ARTICLE

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Proof of Exoneration in Legal Malpractice Cases: The *Peeler* Doctrine and Its Limits in Texas and Beyond

Abstract. This article examines the requirements of "actual innocence" or exoneration as a prerequisite for bringing a claim of legal malpractice against a criminal defense attorney. It analyzes the public policy underpinnings and differing approaches taken in those jurisdictions that have adopted an "actual innocence" requirement. To illustrate the way in which this comparatively recent phenomenon has developed, the Article views the exoneration doctrine through the prism of Texas law, analyzing the doctrine's emergence in *Peeler v. Hughes & Luce* and discussing how it has expanded over the years. Yet even as this "actual innocence" doctrine has expanded in Texas, recent decisions including the Texas Supreme Court's holding in *Dugger v. Arredondo* may be harbingers of brakes being applied. Finally, the Article examines the experience of a state like New Jersey, where the requirement of exoneration has eroded and may be on the verge of being discarded.

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ARTICLE CONTENTS

I. INTRODUCTION

In the world of legal malpractice in Texas, as in the majority of jurisdictions, a plaintiff seeking to recover has to meet traditional tort standards demonstrating that the attorney in question owed a duty to the plaintiff, that duty was breached, and the breach resulted in injuries and damages to the plaintiff.[1] But when it came to claims of malpractice arising out of a criminal case, the Supreme Court of Texas's 1995 decision in *Peeler v. Hughes & Luce*[2] added an additional requirement—exoneration.[3] With this added element of legal innocence, a malpractice plaintiff—who may have never actually committed a crime—will not be able to recover unless the plaintiff can prove that the conviction was overturned and that it was the lawyer's negligence that proximately caused the conviction in the first place. The underlying premise of the *Peeler* doctrine is that the criminal defendant's wrongful conduct or illegal act is the sole proximate cause of the defendants conviction, and that the only way to overcome this sole proximate cause bar is to first obtain exoneration.[4]

A number of public policy rationales have been offered for *Peeler*'s exoneration rule. One is grounded in the belief that a criminal actor should not benefit from his wrongdoing.[5] Besides avoiding profit by unlawful conduct, another justification is that adequate "constitutional and procedural safeguards" already exist to protect a criminal defense client, such as the heightened "beyond a reasonable doubt" standard; the availability of relief through direct appeals as well as habeas relief and pardon proceedings; and the multiple claims and forums for post-conviction relief, including collateral attacks and claims of ineffective assistance of counsel.[6] Yet another justification is that without an exoneration requirement, the risk of malpractice exposure would create a chilling effect on a defense attorney's willingness to take cases and would deter the defense counsel from pursuing what is in the client's best interest as opposed to what makes the client happy.[7] Finally, courts also reason

1. Peeler v. Hughes & Luce, 909 S.W.2d 494, 496 (Tex. 1995).

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

3. *Id.* at 497–98.

4. *Id.* at 495.

5. *Id.* at 498.

6. Carmel v. Lunney, 511 N.E.2d 1126, 1128 (N.Y. 1987) (citing Otto M. Kaus & Ronald E. Mallen, *The Misguiding Hand of Counsel—Reflections on "Criminal Malpractice,"* 21 UCLA L. REV. 1191, 1205 (1974)).

7. Otto M. Kaus & Ronald E. Mallen, *The Misguiding Hand of Counsel—Reflections on "Criminal Malpractice,"* 21 UCLA L. REV. 1191, 1199 (1974).

that without the exoneration requirement, the floodgates would be open to a barrage of malpractice claims by criminal defendants with nothing but time and no other option but to sue their lawyers, thus clogging the courts and jeopardizing judicial economy.[8]

Virtually from inception, *Peeler* and the exoneration rule have been widely criticized. In his dissent in *Peeler*, Chief Justice Phillips termed the majority's approach absolutist, arguing that the exoneration rule should not be applied to situations where the malpractice plaintiff "would not have been either indicted or convicted" except for the defense attorney's conduct.[9] Legal scholars and commentators have been quick to criticize the rule, with one describing it as "a lawyer's holiday."[10] Another compared the exoneration rule to a resurrection of the discredited "outlaw doctrine."[11] One Texas appellate judge has even referred to *Peeler* "as the incompetent criminal lawyer defense act."[12] Indeed, the perverse incentive that the exoneration rule seems to create has been repeatedly noted. As Professor Roy Anderson observed in his critique of *Peeler*, "once an attorney has messed up that badly, isn't it in his own best interest to make every subtle effort to make sure that his client is ultimately found guilty so that he will be immune from liability to his client?"[13] In *Owens v. Harmon*,[14] Justice Grant's concurring opinion put it bluntly stating, "If a criminal lawyer can bungle a case sufficiently so that his client will never get out of prison, then the attorney can never be responsible for malpractice."[15]

Despite the criticism, the unlawful conduct defense remains the majority approach in the United States, with a number of states joining Texas in maintaining an exoneration or actual innocence requirement for criminal malpractice actions.[16] In Texas, *Peeler* has been steadily

8. Meredith J. Duncan, *Criminal Malpractice: A Lawyer's Holiday*, 37 GA. L. REV. 1251, 1272 (2003).

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

10. Meredith J. Duncan, *Criminal Malpractice: A Lawyer's Holiday*, 37 GA. L. REV. 1251, 1251, 1269–70 (2003).

11. Vincent R. Johnson, *The Unlawful Conduct Defense in Legal Malpractice*, 77 UMKC L. REV. 43, 43–45 (2008).

12. Owens v. Harmon, 28 S.W.3d 177, 179 (Tex. App.—Texarkana 2000, pet. denied) (Grant, J., concurring).

13. 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, 674 (1999).

14. Owens v. Harmon, 28 S.W.3d 177 (Tex. App.—Texarkana 2000, pet. denied).

15. *Id.* at 179 (Grant, J., concurring).

16. *See id.* (conceding that while Justice Grant is compelled to agree with the *Peeler* decision, he is more in line with Chief Justice Phillip's dissent).

expanded to contexts involving all stages of a criminal prosecution (from pre-trial representation to appeal, habeas, and parole proceedings) to scenarios involving immigration and even certain civil proceedings. More recently, however, the *Peeler* doctrine has shown signs of erosion, as courts in Texas have declined to apply it to criminal proceedings and claims of fraudulent conduct, and while other jurisdictions have relaxed or rejected the exoneration rule, recent decisions in states like New Jersey, Colorado, and Montana place criminal malpractice claims on the same footing as civil malpractice claims.

This article will examine *Peeler* and its Texas progeny in detail, in order to chart the doctrine's evolution, expansion, and recent limitation. It will also examine the approaches taken in other states toward a *Peeler*-like unlawful conduct defense, including those jurisdictions that have relaxed or outright rejected the exoneration rule and its underlying rationale. Ultimately, this article will demonstrate that *Peeler*'s influence and unique status as an absolute bar to criminal malpractice actions may be waning. This will be achieved by showing the growing disenchantment in other states with the exoneration rule, as well as clear signs of resistance to *Peeler*'s continued expansion and the Texas Supreme Court's recent rejection of the unlawful acts doctrine in *Dugger v. Aredondo*[17] as a bar to a plaintiff's recovery in wrongful death and personal injury cases.

II. CRIMINAL MALPRACTICE CLAIMS AND THE EXONERATION RULE AS A RECENT PHENOMENON

In the world of professional liability, the notion of a criminal defendant bringing a civil claim for negligence against his attorney is a relatively recent phenomenon, with few cases decided until late in the 20th century. Indeed, the author of one 1973 law review article found only eight reported opinions on the subject.[18] By the 1980s, however, the number of criminal malpractice cases had risen sharply and with the relative lack of existing precedent to guide or limit their opinions, courts enjoyed considerable autonomy in creating substantive law to govern this burgeoning area.[19] One state supreme court has even identified the "genesis" of the idea that post-conviction relief is a necessary prerequisite to a former client filing a malpractice lawsuit, as appearing in an influential

17. Dugger v. Arredondo, 408 S.W.3d 825 (Tex. 2013).

18. *See generally* David L. Bazelon, *The Defective Assistance of Counsel*, 42 U. CIN. L. REV. 1 (1973) (providing for an early study on negligence claims for ineffective counsel in criminal cases).

19. David H. Potel, Comment, *Criminal Malpractice: Threshold Barriers to Recovery Against Negligent Criminal Counsel*, 1981 DUKE L.J. 542, 542 (1981).

1974 law review article.[20]

One of the first states to have its highest court dictate explicitly that a criminal must be able to prove actual innocence of the underlying crime in order to recover for malpractice against his defense attorney was New York. In *Carmel v. Lunney*,[21] the plaintiff was subpoenaed to testify at the securities investigation hearing involving his employer.[22] The defendant attorney represented the plaintiff at this hearing and supposedly advised him to testify without limitation; a tactic that later resulted in the grand jury indicting the plaintiff on securities violations based on his testimony.[23] The plaintiff pleaded out to a misdemeanor and then sued his lawyer; however, the court noted the public policy that a criminal should not be allowed to profit from his wrongdoing, and observed that the constitutional and procedural safeguards built into the criminal justice system "make criminal malpractice cases unique, and policy considerations require different pleading and substantive rules."[24] New York's high court required that a plaintiff obtain some type of post-conviction relief as a prerequisite to a malpractice suit.[25]

A few years later in *Shaw v. State (Shaw I)*,[26] the Alaska Supreme Court also held that proof of post-conviction relief was a necessary prerequisite to bringing a criminal malpractice suit.[27] Like its New York counterpart, the Alaska Supreme Court analyzed the public policy considerations, as well as the issue of collateral estoppel.[28] However, it also addressed the statute of limitations concern that militated in favor of requiring post-conviction relief before a legal malpractice suit could be brought.[29] The court noted the concern that if an attorney defendant simultaneously faced a malpractice claim and the plaintiff's criminal trial, the attorney might reveal confidential information while defending the malpractice action that could thwart the plaintiff's ability to gain an acquittal or later post-conviction relief.[30] Because of this, the Alaska Supreme Court in *Shaw I*

20. Rantz v. Kaufman, 109 P.3d 132, 135 (Colo. 2005) (en banc) (citing Otto M. Kaus & Ronald E. Mallen, *The Misguiding Hand of Counsel—Reflections on "Criminal Malpractice,"* 21 UCLA L. REV. 1191 (1974)).

21. Carmel v. Lunney, 511 N.E.2d 1126 (N.Y. 1987).

22. *Id.* at 1127.

23. *Id.*

24. *Id.* at 1128.

25. *Id.*

26. Shaw v. State (*Shaw I*), 816 P.2d 1358 (Alaska 1991).

27. *Id.* at 1359.

28. *Id.* at 1360–61.

29. *Id.* at 1360.

30. *Id.* at 1361.

held that post-conviction relief or exoneration was not only a necessary prerequisite to filing a legal malpractice suit, but also triggers the statute of limitations—thus establishing a bright-line standard on limitations for other courts.[31]

This bright-line or "one-track" approach was followed by a number of other courts, including Oregon,[32] Nevada,[33] Kansas,[34] and Minnesota.[35] Not long after the *Shaw* decisions, the U.S. Supreme Court lent further credence to the prerequisite of post-conviction relief with its ruling in *Heck v. Humphrey*[36] in 1994.[37] In this case, the Court upheld the dismissal of a plaintiff's section 1983 civil rights lawsuit against a police investigator and a county prosecutor because the plaintiff had not proven "that the conviction or sentence [was] reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal . . . or called into question by a federal court's issuance of a writ of habeas corpus."[38] After the ruling in *Heck*, the Virginia Supreme Court, the Texas Supreme Court, and the Florida Supreme Court all held that post-conviction relief was necessary for litigating a claim of criminal malpractice.[39] The Seventh Circuit, applying Illinois law, held likewise in 1997.[40] This bright-line standard or "single-track" approach gained favor not only for public policy reasons, but for reasons of judicial economy as well. After all, a number of issues that would be litigated in the search for post-conviction relief would be relevant to and duplicated in the legal malpractice claim, including proximate cause.

However, another group of states adopted a "two-track" approach, in

31. *Id.* In a subsequent proceeding known as *Shaw II*, the Alaska Supreme Court examined the question of causation, holding that the ex-client "must establish by a preponderance of the evidence that 'but for' the attorney's negligent misrepresentation, the criminal jury would have returned a more favorable verdict." Shaw v. State, 861 P.2d 566, 572 (Alaska 1993). *See also* Stevens v. Bispham, 851 P.2d 556, 566 (Or. 1993) (en banc) (following the bright-line standard that post-conviction relief is a trigger for the statute of limitations).

32. Stevens v. Bispham, 851 P.2d 556, 566 (Or. 1993) (en banc).

33. Morgano v. Smith, 879 P.2d 735, 737 (Nev. 1994).

34. Canaan v. Bartee, 72 P.3d 911, 921 (Kan. 2003).

35. Noske v. Friedberg, 656 N.W.2d 409, 414 (Minn. Ct. App.), *aff'd*, 670 N.W.2d 740 (Minn. 2003).

36. Heck v. Humphrey, 512 U.S. 477 (1994).

37. *Id.* at 486–87.

38. *Id.*

39. *See* Steele v. Kehoe, 747 So. 2d 931, 933 (Fla. 1999) (echoing the idea of post-conviction relief as a prerequisite to a legal malpractice action); Peeler v. Hughes & Luce, 909 S.W.2d 494, 497–98 (Tex. 1995) ("[P]laintiffs who have been convicted of a criminal offense may negate the sole proximate cause bar to their claim for legal malpractice . . . only if they have been exonerated. . . .").

40. Levine v. Kling, 123 F.3d 580, 583 (7th Cir. 1997).

which the criminal defendant simultaneously pursued a legal malpractice suit in the civil justice system and post-conviction relief in the criminal system.[41] Under this approach, the statute of limitations commences upon discovery of the lawyer's negligence, regardless of whether post-conviction relief is sought or obtained.[42] The "double-track" approach was first taken by the Michigan Supreme Court in *Gebhardt v. O'Rourke*.[43] In this case, Gebhardt was convicted of aiding and abetting a rape on January 8, 1987.[44] She successfully petitioned the trial court for a new trial and on July 11, 1988 won a judgment of acquittal—an order that became final on April 19, 1989.[45] Ms. Gebhardt brought a legal malpractice claim against her criminal attorney on November 3, 1989. Under Michigan law, the legal malpractice statute of limitations runs two years after the last day of attorney's representation or within six months of the date plaintiff should have discovered the professional negligence in question.[46] Although Gebhardt argued that this limitations period should have been tolled until she successfully obtained her post-conviction relief, the Michigan Supreme Court rejected this argument and the *Shaw*-inspired policy considerations supporting it—including the complications inherent in simultaneously prosecuting both a legal malpractice case and a quest for post-conviction relief.[47] Concluding that the statute of limitations begins to run on the date the criminal defendant learns of his counsel's negligent acts or omissions, the court reasoned that it was not unusual for a party to have to contend with both a pending criminal matter and a related civil suit arising out of that criminal matter. The court felt that it would be easier for litigants to seek a stay of the pending civil case while the criminal action proceeded, so as to avoid infringing upon the criminal defendant's rights, rather than to burden the civil courts with stale claims and an indefinite tolling of the statute of limitations.[48]

This two-track approach and its implicit recognition that a criminal defendant who has initiated post-conviction relief proceedings should have

41. Duncan v. Campbell, 936 P.2d 863, 868 (N.M. Ct. App. 1997); Morrison v. Goff, 91 P.3d 1050, 1055 (Colo. 2004) (en banc); Ereth v. Cascade Cnty., 81 P.3d 463, 467 (Mont. 2003); Gebhardt v. O'Rourke, 510 N.W.2d 900, 907 (Mich. 1994); Seevers v. Potter, 537 N.W.2d 505, 511 (Neb. 1995).

42. *Morrison*, 91 P.3d at 1051–52 (en banc).

43. Gebhardt v. O'Rourke, 510 N.W.2d 900, 907 (Mich. 1994).

44. *Id.* at 901.

45. *Id.*

46. *Id.* at 902.

47. *Id.* at 905–06.

48. *Id.* at 907–09.

sufficient awareness of their potential claim for legal malpractice quickly gained traction in multiple jurisdictions including Nebraska,[49] New Mexico,[50] Montana,[51] and Colorado.[52]

Despite the divergence between the one-track and two-track approaches in deciding limitations issues on criminal malpractice claims, the exoneration rule continues to hold sway with the majority of jurisdictions confronting the issue adopting some form of post-conviction relief as a prerequisite to maintaining a legal malpractice lawsuit. These include states like Tennessee,[53] Iowa,[54] West Virginia,[55] Georgia,[56] Idaho,[57] Kentucky,[58] New Hampshire,[59] and California.[60]

However, there are several states that, while not making post-conviction relief itself a prerequisite for bringing a suit, arguably set the bar even higher by requiring proof of actual innocence. Consider for example, Massachusetts. In the 1991 case, *Glenn v. Aiken*,[61] the Supreme Judicial Court of Massachusetts found that a plaintiff "must prove by a preponderance of the evidence, not only that the negligence of the attorney defendant caused [the plaintiff's] harm, but also that [the plaintiff] is innocent of the crime charged."[62] The court opined that innocence, in this context, referred to "actual innocence," and not simply "legal innocence."[63] Because of the heavy burden of proof in a criminal case, an acquittal did not suffice to satisfy the actual innocence requirement. It did not necessarily mean that the defendant did not commit the crime for which they were tried; all it meant was that the government was not able to prove beyond a reasonable doubt that the defendant committed the crime. This actual innocence requirement has been followed by Massachusetts,[64]

49. Seevers v. Potter, 537 N.W.2d 505, 511 (Neb. 1995).

50. Duncan v. Campbell, 936 P.2d 863, 868 (N.M. Ct. App. 1997).

51. Ereth v. Cascade Cnty., 81 P.3d 463, 469 (Mont. 2003).

52. Morrison v. Goff, 91 P.3d 1050, 1057 (Colo. 2004) (en banc).

53. Gibson v. Trant, 58 S.W.3d 103, 105 (Tenn. 2001).

54. Trobaugh v. Sondag, 668 N.W.2d 577, 579 (Iowa 2003).

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

56. Gomez v. Peters, 470 S.E.2d 692, 695 (Ga. Ct. App. 1996).

57. Lamb v. Manweiler, 923 P.2d 976, 979 (Idaho 1996).

58. Ray v. Stone, 952 S.W.2d 220, 224 (Ky. Ct. App. 1997).

59. Mahoney v. Shaheen, Cappiello, Stein & Gordon, PA, 727 A.2d 996, 996 (N.H. 1999); Therrien v. Sullivan, 891 A.2d 560, 560 (N.H. 2006).

60. Coscia v. McKenna & Cuneo, 25 P.3d 670, 671 (Cal. 2001).

61. Glenn v. Aiken, 569 N.E.2d 783 (Mass. 1991).

62. *Id.* at 788.

63. *See id.* at 785–86 (proposing where a defendant's criminal trial is deciding his legal guilt, the verdict does not always assess a defendant's actual guilt or innocence).

64. Correia v. Fagan, 891 N.E.2d 227, 234 (Mass. 2008).

as well as states like Washington,[65] Wisconsin,[66] and Illinois.[67]

Having set the stage with a discussion of the exoneration rule's rise and its differing incarnations nationwide, we next focus our attention on the Texas experience with the bar to criminal malpractice claims. We begin with a detailed analysis of the *Peeler* case and its progeny, starting with a discussion of *Peeler*'s bar application to criminal convictions and guilty pleas, as well as other stages, aspects, and actors involved in criminal proceedings (such as investigations). Then we will explore how the growth of the *Peeler* doctrine has expanded into non-criminal contexts, such as breach of contract. However, the story of the *Peeler* doctrine in Texas also betrays signs that courts have applied the brakes to its expansion in certain areas, in some cases actually eroding some of its influence. This is particularly evident in the area of pretrial incarceration, fractured claims, claims by third parties, and (most recently) criminal contempt.

After exploring *Peeler* and its perhaps waning influence, the focus will shift to states where the exoneration rule has been more demonstrably eroded or even rejected, particularly in the State of New Jersey.

III. *PEELER V. HUGHES & LUCE* CRIMINAL MALPRACTICE BAR

In 1995, the Texas Supreme Court essentially banned all legal malpractice claims against criminal defense attorneys in *Peeler v. Hughes & Luce*. Since *Peeler*, courts have continued to extend the criminal malpractice bar to all phases of criminal prosecutions—from pre-trial investigations to appeal and even to parole. As a result, criminal defense attorneys have enjoyed a blanket of protection not afforded to other lawyers in the State of Texas.

A. *The Background of* Peeler v. Hughes & Luce

Carol Peeler was a corporate officer of Hillcrest Equities, "a corporation trading in government securities."[68] The Internal Revenue Services (IRS) investigated Carol Peeler after she was "suspected of engineering illegal tax

65. Ang v. Martin, 114 P.3d 637, 638, 642 (Wash. 2005) (en banc) ("Unless criminal malpractice plaintiffs can prove by a preponderance of the evidence their actual innocence of the charges, their own bad acts, not the alleged negligence of their defense counsel, should be regarded as the cause in fact of their harm.").

66. Hicks v. Nunnery, 643 N.W.2d 809, 823 (Wis. Ct. App. 2002) ("[P]ublic policy requires a plaintiff . . . to prove he is innocent of the charges of which he was convicted in order to prevail on a claim of legal malpractice . . . .").

