentage<sup>2</sup> of legal malpractice suits. Although criminal malpractice is almost identical to civil malpractice, the criminal malpractice plaintiff faces two additional obstacles to his suit.<sup>3</sup> First, most jurisdictions<sup>4</sup> have been hesitant to allow plaintiffs to bring and win criminal malpractice suits without first having successfully shown ineffective assistance of counsel in a separate action.<sup>5</sup> Consequently, the criminal malpractice plaintiff essentially is forced to bring an ineffective assistance of counsel claim prior to bringing a malpractice suit.<sup>6</sup> Second, a smaller number of jurisdictions<sup>7</sup> have recently required plaintiffs to prove actual

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1. See Bogutz & Albert, *A Survey of the Developing Pennsylvania Law of Attorney Malpractice*, 61 Temp. L. Rev. 1237, 1273 (1988).

2. See R. Mallen & J. Smith, *Legal Malpractice* § 21.1, at 284 & n.4 (3d ed. 1989); Bogutz & Albert, *supra* note 1, at 1273. The increase in criminal malpractice suits is expected to continue. See *id.* In fact, the present paucity of criminal malpractice suits has been called the "calm before the storm." *Id.* at 1275.

3. See *infra* notes 30-66 and accompanying text.

4. See J. Burkoff, *Criminal Defense Ethics* § 3.3, at 3-16 (1986); *infra* note 5.

5. See, e.g., *Downton v. Vandemark*, 571 F. Supp. 40, 43-44 (N.D. Ohio 1983) (plaintiff must prove reversal of conviction plus dismissal on the merits or an acquittal on retrial), explained by *Krahn v. Kinney*, 43 Ohio St. 3d 103, 106, 538 N.E.2d 1058, 1062 (1989); *Bledstein v. Superior Court*, 208 Cal. Rptr. 428, 442, 162 Cal. App. 3d 152, 173 (Ct. App. 1984) ("[A] criminal defendant whose conviction has not been reversed, or whose sentence has not been modified after a challenge has been made on competency-of-counsel grounds, has a seemingly insurmountable obstacle to overcome in trying to show any damage resulted from the alleged malpractice."); *Johnson v. Schmidt*, 719 S.W.2d 825, 826 (Mo. Ct. App. 1986) ("The present action is premature, until such time as appellant is successful in securing post-conviction relief upon a finding that he was denied effective assistance of counsel."); *Weaver v. Carson*, 62 Ohio App. 2d 99, 101, 404 N.E.2d 1344, 1346 (Ct. App. 1979) (plaintiffs must show conviction was reversed based on ineffective assistance of counsel), explained by *Krahn v. Kinney*, 43 Ohio St. 3d 103, 106, 538 N.E.2d 1058, 1062 (1989); J. Burkoff, *supra* note 4, § 3.1(c), at 3-10 to 3-11 (plaintiff whose conviction has not been reversed may have "insurmountable obstacle" in showing damages). But see *Jepson v. Stubbs*, 555 S.W.2d 307, 313 (Mo. 1977) (en banc) (holding that setting aside the conviction was not a condition to maintaining suit).

The requirement that the plaintiff must first reverse his conviction, means the plaintiff's guilt precludes his ability to bring a malpractice suit against his attorney. See *Weiner v. Mitchell*, 114 Cal. App. 3d 39, 48, 170 Cal. Rptr 533, 538 (Ct. App. 1980). In *Weiner* the court held that the doctrine of collateral estoppel prevented the plaintiff from relitigating the issue of guilt and precluded him from bringing a malpractice suit. See *id.*; see also *Krahn v. Kinney*, 43 Ohio St. 3d 103, 106, 538 N.E.2d 1058, 1062 (1989) ("[I]n most cases the failure to secure a reversal of the underlying criminal conviction may bear upon and even destroy the plaintiff's ability to establish the element of proximate cause.").

6. See *supra* note 5.

7. Specifically, New York and Illinois have imposed a requirement that the criminal malpractice plaintiff show his actual innocence of the underlying crime. See *Walker v. Kruse*, 484 F.2d 802, 804 (7th Cir. 1973) ("An Illinois court might well hold, as a matter

innocence with respect to the underlying offense even if their conviction was reversed on ineffective assistance of counsel grounds.<sup>8</sup> In all states, even those not requiring actual innocence, if the plaintiff's attempt to reverse his conviction on the basis of ineffective assistance of counsel was unsuccessful, the attorney-defendant may assert that the plaintiff's malpractice claim is barred by the doctrine of collateral estoppel.<sup>9</sup> This Note only addresses cases in which plaintiffs have brought a prior ineffective assistance claim.

This Note asserts that the actual innocence standard is unnecessary because collateral estoppel provides sufficient protection against meritless criminal malpractice claims. Part I describes the criminal malpractice claim. Part II examines the attorney's collateral estoppel defense. Part III analyzes the actual innocence requirement and its justifications. This Note concludes that forcing plaintiffs to show actual innocence is unnecessary and that such a requirement leads to unfair and undesirable results.

## I. BACKGROUND

Legal malpractice is a type of professional negligence in which an attorney fails to meet the standards of a reasonably competent attorney.<sup>10</sup> The client in these actions sues his former lawyer alleging negligence.<sup>11</sup> In the vast majority of legal malpractice suits brought against trial attorneys, the underlying lawsuit is a civil suit, hence the name "civil malpractice."<sup>12</sup>

In most respects, a criminal malpractice suit is identical to a civil malpractice suit.<sup>13</sup> Both require the establishment of an attorney-client relationship, which gives rise to a duty owed by the attorney to the client.<sup>14</sup>

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of law, that a criminal conviction cannot support a malpractice claim unless the plaintiff is able to establish his actual innocence."); *Carmel v. Lunney*, 70 N.Y.2d 169, 173, 511 N.E.2d 1126, 1128, 518 N.Y.S.2d 605, 607 (1987) ("plaintiff must allege his innocence or a colorable claim of innocence"); *Winkler v. Messinger, Alperin & Hufjay*, 147 A.D.2d 693, 693, 538 N.Y.S.2d 299, 300 (2d Dep't 1989) (malpractice claim did not set forth viable cause of action because it did not allege plaintiff's innocence of criminal charges); *B.K. Industries, Inc. v. Pinks*, 143 A.D.2d 963, 965, 533 N.Y.S.2d 595, 596-97 (2d Dep't 1988) (client seeking malpractice damages for negligent misrepresentation in criminal case had burden to prove his innocence); *Claudio v. Heller*, 119 Misc. 2d 432, 433-35, 463 N.Y.S.2d 155, 156-57 (Sup. Ct. 1983) (no viable malpractice claim because plaintiff did not allege innocence).

