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The (So-called) Liability of Criminal Defense Attorneys: A System in Need of Reform

Meredith J. Duncan

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The (So-Called) Liability of Criminal Defense Attorneys: A System in Need of Reform

*Meredith J. Duncan**

“[L]awyers in criminal courts are necessities, not luxuries.”¹

“In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence.”²

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* Assistant Professor of Law, University of Houston Law Center; J.D., University of Houston Law Center, 1993; B.A., Northwestern University, 1988; former law clerk to Judge Edith H. Jones, Fifth Circuit Court of Appeals. My thanks to the University of Houston Law Center and the University of Houston Law Foundation for their generous support of this project. This article was the subject of a presentation given at the Southeastern Conference of the Association of American Law Schools in July of 2001; I am grateful to the conference participants who provided me with thoughtful and useful comments. Thanks also goes to Robert Schuwerk, who provided very useful comments and suggestions to early drafts of this article, as well as to Kristin Frels, Lisa Helfman, Jack Wilburn, Barbara Stalder, and Matt Horak for their wonderful research assistance.

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1] *(So-Called) Liability of Criminal Defense Attorneys*

I. INTRODUCTION

On trial for capital murder in Harris County, Texas³ in June of 1983, Calvin Burdine was represented by Joe Cannon, an experienced criminal defense attorney.⁴ Burdine was accused of murdering W.T. “Dub” Wise during a robbery. Both Douglas McCreight and Burdine were accused of committing this crime.⁵ Although the evidence indicated that McCreight was the primary actor during the crime, the State of Texas entered into a plea arrangement with McCreight for which McCreight served an eight year prison sentence.⁶ At Burdine’s trial, Cannon performed in a fashion that, apparently, was not unusual for him⁷—by sleeping through “substantial portions” of his client’s trial,⁸ including occasions where the prosecutor was questioning witnesses.⁹ Cannon dozed with his chin on his chest, his head bobbing up and down during the proceeding.¹⁰ He had a particular affinity for napping during the afternoons of both the guilt/innocence and punishment phases of Burdine’s trial.¹¹ Cannon slumbered anywhere from a few seconds to about ten minutes at a time,¹² and when he awoke, he often darted his head up suddenly and appeared quite startled.¹³

Of course, the record of Burdine’s trial cannot possibly indicate precisely when Mr. Cannon was asleep or awake or what trial happenings Cannon observed or missed because he was asleep. How-

3. The city of Houston, Texas is located in Harris County. Houston is noted by at least one scholar as being “the capital of capital punishment. Houston sends more people to death row than most states.” See Stephen B. Bright, *Will the Death Penalty Remain Alive in the Twenty-First Century?: International Norms, Discrimination, Arbitrariness, and the Risk of Executing the Innocent*, 2001 WIS. L. REV. 1, 15.

4. Burdine’s was not Cannon’s first representation of a capital case. Cannon had represented others, including Carl Johnson in 1979 when Johnson was convicted of capital murder. See *Burdine v. Johnson*, 66 F. Supp. 2d 854, 859 (S.D. Tex. 1999).

5. *Id.* at 855 n.1.

6. *Id.*

7. See *id.* at 858 (quoting testimony given by the trial judge’s clerk, Rose Marie Berry, who testified at the state district court evidentiary hearing that she “knew that [Cannon] had this problem [of sleeping while representing criminal defendants at trial]”).

8. *Ex parte Burdine*, Cause No. 37944-B (183d Dist. Ct. Harris County, Tex. Apr. 3, 1995).

9. *Burdine*, 66 F. Supp. 2d at 857.

10. *Id.*

11. See *id.*

12. See *id.* at 858.

13. *Id.*

ever, it was established that he missed “substantial portions” of the case against Calvin Burdine.¹⁴ Therefore, it is not surprising that the jury convicted Burdine of capital murder and sentenced him to death. What *is* surprising is that when Burdine complained of his trial counsel’s inexcusable behavior to Texas’s highest court of criminal appeals, the court summarily held that, although Burdine did prove that Cannon slept through substantial portions of Burdine’s capital murder trial, Burdine had not proven that he received ineffective assistance of counsel in violation of the Sixth Amendment.¹⁵ It was not until over sixteen years later that a divided court agreed with Burdine that the lawyering he received at his capital murder trial was constitutionally inadequate.¹⁶ Although ruling in Burdine’s favor, the court did so over strong and vociferous dissent.¹⁷