67. Moore v. Owens, 698 N.E.2d 707, 709 (Ill. App. Ct. 1998).

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

write-offs for wealthy investors."[69] Peeler retained Darrell C. Jordan, then a partner of the firm Hughes & Luce, LLP (Hughes & Luce) as representation in the criminal investigation.[70] A federal grand jury later indicted Peeler and her husband, as well as Peeler's colleagues, on various charges.[71]

Peeler ultimately entered a guilty plea to one of the twenty-one counts against her in exchange for the United States dropping the remainder "of the charges against her, dismiss[ing] all charges against her husband, and recommend[ing] a relatively short prison sentence."[72] In lieu of incarceration, Peeler was subject to five years probation, a $100,000 fine, and a payment of $150,000 in restitution.[73] A few days after pleading guilty, Peeler learned that the U.S. Attorney's Office had previously offered her a deal of absolute transactional immunity in exchange for testimony against her colleagues.[74] Peeler claimed she was never informed of this offer during Jordan's representation of her.[75]

Peeler subsequently brought claims against Jordan and Hughes & Luce, "for legal malpractice, breach of contract, and breach of warranty."[76] In support of her claims, Peeler produced an affidavit confirming that an assistant U.S. attorney had contacted Jordan to offer her an exchange of transactional immunity for cooperation in the investigation.[77] Peeler alleged that Jordan never relayed this offer to her.[78] Hughes & Luce filed for summary judgment, arguing that Peeler's own criminal conduct was the sole cause of her damages and her conviction had not been set aside.[79] The trial court agreed and granted summary judgment in favor of Hughes & Luce.[80] The Dallas Court of Appeals affirmed and the Texas Supreme Court granted review.[81]

The Texas Supreme Court heard the case and a plurality of the court—Enoch, Hecht, Cornyn, and Owen—authored the opinion.[82] The

69. *Id.* at 495–96.
70. *Id.* at 496.
71. *Id.*
72. *Id.*
73. *Id.*
74. *Id.*
75. *Id.*
76. *Id.*
77. *Id.* at 498.
78. Peeler v. Hughes & Luce, 909 S.W.2d 494, 496 (Tex. 1995).
79. *Id.*
80. *Id.*
81. *Id.* at 494.
82. *Id.* at 495.

opinion began with the discussion of the standard framework for a negligence claim against an attorney finding that "[g]enerally, to recover on a claim of legal malpractice, a plaintiff must prove that (1) the attorney owed the plaintiff a duty, (2) the attorney breached that duty, (3) the breach proximately caused the plaintiff's injuries, and (4) damages occurred."[83] However, the court then went on to analyze a legal malpractice claim as it applied to a criminal case to determine "whether the client's criminal conduct is [ultimately] the sole proximate" cause of his damages.[84]

The court cited to a 1985 San Antonio Court of Appeals case holding "that the same elements apply to all legal malpractice cases, civil as well as criminal," but did not find that decision helpful to its analysis.[85] However, the court looked to other states and found that the majority of courts hold that, for public policy reasons, the criminal's conduct—and not the attorney's—is the proximate cause of any damages resulting from a client's conviction.[86] This led the court to the conclusion that a malpractice claim's necessary element of damages cannot be satisfied unless the criminal defendant has been exonerated.[87] The majority noted only two states that did not "impose an 'innocence requirement'" but reasoned that those cases did not fully address the public policy concerns present in *Peeler*.[88]

Based on its public policy rationale, the court "side[d] with the majority of [other states] hold[ing] that plaintiffs who have been convicted of a criminal offense may negate the sole proximate cause bar to their claim for legal malpractice in connection with that conviction only if they have been exonerated on direct appeal, through post-conviction relief, or otherwise."[89] As such, the "innocence requirement" was formally adopted in Texas for plaintiffs who are convicted of a crime and wish to sue their attorney for legal malpractice. In support of the innocence requirement, the court relied on "public policy prohibit[ing] convicts from profiting from their illegal conduct" and from shifting the responsibility for the crimes to anyone but themselves:

83. *Id.* at 496.

84. *Id.* at 496–97.

85. *Id.* at 497 (citing Tijerina v. Wennermark, 700 S.W.2d 342, 344 (Tex. App.—San Antonio 1985, no writ), *overruled on other grounds by* Cosgrove v. Grimes, 774 S.W.2d 662 (Tex. 1989)).

86. *Id.*

87. *Id.*

88. Peeler v Hughes & Luce, 909 S.W.2d 494, 497 (Tex. 1995).

89. *Id.* at 497–498.

> While we agree with the other state courts that public policy prohibits convicts from profiting from their illegal conduct, we also believe that allowing civil recovery for convicts impermissibly shifts responsibility for the crime away from the convict. This opportunity to shift much, if not all, of the punishment assessed against convicts for their criminal acts to their former attorneys, drastically diminishes the consequences of the convicts' criminal conduct and seriously undermines our system of criminal justice. We therefore hold that, as a matter of law, it is the illegal conduct rather than the negligence of a convict's counsel that is the cause in fact of any injuries flowing from the conviction, unless the conviction has been overturned.[90]

Carol Peeler attempted to distinguish her legal malpractice case from the typical criminal prosecution and conviction, arguing that she would have bypassed criminal prosecution had her attorney relayed the offer of absolute transactional immunity to her.[91] The distinction between the two was not lost on Chief Justice Phillips who authored the dissent and was joined by Justices Gammage and Spector.[92] The dissent agreed that public policy dictates "the law should not permit" all convicted criminals to bring suit against their attorneys for legal malpractice and doing so would likely wreak havoc on the criminal justice system.[93] However, the dissent believed that the plurality's innocence requirement was an "absolutist position" that should not apply to Peeler's case since "Peeler [did] not need to establish her innocence in order to prove with a high degree of certainty that her attorney's conduct resulted in her indictment and conviction."[94] In a discreet footnote, the dissent also opined that Peeler should have been able to pursue her contract claims "[s]ince causation [was] not an element of a contract or restitution."[95] However, Peeler did not pursue her contract claims on appeal, so that issue was not addressed until later in Texas case law history.[96]

In the nineteen years following *Peeler*, Texas courts have extended the innocence requirement to bar a client's legal malpractice claim against his

90. *Id.* at 498.
91. *Id.* at 498.
92. *Id.* at 500.
93. *Id.* at 501.
94. *Id.*
95. *Id.* at 501 n.1.
96. *See* Futch v. Baker Botts, LLP, 435 S.W.3d 383, 393 (Tex. App.—Houston [14th Dist.] 2014, no pet.) ("[T]he trial court did not err in granting summary judgment as to Futch's breach-of-contract claim. Under this court's precedent, the *Peeler* doctrine applies to Futch's request for fee forfeiture based on the Law Firm's [a]lleged [b]reaches of [f]iduciary [d]uty.").

attorney in a broad range of cases.[97] There have been 256 cases citing to *Peeler*.[98] Approximately seventy of those cases specifically address *Peeler*'s criminal malpractice bar in light of a criminal defendant's conviction. Those cases are discussed below.

B. *The Criminal Malpractice Bar, Criminal Convictions, and Guilty Pleas*

Criminal defendants, who pled guilty or were convicted, account for approximately one-half of the cases dismissed under the *Peeler* criminal malpractice bar.[99] These are perhaps the most clear-cut cases for which *Peeler* was meant to apply and for which public policy is most supported.

1. *Peeler* and Criminal Convictions

a. *Suniga v. Garcia*[100]

In one of the first cases to apply *Peeler*, the San Antonio Court of Appeals unanimously ruled that a client who was convicted of murder by a jury and sentenced to prison was not allowed to sue his trial counsel for legal malpractice because the client had not been exonerated of the murder.[101] Since he had not been exonerated, the client's illegal conduct in murdering the victim was "the sole proximate cause of his indictment and conviction as a matter of law."[102] The public policy rationale in *Peeler* served to bar the client's legal malpractice claims stemming from his criminal conviction.[103]

b. *Benavides v. Torres*[104]

Shortly after *Suniga*, the San Antonio Court of Appeals released another unanimous and unpublished opinion. *Peeler* barred Benavides's claims against his attorney Torres for "fraud, legal malpractice, and violations of

97. *See, e.g.*, Wooley v. Schaffer, No. 14-13-00385-CV, 2014 WL 3955111, at *5 (Tex. App.—Houston [14th Dist.] Aug. 14, 2014, no. pet. h.) ("We have applied the *Peeler* doctrine to claims for breaches of contract and fiduciary duty and a request for fee forfeiture.").

98. *See generally* Peeler v. Hughes & Luce, 909 S.W.2d 494, 496 (Tex. 1995) (providing the number of case citations for *Peeler*).

99. *See generally id.* at 496 (providing the citations for cases following the *Peeler* standard).

100. Suniga v. Garcia, No. 04-93-00802-CV, 1996 WL 134964 (Tex. App.—San Antonio Mar. 27, 1996, writ denied) (not designated for publication).

101. *Id.* at *1.

102. *Id.*

103. *Id.*

104. Benavides v. Torres, No. 04-93-00753-CV, 1996 WL 591929 (Tex. App.—San Antonio Oct. 16, 1996, writ denied) (not designated for publication).

the Deceptive Trade Practices Act (DTPA)."[105] Benavides's claims and alleged injuries arose out of Torres's representation of Benavides in a criminal trial for which he was not exonerated.[106]

c. *Humphreys v. Meadows*[107]

In 1996, the Fort Worth Court of Appeals heard *Humphreys v. Meadows*.[108] Humphreys was an attorney "who was convicted in federal court on various counts of tax evasion."[109] The conviction was affirmed on appeal and Humphreys sued Meadows for legal malpractice, fraud and breach of contract.[110] The trial court dismissed the suit with prejudice as a form of sanctions for discovery violations.[111] On appeal, Meadows argued that "Humphreys's claim must fail as a matter of law under" *Peeler* because Humphreys was not exonerated of his criminal conviction.[112] The Fort Worth Court of Appeals reversed the trial court's dismissal in a unanimous opinion, not under *Peeler*, but rather because the trial "court abused its discretion by imposing the 'death penalty' sanction" to dismiss Humphreys's case.[113]

However, the court of appeals did address Meadows's *Peeler* argument holding that if Meadows's sole proximate cause bar defense is correct, then "the proper procedural tactic to dispose of the case [was] a motion for summary judgment" and not dismissal.[114]

d. *Johnson v. Odom*[115]

One year after *Peeler*, the Houston Court of Appeals affirmed the grant of summary judgment dismissing a client's legal malpractice claims against his criminal defense attorney after the client was convicted of tax fraud in federal court.[116] The client did not appeal his conviction, but sued his attorney for breach of fiduciary duty, breach of contract, fee disgorgement

105. *Id.* at *1.
106. *Id.*
107. Humphreys v. Meadows, 938 S.W.2d 750 (Tex. App.—Fort Worth 1996, writ denied).
108. *Id.* at 751.
109. *Id.* at 750.
110. *Id.* at 751.
111. *Id.*
112. *Id.* at 754 n.2.
113. *Id.* at 751.
114. *Id.* at 754 n.2.
115. Johnson v. Odom, 949 S.W.2d 392 (Tex. App.—Houston [14th Dist.] 1997, pet. denied).
116. *Id.* at 393.

and violation of the Texas DTPA.[117] The client alleged that he had been exonerated by the IRS in post-conviction relief, but failed to produce any supporting evidence.[118] In a unanimous opinion, the court cited to *Peeler*, finding "that all claims 'flowing from the [client's] conviction' [were] barred by public policy" unless he could prove that his conviction was overturned.[119]

e. *Owens v. Harmon*[120]

In 2000, the Texarkana Court of Appeals affirmed summary judgment for Harmon who was sued by his client, Owens, for legal malpractice stemming from Owens's conviction on various federal crimes.[121] Owens brought an ineffective assistance of counsel claim that was denied by the U.S. District Court for the Eastern District of Texas.[122] "The United States Court of Appeals for the Fifth Circuit found no error and affirmed the convictions."[123] Owens then sued Harmon for legal malpractice, steadfastly claiming his innocence.[124] However, Owens was not exonerated and his direct appeals were unsuccessful.[125]

In an attempt to distinguish his case from *Peeler*, Owens argued that *Peeler* was limited to guilty pleas and did not apply to his case because he claimed he was innocent.[126] The majority was not convinced by Owens's argument and held that the public policy reasoning in *Peeler* was "not limited to guilty pleas."[127] In applying *Peeler*'s malpractice bar to criminal convictions, the majority held that the opinion in *Peeler* "makes clear that a person convicted of a crime cannot pursue a malpractice claim against his attorney unless he has established his innocence by direct appeal, post-conviction relief, or other legal proceedings."[128]

However, the majority did note that some of Harmon's actions were questionable (i.e. "not know[ing] whether Owens knew he had a right to testify" at trial, and "direct[ing] Owens not to testify"), but ultimately ruled that "[a]ctual error . . . is insufficient to overcome the public policy

117. *Id.* at 394.
118. *Id.*
119. *Id.* at 393.
120. Owens v. Harmon, 28 S.W.3d 177 (Tex. App.—Texarkana 2000, pet. denied).
121. *Id.* at 178–79.
122. *Id.* at 178.
123. *Id.*
124. *Id.*
125. *Id.* at 179.
126. *Id.*
127. *Id.*
128. *See id.* (citing Peeler v. Hughes & Luce, 909 S.W.2d 494, 500 (Tex. 1995)).

considerations articulated in *Peeler*."[129]

In the first opinion since *Peeler* to agree with its dissent, Justice Grant wrote a concurring opinion wherein he acknowledged that he was compelled to concur with the *Owens* majority based on *Peeler*'s precedent.[130] However, he agreed with *Peeler*'s dissent "that even if [a] defendant has not been exonerated, if the defendant can prove that there would have been no conviction but for the attorney's malpractice, relief should be available."[131]

f. *Austin v. Friend*[132]

Applying *Peeler*'s criminal malpractice bar, the Beaumont Court of Appeals unanimously upheld the trial court's dismissal of Austin's legal malpractice lawsuit against Friend, his criminal defense attorney.[133] The court ruled that it was not an abuse of discretion for the trial court to dismiss Austin's legal malpractice suit as frivolous because his criminal conviction had not been overturned, nor did he allege in his malpractice suit that he had been exonerated as required under *Peeler*.[134]

g. *Nelson v. Gioffredi & Assocs.*[135]

Nelson filed a lawsuit against his criminal defense attorneys, complaining of their performance, and alleging negligence, fraud, and forgery.[136] The Amarillo Court of Appeals unanimously affirmed the trial court's dismissal of Nelson's lawsuit as frivolous and malicious.[137] All of Nelson's claims dealt with the quality of legal representation he received and were thus nothing more than claims for legal malpractice improperly couched in other causes of action.[138] As such, all of Nelson's claims were barred under *Peeler* because Nelson had not been exonerated nor did "he allege that he was exonerated of guilt viz that conviction through appeal or

129. *Id.*

130. Owens v. Harmon, 28 S.W.3d 177, 179 (Tex. App.—Texarkana 2000, pet denied) (Grant, J., concurring).

131. *Id.*

132. Austin v. Friend, No. 09-00-043CV, 2000 WL 1089165 (Tex. App.—Beaumont Aug. 3, 2000, no pet.) (not designated for publication).

133. *Id.* at *2.

134. *Id.* at *1.

135. Nelson v. Gioffredi & Assocs., No. 07-01-0284-CV, 2002 WL 123347 (Tex. App.—Amarillo Jan. 29, 2002, pet denied) (not designated for publication).

136. *Id.* at *1.

137. *Id.* at *2.

138. *Id.*

otherwise."[139]

h. *McLendon v. Detoto*[140]

Detoto defended McLendon in a criminal case in which he was ultimately convicted of arson.[141] The Houston Court of Appeals affirmed McLendon's conviction and the Texas Court of Criminal Appeals denied his petition for discretionary review.[142] McLendon subsequently sued Detoto for "malpractice, professional negligence, breach of legal duty, breach of contract, and [DTPA] violations."[143] The trial court found that McLendon (1) had impermissibly severed his legal malpractice claim and (2) that his malpractice claim was barred because his conviction had not been repealed.[144] In a unanimous opinion, the Houston Court of Appeals affirmed the trial court's grant of summary judgment on all of McLendon's claims against Detoto.[145] Relying on *Deutsch v. Hoover, Bax & Slovacek, LLP*,[146] McLendon could not opportunistically transform his negligence claim into other claims because all of his claims dealt with the quality of legal representation he received from Detoto.[147] Furthermore, McLendon's conviction served to negate the sole proximate cause requirement for his legal malpractice claim.[148] Because McLendon had not been exonerated or obtained any post-conviction relief, his malpractice claim was barred under *Peeler*'s sole proximate cause bar.[149]

i. *Osborne v. Normand*[150]

More recently, the Beaumont Court of Appeals affirmed the grant of a no-evidence summary judgment in favor of an attorney who was sued by her client for legal malpractice stemming from a criminal conviction.[151]

139. *Id.*

140. McLendon v. Detoto, No. 14-06-00658-CV, 2007 WL 1892312 (Tex. App.—Houston [14th Dist.] July 3, 2007, pet denied) (mem op.).

141. *Id.* at *1.

142. *Id.*

143. *Id.*

144. *Id.* at *1–2.

145. *Id.* at *3.

146. Deutsch v. Hoover, Bax & Slovacek, LLP, 97 S.W.3d 179, 189 (Tex. App.—Houston [14th Dist.] 2002, no pet.).

147. *See McLendon*, 2007 WL 1892312, at *3 (citing *Deutsch*, 97 S.W.3d at 189 (Tex. App.—Houston [14 Dist.] 2002, no pet.)).

148. *Id.* at *1–2.

149. *Id.*

150. Osborne v. Normand, No. 09-06-513-CV, 2007 WL 4991343 (Tex. App.—Beaumont Mar. 13, 2008, no pet.) (mem. op.).

151. *Id.* at *1.

The court of appeals acknowledged that "[i]n this case, the alleged malpractice relate[d] to a prior criminal prosecution; the plaintiff in these circumstances must prove that, but for the attorney's breach of her duty, the plaintiff would have prevailed in the prior proceeding."[152] In support of that proposition, the court of appeals cited to two cases—*Hoover v. Larkin*[153] and *Greathouse v. McConnell*.[154] However, a close reading of those cases indicates they are both probate cases, neither of which involves a criminal case or the *Peeler* criminal malpractice bar.[155] The court of appeals does reference *Peeler* later in its opinion, finding that the client failed to state the outcome of his criminal case, but the court does not actually opine that the client must show he was exonerated to proceed with his malpractice case.[156] Despite the apparent confusion, the court of appeals reached the same conclusion and affirmed summary judgment in favor of the criminal defense attorney.[157]

j. *Renteria v. Myers*[158]

Renteria retained Myers for representation in a federal criminal case and paid him a $25,000 fee.[159] Renteria alleged that he had limited contact with Myers, who failed to inform him of any consequence of taking his case to trial.[160] According to Renteria, Myers only met with him the evening before his trial for all of forty-five minutes.[161] A jury convicted Renteria the following day and he was released on bond pending a pre-sentencing report.[162] Renteria fled while on release, but was later re-arrested and incarcerated.[163] Myers refused to continue to represent Renteria, despite Renteria's demands, unless he paid Myers an additional $10,000.[164] Renteria retained new defense counsel whom he paid

152. *Id.*

153. Hoover v. Larkin, 196 S.W.3d 227 (Tex. App.—Houston [1st Dist.] 2006, pet. denied).

154. Greathouse v. McConnell, 982 S.W.2d 165 (Tex. App.—Houston [1st Dist.] 1998, pet. denied).

155. *See generally id.* (providing analysis for legal ethics in regard to probate matters); *see also Hoover*, 196 S.W.3d at 229 (exploring legal ethics within a probate case).

156. Osborne v. Normand, No. 09-06-513-CV, 2007 WL 4991343, at *2 (Tex. App.—Beaumont Mar. 13, 2008, no pet) (mem. op.).

157. *Id.*

158. Renteria v. Myers, No. 2-07-074-CV, 2008 WL 2078617 (Tex. App.—Fort Worth May 15, 2008, no pet.) (mem op.).

159. *Id.* at *1.

160. *Id.*

161. *Id.*

162. *Id.*

163. *Id.*

164. *Id.*

$12,500, but was ultimately "sentenced to 188 months in [prison]."[165] Renteria demanded that Meyers return $12,500 to him to offset the cost of the second attorney, however, when Myers refused to return the money, Renteria sued him for "[m]alpractice, [b]reach of [c]ontract, [e]thics, and [p]rofessional [c]onduct."[166] Myers filed traditional and no-evidence summary judgments which were granted by the trial court.[167] The Fort Worth Court of Appeals unanimously affirmed.[168]

In affirming the trial court's judgment, the court of appeals noted that Renteria failed to show that any negligence on the part of Myers—and not Renteria's own guilt—"was the proximate cause of [Renteria's] injury."[169] The court cited to *Peeler*'s holding that "[p]laintiffs who have been convicted of a criminal offense may negate the sole proximate cause bar to their claim for legal malpractice in connection with that conviction only if they have been exonerated on direct appeal, through post-conviction relief, or otherwise."[170]

k. *Gonzalez v. De La Grana*[171]

In 2003, the Fifth Circuit Court of Appeals applied *Peeler* to bar a criminal defendant's state law legal malpractice claim against his defense attorney.[172] The court found that, because the defendant's federal conviction had not been overturned, he could not pursue his state law tort claim against his criminal defense attorney for legal malpractice.[173]

l. *Rogers v. Harwell*[174]

Harwell and Harris defended Rogers in a felony criminal case in which Rogers was ultimately convicted "and sentenced to forty year[s] confinement."[175] Rogers unsuccessfully filed a petition for review and multiple post-conviction petitions for writ of habeas corpus, all of which

165. *Id.*
166. *Id.*
167. *Id.*
168. Renteria v. Myers, No. 2-07-074-CV, 2008 WL 2078617, at *1 (Tex. App.—Fort Worth May 15, 2008, no pet.) (mem op.).
169. *Id.* at *1, *3.
170. *Id.* at *1 (citing Peeler v. Hughes & Luce, 909 S.W.2d 494, 497–498 (Tex. 1995)).
171. Gonzalez v. De La Grana, 82 F. App'x 355 (5th Cir. 2003).
172. *Id.* at 357.
173. *Id.* (citing Peeler v. Hughes & Luce, 909 S.W.2d 494, 497–498 (Tex. 1995)).
174. Rogers v. Harwell, No. 2-08-376-CV, 2009 WL 1506885 (Tex. App.—Fort Worth May 28, 2009, pet. denied) (mem. op.).
175. *Id.* at *1.

were dismissed or denied.[176] Rogers sued Harwell and Harris for malpractice "based on the theory that he would not have been convicted" had they produced evidence from a forensic serologist that would have exonerated him.[177] The trial court dismissed Rogers's legal malpractice case as frivolous.[178]

On appeal, Rogers argued that he was exonerated, in effect, because the evidence would have shown he was innocent.[179] The Fort Worth Court of Appeals reviewed the serologist's findings, finding that it was not enough to warrant exoneration or establish innocence.[180] As such, Rogers was unable to establish exoneration to negate the *Peeler* sole proximate cause bar and public policy mandated that Rogers's claims fail as a matter of law.[181]

This opinion presents an interesting question that has yet to be addressed in Texas. If a criminal defendant who has been convicted, but not exonerated, produces evidence proving he was innocent (DNA evidence, for example), would that qualify to establish exoneration for purposes of *Peeler*? That fact scenario has yet to be tried in a Texas court, and there may be a statute of limitations issue, but it is an interesting scenario.

m. *Cannon v. James*[182]

In a pre-trial report and recommendation from the U.S. District Court for the Eastern District of Texas, Texarkana Division, *Peeler* was applied to bar Cannon's legal malpractice claims against James.[183] Cannon failed to allege or "show that he ha[d] been exonerated of his criminal conviction" or that his complaint should have been dismissed.[184] Cannon "argue[d] that *Peeler*'s 'or otherwise' language provide[d] an alternative to the exoneration requirement."[185] The court disagreed, finding "the 'or otherwise' language referre[d] to the means of exoneration, i.e. 'on direct

176. *Id.*
177. *Id.* at *2.
178. *Id.*
179. *Id.* at *3.
180. *Id.*
181. *Id.*
182. Cannon v. James, No. 5:09-CV-132-TJW-CE, 2010 WL 2432354 (E.D. Tex. May 27, 2010), *report and recommendation adopted*, 5:09-CV-132-TJW-CE, 2010 WL 2430764 (E.D. Tex. June 15, 2010).
183. *Id.* at *1.
184. *Id.*
185. *Id.*

appeal [or] through post-conviction relief.'"[186]

n. *Lawson v. West*[187]

Lawson sued West, his court-appointed attorney, alleging that West had a duty to have Lawson examined or to alert the criminal court of Lawson's possible mental illness or retardation, but failed to do so.[188] The Beaumont Court of Appeals unanimously found that Lawson's claims were for legal malpractice, and as such, he must prove that West breached a duty that proximately caused Lawson's injury.[189] Citing *Peeler*, the court held that a "convict's criminal conduct is considered the sole proximate cause of the conviction and its consequences."[190] Since Lawson was convicted of a crime and not exonerated, he was unable to satisfy the proximate cause element of his legal malpractice claim.[191]

o. *Lempar v. Nicholas*[192]

Nicholas and Bozzo represented Lempar in a criminal case wherein Lempar was convicted by a jury and ordered to confinement for twenty years.[193] The conviction was affirmed and "the Texas Court of Criminal Appeals refused [Lempar's] petition for discretionary review."[194] "Lempar filed an application for writ of habeas corpus" and a legal malpractice case against Nicholas and Bozzo.[195] Nicholas and Bozzo moved for summary judgment asserting there was no evidence that Lempar had been exonerated.[196] Lempar filed a "response and motion to stay the [malpractice] case pending resolution of his habeas corpus proceeding."[197] The trial court granted the motion for summary judgment on "traditional and no-evidence grounds and . . . denied Lempar's motion to stay."[198]

Lempar did "not challenge [the] summary judgment on the merits,"

186. *Id.*

187. Lawson v. West, No. 09-10-00052-CV, 2011 WL 2119739 (Tex. App.—Beaumont May 19, 2011, pet denied) (mem. op.).

188. *Id.* at *1.