8. See *infra* notes 57-66 and accompanying text.

9. See *infra* notes 30-56 and accompanying text.

10. See *Trice v. Mozenter*, 356 Pa. Super. 510, 517, 515 A.2d 10, 13 (Super. Ct. 1986); W. Keeton, D. Dobbs, R. Keeton, D. Owen, *Prosser and Keeton on the Law of Torts* 185-86 (5th ed. 1984) [hereinafter *Prosser & Keeton*].

11. See *Trice*, 356 Pa. Super. at 517, 515 A.2d at 13.

12. See *Bogutz & Albert, supra* note 1, at 1273 & nn. 285-86.

13. See Note, *Criminal Malpractice: Threshold Barriers to Recovery Against Negligent Criminal Counsel*, 1981 *Duke L.J.* 542, 542-43.

14. See *Togstad v. Vesely, Otto, Miller & Keefe*, 291 N.W.2d 686, 692 (Minn. 1980); J. Burkoff, *supra* note 4, § 3.1(b)(1), at 3-5. The appointed attorney owes his client the

The attorney's duty is not defined specifically but rather requires that he render to the client reasonably competent legal representation.<sup>15</sup> Moreover, as a "specialist" the criminal defense attorney may have a duty to use greater skill in his area of expertise than would a general practitioner.<sup>16</sup>

As in civil malpractice suits, the criminal malpractice plaintiff must show both that the attorney-defendant breached his duty by failing to meet the standard of a reasonably competent attorney,<sup>17</sup> and that the attorney factually<sup>18</sup> and proximately caused<sup>19</sup> injury to the plaintiff. The

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same duty as the retained attorney. *See Ferri v. Ackerman*, 444 U.S. 193, 200-01 n.17 (1979).

15. Although the requirement of reasonable competence is phrased differently in various jurisdictions the requirement is essentially "to give legal advice or to render other legal services [and] use such skill, prudence, and diligence as lawyers of ordinary skill and capacity commonly possess and exercise in the performance of the tasks which they undertake." *Lucas v. Hamm*, 56 Cal. 2d 583, 587, 15 Cal. Rptr 821, 825, 364 P.2d 685, 689 (1961), *cert. denied* 368 U.S. 987 (1962); *see, e.g., Hill Aircraft & Leasing Corp. v. Tyler*, 161 Ga. App. 267, 273, 291 S.E.2d 6, 12 (Ct. App. 1982) (duty requires attorney to exercise reasonable care and skill under the circumstances); *Russo v. Griffin*, 147 Vt. 20, 24, 510 A.2d 436, 438 (1986) (quoting *Cook, Flanagan & Burst v. Clausing*, 73 Wash. 2d 393, 395, 438 P.2d 865, 867 (1968)) (duty requires attorney to exercise the "degree of care, skill, diligence and knowledge commonly possessed and exercised by a reasonable, careful and prudent lawyer in the practice of law in this jurisdiction").

16. *See Rodriguez v. Horton*, 95 N.M. 356, 359, 622 P.2d 261, 264 (Ct. App. 1980); *J. Burkoff, supra* note 4, at § 3.1(b)(2), at 3-6 - 9; *see also Prosser & Keeton, supra* note 10, at 187 (doctors representing themselves as having greater skill must meet a greater standard of care).

17. The Model Code of Professional Responsibility, promulgated by the American Bar Association ("ABA") in 1969, and the Model Rules of Professional Conduct, approved by the ABA House of Delegates in 1983 are codes of professional ethics that define the attorney's role. These rules specify, for example, that an attorney must not accept any client the protection of whose interest may adversely affect his ability to represent another client, Model Rules of Professional Conduct Rule 1.7 (1983), Model Code of Professional Responsibility DR 5-105(A) and (B) (1980). Also, the attorney must communicate any plea bargain offer to his client and allow the client to decide whether to accept such offer, Model Rules of Professional Conduct Rule 1.2(a) (1983). Although violations of these codes do not necessarily give rise to malpractice liability, there is a de facto relationship between legal malpractice and professional ethics, and courts commonly refer to such rules in defining the attorney's obligation for purposes of a malpractice claim. *See J. Burkoff, supra* note 4, § 3.2, at 3-15; *Vance v. Robinson*, 292 F. Supp. 786, 788 (W.D.N.C. 1968). As one treatise stated, "ethical code provisions are often cited, argued, and discussed in legal malpractice cases; they are, however, typically not considered to be of precedential weight in such proceedings in and of themselves." *J. Burkoff, supra* note 4, § 3.2, at 3-15 (citation omitted).

18. To establish factual causation, the plaintiff must show that but for the attorney's negligence the plaintiff would have prevailed. This "but for" requirement can be considered a "trial within a trial." *See Kaus & Mallen, The Misguiding Hand of Counsel — Reflections on "Criminal Malpractice"*, 21 UCLA L. Rev. 1191, 1201-03 (1974). The criminal malpractice plaintiff, however, does not have to show that he would have prevailed completely, but rather that he would have fared better had his attorney been competent. *See Schlumm v. Terrence J. O'Hagan, P.C.*, 173 Mich. App. 345, 359, 433 N.W.2d 839, 846 (Ct. App. 1988) ("A plaintiff in a legal malpractice action need not show that he would have prevailed completely in the former action in order to recover where the allegation is that the verdict against him was greater than what would have been returned in the absence of the defendant's negligence"). *Cf. J. Burkoff, supra* note 4,

plaintiff must also show that he has suffered damages from the attorney's negligence.<sup>20</sup> Malpractice claims may allege negligence on many different grounds,<sup>21</sup> including failure to investigate adequately,<sup>22</sup> failure to make a suppression motion,<sup>23</sup> and failure to consult with or advise the client adequately.<sup>24</sup>

Courts and commentators have noted that many criminal malpractice complaints are meritless.<sup>25</sup> One explanation asserted for the large proportion of meritless claims is that "criminal defense practice invariably results in a great many disgruntled former clients who have a lot of time on their hands."<sup>26</sup> Moreover, the problem of former clients asserting meritless claims is generally worse for court-appointed attorneys.<sup>27</sup> The accused sometimes views the court-appointed attorney as an instrument of the state, and may therefore question the attorney's desire to represent him zealously.<sup>28</sup> Collateral estoppel has emerged as one of the most effective defenses to such meritless litigation.<sup>29</sup>

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§ 3.1(c), at 3-10 ("[T]he plaintiff must demonstrate at the legal malpractice trial that in the hypothesized, legal proceedings which are the subject of the litigation, absent the attorney's breach of duty, the client would not have been similarly injured in any event.") (emphasis added).

19. See J. Burkoff, *supra* note 4, § 3.1(a), at 3-2. "Proximate cause" or "legal cause" is "merely the limitation which the courts have placed upon the actor's responsibility for the consequences of the actor's conduct." Prosser & Keeton, *supra* note 10, at 264. In addition to requiring that the plaintiff show factual causation, the court determines as a matter of law whether the plaintiff can show proximate cause. This limitation is determined to some extent by an examination of how close the association is between the defendant's conduct and the plaintiff's injury. See *id.* "[T]o [a] greater extent, however, the legal limitation on the scope of liability is associated with policy," with ideas of what is just, possible or convenient. *Id.*

20. See R. Mallen & J. Smith, *supra* note 2, § 27.8, at 649 (3d ed. 1989).

21. The most common assertions of negligence against criminal defense attorneys are inadequate grand jury or other investigative body representation, inadequate or unlawful pretrial preparation or investigation, inadequate presentation of a defense, failure to consult with or to advise the client, conspiratorial activity directed against the client, failure to appear on behalf of the client, bad advice to tender—or actions coercing—*nolo contendere* or guilty pleas, bad advice about the law, conflicts of interest, failure to file—or negligence relating to—post-verdict motions or appeals, failure to keep confidential client information secret, failure to file suppression or other pre-trial motions, inadequate disclosure to the client of significant information, improper or untimely withdrawal or threat to withdraw from representation, and the charging of an exorbitant fee for services.

J. Burkoff, *supra* note 4, § 3.5, at 3-21 to 3-23 (citations omitted). See *id.* and citations therein for a listing of illustrative cases.

22. See *Housand v. Heiman*, 594 F.2d 923, 924 (2d Cir. 1979); *Carey v. Campbell*, 93 A.D.2d 923, 923, 462 N.Y.S.2d 331, 332 (1983).

23. See *Walker v. Kruse*, 484 F.2d 802, 804 (7th Cir. 1973); *Hibbett v. City of Cincinnati*, 4 Ohio App. 3d 128, 131, 446 N.E.2d 832, 835 (1982).

24. See *Ferguson v. Burkett*, 454 So. 2d 413, 414 (La. Ct. App. 1984).

25. See J. Burkoff, *supra* note 4, § 3.5, at 3-20 - 3-21.

26. *Id.* at 3-20.

27. See *Ferri v. Ackerman*, 444 U.S. 193, 200-01 n.17 (1979).

28. See *id.*

29. See *infra* notes 30-56 and accompanying text.

## II. COLLATERAL ESTOPPEL

In most jurisdictions, the criminal malpractice plaintiff must clear a significant hurdle before bringing a malpractice claim: the court effectively requires him to first bring an ineffective assistance of counsel claim.<sup>30</sup> If this claim is unsuccessful, the attorney-defendant has a collateral estoppel defense and therefore the subsequent malpractice claim will most likely be dismissed.<sup>31</sup>

### A. *Ineffective Assistance of Counsel: The Strickland Standard*

A criminal defendant has the right to attack the reliability of his conviction and assert that he has been denied his constitutional right to effective assistance of counsel.<sup>32</sup> In *Strickland v. Washington*,<sup>33</sup> the Supreme Court set forth a two-part standard to determine whether a criminal defendant's conviction must be set aside because of ineffective assistance of counsel.<sup>34</sup> The first prong of the *Strickland* test requires the defendant to show that counsel's performance was deficient.<sup>35</sup> The performance is deemed insufficient if "counsel's representation fell below an objective standard of reasonableness."<sup>36</sup>

To satisfy the second prong of the *Strickland* test, the defendant must show that counsel's errors prejudiced the defense.<sup>37</sup> This requires that "there is a reasonable probability that, but for counsel's unprofessional

30. See *supra* notes 4-6 and accompanying text.

31. See *infra* notes 43-50 and accompanying text.

32. This right derives from the sixth amendment, applicable to the states through the fourteenth amendment. See *Gideon v. Wainwright*, 372 U.S. 335, 342 (1963). 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.

Ineffective assistance of counsel claims are most frequently raised on collateral attack. See 2 W. LaFave & J. Israel, *Criminal Procedure*, § 11.10, at 96 (1984). Defendants are not foreclosed from making such claims on appeal, however. See *id.* at n.14.

The same principles that govern on direct appeal apply in collateral proceedings. See *Strickland v. Washington*, 466 U.S. 668, 697 (1984). However, "the presumption that a criminal judgment is final is at its strongest in collateral attacks on that judgment." *Id.*

In a federal habeas proceeding, a state court's determination that counsel's representation was effective is not considered a finding of fact. See *id.* at 698. Rather, "both the performance and prejudice components of the ineffectiveness inquiry are mixed questions of law and fact." *Id.* This gives the reviewing court a wider scope of review. See *id.*

33. 466 U.S. 668 (1984)

34. See *id.* at 687.

35. See *id.* at 686.

36. *Id.* at 688.

37. See *Strickland v. Washington*, 466 U.S. 668, 687 (1984). Prejudice is presumed in certain contexts, such as when there is actual or constructive denial of the assistance of counsel. See *id.* at 692; *United States v. Cronin*, 466 U.S. 648, 659 (1984). Various kinds of state interference with counsel's assistance create a presumption of prejudice. See *Strickland*, 466 U.S. at 692. A more limited presumption of prejudice is created when counsel acts under a conflict of interest. In such cases prejudice is presumed once the defendant shows that counsel "actively represented conflicting interests" and that "an actual conflict of interest adversely affected his lawyer's performance." *Id.* at 692 (quoting *Cuyler v. Sullivan*, 446 U.S. 335, 348 (1980) (footnote omitted)).

errors, the result of the proceeding would have been different."<sup>38</sup>

### B. Making Use of Collateral Estoppel

Collateral estoppel<sup>39</sup> is a procedural device that prevents relitigation of issues that have been decided in previous judicial proceedings.<sup>40</sup> Collateral estoppel requires that both cases contain the same issue, that the issue was actually litigated in the previous proceeding and that deciding the issue was necessary to the court's judgment.<sup>41</sup> In the criminal mal-

38. *Strickland v. Washington*, 466 U.S. 668, 694 (1984). "An error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment." *Id.* at 691.

The *Strickland* standard, both in its formulation and application, is highly deferential to the attorney's conduct. This is considered necessary, partly for the benefit of the accused. As the court stated, "[n]o particular set of detailed rules for counsel's conduct can satisfactorily take account of the variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how best to represent a criminal defendant." *Id.* at 688-89. Such rules "would interfere with the constitutionally protected independence of counsel and restrict the wide latitude counsel must have in making tactical decisions. Indeed, the existence of detailed guidelines for representation could distract counsel from the overriding mission of vigorous advocacy of the defendant's cause." *Id.* at 689 (citations omitted); accord 2 W. LaFave & J. Israel, *supra* note 32, § 11.10, at 95 ("If counsel is not accorded a strong presumption of competency . . . counsel, fearful that judicial hindsight will reject his judgment, may hesitate to follow the path that he believes most effective in representing his client.").

The second prong of the *Strickland* test, which relates to the attorney's competency, may never be addressed because courts may dispose of the ineffectiveness claim by determining that the defendant's case was not prejudiced:

[A] court need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies. . . . If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we would expect will often be so, that course should be followed.