189. *Id.* at *2.

190. *Id.*

191. *Id.*

192. Lempar v. Nicholas, No. 14-10-00311-CV, 2011 WL 3586017 (Tex. App.—Houston [14th Dist.] Aug. 16, 2011, no pet) (mem. op.).

193. *Id.* at *1.

194. *Id.*

195. *Id.*

196. *Id.*

197. *Id.*

198. *Id.*

only the denial of his motion to stay.[199] Lempar argued that he would ultimately be exonerated in the habeas corpus proceeding, therefore negating the *Peeler* sole proximate cause bar.[200] Citing to *Peeler*, Lempar argued "that the trial court abused its discretion by" not staying the case.[201] The Houston Court of Appeals disagreed, finding that even if Lempar was exonerated, the exoneration would only serve to "negate the sole proximate cause bar," and he would still have to satisfy all other elements of his legal malpractice claim.[202] Lempar failed to establish the element of breach—that Nicholas's and Bozzo's "conduct fell below the applicable standard of professional care."[203] As such, the trial court did not abuse its discretion in considering the no-evidence summary judgment ground on the element of breach regardless "of the pending habeas corpus proceeding" because the habeas corpus outcome would not have been dispositive of that summary judgment ground.[204]

The Houston Court of Appeal's opinion raises at least two questions that are not addressed in any cases dealing with *Peeler*. First, had Lempar produced some evidence that Nicholas and Bozzo fell below the standard of care and the other elements of legal malpractice, would Lempar have been entitled to a stay pending the disposition of his habeas corpus petition? Secondly, had Lempar's habeas corpus petition been granted and had he been exonerated for purposes of *Peeler*, would Lempar be able to bring a new legal malpractice claim against Nicholas and Bozzo if the statute of limitations had run?

p. *Roberts v. Allen*[205]

In another case from the Beaumont Court of Appeals, an inmate's legal malpractice claim against his defense attorney was dismissed as frivolous on multiple grounds, including *Peeler*'s criminal malpractice bar.[206] The court found that the inmate failed to establish he had been exonerated and, in fact, his pleadings stated that he was still incarcerated when he sued his

199. *Id.*

200. *Id.* at *2.

201. *Id.*

202. Lempar v. Nicholas, No. 14-10-00311-CV, 2011 WL 3586017, at *2 (Tex. App.—Houston [14th Dist.] Aug. 16, 2011, no pet) (mem. op.).

203. *Id.*

204. *Id.*

205. Roberts v. Allen, No. 09-12-00339-CV, 2013 WL 1279401 (Tex. App.—Beaumont Mar. 28, 2013, no pet.) (mem. op.).

206. *Id.* at *1.

attorney.[207]

q. *Macias v. Moreno*[208]

Macias v. Moreno is the only opinion applying *Peeler*'s criminal malpractice bar where the criminal defendant was not ultimately convicted and had not pled guilty.[209] Moreno, a police officer, was indicted for violating a prisoner's civil rights.[210] He was released on bond and hired Macias to defend him.[211] Macias failed to inform Moreno of the judge's final conference and Moreno did not appear, causing the trial court to revoke Moreno's bond.[212] After Macias's bond reduction attempts were unsuccessful, Moreno was arrested and jailed for three weeks.[213] Moreno retained new defense counsel and eventually the charges against him were dismissed for lack of evidence.[214] Moreno subsequently sued Macias for legal malpractice and a "jury found Macias was ninety percent responsible for Moreno's [injuries]," and awarded damages for mental anguish, lost wages, and legal fees.[215]

The El Paso Court of Appeals upheld the jury's finding.[216] In doing so, the court distinguished *Peeler* from Moreno's case based on the fact that Moreno was not convicted of the underlying criminal act and his case was ultimately dismissed.[217] In further support of its finding, the court agreed with Moreno's argument that because the case against him was dismissed, he was exonerated of the criminal charges on the basis of *Peeler*, and a sole proximate cause jury instruction was unavailable to Macias.[218]

2. *Peeler* and Guilty Pleas

When reviewing the *Peeler* criminal malpractice bar with respect to guilty pleas, it is important to remember that *Peeler* involved a guilty plea for which the Texas Supreme Court affirmed that "any person who pleads guilty, remains convicted of an offense, and is unable to prove innocence

207. *Id.* at *3.

208. Macias v. Moreno, 30 S.W.3d 25 (Tex. App.—El Paso 2000, pet. denied).

209. *See id.* at 26 (applying *Peeler* malpractice standards when charges were ultimately dismissed).

210. *Id.*

211. *Id.*

212. *Id.*

213. *Id.*

214. *Id.*

215. *Id.*

216. *Id.*

217. *Id.* at 28.

218. Macias v. Moreno, 30 S.W.3d 25, 28 (Tex. App.—El Paso 2000, pet. denied).

must accept his criminal conduct as the sole proximate or producing cause of his indictment and conviction for that offense."[219]

a. *Valdez v. Manka*[220]

Valdez was originally convicted on a drug charge, but the conviction was reversed after it was found that his attorney provided ineffective assistance of counsel.[221] On remand and represented by new counsel, Valdez pled guilty to the same drug charge.[222] Valdez subsequently sued Manka for legal malpractice on various theories including "negligence, breach of contract, breach of the implied warranty to perform services in a good and workmanlike manner, and violations of the [DTPA]."[223]

Manka moved for summary judgment, arguing that public policy precluded Valdez's malpractice suit because Valdez pled guilty and was not exonerated.[224] The trial court agreed with Manka and granted his motion for summary judgment, which the San Antonio Court of Appeals unanimously affirmed.[225] Because Valdez pled guilty to a criminal offense and was not exonerated, he could not establish that Manka's conduct was a proximate cause of his conviction.[226] Public policy barred all of Valdez's claims, whether they sounded in tort or breach of contract.[227]

b. *Trejo v. McGuire*[228]

Trejo sued his attorney, McGuire, after pleading guilty to aggravated robbery.[229] In doing so, Trejo agreed to drop his appeal in another criminal case in exchange for the State dropping other pending criminal charges against him.[230] McGuire moved for summary judgment and the Corpus Christi Court of Appeals affirmed, finding that *Peeler* barred

219. Peeler v. Hughes & Luce, 909 S.W.2d 494, 499 (Tex. 1995) (quoting Peeler v. Hughes & Luce, 868 S.W.2d 823, 835 (Tex. App.—Dallas 1993, writ granted) (internal quotation marks omitted).

220. Valdez v. Manka, No. 04-96-00510-CV, 1997 WL 438760 (Tex. App.—San Antonio Aug. 6, 1997, no writ) (not designated for publication).

221. *Id.* at *1.

222. *Id.*

223. *Id.*

224. *Id.*

225. *Id.* at *2.

226. *Id.*

227. *Id.* at *1 (citing Saks v. Sawtelle, Goode, Davidson & Troilo, 880 S.W.2d 466, 469–71 (Tex. App.—San Antonio 1994, writ denied).

228. Trejo v. McGuire, No. 13-98-382-CV, 1999 WL 34973577 (Tex. App.—Corpus Christi Mar. 25, 1999, no pet.) (not designated for publication).

229. *Id.* at *1.

230. *Id.*

Trejo's claims.[231] Since Trejo had not been exonerated, his illegal acts were the sole proximate and producing cause of his indictment and conviction as a matter of law.[232]

c. *Donalson v. Martin*[233]

Based on Martin's legal advice, Donalson pled guilty, waived the right to a jury, and sought probation or incarceration in a mental institution.[234] Donalson alleged that Martin told him "the prosecutor would seek stacked sentences if he exercised his right to a jury trial," and that Donalson subsequently pled guilty based on that advice.[235] The court denied Donalson's "request for probation and sentenced him to 50 years imprisonment."[236] Donalson then sued Martin for legal malpractice on various counts including "fraudulent misrepresentation, constructive fraud, and actionable fraud."[237] The trial court dismissed Donalson's suit noting that it was "essentially a legal malpractice claim which [Donalson] attempt[ed] to recycle as a fraud claim."[238] The trial court noted that Donalson had failed to establish, or even assert, his innocence and ordered that Donalson's case be dismissed.[239]

The Houston Court of Appeals affirmed the dismissal, finding *Peeler* both persuasive and analogous.[240] As in *Peeler*, Donalson claimed that his defense attorney failed to keep him properly informed during plea negotiations.[241] Like *Peeler*, Donalson had not been absolved of guilt by direct appeal or collateral attack.[242] As such, Donalson failed to state a legitimate cause of action and his claim had no basis in law.[243] Citing to *Peeler*, the court found it was Donalson's own illegal conduct, and not the negligence of Martin, that was the cause in fact of any injuries flowing from Donalson's conviction.[244]

231. *Id.*
232. *Id.* at *1–2.
233. Donalson v. Martin, No. 14-01-00977-CV, 2003 WL 22145667 (Tex. App.—Houston [14th Dist.] Sept. 18, 2003, no pet.) (mem. op.).
234. *Id.* at *1.
235. *Id.*
236. *Id.*
237. *Id.*
238. *Id.*
239. *Id.*
240. Id. at *3–4.
241. Id. at *3.
242. *See id.* (showing similarities to the fact pattern in *Peeler*).
243. Donalson v. Martin, No. 14-01-00977-CV, 2003 WL 22145667, at *3 (Tex. App.—Houston [14th Dist.] Sept. 18, 2003, no pet.) (mem. op.).
244. *Id.* at *2.

d. *Gaines v. Lollar*[245]

Gaines sued Lollar for legal malpractice stemming from Lollar's representation of him when the State of Texas moved to revoke Gaines's probation for committing a crime while on probation.[246] The trial court dismissed Gaines's malpractice suit, finding that it was frivolous, and the dismissal was affirmed on appeal.[247] The sole legal cause of Gaines's conviction was his illegal conduct, barring the reversal of his conviction or exoneration.[248] There was no evidence in the record that Gaines's conviction was overturned and thus, he was barred from bringing a legal malpractice claim related to that conviction.[249]

e. *Hughes v. Wells (In re Wells)*[250]

In a complex case out of the U.S. Bankruptcy Court for the Northern District of Texas, the Hugheses filed claims in Wells's bankruptcy case for the return of legal fees paid to Wells.[251] Hughes Sr. was convicted of money laundering and sentenced to federal prison.[252] The Fifth Circuit Court of Appeals affirmed the jury's guilty verdict and the U.S. Supreme Court denied certiorari, finalizing the conviction.[253] Hughes Sr. then retained Wells, a criminal defense attorney, to investigate other avenues that might secure Hughes Sr.'s release from prison.[254] Hughes Sr. gave his daughter Rhonda power of attorney and retained Wells to handle a habeas petition.[255] Wells advised Hughes Sr. and Rhonda that Udashen, another criminal defense attorney, would also be working on Hughes Sr.'s case.[256] Rhonda signed three separate contracts with Wells, all of which contained non-refundable provisions.[257]

Wells and Udashen originally prevailed on Hughes Sr.'s habeas petition and U.S. Magistrate Judge Boyle authored a report and recommendation

245. Gaines v. Lollar, No. 05-03-001405-CV, 2004 WL 1691013 (Tex. App.—Dallas July 29, pet. denied) (mem. op.).

246. *Id.* at *1.

247. *Id.*

248. *Id.* at *2.

249. *Id.*

250. Hughes v. Wells (In re Wells), No. 05-34432-BJH-7, 2006 WL 6508180 (Bankr. N.D. Tex., Mar. 8, 2006).

251. *Id.* at *1.

252. *Id.*

253. *Id.*

254. *Id.*

255. *Id.* at *2.

256. *Id.*

257. *Id.* at *2–3.

that the conviction be vacated.[258] The habeas petition was granted and Hughes Sr.'s conviction was vacated with a new trial set.[259] However, the government appealed the grant of new trial, and the Fifth Circuit reversed, reinstating Hughes Sr.'s conviction.[260]

Subsequently, Hughes Sr. and Rhonda sued Wells, Udashen, and others in state district court seeking a refund of $435,000—the amounts paid under the first and third contracts (the State Court Suit).[261] The State Court Suit asserted two claims "(1) for declaratory judgment that the Fee Contracts were unconscionable and unenforceable, and (2) for breach of the fee contracts, thereby entitling the Hughes's to damages in the amount of $435,000."[262] Wells filed for bankruptcy and the State Court Suit was abated pending the bankruptcy.[263] The bankruptcy court heard the State Court Suit claims and determined it was not unconscionable for Wells to retain the funds under the first contract, but it was unconscionable for Wells to retain all of the funds under the third contract.[264] However, the bankruptcy court ultimately found that Hughes Sr.'s claims to the attorney fees were subject to discharge under Wells's Chapter 7 bankruptcy and did not qualify under any exemption to discharge.[265]

In his argument for non-dischargeability, Hughes Sr. alleged that Wells's actions were willful and malicious, causing injury to both Rhonda's property and to his person.[266] The bankruptcy court found those arguments unpersuasive and found no evidence that Wells acted maliciously or with the intent to cause injury.[267] The court also found that it was Hughes Sr.'s own criminal conduct that caused his injuries—his continuing incarceration.[268] The bankruptcy court applied *Peeler*'s holding that a plaintiff-convict may negate the sole proximate cause bar to his claim for malpractice in connection with that conviction only if he has been exonerated.[269] The court determined that Hughes Sr.'s claims were connected to his conviction and that he had not been exonerated; thus, his

258. *Id.* at *2.
259. *Id.* at *3.
260. Hughes v. Wells (In re Wells), No. 05-34432-BJH-7, 2006 WL 6508180, at *4 (Bankr. N.D. Tex., Mar. 8, 2006).
261. *Id.* at *4.
262. *Id.*
263. *Id.*
264. *Id.* at *27.
265. *Id.*
266. *Id.* at *26.
267. *Id.*
268. *Id.* at *27.
269. *Id.*

claims did not fall within one of the exceptions for non-dischargeability.[270] The bankruptcy court summed up its holding with respect to Peeler in the following statement: "In truth, there remains very little to be done for Hughes Sr.—he was convicted of a serious crime and he must live with the consequences of his criminal conviction."[271]

f. *Martinez v. Alvarenga*[272]

Martinez filed a legal malpractice suit against his criminal defense attorney "after he entered a plea of *nolo contendere*" to arson, was convicted, and was sentenced to prison.[273] The trial court granted the attorney's "traditional and no-evidence motion for summary judgment."[274] Martinez argued that *Peeler* did not apply to his malpractice suit because Martinez did not plead guilty.[275] The San Antonio Court of Appeals found Martinez's argument unpersuasive, holding that *Peeler* was based on public policy considerations, not on Carol Peeler's guilty plea.[276] The same public policy concerns that supported the decision in *Peeler* supported barring Martinez's malpractice claim. Since Martinez had been convicted of the crime and had not been exonerated, he was unable to negate the sole proximate cause bar established in *Peeler* and his malpractice suit was barred as a matter of law.[277]

g. *Martinez v. Woerner*[278]

Woerner served as Martinez's court-appointed counsel after Martinez was arrested on felony charges.[279] Since Martinez was a repeat felony offender, Woerner advised him to plead guilty to aggravated assault to avoid being tried for attempted murder.[280] Martinez followed Woerner's

270. Hughes v. Wells (In re Wells), No. 05-34432-BJH-7, 2006 WL 6508180, at *27 (Bankr. N.D. Tex., Mar. 8, 2006).

271. *Id.* at *26.

272. Martinez v. Alvarenga, No. 04-07-00283-CV, 2008 WL 441806 (Tex. App.—San Antonio Feb. 20, 2008, no pet.) (mem. op.).

273. *Id.* at *1.

274. *Id.*

275. *Id.*

276. *Id.*

277. *Id.*

278. Martinez v. Woerner, No. 13-07-293-CV, 2008 WL 2744749 (Tex. App.—Corpus Christi July 3, 2008, no pet.) (mem. op.).

279. *Id.* at *1.

280. *Id.*

advice and pled guilty, receiving a twenty year prison sentence.[281] Martinez filed an application for writ of habeas corpus that was denied by the court of criminal appeals.[282] Martinez then filed a lawsuit against Woerner alleging "breach of fiduciary duty, fraud and unconscionable conduct under the DTPA," but did not include a claim for legal malpractice or negligence.[283] Martinez alleged Woerner informed him that witnesses refused to testify on Martinez's behalf, and that Martinez should enter a guilty plea to avoid upsetting the arresting officer who had an unseemly medical condition that might be revealed at trial.[284] The trial court granted Woerner's motion for summary judgment and the court of appeals unanimously affirmed.[285]

The Corpus Christi Court of Appeals found that Martinez was still required to establish causation on all of his claims because all of the claims were torts, even though they were not labeled as legal malpractice or negligence claims.[286] Martinez could not meet the causation requirement because he had not been exonerated as required by *Peeler*.[287] The court acknowledged that *Peeler*'s holding does not completely preclude a convicted party from suing his defense attorney, but imposed the exoneration requirement as a limitation.[288] Martinez failed to satisfy the exoneration requirement and, as such, his claims failed as a matter of law.[289]

h. *Chavez v. Hill*[290]

Chavez pled guilty to "theft and was sentenced to five years confinement" while represented by his court-appointed attorney, Hill.[291] While Chavez was still incarcerated, he filed a complaint against Hill and other defendants alleging "ineffective assistance of counsel and deprivation of liberty and property without due process."[292] Chavez's complaint was

281. *Id.*
282. *Id.*
283. *Id.*
284. *Id.*
285. *Id.*
286. *Id.* at *2.
287. *Id.*
288. Martinez v. Woerner, No. 13-07-293-CV, 2008 WL 2744749, at *2 (Tex. App.—Corpus Christi July 3, 2008, no pet.) (mem. op.).
289. *Id.* at *2–3.
290. Chavez v. Hill, No. 07-08-0340-CV, 2009 WL 322885 (Tex. App.—Amarillo Feb. 10, 2009, no pet.) (mem. op.).
291. *Id.* at *1.
292. *Id.*

dismissed as frivolous and he subsequently brought a legal malpractice case against Hill for breach of fiduciary duty, fraud, misrepresentation, forgery, deception, coercion, and violations of the DTPA.[293] Chavez alleged "that Hill forged his name on the plea agreement," but there was no evidence offered to that effect, except Chavez's own affidavit.[294]

The trial court granted Hill's no-evidence summary judgment with respect to all of Chavez's claims against Hill.[295] The Amarillo Court of Appeals unanimously affirmed the trial court's dismissal, finding that Chavez's malpractice suit against Hill was barred by res judicata because the legal malpractice claims were previously litigated in his ineffective assistance of counsel lawsuit and were summarily dismissed.[296] The court of appeals found Chavez's legal malpractice suit was also barred under *Peeler* because Chavez had not been exonerated from his criminal conviction and thus, Chavez's criminal conduct was the sole proximate or producing cause of this conviction and damages—not Hill's conduct.[297]

i. *Nabors v. McColl*[298]

McColl represented Nabors in federal drug-related criminal cases pending in Navarro and Dallas Counties.[299] Nabors reached a "plea agreement in Navarro County" to serve concurrent sentences.[300] McColl advised Nabors that the charges in Dallas County had been dismissed.[301] Three years after the plea agreement, Nabors discovered that the Dallas County case was still pending, thus making him ineligible for a residential drug and alcohol treatment program (RDAP) which could have reduced his time in confinement by up to one year.[302] Nabors then hired a new criminal defense attorney to resolve the Dallas County case.[303] Nabors new attorney obtained a plea agreement in the Dallas County case; then Nabors entered the RDAP program and was released from incarceration seven and a half months early.[304]

293. *Id.*
294. *Id.* at *3.
295. *Id.* at *1.
296. *Id.* at *4.
297. *Id.*
298. Nabors v. McColl, No. 05-08-01491-CV, 2010 WL 255968 (Tex. App.—Dallas Jan. 25, 2010, no pet.) (mem. op.).
299. *Id.* at *1.
300. *Id.*
301. *Id.*
302. *Id.*
303. *Id.*
304. *Id.*

Nabors then sued McColl for malpractice, arguing McColl's negligent representations delayed Nabors entry into RDAP, thereby delaying his release by twelve months.[305] Nabors asserted claims for "DTPA violations, fraud, breach of contract, breach of fiduciary duty, and conversion."[306] The trial court granted summary judgment in favor of McColl, and the Dallas Court of Appeals unanimously affirmed.[307] First, the court of appeals determined that all of Nabors's claims dealt with the quality of his lawyer's representation, which sounded in tort and constituted impermissible fracturing of a legal malpractice claim.[308] Secondly, Nabors's legal malpractice claim was barred under the *Peeler* criminal malpractice bar.[309]

The court of appeals noted that "cause in fact" is an essential element of causation and requires "that the defendant's acts or omissions were a substantial factor in bringing about the injury which would not otherwise have occurred."[310] Plaintiffs who have been judged guilty may only refute the sole proximate cause bar upon exoneration "on direct appeal, via post-conviction relief, or otherwise."[311] Citing to *Peeler*'s public policy, the court found that allowing monetary recovery for convicted offenders impermissibly shifts accountability for the crime onto attorneys, diminishing the consequents of the convicts' offensive conduct and undermining the criminal justice system.[312] Because no exoneration had been granted to Nabors, his own illegal acts sufficed as the single "proximate and producing cause[] of his . . . conviction as a matter of law."[313]

j. *Garcia v. Garcia*[314]

Lisa Garcia was charged with a count of felony money laundering.[315] She "pled *nolo contendere* to a lesser charge . . . of engaging in deceptive

305. *Id.*

306. *Id.*

307. *Id.*

308. Nabors v. McColl, No. 05-08-01491-CV, 2010 WL 255968, at *3 (Tex. App.—Dallas Jan. 25, 2010, pet. denied) (mem. op.).