*Strickland*, 466 U.S. at 697.

Lower courts have generally heeded this suggestion. "Indeed, in case after case alleging that counsel's factual investigation was inadequate, the standard response is that there has been no showing of prejudice . . ." 2 W. LaFave & J. Israel, *supra* note 32, § 11.10, at 52 (Supp. 1990); see also *id.* at 54 n.76.5 (listing cases) (Supp. 1990). The fact that a failure to establish one prong of the *Strickland* test allows the court to dismiss an ineffectiveness of counsel claim has no bearing on the equivalency of the *Strickland* and malpractice standards. See J. Burkoff, *supra* note 4, § 3.3, at 3-16 to 3-16.1. In malpractice, the plaintiff's inability to establish the incompetence or the causation element would similarly destroy his claim. See *supra* notes 17-20 and accompanying text.

39. Collateral estoppel is also known as "issue preclusion." See J. Friedenthal, M. Kane & A. Miller, *Civil Procedure*, § 14.1, at 609 (1985). The two terms are interchangeable. See *id.*

40. See C. Wright, A. Miller, and E. Cooper, *Federal Practice and Procedure*, § 4463 (1981).

41. See Restatement (Second) of Judgments § 27 (1982). At one time, there was a requirement of identity of parties, known as a "mutuality requirement." See C. Wright, A. Miller, and E. Cooper, *supra* note 40, § 4463, at 559-60 (mutuality requirement existed for many years in federal and state courts); Black's Law Dictionary 261 (6th ed. 1990) (defining collateral estoppel as requiring prior judgment between same parties). In most states, a mutuality of parties is no longer required. See C. Wright, A. Miller, E. Cooper, *supra* note 40, § 4464, at 570; see also Restatement (Second) of Judgments § 29 (1982) (issue preclusion where identity of parties is not required). Such a requirement

practice context, the attorney-defendant may assert that the client's unsuccessful attempt at reversing his conviction through an ineffective assistance of counsel claim collaterally estops him from bringing a criminal malpractice suit.<sup>42</sup> Collateral estoppel, therefore, works as an affirmative defense to criminal malpractice claims.

### C. *Similarity of Strickland Standard and Malpractice Standard*

Courts and commentators generally agree that a criminal defense attorney may use collateral estoppel as an affirmative defense<sup>43</sup> to preclude the client from further asserting that the attorney's incompetence caused his conviction.<sup>44</sup> Collateral estoppel bars relitigation of an issue only

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would effectively foreclose the attorney's ability to use issue preclusion in the criminal malpractice context.

Interestingly, some courts allowed the non-mutual use of collateral estoppel in the criminal malpractice context before the Supreme Court endorsed the abandonment of the mutuality requirement in *Blonder-Tongue Laboratories, Inc. v. University of Ill. Found.*, 402 U.S. 313, 329 (1971). The Restatement (Second) of Judgments states: "[L]ong before the mutuality rule was repudiated in civil cases, well reasoned decisions had extended the rule of preclusion to operate in favor of third persons where the first action is criminal and the second is civil." *Id.* § 85 comment (e); see, e.g., *Lamore v. Laughlin*, 159 F.2d 463, 463 (D.C. Cir. 1947) (court allows use of collateral estoppel in criminal-civil case twenty-three years before *Blonder-Tongue*); see also *Zeidwig v. Ward*, 548 So. 2d 209, 214 (Fla. 1989) (use of non-mutual defensive collateral estoppel in criminal-civil context to bar criminal malpractice suit where plaintiff had unsuccessfully asserted ineffective assistance claim in prior postconviction proceeding allowed even though state had not completely abandoned mutuality requirement); *Knoblauch v. Kenyon*, 163 Mich. App. 712, 725, 415 N.W.2d 286, 292 (1987) (court allows non-mutual defensive collateral estoppel in criminal-civil context although state had not yet abandoned mutuality requirement in civil-civil litigation).

42. See, e.g., *McCord v. Bailey*, 636 F.2d 606, 608-09 (D.C. Cir. 1980), *cert. denied* 451 U.S. 983 (1981) (court upholds district court's grant of defendant-attorneys' motion for summary judgment with collateral estoppel used as one of the bases for their holding); *Rastelli v. Sutter, Moffatt, Yannelli & Zerlin, P.C.*, 87 A.D.2d 865, 866, 449 N.Y.S.2d 305, 307 (2d Dep't 1982) (action for criminal malpractice barred by collateral estoppel because of prior determination that plaintiff's ineffective assistance of counsel claim was inadequate).

43. See *Barker v. Norman*, 651 F.2d 1107, 1130 (5th Cir. 1981); *Fed. R. Civ. P.* 8(c); *J. Friedenthal, M. Kane and A. Miller, supra* note 39, § 14.9, at 661. As an affirmative defense, collateral estoppel must be pled in the defendant's answer. See *id.* at 288. Otherwise it cannot be proved at trial. See *id.* at 288-89.

44. See Restatement (Second) of Judgments § 85(2)(a) (1982). But see *Schlumm v. Terrence J. O'Hagan, P.C.*, 173 Mich. App. 345, 357-58, 433 N.W.2d 839, 845 (Ct. App. 1988) (stating in dicta that third parties should be able to sue the attorney and that collateral estoppel can affect only the time periods of the attorney's representation that the appellate court addressed); *McCord v. Bailey*, 636 F.2d 606, 620-21 (D.C. Cir. 1980) (*Wald, J.*, concurring in part, dissenting in part) (unusual circumstances justify allowing plaintiff to prove malpractice although appellate court determined counsel was effective), *cert. denied* 451 U.S. 983 (1981).

In *Schlumm*, the third parties that the court found not to be collaterally estopped were the client's parents. See *Schlumm*, 173 Mich. App. at 357, 433 N.W.2d at 845. The court in *Schlumm* also found the plaintiff's breach of contract, breach of fiduciary duty and fraudulent misrepresentation claims against the attorney were not collaterally estopped because there was "no identity of issue with the conclusion reached regarding the



when the identical issue has been decided in a prior proceeding.<sup>45</sup> Courts have consistently held that the legal standards for ineffective assistance of counsel and for legal malpractice are similar enough to satisfy the requirement that the second proceeding involve the same issue.<sup>46</sup> The *Strickland* standard requires the plaintiff to show that his attorney's representation was inadequate and that this inadequacy prejudiced his case.<sup>47</sup> This standard is equivalent to the malpractice elements that require the plaintiff to show that his attorney was negligent and that this negligence damaged the plaintiff's chance for success in the case.<sup>48</sup>

The use of collateral estoppel is considered appropriate, therefore, because in determining whether the attorney's representation was constitutionally ineffective, the court is applying the same standard used to determine whether an attorney is liable for malpractice.<sup>49</sup> The requirements that the issue decided in the unsuccessful ineffective assistance claim was actually litigated and essential to the court's decision are satisfied as well.<sup>50</sup>

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effectiveness of defendant's representation." *Schlumn*, 173 Mich. App. at 357, 433 N.W.2d at 845.

45. See *supra* note 41 and accompanying text.

46. See, e.g., *McCord*, 636 F.2d at 609 ("the legal standards for ineffective assistance of counsel in [plaintiff's] criminal proceedings and for legal malpractice in this action are equivalent"); *Knoblauch v. Kenyon*, 163 Mich. App. 712, 717, 415 N.W.2d 286, 288 (Mich. Ct. App. 1987) ("According to plaintiff, the standards for finding ineffective assistance of counsel and legal malpractice are different, and the ineffective assistance of counsel standard is more difficult for a client to meet. We disagree."); *Krahn v. Kinney*, 43 Ohio St. 3d 103, 107 n.8, 538 N.E.2d 1058, 1062 n.8 (1989) ("Though not identical, [the *Strickland*] elements are similar to the elements in an attorney malpractice action."); *Garcia v. Ray*, 556 S.W.2d 870, 872 (Tex. Civ. App. 1977) ("[H]ow could you test the adequacy of counsel any better than by having the direct point determined by the highest court of our State in the related criminal case?"); *J. Burkoff, supra* note 4, § 3.3, at 3-16.1 ("[T]he *Strickland* ineffective assistance of counsel standard utilized as a matter of sixth amendment law is quite similar to the legal malpractice standard of care currently used in most jurisdictions." (footnote omitted)).

The court's ruling in *Strickland* made the test for ineffectiveness of counsel uniform. See *id.* Prior to *Strickland*, however, there was a multitude of tests to determine whether counsel was ineffective. See *Strickland v. Washington*, 466 U.S. 668, 696-97 (1984); *J. Burkoff, supra* note 4, § 3.3 at 3-16; 2 W. LaFave & J. Israel, *supra* note 32, § 11.10, at 36-37 (Supp. 1990) (discussing the various tests). Because these tests were different from the standard for determining legal malpractice, there was concern over using an adverse ineffectiveness ruling to estop the malpractice suit. See *J. Burkoff, supra* note 4, § 3.3 at 3-16; Note, *supra* note 13, at 552-53 ("In jurisdictions applying the 'farce and mockery' standard, the client's failure to establish ineffective assistance of counsel should not bar him from attacking the attorney's competence in a subsequent criminal malpractice suit."). *Id.* However, even before *Strickland* a majority of courts to address the issue allowed the collateral estoppel defense where the former client had been unsuccessful in establishing ineffective assistance of counsel. See *J. Burkoff, supra* note 4, § 3.3, at 3-16.1. For a list of such cases, see *id.* at n.66.

47. See *supra* notes 33-38 and accompanying text.

48. See *supra* notes 17-20 and accompanying text.

49. See *supra* notes 43-48.

50. These requirements are satisfied because the court's decision on whether there was constitutionally ineffective counsel is the issue that is being collaterally estopped. Therefore, it is certain to have been essential to the court's final decision and actually

There are, however, arguments against allowing a finding that the attorney's performance was constitutionally adequate to provide a collateral estoppel defense to a malpractice claim. The assistance of the attorney who represented the client at trial may be necessary to show that his legal representation was constitutionally inadequate.<sup>51</sup> By withholding his assistance, however, the attorney may cause the client's ineffective assistance claim to fail, and he may thereby gain an iron-clad defense to future malpractice litigation brought by the client.<sup>52</sup> Thus, allowing the attorney a collateral estoppel defense may hinder the client's ability to show inadequate legal representation and obtain a new trial.

In addition, a constitutional challenge to the adequacy of legal representation differs fundamentally from a challenge based on tort law because the remedies sought are very different. In bringing a malpractice claim, the plaintiff will almost certainly seek damages,<sup>53</sup> whereas in a constitutional challenge the claimant seeks a new trial.<sup>54</sup> The institutional and societal interest in the finality of convictions may create a reluctance to reverse a conviction even where the awarding of damages would be appropriate.<sup>55</sup> Nevertheless, despite the countervailing considerations, courts have consistently allowed attorneys to use collateral estoppel against criminal malpractice claims.<sup>56</sup>

### III. ACTUAL INNOCENCE

#### A. *Beyond Ineffective Assistance of Counsel*

Some jurisdictions, such as New York<sup>57</sup> and Illinois,<sup>58</sup> not only require

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litigated. See Note, *supra* note 13, at 551-52. But see *McCord v. Bailey*, 636 F.2d 606, 619-21 (D.C. Cir. 1980) (Wald, J., concurring in part, dissenting in part) (straightforward application of collateral estoppel may in some cases be unjust), *cert. denied* 451 U.S. 983 (1981).

51. See *Kaus & Mallen, supra* note 18, at 1198.

52. Cf. *id.* (possibility that ineffectiveness claim may lead to malpractice suits must have "chilling effect" on lawyers' willingness to assert ineffectiveness).

53. See *R. Mallen & J. Smith, supra* note 2, § 16.1, at 889-90.

54. See *Capps v. Sullivan*, 921 F.2d 260, 263 (1990); *McConico v. Alabama*, 919 F.2d 1543, 1544 (1990); *Kaus & Mallen, supra* note 18, at 1199. The Fifth Amendment guarantee against double jeopardy is not a bar to reprosecution where through appeal or collateral attack the defendant has managed to obtain a reversal of his conviction. See *U.S. v. Tateo*, 377 U.S. 463, 466 (1964); 2 *W. LaFave & J. Israel, supra* note 32, § 24.4, at 85.

55. Cf. *Morris v. Slappy*, 461 U.S. 1, 15-16 (1983) (new trials impose a heavy burden on courts, witnesses and victims); *Allen v. McCurry*, 499 U.S. 90, 105 (1980) (Blackmun, J., dissenting) (arguing that state court's partial finding of no fourth amendment violation should not preclude a § 1983 claim on same police action).