309. *Id.* at *1.

310. *Id.* (citing Rodgers v. Weatherspoon, 141 S.W.3d 342, 345 (Tex. App.—Dallas 2004, no pet.)).

311. *Id.* at *2.

312. *Id.*

313. *Id.*

314. Garcia v. Garcia, No. 04-09-00207-CV, 2010 WL 307880 (Tex. App.—San Antonio Jan. 27, 2010, no pet.) (mem. op.).

315. *Id.* at *1.

business practice[s]" and was convicted.[316] She also settled an ancillary forfeiture case that was civil in nature.[317] Rolando Garcia represented Lisa in the criminal proceeding and Raymond Fuchs represented her in the forfeiture case.[318] Following her plea and settlement, "Lisa applied for a bingo worker's license" and was denied because of her conviction.[319] Subsequently, Lisa appeared *pro se* before the trial court and requested the court "set aside the criminal conviction pending the State's amendment of the charges" against her.[320] The trial court granted Lisa's request, finding her plea "not being freely and voluntarily taken because it seem[ed] [that Lisa was] not advised of all the potential consequences."[321] The charges were amended to a Class C misdemeanor, to which Lisa entered a plea of no contest and was convicted.[322]

Lisa filed suit against both Garcia and Fuchs for legal malpractice in several causes of action, all of which were dismissed on summary judgment.[323] On appeal, Lisa only asserted error on the dismissal of her legal malpractice claim, which the San Antonio Court of Appeals affirmed after finding that Lisa was not exonerated or acquitted.[324] The court of appeals found that "the trial court did not make any statements indicating that Lisa was innocent of the actual charges against her; the trial court was merely concerned with whether Lisa had received adequate representation, which is not a basis for exoneration under the standard articulated in *Peeler*."[325] The court of appeals "liken[ed] exoneration to acquittal, which is defined as '[t]he legal and formal certification of the innocence of a person who has been charged with crime; . . . finding of not guilty.'"[326] Since Lisa was not exonerated of the offense forming the basis of Garcia's representation, Garcia negated causation and proved he was entitled to judgment as a matter of law.[327]

316. *Id.*
317. *Id.*
318. *Id.*
319. *Id.*
320. *Id.*
321. *Id.* at *3.
322. *Id.*
323. *Id.* at *1.
324. Garcia v. Garcia, No. 04-09-00207-CV, 2010 WL 307880, at *1 (Tex. App.—San Antonio Jan. 27, 2010, no pet.) (mem. op.).
325. *Id.* at *3.
326. *Id.* at *2 (citing BLACK'S LAW DICTIONARY 23 (5th ed. 1979)).
327. *Id.* at *3.

k. *Jones v. Sulla*[328]

Jones sued his court-appointed attorney, Sulla, in connection with Sulla's representation of him in a negotiated guilty plea to felony theft charges in exchange for deferred adjudication probation.[329] While on probation, Jones committed murder for which he was charged and convicted and sentenced to prison.[330] Jones filed a legal malpractice claim against Sulla for failing to negotiate a settlement with the complaint "in the theft charge and for [negotiating Jones's] deferred adjudication probation instead of jail time."[331] Jones's malpractice case was dismissed after he failed to pay the court costs and an appeal ensued.[332] The Houston Court of Appeals upheld the dismissal finding that Jones's malpractice case had only a slight chance of ultimate success and that Jones could not have proven the required facts to support his claim.[333] Ultimately, the court of appeals found that *Peeler* barred Jones's claim because Jones "voluntarily accepted a plea in exchange for deferred adjudication."[334] Under *Peeler*, Jones's illegal conduct was the factual cause of his harm—not the conduct of his attorney—thus, Jones's suit had "no arguable basis in law."[335]

l. *Dodson v. Ford*[336]

Ford represented Dodson on a capital murder charge to which Dodson pled guilty.[337] Dodson was sentenced to life in prison without the possibility of parole.[338] Dodson sued Ford for negligence and conspiracy, alleging Ford neglected to prepare an insanity defense for Dodson, and convinced Dodson to plead guilty even though Dodson was mentally ill.[339] Ford filed a no-evidence motion for summary judgment citing *Peeler* and asserting that Dodson had not been exonerated of his

328. Jones v. Sulla, No. 14-11-00269-CV, 2012 WL 2048216 (Tex. App.—Houston [14th Dist.] June 7, 2012, no pet.) (mem. op.).

329. *Id.* at *1.

330. *Id.*

331. *Id.*

332. *Id.*

333. *Id.*

334. *Id.*

335. *Id.* at *3.

336. Dodson v. Ford, No. 02-12-00168, 2013 WL 5433915 (Tex. App.—Fort Worth Sept. 26, 2013, no pet.) (mem. op.).

337. *Id.* at *1 .

338. *Id.*

339. *Id.*

conviction.[340] The trial court granted Ford's motion for summary judgment on both the negligence and conspiracy claims.[341] However, Dodson only appealed the conspiracy claim.[342] The Fort Worth Court of Appeals discussed *Peeler*'s criminal malpractice bar, but failed to state whether it was the basis for their affirmation of summary judgment.[343]

C. *Other Criminal Cases Applying the* Peeler *Criminal Malpractice Bar*

Since *Peeler*, Texas courts have taken the opportunity to extend the criminal malpractice bar to protect attorneys who represent criminal defendants at all stages of prosecution, including pre-trial representation, appeal, habeas corpus, and parole. Each of those cases are categorized and discussed below in detail.

1. Pre-Trial

a. Line-Up Procedures—*McDade v. Miller*[344]

Miller was appointed to defend McDade on a charge of aggravated robbery.[345] McDade was forced "to participate in a line-up, despite his" protest, and blamed Miller for the mandatory participation.[346] Miller was allowed to withdraw as counsel prior to trial and McDade was ultimately convicted and sentenced to life imprisonment.[347] McDade filed suit against Miller for legal malpractice and Miller moved for summary judgment on the grounds that *Peeler* barred McDade's malpractice claims against him because McDade had not been exonerated of the offense.[348] The trial court agreed with Miller and granted summary judgment.[349] McDade filed several *pro se* notices of appeal in the Houston Court of Appeals that were ultimately dismissed for lack of jurisdiction.[350]

340. *Id.* at *2.
341. *Id.* at *3.
342. *Id.*
343. *See id.* at *6 (disposing of Dodson's claims without addressing *Peeler*'s applicability).
344. McDade v. Miller, No. 01-99-00435-CV, 2001 WL 392695 (Tex. App.—Houston [1st Dist.] Apr. 19, 2001, no pet.) (mem. op., not designated for publication).
345. *Id.* at *1.
346. *Id.*
347. *Id.*
348. *Id.*
349. *Id.*
350. *Id.*

b. Arraignment—*Poledore v. Fraley*[351]

Fraley was appointed by the court to defend Poledore, who was originally indicted on three felony criminal charges, hereinafter referred to as the "A indictments."[352] Fraley had Poledore sign a waiver of arraignment in connection with the A indictments.[353] "The State later issued two sets of re-indictments" consisting of several changes to the original indictments, hereinafter referred to as the "B re-indictments."[354] Before Fraley filed Poledore's waiver of arraignment, Fraley added the B re-indictments to the waiver, purportedly without Poledore's knowledge or consent.[355] In court, and in Poledore's presence, Fraley admitted "that he altered the waiver of arraignment form to apply it to the B re-indictments after Poledore signed the form."[356] Fraley advised the court that Poledore was concerned that he may have "six charges pending against him" instead of the original three.[357] The trial court determined that Fraley's concern was not adequate grounds to stop the trial or dismiss the charges.[358] Poledore was ultimately convicted on the three counts under the B re-indictments, which were affirmed on direct appeal.[359] Poledore's petitions for discretionary review were denied by the Texas Court of Criminal Appeals.[360]

Poledore sued Fraley for legal malpractice, forgery, fraudulent conduct, and under the Texas Tort Claims Act.[361] Fraley moved for summary judgment, which was granted and unanimously affirmed.[362] In its memorandum opinion on rehearing, the court of appeals found that Poledore could not fracture his legal malpractice claim into other causes of action and that all of his claims sounded in tort.[363] The court of appeals also found that Fraley's addition of the B re-indictments to the waiver of arraignment was not fraudulent because Fraley disclosed his actions to his

351. Poledore v. Fraley, No. 01-09-000658-CV, 2010 WL 3928516 (Tex. App.—Houston [1st Dist.] Oct. 7, 2010, pet. denied) (mem. op.).

352. *Id.* at *1.

353. *Id.* at *1–2.

354. *Id.* at *1.

355. *Id.* at *2.

356. *Id.*

357. *Id.*

358. *Id.*

359. *Id.*

360. *Id.*

361. Poledore v. Fraley, No. 01-09-000658-CV, 2010 WL 3928516, at *3 (Tex. App.—Houston [1st Dist.] Oct. 7, 2010, pet. denied) (mem. op.).

362. *Id.*

363. *Id.* at *4.

client and the court in the presence of his client.[364] Furthermore, Fraley objected to the B re-indictments and moved to dismiss the charges, though he was unsuccessful.[365]

Poledore's remaining legal malpractice claim failed as a matter of law because his convictions had been affirmed and he was not exonerated as required by *Peeler*.[366] In reaching its decision, the court of appeals noted Houston Court of Appeals precedent that warranted summary judgment on proximate cause in legal malpractice "if the attorney's act or omission was not the cause of any damages to the client."[367] Referring to the public policy concerns addressed in *Peeler*, the court found that "legal malpractice claims brought by a convicted criminal defendant against his defense counsel—like Poledore's claims []—fail as a matter of law, unless an appellate court first reverses the conviction."[368]

2. Investigators

a. *Golden v. McNeal*[369]

Following a felony conviction, Golden sued his court-appointed defense attorney and investigator on various claims including malpractice, breach of fiduciary duty, breach of contract, negligence, and DTPA.[370] Golden had exhausted the criminal appeals process with no success.[371] Both the attorney and investigator moved for summary judgment on a statute of limitations issue, but only the investigator moved for summary judgment under *Peeler*'s sole proximate cause bar.[372]

The Houston Court of Appeals acknowledged that the case before it "present[ed] three issues not expressly decided in *Peeler*: (1) whether *Peeler* should be extended to apply to the conduct of an investigator working for the defense in a criminal trial; (2) whether *Peeler* applies to contract claims; and (3) whether *Peeler* applies to breach of fiduciary duty claims."[373] The court found *Peeler*'s language expansive enough to encompass malpractice

364. *Id.*

365. *Id.*

366. *Id.* at *5.

367. *Id.* (citing Swinehart v. Stubbeman, McRae, Sealy, Laughlin & Browder, Inc., 48 S.W.3d 865, 875 (Tex. App.—Houston [14th Dist.] 2001, pet. denied)).

368. *Id.* (citing Peeler v. Hughes & Luce, 909 S.W.2d 494, 497 (Tex. 1995)).

369. Golden v. McNeal, 78 S.W.3d 488 (Tex. App.—Houston [14th Dist.] 2002, pet. denied).

370. *Id.* at 491–92.

371. *Id.* at 491.

372. *Id.*

373. *Id.* at 492.

claims against non-attorneys.[374] It also found *Peeler*'s public policy persuasive, affirming that "[c]onvicts may not shift the consequences of their crime to a third party."[375]

However, the court left open the issue of whether Golden would have been able to succeed on a breach of contract claim against the non-attorney investigator.[376] Citing to *Van Polen v. Wisch*,[377] the court reasoned that "breach of contract allegations against criminal defense counsel" sound only in tort, but declined to decide whether the same is true for breach of contract claims against non-attorneys.[378] Ultimately, the court decided that the issue was not before them, as Golden had not sued the investigator for breach of contract.[379] To date, no court of appeals has addressed the issue of whether *Peeler* would bar a breach of contract claim against a non-attorney investigator. Based on the public policy reasoning in *Peeler* and the general rule against fracturing a legal malpractice claim, it is this author's opinion that a breach of contract claim against the investigator in Golden's case would be deemed a tort claim and thus would be barred by *Peeler*.

3. Appellate Malpractice

a. *Soliz v. Canales*[380]

Two years after *Peeler*, the San Antonio Court of Appeals was the first appellate court to apply the *Peeler* criminal malpractice bar to claims for appellate malpractice.[381] The memorandum opinion was unanimous, though unpublished.[382] The criminal defendant "failed to allege innocence or post-conviction exoneration," and as such, could not establish as a matter of a law "that any negligence of his [criminal appellate] attorney, rather than his own criminal conduct, was a cause in fact of any injury flowing from his conviction."[383]

374. *Id.*

375. *Id.* (quoting Peeler v. Hughes & Luce, 909 S.W.2d 494, 498 (Tex. 1995)).

376. Golden v. McNeal, 78 S.W.3d 488, 492 (Tex. App.—Houston [14th Dist.] 2002, pet. denied).

377. Van Polen v. Wisch, 23 S.W.3d 510 (Tex. App.—Houston [1st Dist.] 2000, pet. denied).

378. *Golden*, 78 S.W.3d at 492 n.2 (citing *Van Polen*, 23 S.W.3d at 515–16).

379. *Id.*

380. Soliz v. Canales, No. 04-97-00117-CV, 1997 WL 786794 (Tex. App.—San Antonio Dec. 24, 1997, no pet.) (mem. op., not designated for publication).

381. *Id.* at *1 (citing Peeler v. Hughes & Luce, 909 S.W.2d 494, 497–98 (Tex. 1995)).

382. *Id.*

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

b. *Barnum v. Munson*[384]

Munson was appointed to represent Barnum in an appeal from his conviction for attempted murder and was unsuccessful.[385] Barnum sued Munson for legal malpractice and his claim was dismissed as frivolous and malicious.[386] The Dallas Court of Appeals held that Barnum's criminal conduct was "the sole proximate cause of his conviction" and that he was barred from bringing a malpractice claim "absent a showing he was exonerated from the criminal conviction."[387] Since there was no evidence proving Barnum's conviction was overturned, "Barnum was barred from bringing" any malpractice claim related to his conviction, even for appellate malpractice.[388] As such, it was not an abuse of discretion for the trial court to dismiss Barnum's malpractice claims as frivolous.[389]

c. *Lann v. Callahan*[390]

The San Antonio Court of Appeals cited *Peeler* to confirm that, based on public policy, trial courts have the authority to resolve legal malpractice cases by summary judgment when they are brought against a criminal defense attorney.[391]

d. *Martin v. Sicola*[392]

Martin was convicted by jury and sentenced to life in prison.[393] After his conviction, the criminal trial court appointed Martin as appellate counsel; however, the appointed appellate counsel failed to file notice of appeal before the deadline.[394] The criminal trial court then appointed Sicola to represent Martin on appeal.[395] Sicola filed an application for writ of habeas corpus, asserting that Martin's prior appellate counsel had

384. Barnum v. Munson, Munson, Pierce & Cardwell, PC, 998 S.W.2d 284 (Tex. App.—Dallas 1999, pet. denied).

385. *Id.* at 285–86.

386. *Id.* at 286.

387. *Id.* (citing *Peeler*, 909 S.W.2d at 497).

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

389. *Id.*

390. Lann v. Callahan, No. 04-05-00718-CV, 2006 WL 1684785 (Tex. App.—San Antonio Jun. 21, 2006, no pet.) (mem. op.).

391. *Id.* at *1.

392. Martin v. Sicola, No. 03-09-00453-CV, 2010 WL 4909987 (Tex. App.—Austin Dec. 1, 2010, no pet.) (mem. op.).

393. *Id.* at *1.

394. *Id.*

395. *Id.*

deprived Martin of the right to appeal his conviction.[396] The Texas Court of Criminal Appeals "granted Martin the right to directly appeal his conviction."[397] Sicola then filed a notice of appeal, but filed a motion to withdraw from the case as Martin's counsel after several months, asserting that she found no arguable issues to warrant a direct appeal.[398] The Austin Court of Appeals subsequently granted Sicola's motion to withdraw and affirmed Martin's conviction.[399]

Martin then filed an application for habeas corpus relief with the Texas Court of Criminal Appeals.[400] Martin alleged that he was denied the right to file a petition for discretionary review because Sicola failed to notify him that the Austin Court of Appeals affirmed his conviction and did not inform Martin that he could file a petition for discretionary review *pro se*.[401] The court of criminal appeals agreed with Martin and allowed him to file a *pro se* petition for discretionary review.[402] Martin's petition for discretionary review was later refused by the Texas Court of Criminal Appeals.[403]

Martin then filed a civil malpractice suit against Sicola alleging that she committed malpractice by:

> (1) filing an Anders brief asserting that his appeal was frivolous and without merit, (2) failing to inform him that this Court had affirmed his aggravated sexual assault conviction in May 2003, (3) failing to inform him that he could file a petition for discretionary review on his own, (4) failing to inform him that this Court had granted Sicola's motion to withdraw as his attorney of record, and (5) acting as his counsel without being legally appointed.[404]

Sicola moved for a no-evidence summary judgment on the basis that Martin could not produce any evidence of causation.[405] The trial court granted Sicola's motion.[406]

In his appeal, Martin cited to Michigan and Ohio Supreme Court decisions allowing plaintiffs to sue for criminal legal malpractice regardless

396. *Id.*
397. *Id.*
398. *Id.*
399. *Id.*
400. *Id.*
401. *Id.*
402. Martin v. Sicola, No. 03-09-00453-CV, 2010 WL 4909987, at*1 (Tex. App.—Austin Dec. 1, 2010, no pet.) (mem. op.).
403. *Id.*
404. *Id.*
405. *Id.* at *2.
406. *Id.*

of the plaintiff's innocence.[407] The Austin Court of Appeals rejected Martin's argument and held that *Peeler* was binding in Martin's case[408] because the *Peeler* court specifically reviewed the law in other jurisdictions when it adopted the exoneration requirement, including *Gebhardt* and *Kahn*.[409]

Martin further argued that his suit was distinguishable from *Peeler* because Sicola did not cause his conviction, but hindered his ability to attack his conviction.[410] The Austin Court of Appeals also rejected this argument, finding that Martin's alleged injury still flowed from his conviction, as was supported by Martin's own complaint "that Sicola's wrongful act denied Martin the opportunity on direct appeal to determine if Martin had been lawfully convicted."[411] The court ruled that *Peeler* was not limited to trial counsel, but also extended to counsel on appeal[412] and in parole hearings.[413] Since Martin had not been exonerated on direct appeal, through post-conviction relief or otherwise, Martin was unable to negate the sole proximate cause bar in *Peeler* and his malpractice claims were properly dismissed.[414]

4. Habeas Corpus

a. *Falby v. Percely*[415]

Falby was convicted of a crime, sentenced to prison, and unsuccessfully exhausted his appeals.[416] Falby's mother contacted Satterwhite about

407. *Id.* at *3; *see also* Gebhardt v. O'Rourke, 510 N.W.2d 900, 908–909 (Mich. 1994) (holding that a legal malpractice claim based on negligent misrepresentation regarding a criminal matter can be maintained regardless of post-conviction relief); Krahn v. Kinney, 538 N.E.2d 1058, 1063 (Ohio 1989) (holding that all legal malpractice actions apply the same elements of proof regardless of whether those actions arise from criminal or civil conduct).

408. *Martin*, 2010 WL 4909987, at *3.

409. *Id.* (citing Peeler v. Hughes & Luce, 909 S.W.2d 494, 497 (Tex. 1995)).

410. *Id.*

411. *Id.* (alteration in original) (internal quotation marks omitted).

412. *See* Barnum v. Munson, Munson, Pierce & Cardwell, PC, 998 S.W.2d 284, 286 (Tex. App.—Dallas 1999, pet. denied) (applying the *Peeler* malpractice bar to counsel on appellate proceeding).

413. *Martin*, 2010 WL 4909987, at *3; Garner v. Redmond, No. 13-02-00658-CV, 2004 WL 1746352, at *2 (Tex. App.—Corpus Christi Aug. 5, 2003, pet. denied) (mem. op.) (holding *Peeler* is applicable to claims stemming from representation in parole hearings).