56. See *supra* note 44.

57. See, e.g., *Carmel v. Lunney*, 70 N.Y.2d 169, 173, 511 N.E.2d 1126, 1128, 518 N.Y.S.2d 605, 607 (1987) ("plaintiff must allege his innocence or a colorable claim of innocence"); *Winkler v. Messinger, Alperin & Hufjay*, 147 A.D.2d 693, 693, 538 N.Y.S.2d 299, 300 (2d Dep't 1989) (malpractice claim did not set forth viable cause of action because it did not allege plaintiff's innocence of criminal charges); *B.K. Industries, Inc. v. Pinks*, 143 A.D.2d 963, 964-65, 533 N.Y.S.2d 595, 596-97 (2d Dep't 1988) (client seeking malpractice damages for negligent misrepresentation in criminal case had burden

that the criminal malpractice plaintiff successfully show ineffective assistance of counsel in a separate action but further require the plaintiff to show his actual innocence of the underlying offense.<sup>59</sup> The plaintiff in such a jurisdiction must prove his underlying innocence using the burden of proof and evidentiary standards of a civil proceeding.<sup>60</sup> To understand the effect that a requirement of innocence would have on a malpractice suit, consider the following scenario: the lawyer of a civil defendant fails to raise an existing statute of limitations defense and his client ultimately does not prevail.<sup>61</sup> In a civil malpractice suit, the client is not required to show that he would have prevailed on the merits in order to have a successful malpractice claim.<sup>62</sup> The client need only show that there was a viable defense that his lawyer failed to raise, and that "but for" such failure he would have prevailed.<sup>63</sup>

In a criminal malpractice suit, however, when the plaintiff has already shown ineffective assistance of counsel in a jurisdiction requiring actual innocence,<sup>64</sup> a reversal based on the attorney's failure to raise a statute-of-limitations defense would be insufficient to establish a claim for malpractice liability.<sup>65</sup> A criminal malpractice plaintiff would be required to

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to prove his innocence); *Claudio v. Heller*, 119 Misc. 2d 432, 433-35, 463 N.Y.S.2d 155, 156-57 (Sup. Ct. 1983) (no viable malpractice claim because plaintiff guilty in prior action could not allege causation in subsequent malpractice suit).

58. See, e.g., *Walker v. Kruse*, 484 F.2d 802, 804 (7th Cir. 1973) (federal court ruled in this diversity malpractice action that Illinois law might require innocence); *Sullivan v. Weiner*, No. 88 C 6813, slip op. at 1 (N.D. Ill. June 5, 1989) (plaintiff must show innocence of actual charges to succeed in malpractice action).

59. See *supra* notes 57-58; see also *J. Burkoff*, *supra* note 4, § 3.1(c), at 3-10 ("the fact that there is a basis for a finding of plaintiff's guilt on the record has generally been deemed to be sufficient to negate the plaintiff's requisite showing of causation") (footnote omitted).

60. See *Sullivan v. Weiner*, No. 88 C 6813, slip op. at 1, (N.D. Ill. June 5, 1989). For a discussion of the evidence that would be available in a malpractice proceeding to show the client's actual guilt, see *Kaus & Mallen*, *supra* note 18, at 1204-06.

61. See, e.g., *Fairhaven Textile v. Sheehan, Phinney, Bass & Green, P.A.*, 695 F. Supp. 71, 74 (D.N.H. 1988) (failure to raise issue of notice of defects in U.C.C. action); *Ignotov v. Reiter*, 425 Mich. 391, 397, 390 N.W.2d 614, 616 (1986) (holding it was proper to consider whether proper legal representation would have led to a more favorable result for plaintiff through settlement); cf. *Maine Bonding & Casualty Co. v. Mahoney*, 392 A.2d 16, 17-18 (Me. 1978) (holding that the statute of limitations had not run and therefore the attorney's failure to assert it as a defense was not negligent).

62. See *Fairhaven*, 695 F. Supp. at 74.

63. See generally, *R. Mallen & J. Smith*, *supra* note 2, § 24.19, at 494-96 (discussing defenses); see also *Kaus & Mallen*, *supra* note 18, at 1203 (attorney's permitting an action on a debt to default is a sufficient basis for malpractice; the client-debtor need not show that he did not actually owe the debt).

One appellate court even found that a jury was justified in finding that the civil defendant's case was prejudiced by his attorney's failure to raise a defense that was not legally viable. The court reasoned that raising the defense might have improved the defendant's bargaining position in settlement. See *Public Taxi Serv., Inc. v. Barrett*, 44 Ill. App. 3d 452, 456-57, 357 N.E.2d 1232, 1236-37 (1976).

64. See *Sullivan v. Weiner*, No. 88 C 6813, slip op. at 1 (N.D. Ill. June 5, 1989).

65. Imposing a requirement of innocence when the attorney has failed to raise a statute of limitations defense shows persuasively how the innocence requirement will hinder

show that he did not commit the underlying crime under the evidentiary and burden-of-proof standards that govern a civil trial.<sup>66</sup>

## B. *Justifications for Innocence Requirement*

### 1. Frivolous Litigation

Adoption of the innocence requirement may have been prompted partly by fears of frivolous litigation from disgruntled criminal defendants.<sup>67</sup> A general perception exists that many criminal malpractice complaints are without merit.<sup>68</sup> According to this view, the notoriously litigious nature of convicts,<sup>69</sup> may cause public defenders to become vulnerable to an onslaught of malpractice suits.<sup>70</sup> This onslaught may detract from public defenders' ability to represent effectively the defendants assigned to them. Some courts have, therefore, favored an actual innocence requirement because it gives the court an easy basis to grant an attorney's summary judgment motion. It is argued that the requirement limits the flood of potential criminal malpractice litigation.<sup>71</sup>

The defense of collateral estoppel is, however, broad enough to obstruct frivolous pursuit of criminal malpractice claims. Attorneys may utilize collateral estoppel where the plaintiff has failed in his ineffective assistance of counsel claim.<sup>72</sup> By asserting that the client's unsuccessful ineffective assistance claim bars a malpractice suit, the attorney takes advantage of prior litigation to which he was not a party.<sup>73</sup> Thus, collateral estoppel already provides the attorney with a broad, easily asserted defense that allows the court to dispose of many malpractice claims on summary judgment.<sup>74</sup>

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valid criminal malpractice claims. The attorney who fails to raise a clear-cut, valid technical defense can more easily be proven negligent than one who overlooks a viable truth-related defense. See Note, *supra* note 13, at 547.

66. Thus far, only one court has had occasion to address specifically the situation in which a plaintiff was called on to prove his actual innocence. See *Sullivan v. Wiener*, No. 88 C 6813, slip op. at 4, (N.D. Ill. June 5, 1989).

67. See *id.* at 1193.

68. See J. Burkoff, *supra* note 4, § 3.5, at 3-20 to 3-21.

69. See Kaus & Mallen, *supra* note 18, at 1193.

70. Cf. *Ferri v. Ackerman*, 444 U.S. 193, 199 (1979) (observing that immunity for court-appointed attorneys could avoid discouraging attorneys from representing indigent clients); *Reese v. Danforth*, 486 Pa. 479, 495-99, 406 A.2d 735, 743-46 (1979) (O'Brien, J., dissenting) (arguing that public defenders should be granted immunity to avoid repetitive litigation).

71. Cf. Kaus & Mallen, *supra* note 18, at 1231-32 (suggesting innocence requirement is appropriate and submitting that "any suggestions for changes from the Bar would command a more respectful hearing today . . . than ten years from now when [criminal malpractice] may be making a more substantial contribution to the judicial logjam").

72. See *infra* note 74 and authorities cited therein.

73. The attorney is not forced to take part in the ineffective assistance of counsel proceeding because that is brought by the criminal defendant against the state. See Note, *supra* note 13, at 556.

74. See, e.g., *McCord v. Bailey*, 636 F.2d 606, 610-11 (D.C. Cir. 1980) (application of collateral estoppel precludes legal malpractice claim), *cert. denied*, 451 U.S. 983 (1981); *Zeidwig v. Ward*, 548 So. 2d 209, 214 (Fla. 1989) (approving use of defensive collateral

Furthermore, the innocence requirement may preclude criminal defendants from bringing otherwise worthy criminal malpractice claims.<sup>75</sup> The *Strickland* test<sup>76</sup> requires courts to give great leeway to defense counsel's strategic decisions.<sup>77</sup> When a court reverses a criminal conviction for ineffective assistance of counsel, the defense counsel's error is most likely to have been a clear-cut technical mistake that may have no relation to the plaintiff's guilt.<sup>78</sup> The innocence requirement, therefore, may prevent plaintiffs from asserting criminal malpractice claims in situations where they may be most likely to maintain successful ineffective assistance of counsel claims.<sup>79</sup>

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estoppel to prevent relitigating issue litigated in prior criminal proceeding); *Knoblauch v. Kenyon*, 163 Mich. App. 712, 715, 415 N.W.2d 286, 287 (1987) (because same standards are used for ineffective counsel and criminal malpractice claims, collateral estoppel bars relitigation absent new issues); *Rastelli v. Sutter, Moffatt, Yannelli & Zerlin, P.C.*, 87 A.D.2d 865, 866, 449 N.Y.S.2d 305, 307 (2d Dep't 1982) (where criminal defendant has had full and fair opportunity to establish ineffective assistance of counsel in prior proceeding, he is barred from relitigating by collateral estoppel); *Garcia v. Ray*, 556 S.W.2d 870, 872 (Tex. Civ. App. 1977) (adjudication of ineffective assistance of counsel bars further assertion of attorney's incompetence); *J. Burckoff*, *supra* note 4, § 3.3 at 3-16 (ineffectiveness of counsel adversely decided in criminal post-trial proceeding bars claim of legal malpractice).

75. See *Kaus & Mallen*, *supra* note 18, at 1205 ("[T]he temptation to urge the relevance of actual guilt is strongest in situations in which the malpractice may be the least excusable . . . [M]alpractice is liable to be most obvious where it consists of a failure to raise . . . a 'technical' defense . . .").

76. See *supra* notes 32-38 and accompanying text.

77. See *supra* note 38.

78. See 2 W. LaFave & J. Israel, *supra* note 32, § 11.10, at 46 (Supp. 1990) ("A possible strategic justification is more difficult to hypothesize, however, where counsel failed to raise a claim of apparent merit which would have resulted in dismissal of the charges with prejudice — such as double jeopardy, the denial of a speedy trial, or the statute of limitations.") (footnote omitted). Examples of such technical defenses that might provide a basis for ineffectiveness of counsel if not raised include the exclusionary rule, the statute of limitations and the rule against improper grand jury selection. See Note, *supra* note 13, at 549 and citations therein.

79. *Kaus & Mallen*, *supra* note 18, at 1205 & nn. 41-43. As one commentator noted, "[A]ny ruling that actual guilt is relevant . . . should be made with full awareness of the consequence that such a decision just about destroys criminal malpractice as an actionable tort in the very type of situation where the lawyer's incompetence is most flagrant and its consequences most easily demonstrable." *Kaus & Mallen*, *supra* note 18, at 1205. *Sullivan v. Wiener*, No. 88 C 6813 (N.D. Ill. June 5, 1989), provides an example of the effect of the innocence requirement. The plaintiff successfully challenged his murder conviction through a habeas corpus petition and received an order of nolle prosequi from the state. See slip op. at 1. He then brought a malpractice action against his attorney alleging negligence based on the attorney's failure to locate and interview five exculpatory witnesses. See *id.* In the malpractice suit, the plaintiff sought to bar discovery of evidence of guilt which the state had failed to introduce in the underlying criminal prosecution. See *id.* The plaintiff argued that his only requirement under Illinois law was to show that but for the defendant's negligence the verdict would have been different. See *id.* The plaintiff, therefore, contended that his actual guilt was irrelevant and that the only relevant evidence with respect to causation was the trial transcript and the testimony of the missing witnesses. See *id.*

After surveying the law in several states, the court held that the plaintiff was required to show his innocence, stating "we see no indication that Illinois would depart from what is clearly the prevailing rule in other jurisdictions." *Id.* at 2. The court, however, did

## 2. Public Policy — Constitutional Criminal Safeguards

Courts have used the unique structure of the criminal justice system to justify the actual innocence requirement.<sup>80</sup> The criminal justice system has constitutional safeguards that are designed to provide a check on police conduct.<sup>81</sup> The criminal legal system often provides an enforcement mechanism for these constitutional safeguards often through excluding probative evidence from the trial.<sup>82</sup> This sometimes results in the acquittal of criminal defendants who actually committed the crime with which they are charged.<sup>83</sup> These occasional acquittals are windfalls to criminal defendants. Some courts make the argument that the actual innocence requirement for the criminal malpractice claims may ensure that guilty criminal defendants do not get windfall damages from their attorney's failure to procure a "windfall acquittal."<sup>84</sup>

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not rule on who had the burden of proof, stating that "[w]hether the plaintiff bears the burden of proving his innocence as an element of his claim, or whether the defendants bear the burden of proving guilt as [a] defense, we leave for the parties to brief with regard to jury instructions." *Id.* at 2 n.3.

Many substantive and procedural questions remain as to how courts should manage the innocence issue. "(1) Is it part of the client's prima facie malpractice case to prove his innocence by a preponderance of the evidence? (2) May the lawyer raise the client's guilt as a sort of affirmative defense with respect to which he carries the burden of proof? Or, (3) Is actual guilt relevant only with respect to certain elements of damage?". Kaus and Mallen, *supra* note 18, at 1200 n. 25.

80. See *Sullivan v. Wiener*, No. 88 C 6813, slip op. at 1 (N.D. Ill. June 5, 1989); *Carmel v. Lunney*, 70 N.Y.2d 169, 173, 511 N.E.2d 1126, 1128, 518 N.Y.S.2d 605, 607 (1987).

81. See, e.g., *Lego v. Twomey*, 404 U.S. 477, 489 (1972) ("exclusionary rules are very much aimed at deterring lawless conduct by police and prosecution"); Kaus & Mallen, *supra* note 18, at 1203 ("[A] parallel assumption of congruence between actual innocence and acquittal is misplaced. For well understood reasons the criminal process is structured in such a way that many accused clients who are in fact guilty will escape conviction.").