414. *Martin*, 2010 WL 4909987, at *3

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

416. *Id.* at *1.

representing her son in an application for writ of habeas corpus.[417] According to Falby's legal malpractice suit, Satterwhite informed Falby's family that he possessed a law degree, and worked for a licensed attorney but was not himself licensed to practice law.[418] Falby's family retained Satterwhite who was supposed to visit the prison to investigate the case by conducting legal visits with Falby.[419] Some time later, Satterwhite entered the prison "through a document, signed by Allen Percely, that authorized Satterwhite, as Percely's representative, to visit Falby."[420] Neither Satterwhite nor Percely filed a habeas application.[421] Falby later claimed that he filed a state habeas application himself with the aid of a "writ writer," but the application was denied.[422] Falby claimed that in failing to file a state writ, Percely and Satterwhite missed a deadline for filing a federal writ. Percely claimed Falby would be unable to establish proximate cause or the existence of an attorney–client relationship.[423] The trial court granted Percely's no evidence motion for summary judgment.[424] The Beaumont Court of Appeals did not address Percely's argument regarding the lack of an attorney–client relationship, but unanimously affirmed the trial court's judgment based on *Peeler*.[425]

In an effort to distinguish his case from *Peeler*, Falby argued that his damages were not caused by his own conduct; Percely was not his representative in the criminal proceeding; and there was no malpractice or DTPA violation in relation to that conviction.[426] The court of appeals disagreed that Falby's malpractice suit was unrelated to his conviction, finding that the "gravamen of his complaint [was] that he ha[d] lost the ability to challenge his conviction" and that "[t]he habeas corpus application, regardless of who filed it, relate[d] to and flow[ed] from the conviction."[427] Falby failed to distinguish his case from *Peeler,* and, as such, Falby's legal malpractice suit was barred under the public policy considerations of *Peeler*.[428]

417. *Id.*
418. *Id.*
419. *Id.*
420. *Id.*
421. *Id.*
422. *Id.*
423. *Id.*
424. *Id.* at *2.
425. Falby v. Percely, No. 09-04-422-CV, 2005 WL 1038776, at *3 (Tex. App.—Beaumont May 5, 2005, no pet.) (mem. op.).
426. *Id.* at *2.
427. *Id.*
428. *Id.*

b. *Butler v. Mason*[429]

A jury convicted Butler of aggravated assault and murder.[430] After the conviction, Butler retained Mason to file applications for state and federal post-conviction writs of habeas corpus, all of which were denied.[431] Butler sued Mason for legal malpractice "alleging that Mason was negligent in handling the applications for writs of habeas corpus and that Mason breached his contract with Butler."[432] The trial court dismissed Butler's claims as frivolous, finding that his "alleged injuries flowed from his convictions and resulting incarceration."[433] Butler appealed, arguing that the trial court's reliance on *Peeler* was misplaced.[434] In a unanimous opinion, the Eastland Court of Appeals disagreed with Butler's argument and found that it was not Mason's alleged misbehavior in handling the writs of habeas corpus that resulted in Butler's injuries—it was Butler's continued incarceration for a crime for which he had not been exonerated.[435]

c. *Bailey v. Schneider*[436]

Bailey retained Schneider to file a petition for writ of habeas corpus on his behalf, which Schneider allegedly filed late.[437] Bailey then "sued Schneider for negligence, gross negligence, and violation of rights and privileges secured by the Texas Constitution."[438] Schneider moved to dismiss Bailey's suit, alleging it was frivolous and barred by the applicable statute of limitations, res judicata, and the sole proximate cause bar in *Peeler*.[439] The trial court dismissed Bailey's suit with prejudice, but did not specify the grounds for the dismissal.[440] The Corpus Christi Court of Appeals unanimously affirmed the trial court's dismissal, finding that Bailey's malpractice suit was frivolous and barred by the applicable statute

429. Butler v. Mason, No. 11-05-00273-CV, 2006 WL 3747181 (Tex. App.—Eastland Dec. 21, 2006, pet. denied) (mem. op.).

430. *Id.* at *1.

431. *Id.*

432. *Id.*

433. *Id.*

434. *Id.*

435. *Id.* at *2.

436. Bailey v. Schneider, No. 13-11-0057-CV, 2011 WL 3652618 (Tex. App.—Corpus Christi Aug. 18, 2011, pet. denied) (mem. op.).

437. *Id.* at *1.

438. *Id.* (internal quotation marks omitted).

439. *Id.*

440. *Id.*

of limitations.[441] Based on the statute of limitations bar, the court of appeals did not reach the merits of the application of *Peeler* to Bailey's claims.[442] However, a review of the criminal dockets indicates that Bailey had not been exonerated on appeal at the time of his legal malpractice suit.[443]

d. *Meullion v. Gladden*[444]

Meullion argued that *Peeler* did not bar his legal malpractice claims against Gladden because (1) not all of his claims flowed from his conviction and (2) Gladden only represented Meullion in an application for writ of habeas corpus and was not his attorney at trial or on direct appeal.[445] Disagreeing with Meullion's first argument, the Houston Court of Appeals adopted the reasoning in *Falby v. Percely*,[446] finding that all of Meullion's claims concerned the quality of Gladden's legal representation in relation to Meullion's criminal proceedings, and thus, sounded in negligence.[447] In adopting that reasoning, the court found *Peeler* barred all of Meullion's claims—including "fraud, breach of fiduciary duty, and breach of contract"—because only his illegal conduct was the cause in fact of any of his injuries flowing from his conviction.[448]

In response to Meullion's second argument, the court of appeals declined to distinguish Gladden's representation of Meullion seeking habeas relief from Peeler's guilty plea.[449] Citing to *Martin v. Sicola*, *Nabors v. McColl*, and *Butler v. Mason*, the court found that Gladden's legal representation still stemmed from Meullion's conviction, to which *Peeler*'s criminal malpractice bar applied.[450] It did not matter what stage of the criminal proceedings that Gladden represented Meullion. [451]

Interestingly, the *Meullion* decision appears to have left the door open for a client to pursue his criminal defense counsel—despite *Peeler*—if he is

441. *Id.*

442. *Id.* at *2–3.

443. *Id.*

444. Meullion v. Gladden, No. 14-10-01143-CV, 2011 WL 5926676 (Tex. App.—Houston [14th Dist.] Nov. 29, 2011, no pet.) (mem. op.).

445. *Id.* at *3.

446. *See* Falby v. Percely, No. 09-04-422-CV, 2005 WL 1038776, at *3 (Tex. App.—Beaumont May 5, 2005, no pet.) (mem. op.) (declining to differentiate between the type of counsel when deciding to apply *Peeler*).

447. *Meullion*, 2011 WL 5926676, at *4.

448. *Id.* at *5.

449. *Id.*

450. *Id.* at *4.

451. *Id.*

able to properly fracture his malpractice claim. Citing *Murphy v. Gruber*,[452] the Houston Court of Appeals opined that:

> Parties are prohibited from fracturing a professional negligence claim into multiple causes of action, but this prohibition does not necessarily foreclose the simultaneous pursuit of a negligence-based malpractice claim and a separate breach of fiduciary duty or fraud claim when there is a viable basis for doing so. But to do so, "the plaintiff must do more than merely reassert the same claim . . . under an alternative label."[453]

e. *Huerta v. Shaw*[454]

In a legal malpractice case filed in the U.S. District Court for the Western District of Texas, San Antonio Division, the U.S. Magistrate Judge reported that *Peeler* would bar all of Huerta's claims against Shaw.[455] These included a "professional negligence *and other related claims* arising from representation in a habeas corpus proceeding . . . unless the underlying conviction ha[d] been overturned or set aside."[456] Furthermore, *Peeler*'s public policy consideration would bar all of Huerta's claims including malpractice, breach of contract, breach of fiduciary duty, and fraud.[457]

f. *Mendenhall v. Clark*[458]

Mendenhall retained Clark to represent him in a post-conviction writ of habeas corpus after being convicted of a felony.[459] The Texas Court of Criminal Appeals denied the writ and Mendenhall sued Clark for malpractice, alleging fraud by breach of fiduciary duty and nondisclosure.[460] Clark filed a no-evidence motion for summary judgment based on the criminal malpractice bar in *Peeler*.[461] The trial court granted Clark's motion and the Amarillo Court of Appeals

452. Murphy v. Gruber, 241 S.W.3d 689 (Tex. App.—Dallas 2007) (pet. denied).

453. *Meullion*, 2011 WL 5926676, at *4 (quoting Duerr v. Brown, 262 S.W.3d 63, 70 (Tex. App.—Houston [14th Dist.] 2008, no pet.).

454. Huerta v. Shaw, No. SA-11-CA-476-OG, 2012 WL 48046 (W.D. Tex. Magis. Ct. Jan. 6, 2012).

455. *Id.* at *2.

456. *Id.* (emphasis in original).

457. *Id.*

458. Mendenhall v. Clark, No. 07-11-00213-CV, 2012 WL 512657 (Tex. App.—Amarillo Feb. 16, 2012, pet. denied) (mem. op.).

459. *Id.* at *1.

460. *Id.*

461. *Id.*

unanimously affirmed.[462] Mendenhall's claims, even though labeled as fraud and breach of fiduciary duty, were "nothing more or less than contentions that Clark failed to exercise reasonable professional skill and diligence in advising Mendenhall regarding Mendenhall's writ of habeas corpus."[463] Because Mendenhall's claims were simply negligence claims and Mendenhall had not been exonerated, his claims failed as a matter of law under *Peeler* because Mendenhall was unable to negate the sole proximate cause bar.[464]

g. *Westmoreland v. Turner*[465]

Eight months after *Mendenhall*, the Amarillo Court of Appeals had another opportunity to apply the *Peeler* criminal malpractice bar.[466] Westmoreland sued Turner for malpractice relating to "post-conviction writs of habeas corpus in state and federal court" filed on Mendenhall's behalf, stemming from his murder conviction.[467] Mendenhall argued that the standard of review in *Peeler* should not apply.[468] Instead, he argued that the court should apply the standard of review that is applied in civil appellate malpractice claims—that the plaintiff must show that "but for the attorney's negligence, he would have prevailed on appeal."[469] The court disagreed with that argument, finding that *Peeler* specifically addressed criminal malpractice claims and Mendenhall specifically addressed legal malpractice claims arising from post-conviction writs of habeas corpus.[470] Because Westmoreland was not exonerated, and did not even deny guilt, summary judgment was proper under *Peeler*.[471]

462. *Id.*

463. *Id.* (citing Greathouse v. McConnell, 982 S.W.2d 165, 172 (Tex. App.—Houston [1st Dist.] 1998, pet. denied) (holding that claims of breach of fiduciary duty, good faith and fair dealing, and negligence are all ways to allege legal malpractice)).

464. *Id.* at *2–3.

465. Westmoreland v. Turner, No. 07-12-0018-CV, 2012 WL 4867574 (Tex. App.—Amarillo Oct. 15, 2012, pet. denied) (mem. op., per curiam).

466. *Id.* at *1.

467. *Id.*

468. *Id.*

469. *Id.*

470. *Id.*

471. *Id.*

h. *Huerta v. Shein*[472]

Huerta retained Shein to file a habeas corpus motion under Section 2255 of Title 28 of the United States Code.[473] Shein filed the motion one day late and it was dismissed as untimely.[474] According to Huerta, Shein never told him that the motion was dismissed as untimely and Huerta did not find out until many years later—when another attorney told him that he might have a legal malpractice claim.[475] Huerta subsequently filed a legal malpractice suit against Shein, bringing claims for negligence, breach of contract, fraudulent concealment of facts, breach of fiduciary duty, and fraud.[476] Shein moved to dismiss Huerta's complaint and the presiding magistrate judge initially recommended that the district court deny Shein's motion to dismiss and allow Huerta to bring his claims.[477] Shein filed written objections, arguing that *Peeler* barred Huerta's claim because it was Huerta's criminal conduct, rather than Shein's negligence, that was the "sole proximate cause of any injuries flowing from" his conviction.[478] "[T]he magistrate judge found *Peeler* and its progeny controlling" and found that "Huerta had not been exonerated," and therefore recommended dismissal of Huerta's claims.[479] The district court adopted the magistrate judge's findings and dismissed Huerta's claims under the sole proximate cause bar of *Peeler*.[480] Huerta appealed the district court's ruling.[481]

The Fifth Circuit affirmed the district court's findings based on the public policy concerns addressed in *Peeler* and agreed that "permitting [a] plaintiff to pursue [a] malpractice claim would thwart the public policies of 'prohibit[ing] convicts from profiting from their illegal conduct' and 'impermissibly shift[ing] responsibility for the crime away from the convict.'"[482] Because Huerta had not been exonerated of the crime for which he was convicted, his illegal acts remained the sole proximate and producing cause of his conviction and any injuries stemming from it.[483]

472. Huerta v. Shein, 498 F. App'x 422 (5th Cir. 2012).
473. *Id.* at 423.
474. *Id.*
475. *Id.*
476. *Id.*
477. *Id.*
478. *Id.*
479. *Id.* at 423.
480. *Id.*
481. *Id.*
482. Huerta v. Shein, 498 F. App'x 422, 425 (5th Cir. 2012) (quoting Peeler v. Hughes & Luce, 909 S.W.2d 494, 498 (Tex. 1995)).
483. *Id.* at 427.

Huerta attempted to distinguish his claim against Shein on the basis that Shein did not represent him at the time of his conviction.[484] The Fifth Circuit was not persuaded by Huerta's argument and deferred to Texas appellate court precedent.[485] Likewise, the Fifth Circuit was not persuaded by Huerta's argument that *Peeler* only applies to professional negligence claims and that none of his causes of action were subsumed into a negligence claim.[486] Huerta was not necessarily foreclosed from pursuing a separate claim if there was a "viable basis for doing so,"[487] but he was required to "do more than merely reassert the same claim for legal malpractice under an alternative label."[488] Huerta's claims all asserted that Shein committed legal malpractice, and thus, sounded in tort.[489] As such, they were barred by the *Peeler* sole proximate cause bar "because Huerta had not been exonerated."[490]

i. *Wooley v. Schaffer*[491]

In the most recent case to apply the *Peeler* criminal malpractice bar, Wooley sued Schaffer for malpractice stemming from Schaffer's representation of Wooley in a post-conviction petition for writ of habeas corpus.[492] Wooley's original convictions consisted of an aggravated sexual assault charge and related offenses.[493] Wooley appealed his convictions, which were affirmed.[494] Schaffer agreed to investigate if "there [was] any basis to file an application for a writ of habeas corpus."[495] Schaffer determined there were two separate issues on which applications for writs of habeas corpus could be based.[496] Schaffer notified Wooley that the fee

484. *Id.* at 425.

485. *See id.* ("[S]everal other [Texas] courts ha[ve] 'declined to distinguish between the application of *Peeler* to suits against a convict's trial counsel, counsel on direct appeal, or counsel retained in connection with seeking habeas or other post-conviction relief.'" (quoting Meullion v. Gladden, No. 14-10-01143-CV, 2011 WL 5926676, at *4 (Tex. App.—Houston [14th Dist.] Nov. 29, 2011, no pet.) (mem. op.))).

486. *Id.*

487. *Id.* (citing *Meullion*, 2011 WL 5926676, at *4).

488. *Id.* at 427 (quoting Duerr v. Brown, 262 S.W.3d 63, 70 (Tex. App.—Houston [14th Dist.] 2008, no pet.)).

489. *Id.* at 428.

490. *Id.*

491. Wooley v. Schaffer, No. 14-13-00385-CV, 2014 WL 3955111 (Tex. App.—Houston [14th Dist.] Aug. 14, 2014, no pet. h.).

492. *Id.* at *1.

493. *Id.*

494. *Id.*

495. *Id.*

496. *Id.*

for representing him would depend on whether both issues were raised; to argue both issues, his fee would amount to $25,000 in addition to costs.[497] Arguing just the second issue would cost $15,000 plus expenses.[498] Wooley authorized Schaffer "to argue only the second issue," indicating that the first issue was unlikely to succeed.[499] Schaffer argued Wooley's application for habeas corpus on the second issue; but, the Court of Criminal Appeals refused to provide relief.[500] After the denial, Wooley told Schaffer that he had "wanted Schaffer to raise the" first issue as well and demanded a refund of Schaffer's fee.[501] Wooley sued after Schaffer refused to refund the fee.[502] Schaffer filed a Rule 91(a) motion to dismiss Wooley's suit because it lacked a basis in law or in fact.[503] The trial court granted Schaffer's Rule 91(a) motion and the Houston Court of Appeals unanimously affirmed.[504]

The court of appeals determined that the *Peeler* doctrine established Wooley's claims lacked a basis in law or fact.[505] Wooley's petition acknowledged that he was a convicted felon and had not been exonerated, but argued that his causes of action were viable because they were against counsel retained to seek habeas relief, and not against trial counsel as in *Peeler*.[506] Wooley also argued that his claims for "breach of contract, and violations of the DTPA and his constitutional rights" were exempt from the *Peeler* malpractice bar.[507]

The Houston Court of Appeals denied Wooley's arguments, finding that the "court's expansive interpretation of the *Peeler* doctrine" barred all of Wooley's claims against Schaffer because the "claims [were] related to Schaffer's alleged failure to provide adequate representation in seeking habeas relief in connection with Wooley's convictions."[508] As such, Wooley's claims sounded in negligence and had no basis in law or fact

497. *Id.*

498. *Id.*

499. *Id.* ("[T]rying to prove his son did not intend to turn over the videos to authorities would be a 'waste of time and money' . . . .").

500. *Id.*

501. Wooley v. Schaffer, No. 14-13-00385-CV, 2014 WL 3955111, at *1 (Tex. App.—Houston [14th Dist.] Aug. 14, 2014, no pet. h.).

502. *Id.*

503. *Id.* at *2.

504. *Id.* at *1.

505. *Id.* at *2.

506. *Id.* at *5.

507. *See id.* at *4 (indicating that Wooley's various causes of action remain viable despite the *Peeler* case).

508. *See id.* at *5, n.17 (concluding "all of the above causes of action . . . are barred as a matter of law").

under the *Peeler* sole proximate cause bar.

5. Parole

a. *Campbell v. Brummett*[509]

In a unanimous opinion, the Fourteenth Court of Appeals in Houston extended *Peeler* to legal malpractice claims against attorneys who represent convicted defendants in parole proceedings.[510] Campbell, a disbarred attorney, represented Brummett in front of the Texas Board of Pardons and Paroles.[511] While Campbell was incarcerated, Brummett accessed the prison outside of normal visiting hours by presenting an invalid bar card and completing an "attorney application to visit an inmate form."[512] Campbell claimed to have stated to Brummett in a visit that although he was previously disbarred, he could represent Brummett before the parole board.[513] Brummett was denied parole and sent a letter to Campbell terminating his representation and demanding a refund of the $1,500 legal fee paid to Brummett.[514] After Campbell refused this demand, Brummett sued for legal malpractice, alleging $1,500 in damages.[515] While the trial court granted Brummett's summary judgment motion, the Fourteenth Court of Appeals reversed and remanded after determining fact issues precluded summary judgment.[516]

The court held Brummett failed to prove damages as a matter of law because public policy prohibits the assertion of damages predicated on continued incarceration.[517] The court of appeals referred to *Peeler*'s holding, stating "that unless the convicted inmate can prove his innocence, he cannot claim his incarceration or parole forms [the] basis of damages in action against his attorney because his criminal conduct is the only proximate cause of injury suffered as result of that conviction."[518]

509. Campbell v. Brummett, No. 14-99-00750-CV, 2000 Tex. App. LEXIS 7991 (Tex. App.—Houston [14th Dist.] Nov. 30, 2000, no pet.).

510. *See id.* at *14–15 (applying *Peeler* to claims against an attorney in parole proceedings).

511. *Id.* at *2.

512. *Id.* at *1–2.

513. *Id.* at *2.

514. *Id.* at *2–3.

515. *Id.* at *3.

516. *Id.* at *15–16.

517. *Id.* at *14.

518. *Id.* at *14–15 (citing Peeler v. Hughes & Luce, 909 S.W.2d 494, 479–98 (Tex. 1995)).

b. *Garner v. Redmond*[519]

Garner retained Redmond to represent him in two parole review hearings, both of which were unsuccessful.[520] Following the first parole denial, Redmond sent Garner a letter incorrectly indicating he was incarcerated for a "3G" offense, which was incorrect.[521] Garner, believing "his sentence was erroneously entered as an aggravated robbery," filed an application for a writ of habeas corpus which was denied by the Texas Court of Criminal Appeals after finding the trial court's written order complied with the plea agreement.[522] Garner sued Redmond for legal malpractice, alleging that Redmond's negligence caused him to file an incorrect application of writ of habeas corpus, which is limited to one application per case.[523] Redmond filed a motion for summary judgment asserting that Garner "could not establish causation as a matter of law."[524] Explicitly applying the *Peeler* doctrine, the trial court granted Redmond's summary judgment and held, "[a] legal malpractice claim may not be maintained by a [c]riminal [d]efendant against his attorney absent a showing that he has been exonerated from the criminal conviction."[525]

The Thirteenth Court of Appeals in Corpus Christi affirmed in a 2-1 opinion with the majority ruling that *Peeler* applied to Garner's legal malpractice claims.[526] On appeal, Garner urged his relationship with Redmond, as between a "convict client" and a "non-defense lawyer," was independent of his conviction and related to representation for parole board proceedings.[527] The majority disagreed with Garner, finding that "the gravamen of appellant's claim [was] that because of [Redmond's] negligence, he . . . lost the ability to challenge his conviction through post-conviction relief."[528] Because Garner's complaint against Redmond

519. Garner v. Redmond, No. 13-02-00658-CV, 2004 WL 1746352 (Tex. App.—Corpus Christi Aug. 5, 2004, pet. denied) (mem. op.).

520. *Id.* at *1.

521. *Id.*

522. *Id.*

523. *See id.* ("Because the trial court's written order found appellant guilty of the offense of robbery and did not contain an affirmative finding of the use of a weapon, the court of criminal appeals denied the application."). *See generally* TEX. CODE CRIM. PROC. ANN. art. 11.07 § 4(a) (West Supp. 2004) (identifying the only exceptions allowing the filing of a subsequent application for a writ of habeas corpus).

524. *Garner*, 2004 WL 1746352, at *1.

525. *Id.* at *2 (quoting the trial court's order) (citations omitted).

526. *Id.* at *3.

527. *Id.*

528. *Id.*

related to his conviction, *Peeler*'s criminal malpractice bar applied.[529] The majority pointed out that Garner never averred he was innocent of the offense for which he was convicted, nor was he exonerated of his conviction.[530] As such, Garner's damages were the result of his own illegal conduct and his legal malpractice claim against Redmond was barred as a matter of public policy.[531]

Justice Yañez authored the dissenting opinion, arguing that Garner's injury was "separate and distinct" from his conviction and that his claim should not be barred by *Peeler*.[532] Justice Yañez differentiated Garner's suit from *Peeler* in that Garner claimed that Redmond used up his one and only application for writ of habeas corpus by misidentifying the crime he had been charged with.[533] Thus, the public policy considerations at issue in *Peeler* were not present in Garner's case. Justice Yañez likened Garner's case to *Satterwhite* where the criminal defendant was allowed to bring a legal malpractice claim against his original criminal defense attorney because the legal malpractice claim was not related to whether Satterwhite was guilty or not, and was thus materially different from *Peeler*.[534] In Garner's case, Justice Yañez believed that Garner's conviction was irrelevant to the claim he asserted against Redmond.[535] "He did not challenge his conviction in the trial court, nor . . . on appeal."[536] Justice Yañez stated that "[s]imply because a convicted criminal has a right to a writ of habeas corpus does not in essence make his criminal conviction relevant to his claim for legal malpractice."[537] Justice Yañez opined that "Garner's ultimate guilt or innocence [was] not at issue" in the parole hearings "giving rise to Garner's claim" and thus, his "injuries [did] do not flow from the conviction, but rather" Redmond's negligence.[538]

529. Garner v. Redmond, No. 13-02-00658-CV, 2004 WL 1746352, at *3 (Tex. App.—Corpus Christi Aug. 5, 2004, pet. denied) (mem. op.).

530. *Id.*

531. *Id.*

532. *Id.* at *4 (Yañez, J., dissenting).

533. *Id.*

534. *See id.* at *5–6 (citing Satterwhite v. Jacobs, 26 S.W.3d 35, 37 (Tex. App.—Houston [1st Dist.] 2000, pet. granted), *rev'd on other grounds*, 65 S.W.2d 653 (Tex. 2011)) (distinguishing the instant case from *Peeler*).

535. *See id.* at *5 (citing Satterwhite v. Jacobs, 26 S.W.3d 35, 37 (Tex. App.—Houston [1st Dist.] 2000, pet. granted), *rev'd on other grounds*, 65 S.W.2d 653 (Tex. 2011)) (analogizing to *Satterwhite*).

536. *Id.*

537. *Id.* (footnote omitted).

538. *Id.*

c. *Douglas v. Redmond*[539]

In another legal malpractice lawsuit against Lori K. Redmond, Redmond was retained for the purpose of representing Douglas at proceedings before the Texas Board of Pardons and Parole.[540] Redmond attended several parole review hearings on Douglas's behalf, but the parole board continued to deny his release.[541] Douglas then "designated an elected state representative to speak for him," of which Redmond became aware.[542] Redmond did not attend that parole hearing, and parole was still denied.[543] Douglas then sued Redmond for legal malpractice, arguing that "Redmond had a duty to represent him" until parole was granted based on Redmond's website that advertised, "[a]s an [a]ttorney, Lori does not and cannot make any guarantee of parole. On the other hand, if denied parole, she does guarantee that she will continue to represent her clients for no additional charge, provided that her services are valued and appreciated."[544] Redmond moved for summary judgment and requested sanctions.[545] The sanctions motion was treated as seeking a declaration that Douglas was a "vexatious litigant," and the trial court ruled in her favor on both issues.[546]

The Fourteenth Court of Appeals found that Douglas failed to produce evidence that Redmond had a duty to continue to attend the parole hearing.[547] However, even if Douglas had proffered evidence that a duty existed, his claims would be barred under *Peeler*[548]—he would be unable to establish that a duty caused his damages because he had not been exonerated.[549] Absent exoneration, his own illegal conduct, and not Redmond's negligence, "was the cause in fact of any of injuries flowing from [his] conviction."[550]

539. Douglas v. Redmond, No. 14-12-00259-CV, 2012 WL 5921200, at *1 (Tex. App.—Houston [14th Dist.] Nov. 27, 2012, pet. denied) (mem. op.).

540. *Id.*

541. *Id.*

542. *Id.*

543. *Id.* at *1–2.

544. *Id.*

545. *Id.* at *2.

546. *Id.*

547. *See id.* at *4 ("Without evidence of an applicable duty, the trial court properly granted summary judgment in Redmond's favor.").

548. *See id.* (stressing that the court in *Peeler* noted "that to permit civil recovery absent exoneration would 'impermissibly shift . . . responsibility for the crime away from the convict'").

549. Douglas v. Redmond, No. 14-12-00259-CV, 2012 WL 5921200, at *5 (Tex. App.—Houston [14th Dist.] Nov. 27, 2012, pet. denied) (mem. op.).

550. *See id.* at *4 ("[I]t is the illegal conduct rather than the negligence of a convict's counsel that is the cause in fact of any injuries flowing from the conviction.").

D. *Non-Criminal Cases Applying the* Peeler v. Hughes & Luce *Criminal Sole Proximate Cause Bar*

Peeler was not the first case to apply a criminal malpractice bar in a non-criminal context. Prior to *Peeler*, Texas courts were already applying a sole proximate cause bar to dismiss legal malpractice claims stemming from criminal convictions.[551] In *Saks v. Sawtelle*,[552] Saks, Spruill, and their business partnership, Omni (the Clients) filed a legal malpractice case against two law firms that had represented them in connection with a $19 million loan transaction.[553] Sawtelle, Goode, Davidson & Troilo (Sawtelle) offered legal advice concerning the loan transaction and prepared the loan documents for the Clients.[554] Heard, Goggan, Blair & Williams (Heard) represented the Clients in subsequent civil litigation stemming from the loan transaction in which the Clients made damaging admissions.[555] Those admissions were later admitted into a criminal case against Saks and Spruill who were both ultimately convicted on charges of bank fraud stemming from the loan transaction.[556] Following their convictions, the Clients sued both law firms for legal malpractice.[557] The Clients alleged that Sawtelle negligently prepared the loan documents and failed to understand or convey the illegality of the loan transaction to the clients.[558] The suit against Heard alleged derelict representation because the Clients were not advised of criminal liability resulting from their prior conduct.[559]

The public policy grounds addressed in *Peeler* were the same concerns addressed in *Saks*.[560] *Saks* relied on an 1888 Supreme Court of Texas decision which confirmed the underlying policy principle:

> It may be assumed, as undisputed doctrine, that no action will lie to recover a claim for damages, if to establish it the plaintiff requires aid from an illegal

551. *E.g.*, Saks v. Sawtelle, Goode, Davidson & Troilo, 880 S.W.2d 466, 467 (Tex. App.—San Antonio 1994, writ denied) (adjudicating a malpractice action in favor of the attorneys and the law firm because public policy precluded action).

552. Saks v. Sawtelle, Goode, Davidson & Troilo, 880 S.W.2d 466 (Tex. App.—San Antonio 1994, writ denied).

553. *See id.* at 467 (barring illegal conduct that is "knowingly and willfully" committed from recovery of damage).

554. *Id.* at 468.

555. *Id.*

556. *Id.*

557. *Id.*

558. *Id.*

559. *Id.*

560. *Id.* at 469 (questioning the maintenance of a suit for malpractice against an attorney by a convicted client).

> transaction, or is under the necessity of showing or in any manner depending upon an illegal act to which he is a party.[561]

The court in *Saks* held "that public policy bar[red] recovery for injuries arising from a knowing and willful crime."[562] The court reasoned that the clients' own criminal acts—and not the actions of the attorneys—contributed to the clients' injuries.[563] The court expounded on the malpractice bar, ultimately finding Sawtelle's alleged misrepresentation and negligence irrelevant as the Clients' claims stemmed from the criminal prosecution and conviction, and not the legal advice.[564] This same reasoning supported the extension of *Peeler* to protect attorneys who represented clients in civil or administrative proceedings discussed below where their clients were ultimately convicted.

1. Immigration—*Alvarez v. Casita Maria, Inc.*[565]

Peeler was extended to bar a client's legal malpractice claim against his immigration attorney when the client was ultimately indicted and convicted of the crime of illegal reentry.[566] Alvarez retained Casita Maria, Inc. for immigration counseling services.[567] Alvarez was in the United States illegally when he retained Casita Maria.[568] Casita Maria advised Alvarez of various forms to file with the Immigration and Naturalization Service (INS).[569] Maria Briones, a Casita Maria employee, filled out the immigration forms for Alvarez, which were reviewed by Casita Maria's attorney, Christina Martinez.[570] Attorney Martinez concluded that the forms were complete and could be filed.[571] Based on the advice of a Casita Maria employee, Alvarez mailed the documents to the Dallas District Benefits Adjudication Section of the INS, alerting the INS to Alvarez's whereabouts.[572] The INS then scheduled an interview with

561. *See id.* (quoting Gulf v. Johnson, 71 Tex. 619, 9 S.W. 602, 603 (1888)).

562. Saks v. Sawtelle, Goode, Davidson & Troilo, 880 S.W.2d 466, 470 (Tex. App.—San Antonio 1994, writ denied).

563. *Id.* (identifying the illegal acts engaged in by clients as cause of their harm).

564. *Id.* (emphasizing that regardless of an attorney's guilt or negligence, recovery would be denied).

565. Martinez Alvarez v. Casita Maria, Inc., 269 F. Supp. 2d 834 (N.D. Tex. 2003) (mem. op.).

566. *Id.* at 835–36.

567. *Id.* at 834.

568. *Id.* at 834–35.

569. *Id.* at 835.

570. *Id.*

571. *Id.*

572. *Id.*

Alvarez that was attended by a Casita Maria employee.[573] At the interview, Alvarez was informed that his Permanent Residence Application would probably be denied.[574] Alvarez was thereafter arrested for the crime of illegal reentry pursuant to Title 8, Section 1326 of the U.S. Code.[575] Alvarez entered a guilty plea, was sentenced, and then placed in the custody of the U.S. Bureau of Prisons.[576] Alvarez sued Casita Maria and the individual employees and attorneys who represented him.[577] He alleged that all of his harm, from his arrest and indictment to his conviction, was avoidable had he been advised to submit a Form I-212.[578]

In a memorandum opinion and order, the U.S. District Court for the Northern District of Texas, Dallas Division, held that all of Alvarez's damages related to his imprisonment were barred by *Peeler*.[579] Alvarez attempted to distinguish his case from *Peeler* by arguing that his malpractice claims related to an administrative law matter rather than a criminal prosecution.[580] The court disagreed, finding that "the *harm* to [Alvarez was] the same" and that Alvarez was seeking damages stemming from his incarceration.[581] *Peeler* barred Alvarez's claims due to the fact that it prevented Alvarez from proving causation because his incarceration resulted from his guilty plea to the charge of illegal reentry.[582] Citing *Peeler*'s public policy, the court agreed that "convicts [cannot] shift the consequences of their crime to a third party."[583]

However, the court must have questioned whether its analysis and application of *Peeler* to Alvarez's case was improper. The court acknowledged that even if the public policy prohibitions of *Peeler* were inapt in this case, demonstrating that Casita Maria's actions proximately caused Alvarez's imprisonment would have proved onerous.[584] Even if Alvarez filed form I-212, he still may have been imprisoned because filing does not result in instant approval to reapply for admission into the United

573. *Id.*
574. *Id.*
575. Martinez Alvarez v. Casita Maria, Inc., 269 F. Supp. 2d 834, 835 (N.D. Tex. 2003) (mem. op.).
576. *Id.*
577. *Id.*
578. *Id.*
579. *Id.*
580. *Id.*
581. *Id.*
582. *Id.*
583. *Id.* (quoting Peeler v. Hughes & Luce, 909 S.W.2d 494, 498 (Tex. 1995)).
584. *Id.* at 836 n.2.

States. [585]

2. U.S. Commodities Futures Trading Commission Investigation—*Futch v. Baker Botts, LLP*[586]

Futch sued Baker Botts for breaches of contract and fiduciary duty stemming from their representation of him during an investigation by the U.S. Commodities Futures Trading Commission (the Commission).[587] The Commission commenced an investigation into trading by Reliant Energy Services, Inc. at which time "Futch was the Director of the Gulf Coast/Northeast Natural Gas Trading section."[588] Baker Botts represented Reliant in the investigation and worked with Futch to respond to the Commission's requests.[589] The Commission then issued a subpoena for Futch's deposition, at which point, Baker Botts entered into an attorney–client relationship with Futch.[590] Futch complained that Baker Botts told him to provide deposition testimony to the Commission but failed to inform him regarding his Fifth Amendment rights at, or prior to, his deposition.[591] This deposition testimony was utilized by the Commission to support an obstruction-of-justice claim.[592] Based on its findings, the Commission sanctioned Reliant "for manipulation of the gas market."[593] Futch alleged that Baker Botts never apprised him that the Commission determined his representation by the firm constituted a conflict of interest.[594] Futch was interviewed at Reliant's office by Baker Botts about an "Inside FERC" report, which unbeknownst to Futch, Baker Botts received from an Assistant U.S. Attorney.[595] Baker Botts later provided the interview to the Assistant U.S. Attorney without Futch's

585. Martinez Alvarez v. Casita Maria, Inc., 269 F. Supp. 2d 834, 836 n.2 (N.D. Tex. 2003) (mem. op.). In a discreet footnote, the court acknowledged that even if *Peeler's* public policy concerns did not apply to this case, Alvarez would have faced extreme difficulty in showing that Casita Maria's actions were the proximate cause of his imprisonment since there was no guarantee that the filing of form I-212 would have automatically prevented his imprisonment because it did not automatically result in approval to reapply for admission into the United States. *Id.*

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

587. *Id.* at 384–85.

588. *Id.* at 385.

589. *Id.*

590. *Id.*

591. *Id.*

592. *Id.*

593. *Id.*

594. *Id.*

595. *Id.*

knowledge or consent.[596] Baker Botts additionally voluntarily provided other information, including audio recordings focused on Futch, to the Assistant U.S. Attorney.[597] That information was later used in the criminal indictment and prosecution against Futch.[598] One month later, Baker Botts withdrew as Futch's counsel, stating that it was inappropriate for Baker Botts to "represent both Reliant and Futch."[599]

Futch was subsequently indicted on "four counts of felony false reporting."[600] Futch pled guilty to one count, while the remaining counts were dismissed.[601] Futch unsuccessfully appealed.[602] Futch filed suit against Baker Botts for breach of contract and breach of fiduciary duty based on the disclosure of confidential or privileged information.[603] Baker Botts moved for summary judgment on the sole ground that *Peeler* barred Futch's claims because he had not been exonerated.[604] Baker Botts's summary judgment was granted and an appeal ensued.[605]

The Houston Court of Appeals ruled that Futch's breach of contract claim for "disclosure of confidential or privileged information" was, in essence alleging "that the attorney did not exercise that degree of care, skill, or diligence as attorneys of ordinary skill and knowledge commonly possess."[606] As such, Futch's claim did not sound in contract, but in tort, for which *Peeler* applied.[607] However, the court declined to address whether the claim sounded in negligence or breach of fiduciary duty.[608]

On his breach of fiduciary duty claim, Futch sought fee forfeiture as his only remedy.[609] Baker Botts argued that *Peeler* bars recovery of tort damages and the equitable remedy of fee forfeiture by a person who has been convicted of a crime and not exonerated.[610] The Houston Court of Appeals reviewed *Peeler* in depth, noting the similarities between the two

596. Futch v. Baker Botts, LLP, 435 S.W.3d 383, 385–86 (Tex. App.—Houston [14th Dist.] 2014, no pet.).

597. *Id.* at 386.

598. *Id.*

599. *Id.*

600. *Id.*

601. *Id.*

602. *Id.*

603. *Id.*

604. *Id.*

605. *Id.* at 387.

606. *See* Futch v. Baker Botts, LLP, 435 S.W.3d 383, 387–88 (Tex. App.—Houston [14th Dist.] 2014, no pet.) (determining the claim to be seeking tort damages).

607. *Id.* at 388 (confirming the "breach-of-contract claim failed as a matter of law").

608. *Id.* at 388 n.6.

609. *Id.* at 388.

610. *Id.* at 386.

cases.[611] The court acknowledged that:

> [T]he *Peeler* plurality [did not] address: (1) the claims, other than negligence and DTPA, to which this public policy applies, (2) the types of damages to which this public policy applies, or (3) whether this public policy applies to requests for fee forfeiture based on clear and serious breaches of the attorney's fiduciary duty to the client.[612]

The opinion also acknowledged that the Supreme Court of Texas has not reviewed a case involving the doctrine since *Peeler*.[613] However, the court did note the expansive interpretation of *Peeler* and cited to *Johnson v. Odom* which applied the *Peeler* malpractice bar to claims for breach of contract, breach of fiduciary duty, and a fee forfeiture request.[614] Ultimately, the Houston Court of Appeals found that under its precedent of "applying an expansive interpretation of the *Peeler* doctrine," Futch's claim for breach of fiduciary duty was connected with his conviction and that his request for fee forfeiture was barred by *Peeler*.[615]

Futch attempted to show that *Peeler* was inapplicable to his case reasoning that causation is not required for a breach of fiduciary duty when a fee forfeiture is the only remedy sought.[616] The court noted that Futch was correct in that causation is not a required element, but that Johnson had already decided that very issue.[617] Futch also argued that Baker Botts's breaches of fiduciary duty were unrelated to his criminal conduct.[618] The court disagreed because the occurrence of the fiduciary breaches were concurrent with the criminal investigation which led to Futch's indictment and conviction.[619] Thus, "[b]ecause Futch ha[d] not been exonerated, his fee-forfeiture request fail[ed] as a matter of law under the *Peeler* doctrine."[620]

Ultimately, the court unanimously concluded that *Peeler*'s public policy

611. *See generally id.* at 383 (recounting the facts and reasoning behind *Peeler*).

612. *Id.* at 391.

613. *Id.*

614. *Id.* (citing Johnson v. Odom, 949 S.W.2d 392, 393–94 (Tex. App.—Houston [14th Dist.] 1997, pet. denied)).

615. *Id.* at 392–93 (holding that the *Peeler* doctrine applied).

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

617. *Id. See generally* Johnson v. Odom, 949 S.W.2d 392, 393–94 (Tex. App.—Houston [14th Dist.] 1997, pet. denied) (holding generally that public policy barred legal malpractice recovery including attorney's fees).

618. *Futch*, 435 S.W.3d at 392.

619. *Id.*

620. *Id.* at 393.

concerns outweighed Futch's position that barring his suit undermines the public policy manifest in the attorney–client privilege. Comparing Futch's claim to Carol Peeler's, the court found that:

> Nonetheless, the *Peeler* plurality concluded that Peeler's claims failed as a matter of law based on the policy reasons the plurality articulated, even if the attorney in that case failed to communicate to his client the prosecutor's offer of absolute immunity. Thus, the *Peeler* doctrine is based on strong policy considerations that preclude civil liability in the situations in which the doctrine applies, despite the possibility that the attorney may have engaged in serious misconduct.[621]

3. Violations of School Policy and the Crime Stoppers Privilege—*In re Hinterlong*[622]

In re Hinterlong is a non-legal malpractice case in which *Peeler*'s sole proximate cause bar was applied.[623] Hinterlong, a high school student, was found with alcohol in his vehicle at school based on a crime stoppers tip from a student informant.[624] Hinterlong was expelled from his high school and placed in an alternative school.[625] Hinterlong was also indicted on a minor in possession charge for which a jury ultimately acquitted him.[626] Having reason to believe he was "set up," Hinterlong sued the school, the teacher who received the crime stoppers tip, and others, to discover the student informant's identity and other information relating to the tip.[627] The Fort Worth Court of Appeals found that the crime stoppers privilege applied to Hinterlong's claims and that Hinterlong must show that the crime stoppers privilege unconstitutionally abrogated his cognizable common law causes of action against the school and teacher.[628]

In addressing that narrow issue, the Fort Worth Court of Appeals reviewed part of Hinterlong's claims in light of *Peeler*, finding that Hinterlong would have had "no justiciable common law right to obtain redress" had he not been acquitted of the criminal minor in possession charge against him.[629] Since Hinterlong had been acquitted, *Peeler* did

621. *Id.* at 392–93 (citations omitted).
622. *In re* Hinterlong, 109 S.W.3d 611 (Tex. App.—Fort Worth 2003, no pet.).
623. *Id.* at 628–29 (discussing the implications of the *Peeler* decision in the instant case).
624. *Id.* at 616.
625. *Id.* at 617 n.1.
626. *Id.* at 619.
627. *Id.* at 619, 629.
628. *Id.* at 630.
629. *Id.* at 628.

not bar his claims.[630] However, the court of appeals went further to apply *Peeler* to the unique high school crime stoppers tip, finding that "[t]he bare fact of a student's exoneration does not imply that any civil injuries suffered by the student were *caused by the wrongful acts of another*."[631] The court of appeals found that "[t]he violation of school policy . . . remains the sole proximate cause of any civil damages the student suffers *unless* the student pleads and offers prima facie proof that his injuries were *caused by the wrongful acts of another*."[632]

E. *Claims Brought by Other Parties*

1. Claims by Parents

a. *Manderscheid v. Cogdell*[633]

Manderscheid's parents retained Cogdell to represent their son in federal court for criminal drug charges and paid Cogdell $15,000.[634] Cogdell counselled Manderscheid to plead guilty and Manderscheid was ultimately sentenced "to 135 months of incarceration plus five years of supervised release."[635] Manderscheid's parents filed suit against Cogdell for breach for contract and violating the Texas DTPA.[636] Manderscheid also alleged breach of contract, as a party to or a third-party beneficiary of the contract, or both.[637] Manderscheid and his parents did not claim that he was innocent, only that he was punished too severely.[638]

The trial court granted summary judgment for Cogdell on all claims, and Manderscheid and his parents appealed.[639] Cogdell argued that *Peeler* controlled the case because any of Manderscheid's injuries flowed from his conviction and were barred because his conviction had not been overturned.[640] Manderscheid and his parents argued that *Peeler* did not apply to their breach of contract and DPTA claims and that the parents'

630. *Id.*
631. *Id.* at 628–29.
632. *In re* Hinterlong, 109 S.W.3d 611, 629 (Tex. App.—Fort Worth 2003, no pet.).
633. Manderscheid v. Cogdell, No. 01-99-00930-CV, 2000 WL 233154, at *1 (Tex. App.—Houston [1st Dist.] Mar. 2, 2000, no pet.) (not designated for publication).
634. *Id.*
635. *Id.*
636. *Id.*
637. *Id.*
638. *Id.*
639. *Id.*
640. *Id.* at *2.

claims were separate from Manderscheid's.[641]

The Houston Court of Appeals determined that *Peeler* barred any claims by Manderscheid against his attorney for legal malpractice or DTPA violations because Manderscheid had not been exonerated and thus his illegal acts remained the sole proximate and producing cause of his conviction.[642] However, the court of appeals did not reach the merits of Manderscheid's parents' claims, finding that Cogdell's motion for summary judgment failed to timely address the claims of Manderscheid's parents.[643] The trial court's judgment as to Manderscheid's parents' claims was reversed and remanded.[644]

The case law does not indicate any subsequent history to this case. As such, it is impossible to tell how the Houston Court of Appeals would have ruled if Cogdell moved for summary judgment on the claims of Manderscheid's parents. However, the Houston Court of Appeals decided a very similar issue a few months later in *Van Polen v. Wisch*,[645] discussed directly below.

b. *Van Polen v. Wisch*

Edward and Anita Van Polen retained Wisch to represent their son, Hinojosa, in a motion to adjudicate guilt after Hinojosa violated the conditions of his probation from a prior deferred adjudication on drug charges.[646] The Van Polens signed a contract with Wisch and paid him according to the terms of the contract.[647] The contract stated that it was between the Van Polens and Wisch.[648] Wisch appeared in the criminal court for a bond hearing and Hinojosa's bond was set accordingly.[649] "[M]ore than one-and-one-half years later, the criminal court appointed a substitute counsel for Hinojosa," but Hinojosa was ultimately found guilty "pursuant to [his] stipulation of evidence in the State's motion to adjudicate guilt."[650] The Van Polens and Hinojosa sued Wisch for breach of contract, arguing that Wisch was "to represent Hinojosa through the

641. *Id.*

642. *Id.*

643. Manderscheid v. Cogdell, No. 01-99-00930-CV, 2000 WL 233154, at *3 (Tex. App.—Houston [1st Dist.] Mar. 2, 2000, no pet.) (not designated for publication).