82. See Kaus & Mallen, *supra* note 18, at 1204; *infra* note 83.

83. For example, the Supreme Court stated,

*Miranda v. Arizona* excludes confessions flowing from custodial interrogations unless adequate warnings were administered and a waiver was obtained. *Weeks v. United States* and *Mapp v. Ohio* make impermissible the introduction of evidence obtained in violation of a defendant's Fourth Amendment rights. In each instance, and without regard to its probative value, evidence is kept from the trier of guilt or innocence for reasons wholly apart from enhancing the reliability of verdicts.

*Lego v. Twomey*, 404 U.S. 477, 487-88 (1972) (citations omitted) (emphasis added).

84. New York's highest court has stated that

[if a criminal defendant] cannot assert his innocence, public policy prevents maintenance of a malpractice action against his attorney. . . . [C]riminal prosecutions involve constitutional and procedural safeguards designed to maintain the integrity of the judicial system and to protect criminal defendants from overreaching governmental actions. These aspects of criminal proceedings make criminal malpractice cases unique, and policy considerations require different pleading and substantive rules.

*Carmel v. Lunney*, 70 N.Y.2d 169, 173-74, 511 N.E.2d 1126, 1128, 518 N.Y.S.2d 605, 607 (1987) (citation omitted). See *Sullivan v. Wiener*, No. 88 C 6813, slip op. at 1 (N.D. Ill. June 5, 1989).

Concomitant to the actual innocence requirement's power to prevent windfall damages, however, is its power to free the attorney who fails to utilize these constitutional procedures from liability. One of the purposes of tort law is to deter negligence.<sup>85</sup> Potential malpractice liability is thought to keep a lawyer "on his toes,"<sup>86</sup> ensuring that the defense lawyer will pursue all constitutional protections available to his client. If liability cannot be imposed, constitutional violations may go unasserted, undermining the intended affect of these procedures to safeguard certain constitutional rights.<sup>87</sup>

The availability of malpractice claims to criminal defendants facilitates the sixth amendment's goal of providing the accused with adequate counsel.<sup>88</sup> In lieu of a private civil malpractice claim for attorney negligence in a criminal defense, the state bar would be the only method of assuring competent levels of legal professionalism.<sup>89</sup> State bar associations are often reluctant to impose sanctions for attorney incompetence,<sup>90</sup> however, and do not have as strong an incentive to punish incompetency as malpractice plaintiffs in search of compensation.<sup>91</sup> The focus of state disciplinary committees vis-a-vis criminal defense lawyers is, furthermore, most frequently on overzealousness rather than incompetence.<sup>92</sup>

The innocence requirement is, to some extent, devised to prevent the criminal defendant from using the constitutional windfalls that the criminal justice system provides to procure a favorable tort judgment.<sup>93</sup> Assuming that this goal is valid, a per se innocence requirement is an inappropriate way to achieve it. Some criminal defendants, who are not innocent of the crime, suffer harm as a result of their attorney's negli-

85. See, e.g., Prosser & Keeton, *supra* note 10, § 4, at 25-26 ("When the decisions of the courts become known, and defendants realize that they may be held liable, there is of course a strong incentive to prevent the occurrence of the harm. Not infrequently one reason for imposing liability is the deliberate purpose of providing that incentive.").

86. Kaus & Mallen, *supra* note 18, at 1196.

87. See Note, *supra* note 13, at 550. The claim of criminal malpractice is essential to allowing the criminal defendant to pursue his constitutional rights aggressively. Cf. Hitch v. Pima County Superior Court, 146 Ariz. 588, 596, 708 P.2d 72, 80 (1985) (Feldman, J., dissenting) (Criminal defense counsel maintains the integrity of personal rights by assuring the government meet constitutional requirements. "The system was designed to restrain governmental power and protect all citizens from tyranny.").

88. See *supra* notes 85-87 and accompanying text.

89. See, e.g., Garth, *Rethinking the Legal Profession's Approach to Collective Self-Improvement: Competence and the Consumer Perspective*, 1983 Wis. L. Rev. 639, 642-43 (institutions of quality control have not effectively regulated legal profession); Young & Hill, *Professionalism: The Necessity for Internal Control*, 61 Temp. L. Rev. 205, 209 (1988) ("efficacy of formal rules" is questionable).

90. See Martyn, *Lawyer Competence and Lawyer Discipline: Beyond the Bar?*, 69 Geo. L.J. 705, 712-13 (1981).

91. See *id.* at 712-13.

92. See Mounts, *Public Defender Programs, Professional Responsibility, and Competent Representation*, 1982 Wis. L. Rev. 473, 494 (most of the attention of disciplinary committees on criminal defense lawyers focuses on their overzealous representation rather than their maintenance of a minimum competence level).

93. See *supra* notes 80-84 and accompanying text.

gence that has no relation to any constitutional protection.<sup>94</sup> For example, the defense attorney may negligently represent the client during sentencing, causing the client to receive a longer sentence.<sup>95</sup> Similarly, a defense attorney may neglect to challenge the prosecution's failure to prove an essential element of a charged crime.<sup>96</sup> Thus, the client risks conviction of a more serious crime than one he actually committed.<sup>97</sup>

### 3. Ineffective Assistance of Counsel is Sufficient

If the plaintiff is successful in challenging his conviction through an ineffective assistance of counsel claim, the court should allow the plaintiff to proceed with a criminal malpractice suit without further requiring him to prove actual innocence of the underlying offense. Given the stringency of the *Strickland* standard,<sup>98</sup> plaintiffs' claims in such cases would not be frivolous. Conversely, if plaintiffs receive adverse rulings with respect to their ineffective assistance claim, attorney-defendants may successfully claim collateral estoppel, thereby barring the criminal-plaintiffs' civil claim.<sup>99</sup>

### CONCLUSION

Courts have developed the actual innocence requirement in response to concerns that are unique to criminal malpractice. The actual innocence requirement is, however, an overly broad rule that may enable criminal defense attorneys to act without fear of civil liability. The requirement of bringing an ineffective assistance of counsel claim, coupled with the defense of collateral estoppel, gives the attorney an easily asserted way to defend against frivolous claims and gives the court an efficient way to dispose of such litigation. In cases when the attorney is not able to assert such a defense, the court should examine the merits of the plaintiff's case. If the claim has merit, the plaintiff should be allowed to maintain his malpractice claim.

*Susan M. Treyz*

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94. *Cf. Krahn v. Kinney*, 43 Ohio St. 3d 103, 107, 538 N.E.2d 1058, 1062 (1989).

95. *See Geddie v. St. Paul Fire & Marine Ins. Co.*, 354 So. 2d 718, 719 (La. Ct. App.), *cert. denied*, 356 So. 2d 1011 (La. 1978) (attorney failed to object to four-year sentence imposed for offense carrying two-year maximum penalty).

96. *See Lawson v. Nugent*, 702 F. Supp. 91, 92 (D.N.J. 1988).

97. *See id.*

98. *See supra* notes 32-38 and accompanying text.

99. *See supra* notes 43-50 and accompanying text.