644. *Id.*

645. Van Polen v. Wisch, 23 S.W.3d 510 (Tex. App.—Houston [1st Dist.] 2000, pet. denied).

646. *Id.* at 513.

647. *Id.*

648. *Id.*

649. *Id.*

650. *Id.*

resolution of the motion to adjudicate guilt," which Wisch failed to do.[651] The trial court ruled in favor of Wisch on his motion for summary judgment on both Hinojosa's and the Van Polens' claims. [652]

The Houston Court of Appeals unanimously affirmed the summary judgment with respect to Hinojosa's claims, finding that *Peeler* barred his claim for breach of contract since Hinojosa had not been exonerated and did not argue that "he [was] innocent of the charges alleged in the State's motion to adjudicate guilt."[653] Under *Peeler*, because Hinojosa's breach of contract claim sounded in tort, not contract, "[his] illegal acts remain[ed] the 'sole proximate and producing causes' of his conviction."[654]

However, on the Van Polens' claims, the court ruled that their claims were for breach of contract based on Wisch not attending a hearing for which they had specifically paid him to attend.[655] The court ignored Wisch's argument that the Van Polens were merely acting as Hinojosa's agents, and found the Van Polens had specifically contracted with Wisch to represent their son in the defense of a motion to adjudicate guilt.[656] The evidence indicated that the Van Polens entered into a contract with Wisch and paid him according to the contract, but Wisch failed to represent Hinojosa at the adjudication hearing.[657] The court of appeals held, "We distinguish between an action for negligent legal practice and one for breach of contract relating to excessive fees for services."[658] Wisch unsuccessfully argued "that Hinojosa effectively repudiated the contract by filing *pro se* motions, including petitioning the court to appoint counsel for him," and the court reversed and remanded the summary judgment as to the Van Polens' breach of contract claim against Wisch.[659]

651. *Id.*

652. *Id* at 514.

653. *Id.* at 515–16.

654. *Id.* at 515 (citing Peeler v. Hughes & Luce, 909 S.W.2d 494, 497–98 (Tex. 1995)).

655. Van Polen v. Wisch, 23 S.W.3d 510, 516 (Tex. App.—Houston [1st Dist.] 2000, pet. denied).

656. *Id.*

657. *Id.*

658. *Id.* (citing to Judwin Properties, Inc. v. Griggs & Harrison, 911 S.W.2d 498, 506 (Tex. App.—Houston [1st Dist.] 1995, no writ); Jampole v. Matthews, 857 S.W.2d 57, 62 (Tex. App.—Houston [1st Dist.] 1993, writ denied)).

659. *Van Polen*, 23 S.W.3d at 516–17.

F. *Cases Not Extending the* Peeler *Criminal Malpractice Bar*

1. Accounting Malpractice—*Hillcrest Equities, Inc. v. Thornton*[660]

Hillcrest Equities, Inc. v. Thornton involved claims for accounting malpractice, but also involved the *Peeler* criminal malpractice bar and applied the same public policy principles.[661] Hillcrest Equities sued its accounting firm and accountants for malpractice in connection with "Hillcrest's development and sale of a complex tax shelter program involving the trade of government securities."[662] Grant Thornton provided an audit of Hillcrest's financial statements and "provided interim auditing services, and prepared [Hillcrest's] federal income tax returns for the" relevant years.[663] The IRS subsequently issued notices of tax deficiencies to Hillcrest for the relevant years that Grant Thornton prepared its tax returns.[664] "[T]he IRS disallowed the tax shelter deductions and imposed penalties for fraud."[665] Several of Hillcrest's owners, officers, and directors pleaded guilty to tax fraud. [666]

Hillcrest then sued Grant Thornton for negligence, breach of fiduciary duty, DTPA violations, and breach of contract, in addition to contribution and indemnification claims stemming from a lawsuit filed against Hillcrest by investors styled in *Hendricks v. Hillcrest Securities Corp*. (the Hendricks Suit).[667] "Grant Thornton was granted summary judgment on" all of Hillcrest's claims, and Hillcrest appealed.[668]

The Dallas Court of Appeals likened Hillcrest's claims against Grant Thornton to legal malpractice claims for purposes of *Peeler*'s proximate cause bar and the applicable statute of limitations.[669] Grant Thornton argued that Hillcrest's claims were barred by the criminal acts and fraud of its owners.[670] Hillcrest countered, arguing that its damages were not related to the "underlying . . . criminal convictions of Hillcrest's

660. Hillcrest Equities, Inc. v. Thornton, No. 05-96-01280-CV, 1999 WL 621994 (Tex. App.—Dallas Aug. 17, 1999, pet. denied) (not designated for publication).

661. *See generally Hillcrest Equities*, 1999 WL 621994, at *1 (discussing *Peeler* in the context of professional malpractice, assessing whether the conviction of corporate principals could serve to bar claims of the corporation).

662. *Id.*

663. *Id.*

664. *Id.* at *2.

665. *Id.*

666. *Id.*

667. *Id.*

668. *Id.*

669. *Id.* at *5–7.

670. *Id.* at *7.

owners."[671] "With respect to its contribution and indemnification claims," Hillcrest argued that those "claims [did] not have a causation requirement" and thus, *Peeler* could not apply to bar them.[672]

"Grant Thornton failed to conclusively establish [that] the convictions or fraud of Hillcrest's owner-officers bar[red] Hillcrest's claims for contribution and indemnification under *Peeler* . . . ."[673] Specifically, Grant Thornton could not "establish as a matter of law that Hillcrest's liability in [the] *Hendricks* [suit] was premised upon the fraud underlying the convictions of Hillcrest's owners," and thus "could not establish as a matter of law that *Peeler* applied to bar [the] contribution and indemnity claims."[674]

Ultimately, the court of appeals did not address whether *Peeler* barred Hillcrest's claims against Grant Thornton for negligence, DTPA violations, breach of fiduciary duty, and breach of contract.[675] Instead, the trial court's grant of summary judgment in favor of Grant Thornton was affirmed as time-barred.[676]

2. Pre-Trial Bond Hearing—*Satterwhite v. Jacobs*[677]

A close reading of these two opinions indicates that the *Peeler* criminal malpractice bar does not bar legal malpractice claims against counsel who is retained pre-trial to represent a criminal defendant in a bond hearing.[678] These holdings suggest that the public policy in *Peeler*—that convicted criminals not benefit from their crimes—is not a concern at the bond stage in a criminal prosecution.[679] Perhaps this is because the bond hearing does not serve to adjudicate the defendant's guilt or innocence and merely decides whether the defendant is to remain incarcerated pending trial.[680]

671. Hillcrest Equities, Inc. v. Thornton, No. 05-96-01280-CV, 1999 WL 621994, at *7 (Tex.App.—Dallas Aug. 17, 1999, pet. denied) (not designated for publication).

672. *Id.*

673. *Id.*

674. *Id.* at *8.

675. *Id.* at *9.

676. *Id.*

677. Satterwhite v. Jacobs, 26 S.W.3d 35 (Tex. App.—Houston [1st Dist.] 2000).

678. *Compare id.* at 37 ("[Plaintiff's] action against [his attorney] is based solely on a transaction that occurred prior to the criminal trial."), *with* Jacobs v. Satterwhite, 65 S.W.3d 653, 655 (Tex. 2001) (affirming summary judgment as to malpractice claims, but silent on the applicability of *Peeler* because the plaintiff waived the issue on appeal).

679. *See Satterwhite*, 26 S.W.3d at 37 (citing Peeler v. Hughes & Luce, 909 S.W.2d 494, 499 (Tex. 1995) ("[T]he circumstances and policy considerations involved in *Peeler* are not present in this case.").

680. *See id.* at 36 ("The only issue before the court at the pretrial bond hearing was whether Satterwhite should be held without bond pending trial . . . [and] did not involve the issue of [his]

"Satterwhite was charged with falsely holding himself out as a lawyer" and hired Jacobs "to represent him at a hearing on the State's [m]otion to [h]old [d]efendant [w]ithout [b]ond."[681] "The trial court granted the State's motion and Satterwhite was ordered [to be] incarcerated pending trial."[682] "Satterwhite retained new counsel, [and] pleaded guilty to the felony offense of falsely holding himself out as a lawyer."[683] Satterwhite sued Jacobs for negligence and breach of contract, alleging that Jacobs failed to vigorously represent him at the bond hearing and to vigorously appeal the ruling on the bond hearing.[684] The trial court granted summary judgment against Satterwhite on both the negligence and breach of contract claims, without stating the grounds.[685]

On appeal, the First Court of Appeals in Houston concluded "that the nature of Satterwhite's action . . . [was] materially different from that . . . in *Peeler*," and reversed and remanded the grant of summary judgment on both claims.[686] The court of appeals found that Satterwhite's claim was that he was prematurely incarcerated as a result of Jacobs' negligence, and that his conviction in the criminal proceeding was irrelevant to the malpractice claims he asserted against Jacobs.[687] Specifically, "[t]he only issue before the court at the pretrial bond hearing was whether Satterwhite should be held without bond," not his ultimate guilt or innocence.[688] As such, *Peeler*'s public policy considerations did not apply to bar Satterwhite's claims.[689]

Jacobs appealed to the Supreme Court of Texas which, after granting review, acknowledged that the court of appeals failed to "distinguish . . . the professional negligence and breach-of-contract claims" for purposes of *Peeler*. [690] The Texas Supreme Court affirmed on Satterwhite's breach of contract claim, indicating that Satterwhite was free to pursue a breach of contract claim against Jacobs for his actions at the pre-trial bond hearing and that the claim was not barred by *Peeler*.[691] The Texas Supreme Court

ultimate guilt or innocence.").

681. *Jacobs*, 65 S.W.3d at 654 (citation omitted) (internal quotation marks omitted).

682. *Id.*

683. *Id.* at 655.

684. *Id.* at 654–55.

685. *Id.* at 655.

686. Satterwhite v. Jacobs, 26 S.W.3d 35, 36–37 (Tex. App.—Houston [1st Dist.] 2000), *aff'd in part, rev'd in part*, 65 S.W.3d 653 (Tex. 2001).

687. *Id.* at 36.

688. *Id.*

689. *Id.* at 37.

690. Jacobs v. Satterwhite, 65 S.W.3d 653, 655 (Tex. 2001).

691. *Id.* at 655–56, 656 n.1.

reversed and remanded on Satterwhite's negligence claim—not on the grounds of *Peeler*—but on Satterwhite's failure to preserve the complaint on appeal.[692]

3. Criminal Contempt and Claims by Third Parties—*Byrd v. Phillip Galyen, PC*[693]

Just this year, the Fort Worth Court of Appeals declined to extend *Peeler* to bar Byrd's legal malpractice claims against his divorce attorney, R. Keith Spencer, and the law firm of Phillip Galyen, PC (collectively Spencer).[694] During Spencer's representation of Byrd in his divorce case, Byrd was found to be in criminal contempt for failure to respond to discovery and sentenced to thirty days in jail.[695] Spencer filed a petition for writ of habeas corpus, but erroneously claimed that Byrd was illegally restrained and the petition was ultimately denied.[696] During Byrd's incarceration, two of Byrd's business entities were brought into the divorce case as third parties.[697] Byrd and his businesses sued Spencer for legal malpractice on claims of "negligence, breach of fiduciary duty, and fraud."[698] Spencer filed both traditional and no-evidence motions for summary judgment on the grounds that *Peeler* applied to the legal malpractice claims asserted by Byrd and his business entities because Byrd had not been exonerated of his criminal contempt.[699] Byrd argued that *Peeler*'s criminal malpractice bar did not apply to criminal contempt arising in civil litigation.[700] Byrd also argued that *Peeler* would not bar the malpractice claims of the businesses because they were not parties to the divorce at the time of the contempt order and were never held in contempt.[701]

The trial court determined that *Peeler* barred the claims asserted by both Byrd and his business entities.[702] However, the trial court found that *Peeler* did not apply to Byrd's breach of fiduciary duty or fraud claims.[703]

692. *Id.* at 655.

693. Byrd v. Phillip Galyen, PC, 430 S.W.3d 515 (Tex. App.—Fort Worth 2014, pet. denied).

694. *Id.* at 517.

695. *Id.* at 518.

696. *Id.*

697. *Id.* at 517–18.

698. *Id.* at 519.

699. *Id.* at 520.

700. *Id.* at 521.

701. *Id.*

702. *Id.*

703. Byrd v. Phillip Galyen, PC, 430 S.W.3d 515, 521 (Tex. App.—Fort Worth 2014, pet.

The court granted a partial summary judgment in Spencer's favor and signed an interlocutory order specifically addressing *Peeler*'s application to the claims of Byrd and his business entities.[704] The parties appealed from that order.[705]

On appeal, the Fort Worth Court of Appeals determined that only some of Byrd's negligence claims stemmed specifically from the criminal contempt order, and only those claims could be subject to the trial court's interlocutory order and, thus, possibly barred by *Peeler*.[706] Those negligence claims that did not flow from the criminal contempt were not affected or barred.[707]

The question facing the court of appeals was whether the contempt order against Byrd was tantamount to a criminal conviction, which would bar the negligence claims of Byrd and his businesses under *Peeler*'s sole proximate cause bar.[708] The court of appeals answered in the negative.[709] With respect to those claims stemming from the contempt order, the court found that applying *Peeler*'s sole proximate cause bar to a remedial contempt order would be taking it "one step too far," and that "[t]he nature of a remedial-contempt order in a civil case differs from a criminal conviction such that the policy considerations underlying the sole-proximate-cause bar do not apply."[710] "Byrd was not a convict, having been convicted of a criminal offense . . . the exoneration [requirement that] *Peeler* offers as an exception to the application of the sole-proximate-cause bar is not available in the review of a contempt order issued in a civil case."[711] In fact, a contemnor cannot even challenge the contempt order by stating that he did not violate the court's prior order; but only by proving that the contempt order was void or violated the contemnor's due process.[712] "This legal impossibility renders the public policies announced in *Peeler* inapplicable to a remedial-contempt order arising in a civil case."[713]

The Forth Worth Court of Appeals agreed that criminal contempt

denied).

704. *Id.* at 520.

705. *Id.*

706. *Id.* at 521.

707. *Id.*

708. *Id.* at 521–22.

709. *Id.* at 524.

710. *Id.* at 526.

711. *Id.* at 525.

712. *Id.*

713. Byrd v. Phillip Galyen, PC, 430 S.W.3d 515, 525 (Tex. App.—Fort Worth 2014, pet. denied).

findings are not the same as criminal convictions and do not provide the same due process protections as criminal prosecutions.[714] Agreeing with Byrd's argument, the court confirmed that beside "the label 'criminal' that routinely is applied to the . . . types of contempt orders" at issue, "they are not the equivalent of criminal convictions" and do not provide contemnors the same protections as a defendant charged with a criminal offense.[715]

With respect to the malpractice claims of the business entities, the Fort Worth Court of Appeals found that the entities were not parties to the divorce case at the time of the contempt order and were not served with the discovery requests forming the basis of Byrd's contempt order.[716] Citing *Van Polen v. Wisch*, the court found that the public policies supporting *Peeler*'s sole proximate cause bar did not apply to the businesses as non-parties to the contempt order.[717] The court recognized that one of the public policy considerations underlying *Peeler* is to prevent convicts from benefiting from their own illegal acts.[718] Since the businesses were not parties to the contempt order or parties in the divorce case at the time of the contempt finding, they could not be "participants in the illegal acts" (e.g., failure to respond to discovery requests) that led to the contempt order.[719]

In short, the *Peeler* doctrine's impact on the Texas legal landscape might best be characterized as rather tectonic in nature. *Peeler* initially ushered in an era of rapid expansion in which courts did not hesitate to find the doctrine's applicability in the contexts of actual criminal convictions,[720] guilty pleas,[721] and *nolo contendere* pleas,[722] and steadily extended *Peeler*'s reach to encompass defense counsel's involvement in all stages of criminal prosecution, including pretrial lineup procedures,[723] arraignment,[724] use of an investigator,[725] habeas corpus proceedings,[726] appeal,[727] and parole

714. *Id.*
715. *Id.*
716. *Id.*
717. *Id.* at 525 (citing Van Polen v. Wisch, 23 S.W.3d 510, 515–16 (Tex. App.—Houston [1st Dist.] 2000, pet. denied)).
718. *Id.* (citing Peeler v. Hughes & Luce, 909 S.W.2d 494, 500 (Tex. 1995)).
719. *Id.*
720. *See supra* Part III.B.1.
721. *See supra* Part III.B.2.
722. *See supra* Part III.B.2.f,j.
723. *See supra* Part III.C.1.a.
724. *See supra* Part III.C.1.b.
725. *See supra* Part III.C.2.a.
726. *See supra* Part III.C.4.
727. *See supra* Part III.C.3.

review hearings.[728] This expansion continued into civil cases with quasi-criminal implications (such as incarceration), including immigration[729] and administrative law violations[730] and U.S. Commodities Futures Trading Commission investigations.[731] Yet, the *Peeler* doctrine has also contracted in areas, operating to distinguish and exclude alleged negligence by a criminal defense attorney that results in some form of harm to the defendant other than conviction such as: pretrial incarceration without bond; breach of contract claims brought by third parties who paid the criminal defense lawyers' fees (such as parents); improperly fractured claims in which alternative labels (such as breach of fiduciary duty or fraud) are unsuccessfully applied to causes of action arising out of the defense attorneys' exercise of professional judgment; and remedial contempt actions.[732]

What guidance does this shifting mass of legal precedent offer to Texas courts in future judicial application of the *Peeler* doctrine? The first principle that should guide future courts is the applicability or inapplicability of the policy considerations underlying the criminal exoneration bar. Courts need to analyze, as a threshold issue, whether the nature of the proceeding in question, and the parties being impacted by the purported legal malpractice, even fit within the rubric envisioned by the policy considerations articulated in *Peeler*. So, for example, the appellate court in *Byrd* was correct in pointing out the different nature of a remedial contempt order in a civil case versus a criminal conviction. There is a dramatic gap between punishing the failure to answer discovery in a civil case and punishing for a serious crime such as murder—certainly from the standpoint of protecting society. The court in *Byrd* also correctly observed that the *Peeler* exoneration bar cannot apply to those who were not even parties to the underlying proceeding (in that case, Lucy Leasing and PGB).[733]

Another principle that should guide the future development and application of *Peeler* is whether the criminal defendant can prove—even in the absence of exoneration—that, but for the attorney's negligence, there would not have been a conviction. For example, under current Texas law, even if the criminal defendant has a valid statute of limitations defense to

728. *See supra* Part III.C.5.
729. *See supra* Part III.D.1.
730. *See supra* Part III.D.3.
731. *See supra* Part III.D.2.
732. *See supra* Part IV.
733. *See supra* Part III.F.3.

raise, in the absence of exoneration, he cannot sue his defense attorney for failing to assert such a defense.[734] Yet even in the purely civil context of legal malpractice, courts distinguish between the majority of cases in which the allegation of professional negligence (and the requisite proof of a failure to meet the standard of care) requires expert testimony and those which involve a breach so blatant that expert testimony may not be required. Texas cases have recognized that missing a statute of limitations is one such area in which fact witness testimony alone may be sufficient to demonstrate a breach of the applicable standard of care.[735] Chief Justice Phillips' dissent in *Peeler*, arguing that relief should be available if the criminal defendant can prove that there would have been no conviction absent the attorney's malpractice (even without exoneration) is instructive here.[736] So is Justice Grant's concurrence in *Owens v. Harmon*, in which he agreed with this concept and with Chief Justice Phillip's *Peeler* dissent.[737]

A third and final principle by which courts should be guided by is that complete foreclosure of recovery for a criminal defendant asserting a legal malpractice cause of action who cannot prove exoneration is at odds with Texas' statutory scheme of comparative responsibility. As Professor Vincent Johnson has persuasively argued, conduct of the plaintiff that is illegal should be treated as a defense "only to the extent that it constitutes a form of contributory or comparative negligence or assumption of the risk."[738] In the event of such a finding, applicable rules specific to the jurisdiction would then be applied as to contributory negligence and comparative responsibility. Professor Johnson concludes

> The legal system is ill-served by the recent rush to broadly impose innocence or exoneration requirements on plaintiffs alleging malpractice in criminal representation and by the continued judicial application of hazy and poorly structured concepts, such as the *in pari delicto* and unclean hands doctrines in actions against attorneys. It is appropriate and necessary for courts to embrace a clearly articulated unlawful conduct defense in legal malpractice cases under terms that foreclose judicial redress only in a narrow range of cases where the plaintiff's unlawful conduct is serious, knowingly committed, and closely tied by principles of factual and proximate causation to the

734. *See generally* Peeler v. Hughes & Luce, 909 S.W.2d 494 (Tex. 1995).

735. *Id.*

736. Peeler v. Hughes & Luce, 909 S.W.2d 494, 500–02 (Tex. 1995) (Phillips, J., dissenting).

737. Owens v. Harmon, 28 S.W.3d 177, 179 (Tex. 2000) (Grant, J., concurring).

738. Vincent R. Johnson, *The Unlawful Conduct Defense in Legal Malpractice*, 77 UMKC L. REV. 43, 82 (2008).

injuries for which the plaintiff seeks to recover damages.[739]

In 2013, the Supreme Court of Texas—which has never granted review in a case involving the exoneration doctrine since *Peeler*—explored the unlawful conduct doctrine in a different negligence context, that of personal injury and wrongful death cases. In *Dugger v. Arredondo,* the court considered the applicability of the unlawful acts doctrine as an affirmative defense in light of Texas's proportionate responsibility scheme and the statutory affirmative defenses provided in Section 93.001 of the Texas Civil Practice and Remedies Code.[740] The illegal activity in this instance was the consumption of marijuana and "'cheese'—a mixture of black tar heroin and Tylenol PM."[741] After Geoffrey Dugger and his friend Joel Martinez consumed the drugs at the "house where Dugger lived with his parents," Martinez fell asleep.[742] Shortly thereafter, Dugger noticed his friend choking and vomiting.[743] Although Dugger's father called 911, Dugger did not tell the responding paramedics "that Martinez had ingested heroin."[744] They treated him for alcohol poisoning, and "Martinez died less than two hours after the 911 call."[745] Mary Ann Arredondo, Martinez's mother, sued Dugger under the wrongful death and survival statutes, alleging that Dugger was negligent in failing to call 911 immediately and in failing to disclose Martinez' heroin use to the paramedics.[746]

"Dugger asserted an affirmative defense based on the common law unlawful acts doctrine," which provides that the plaintiff cannot recover damages "if, at the time of the injury, [they] were engaged in an unlawful act that" contributed to the injury.[747] The trial court granted summary judgment for Dugger, but the Court of Appeals reversed, holding that Section 93.001 superseded the common law doctrine, but did not apply under the facts of the case.[748] The Texas Supreme Court, however, held that the Proportionate Responsibility Act applies even where the statutory assumption of the risk defense does not.[749] The court decided that the

739. *Id.* at 82–83.
740. Dugger v. Arredondo, 408 S.W.3d 825, 833 (Tex. 2013).
741. *Id.* at 827.
742. *Id.*
743. *Id.*
744. *Id.*
745. *Id.*
746. *Id.* at 838.
747. *Id.* at 827.
748. *Id.* at 825.
749. *Id.* at 830–31.

Texas legislature's adoption of the Proportionate Responsibility Act (now found in Chapter 33 of the Texas Civil Practice and Remedies Code) was evidence of the legislature's intent to abrogate the common law doctrine, and that responsibility should be apportioned according to the statute.[750] Accordingly, plaintiffs' potential recovery is not barred because they were engaged in an unlawful act.[751] Instead, a plaintiff's share of responsibility should be compared against the defendant's pursuant to the proportionate responsibility statute, which requires the trier of fact to determine (as to each cause of action asserted) the percentage of responsibility for each claimant, each defendant, each settling person, and each responsible third party, in causing or contributing to cause the harm for which recovery is sought.[752]

While the Supreme Court expressly limited its holding to personal injury and wrongful death cases, the question of its potential applicability in the legal malpractice context was very much on the collective minds of the court's majority.[753] The court acknowledged that in recent years, "scholars and courts have disagreed over the viability of the unlawful acts doctrine in modern jurisprudence," pointing to the Restatement (Second) of Torts and Professor Johnson's article on the unlawful conduct defense in legal malpractice, among other examples.[754] Moreover, the opinion specifically notes *Dugger*'s reliance on cases in which a plaintiff was precluded from recovering damages in a legal malpractice case due to the plaintiff's criminal conduct.[755] These cases included *Saks v. Sawtelle* and the slightly later decision in *Peeler*, as well as *Sharpe v. Turley*[756] (a 2006 Dallas Court of Appeals decision foreclosing a plaintiff's recovery from an attorney after finding that the summary judgment evidence established that the plaintiff's conduct that formed the basis of the underlying civil fraud claim was unlawful).[757] The court noted the extension of "that reasoning to civil defendants bringing legal malpractice actions," but declined the opportunity to address it because it wasn't properly before the

750. Dugger v. Arredondo, 408 S.W.3d 825, 830–31 (Tex. 2013).

751. *Id.* at 831.

752. *Id.*

753. *Id.* at 836.

754. *Id.* at 830.

755. *Id.* at 833.

756. Sharpe v. Turley, 191 S.W.3d 362 (Tex. App.—Dallas 2006, pet. denied).

757. *Dugger*, 408 S.W.3d at 833 (Tex. 2013) (citing Peeler v. Hughes & Luce, 909 S.W.2d 494, 500 (Tex. 1995), *Sharpe*, 191 S.W.3d at 365–69, and Saks v. Sawtelle, 880 S.W.2d 466, 467 (Tex. App.—San Antonio 1984, writ denied)).

court.[758]

How long will it be before the question of *Peeler's* steady expansion is before the Court? Only time will tell. However, the Court's specific reference to *Peeler* and some of its progeny, within the overall framework of a discussion of the curtailment of the common law unlawful conduct doctrine, is telling. If and when the right case comes before the Court, the same rationale, sustaining the Proportionate Responsibility Act's primacy over a common law defense in personal injury and wrongful death cases, would seem to apply in other negligence contexts. Such an approach would reduce—but not necessarily bar—the recovery of a criminal plaintiff in a legal malpractice claim.

IV. THE EROSION OF THE EXONERATION RULE

Just as the *Peeler* doctrine has shown signs of erosion in Texas through courts' refusal to extend it to apply in cases of pretrial incarceration,[759] parental claims of breach of contract,[760] fractured claims,[761] and criminal contempt,[762] so too has the exoneration rule displayed signs of weakening in other states.[763] In Illinois, for example, the Seventh Circuit (applying Illinois law) refused to extend the actual innocence requirement to the plaintiff's breach of contract claim.[764] In this case, the court held that the malpractice claim was properly dismissed because proof of actual innocence was required on the underlying criminal charges.[765] However, the court reversed the lower court's finding as to the plaintiff's breach of contract claim, reasoning that the actual innocence rule did not apply to a

758. *Dugger*, 408 S.W.3d at 833 (Tex. 2013).

759. *See generally* Jacobs v. Satterwhite, 65 S.W.3d 653 (Tex. 2001) (indicating courts' hesitation to address the issue, affirming on limitations grounds); Macias v. Moreno, 30 S.W.3d 25 (Tex. App.—El Paso 2000, pet. denied) (distinguishing negligence from bail jumping).

760. *See* Van Polen v. Wisch, 23 S.W.3d 510, 516 (Tex. App.—Houston [1st Dist.] 2000, pet. denied) (holding that the parents of a convict were not barred from asserting a breach of contract claim against a lawyer).

761. *See* Meullion v. Gladden, No. 14-10-01143-CV, 2011 WL 5926676, at *4 (Tex. App.—Houston [14th Dist.] Nov. 29, 2011, no pet.) (mem. op.) (rejecting an inmate's claims for fraud, breach of contract, and breach of fiduciary duty as "relabeled claims for professional negligence").

762. *See* Byrd v. Phillip Galyen, PC, 430 S.W.3d 515, 526 (Tex. App.—Fort Worth 2014, pet. denied) (holding that contempt orders are not criminal convictions as contemplated by *Peeler*).

763. *See* Winniczek v. Nagelberg, 394 F.3d 505, 508 (7th Cir. 2005), *as amended* (Feb. 3, 2005) (rejecting the actual innocence approach); Hilario v. Reardon, 960 A.2d 337, 344–45 (N.H. 2008) (ruling that a client was not precluded from suing attorney for filing a motion without his consent); McKnight v. Office of the Pub. Defender, 936 A.2d 1036 (N.J. Super. Ct. App. Div. 2007), *rev'd per curiam*, 962 A.2d 482 (N.J. 2008) (adopting the two-track approach).

764. *See Winniczek*, 394 F.3d at 508 (criticizing the rule for the limits of its "logic").

765. *Id.* at 507.

claim that alleged overcharging rather than malpractice.[766] For such a contract claim, "[t]here [was] no difficulty in quantifying damages" as there might be in a malpractice claim arising from criminal representation.[767] The court further recognized that "[s]ince liability for breach of contract is, in general, strict liability, the cause, character, and mental element of the breach usually are immaterial."[768] The Supreme Court of New Hampshire held that the criminal malpractice bar does not apply to protect an attorney who had filed a motion to withdraw his client's plea in a criminal case without the defendant's knowledge or consent.[769] The court reasoned that the exoneration rule would not extend to protect such conduct, since it did not relate to any strategic or tactical decision pertaining to the original conviction.[770]

However, nowhere has the erosion of the exoneration rule been more evident than in New Jersey. For example, in *McKnight v. Office of the Public Defender*,[771] the Superior Court of New Jersey, Appellate Division, considered the case of Garvin McKnight, an immigrant from Trinidad and Tobago who pled guilty on July 26, 2000 to assaulting his girlfriend.[772] The plea resulted from the advice of McKnight's public defender, and was documented in a plea form that included "the following question: Do you understand that if you are not a United States citizen or national, you may be deported by virtue of your plea of guilty?"[773] McKnight's public defender, Mr. Walshe, responded "inapplicable," even though his client was not a citizen.[774] On September 12, 2000, the INS informed McKnight that he was deportable, thanks to his guilty plea.[775] Six days later, McKnight moved to withdraw the guilty plea, but on September 21, 2000 the judge denied the motion.[776] That same day, McKnight was sentenced to a three year prison term.[777] On October 24, 2001, McKnight filed a petition requesting post-conviction relief, alleging ineffective assistance of counsel on the grounds that the public defender

766. *Id.* at 509.
767. *Id.*
768. *Id.* (citations omitted).
769. Hilario v. Reardon, 960 A.2d 337, 344–45 (N.H. 2008).
770. *Id.* at 345.
771. McKnight v. Office of Pub. Defender, 936 A.2d 1036 (N.J. Super. Ct. App. Div. 2007), *rev'd per curiam*, 962 A.2d 482 (N.J. 2008).
772. *Id.* at 1037.
773. *Id.*
774. *Id.*
775. *Id.*
776. *Id.*
777. *Id.*

"had failed to advise him of the deportation consequences of his plea."[778] "The Public Defender's Office did not assign counsel to represent [McKnight] until sometime in 2003."[779] On September 12, 2003, following an evidentiary hearing at which Walshe testified that he had filled out the pertinent portion of the form without confirming McKnight's citizenship status, the judge found that McKnight had been deprived of effective assistance of counsel.[780]

On February 13, 2004, McKnight filed a tort claim notice declaring his intent to sue the public entity involved, the Office of the Public Defender.[781] The defendants motioned for summary judgment, arguing that the plaintiff had failed to timely serve a notice of claim within ninety days of the cause of action accruing; a date that defendants pegged as September 12, 2000 (when the INS gave notice of its intent to seek deportation).[782] Agreeing that the cause of action had accrued on September 12, 2000, the trial judge dismissed the case.[783]

The appellate court examined the various approaches taken in other jurisdictions, including those states imposing the actual innocence requirement; states applying the exoneration rule (e.g., Texas); and the handful of states that refused to add any additional requirements like exoneration or proof of actual innocence.[784] It also analyzed the merits of the "two-track approach," which it approvingly described as "a more pragmatic approach not necessarily linked to the relevance of exoneration for defining when a criminal malpractice action accrues."[785] The appellate court rejected the policy considerations underlying *Peeler*'s exoneration rule as "ineffectual," saying:

> In short, it is difficult to view the application of this policy as espousing any philosophy other than a desire to keep the floodgates closed to suits filed by convicted criminals. We find this approach to be inconsistent with the

778. *Id.*

779. *Id.*

780. *Id.* at 1038.

781. McKnight v. Office of Pub. Defender, 936 A.2d 1036, 1039 (N.J. Super. Ct. App. Div. 2007), *rev'd per curiam*, 962 A.2d 482 (N.J. 2008).

782. *Id.*

783. *Id.*

784. *Id.* at 1042–44. The court's analysis includes states like Ohio, where courts treat criminal malpractice actions consistently with other legal malpractice suits. *See, e.g.*, Krahn v. Kinney, 538 N.E.2d 1058, 1061–62 (Ohio 1989) (holding that plaintiffs in criminal malpractice actions "need not allege a reversal of his or her conviction in order to state a cause of action," noting that such a requirement has the potential to "bear upon and even destroy the plaintiff's ability to establish" that their damages were proximately caused by the attorney's negligence). *Id.*

785. *McKnight*, 936 A.2d at 1044.

> understanding that the common law favors the availability of a remedy when a person has been damaged by the negligent conduct of another who owes that plaintiff a duty of care and is blind to the possibility that the plaintiff has not led a blameless life. Although this legal fiction may be all that holds back a flood of lawsuits, we cannot overlook the possibility that there may be meritorious claims in those flood waters; they should be resolved on their merits and not precluded by an artificial bar.[786]

The court also rejected the policy consideration that post-conviction relief procedures were adequate to protect a criminal malpractice plaintiff's constitutional and other rights, saying, "Those procedures do not reach so far as to provide the accused with a monetary remedy based upon an attorney's negligence despite the fact that the attorney's negligence may have caused damage. . . . [T]he relief available is not the same."[787] Furthermore, it also sharply criticized the policy rationale as "plac[ing] a heavy burden on a plaintiff in a criminal malpractice action," observing that such considerations "tend to eliminate the societal benefit of encouraging good lawyering through the imposition of civil liability," and that "[i]nsulating criminal defense attorneys from malpractice suits brought by former clients—through the heavy burden of requiring proof of plaintiff's actual innocence—may have an insidious tendency to lower professional standards."[788] The court also went on to harshly critique the exoneration rule, saying that the rule creates uncertainty about what could truly be considered an exoneration (speculating that McKnight's ultimate disposition might not qualify), and that "defendants who are prevented from pursuing post-conviction relief precisely because of their attorney's malpractice, will be entirely without opportunity for relief, thus allowing attorneys to escape liability by virtue of their own gross negligence."[789]

Ultimately, the New Jersey appellate court adopted the two-track approach, observing that it "best achieves the goals of certainty and predictability in ascertaining the date of accrual without causing a rush to judgment in the criminal malpractice action before the post-conviction proceedings run their course and without duplicating the courts' efforts in both matters."[790] The court also acknowledged that its holding might be viewed "as being more hospitable to malpractice actions," and that it had "no way of fairly assessing whether [its] judgment [would] generate

786. *Id.* at 1046.
787. *Id.* at 1047.
788. *Id.*
789. *Id.* at 1049.
790. *Id.* at 1051.

additional suits against attorneys."[791]

Following its lengthy analysis, the court upheld the dismissal of McKnight's claim on limitations grounds.[792] Justice Stern's vigorous dissent argued against the adoption of the two-track approach in favor of a holding that the malpractice action would not accrue until relief from a conviction is achieved.[793] What exact form should that relief take? According to Stern:

> [T]he defendant [would have] to be exonerated to the point of being able to show some injury caused by the alleged malpractice whether that relief is dismissal of the charges, acquittal on retrial, conviction of a lesser included offense or otherwise, before having to file, if not being permitted to file, his or her notice of tort claim.[794]

Justice Stern's dissent would later have its day when the New Jersey Supreme Court reversed and reinstated McKnight's malpractice action for the reasons articulated by Stern.[795] The court relaxed the meaning of "exoneration" considerably, holding—as Justice Stern had argued—that it "might be vacation of a guilty plea and dismissal of the charges, entry of judgment on a lesser offense after spending substantial time in custody following conviction for a greater offense *or any disposition more beneficial to the criminal defendant than the original judgment*."[796]

This significantly diluted standard was put to test in a recent New Jersey appellate case, *Cortez v. Gindhart*.[797] In this case, Eduardo Cortez pleaded guilty to federal tax charges, but claimed that his attorney "refused to negotiate a plea agreement," and that the deal later struck by another attorney was less favorable than what the government would have agreed to previously.[798] Cortez alleged that Gindhart failed to engage in any plea negotiations despite his repeated requests, resulting in the harsher sentence Cortez later received.[799] The appellate court held that even a guilty defendant who admits to a crime could be harmed by a lawyer's negligence during the plea process, including scenarios in which an attorney fails to

791. McKnight v. Office of Pub. Defender, 936 A.2d 1036, 1051–52 (N.J. Super. Ct. App. Div. 2007), *rev'd per curiam*, 962 A.2d 482 (N.J. 2008).

792. *Id.* at 1054.

793. *Id.* at 1057 (Stern, P.J.A.D., dissenting).

794. *Id.*

795. McKnight v. Office of Pub. Defender, 962 A.2d 482, 483 (N.J. 2008) (per curiam).

796. *Id.* (quoting *McKnight*, 936 A.2d at 1057) (Stern, P.J.A.D., dissenting) (emphasis added).

797. Cortez v. Gindhart, 90 A.3d 653 (N.J. Super. Ct. App. Div. 2014).

798. *Id.* at 656–59.

799. *Id.*

convey a plea.[800] Legal observers have criticized the opinion, saying that it places defense attorneys in a difficult position, given the trend toward using escalating plea offers (where a defendant is presented with a plea offer early in the case, and told it will be taken off the table within a short timeframe).[801] This timeframe, lawyers say, is too short to "have a realistic opportunity to investigate" the case adequately.[802]

Yet another recent New Jersey case follows this trend. In *Lopez-Siguenza v. Roddy*,[803] the Salvadoran criminal defendant was accused in January 2003 of engaging in a sexual relationship with Melissa Aguilar Cruz the year before; Cruz was purportedly fourteen years old at the time, while Lopez-Siguenza was twenty-one years old.[804] After his arrest and indictment, Lopez-Siguenza retained attorney Mark Roddy, who requested a certified or notarized birth certificate for Cruz from the prosecutors. Roddy never received one, and in fact the only birth certificate ever used by the prosecutors was apparently a handwritten forgery.[805] Acting on Roddy's advice that he stood no chance at trial, Lopez-Siguenza pleaded guilty.[806] After serving three years in prison, he was deported by U.S. immigration authorities.[807] Shortly thereafter, the defendant's mother hired another attorney, Jorge Coombs.[808] Noting a discrepancy between the name the purported victim gave police and the name on the alleged birth certificate, Coombs requested verification of the birth certificate from the Honduran consulate.[809] Coombs's digging eventually produced an official birth certificate bearing a name and national identification number that was similar to—but not the same as—what Cruz had provided to authorities.[810] The newly-discovered document revealed that Cruz would have actually been eighteen years old at the time of the relationship, prompting Lopez-Siguenza to file a petition for post-conviction relief that was granted with no opposition from prosecutors in 2012.[811]

800. *Id.* at 661.

801. *See* Mary Pat Gallagher, *Guilty Plea No Bar to Malpractice Claim*, N.J. L. J. (May 23, 2014), http://www.njlawjournal.com/id=1202656676516) (reporting on the reaction within the legal community to the Appellate Division's holding in Cortez).

802. *See id.* (communicating the Appellate Division's holding in Cortez).

803. Lopez-Siguenza v. Roddy, No. 13-2005, 2014 WL 1298300 (D.N.J. Mar. 31, 2014).

804. *Id.* at *1.

805. *Id.*

806. *Id.*

807. *Id.* at *2.

808. *Id.*

809. *Id.*

810. *Id.*

811. *Id.*

In 2013, Lopez-Siguenza then filed his suit in federal court for legal malpractice, breach of fiduciary duty, and breach of contract against Roddy for failure to pursue the production of an authentic birth certificate from the prosecution or any other source.[812] After Roddy's counsel filed a motion to dismiss for failure to state a claim for legal malpractice, the court granted the motion, giving Lopez-Siguenza twenty-one days to amend his complaint but dismissing the breach of contract and breach of fiduciary duty claims as duplicative.[813] The issue of whether or not Lopez-Siguenza's post-conviction relief constituted "exoneration" was not before the court, but under New Jersey's relaxed standards in such legal malpractice cases, it would clearly seem to satisfy requirements post-*McKnight*.

V. CONCLUSION

The unlawful conduct defense is still the majority rule in U.S. jurisdictions, with Texas's *Peeler* doctrine enjoying the company of most states to have considered the issue of whether and under what circumstances a criminal defendant can bring a legal malpractice claim against his lawyer. As exonerations multiply in Texas, and nationwide thanks to heightened public awareness and advances in the forensic sciences, the question of how to fairly compensate the innocent for years lost assumes greater prominence. One avenue, that of obtaining redress through a civil lawsuit for legal malpractice, has been sharply curtailed and in some instances wholly eliminated by the continued influence of the unlawful conduct doctrine. As critics within and beyond Texas's borders have pointed out, the policy considerations supporting the exoneration rule (such as not rewarding bad actors for their unlawful conduct and avoiding a costly flood of malpractice litigation from inmates with time on their hands) are outweighed by countervailing policy considerations. Among the leading ones are favoring the availability of a remedy for those harmed by the negligence of others; the societal benefits of promoting good lawyering and adequate professional standards; and avoiding uncertainty about what truly qualifies as an exoneration.

Even as jurisdictions like New Jersey have eroded or discarded the exoneration requirement, *Peeler* has been, until recently, the subject of relatively steady expansion in Texas. In some areas, such as pre-trial incarceration without bond or breach of contract claims by fee-paying

812. *Id.*

813. *Id.* at *3.

parents or other third parties, Texas law has not retreated from *Peeler* but has certainly resisted the temptation for further expansion. But with the Supreme Court of Texas's landmark ruling in *Dugger v. Arredondo*—a 2013 decision referenced by the Fort Worth Court of Appeals in its April 2014 ruling in *Byrd v. Galyen*—the stage may be set for a limitation on the impact enjoyed by *Peeler* over the last two decades. The day may yet come when a criminal defendant's conduct operates not as a complete bar to recovery, but as the subject of a comparative responsibility analysis by the finder of fact.