Calvin Burdine’s case is unique only inasmuch as he was ultimately afforded relief on his ineffective assistance of counsel claim.¹⁸

14. See *Ex parte* Burdine, Cause No. 37944-B (183d Dist. Ct. Harris County, Tex. Apr. 3, 1995).

15. See *Burdine*, 66 F. Supp. at 856 (quoting the one-page, unsigned opinion of the Texas Court of Criminal Appeals stating that “the trial court’s findings of fact [regarding the sleeping of trial counsel] are supported by the record,” but summarily proceeded to hold that Burdine “is not entitled to relief because he failed to discharge his burden of proof under *Strickland v. Washington*.”). In a similar case, a trial judge in whose court a defense attorney slept during a capital trial explained that the defendant’s Sixth Amendment right to effective assistance of counsel was not violated because the Constitution does not require a criminal defense lawyer to be awake. See Stephen B. Bright, *Casualties of the War on Crime: Fairness, Reliability and the Credibility of Criminal Justice Systems*, 51 U. MIAMI L. REV. 413, 419–20 (1997) (discussing the trial of George McFarland, a defendant sentenced to die after his capital murder trial in Houston).

16. See *Burdine v. Johnson*, 262 F.3d 336, 357 (5th Cir. 2001). The first panel of Fifth Circuit judges to hear Burdine’s appeal was divided in ruling that Burdine’s legal representation did not constitute ineffective assistance of counsel. See *Burdine v. Johnson*, 231 F.3d 950 (5th Cir. 2000).

17. See *Burdine v. Johnson*, 262 F.3d 336, 357–401 (5th Cir. 2001). In ruling on Burdine’s appeal, the Fifth Circuit Court of Appeals, sitting en banc, issued four separate opinions. One of the dissenting judges noted that “Burdine’s counsel actually provided competent representation throughout the course of the trial” and that the “sleeping lawyer” claim [was] in large part [just] a diverting tactic.” *Id.* at 357 (Jolly, J., dissenting). Another dissenting judge wrote that the court’s decision “must not be influenced” by the spectacle of Burdine’s lawyer sleeping through the trial. *Id.* at 356. “In focusing so narrowly and intently on Cannon’s sleeping, the majority has lost sight of the reasons for the Sixth Amendment’s requiring effective assistance of counsel in a criminal proceeding” *Id.* (Barksdale, J., dissenting). Burdine’s case has been appealed to the United States Supreme Court, but the Court has not yet decided whether to grant certiorari. See “*Sleeping Lawyer*” Case Not Ready for Bed Yet, HOUS. CHRON., Jan. 28, 2002, at A15.

18. See *infra* Part III.A.3 (explaining that petitioners rarely prevail in bringing ineffective assistance of counsel claims).

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What is *not* unique about his case is the deplorable legal representation that he received. There are a multitude of cases that reveal legal representation of criminal defendants as something that can be described as nothing less than “poor lawyering.”¹⁹ Unfortunately, this phenomenon occurs more often than our legal system may care to admit.²⁰

Evaluating the legal system as a whole, there are essentially three levels²¹ on which to assess poor lawyering: the constitutional level, the civil level, and the disciplinary level.²² Each of these levels has different mechanisms for evaluating the conduct of criminal defense attorneys: (1) on the constitutional level, by means of an ineffective assistance of counsel claim;²³ (2) on the civil level, by means of a criminal malpractice claim;²⁴ and (3) on the disciplinary level, by means of a disciplinary action against the attorney.²⁵ Unfortunately, the existence of this three-level system of safeguarding has done little to promote respectable criminal defense lawyering and has done even less to encourage the continued improvement of the criminal defense bar. Although unsettling, it is intellectually easy to explain why criminal defense lawyering is lacking: (1) ineffective assistance of counsel claims are difficult to win;²⁶ (2) criminal malpractice claims are even more difficult to win;²⁷ and (3) referrals to appropriate disciplinary bodies are both infrequent and unsuccessful.²⁸

19. See *infra* notes 36–38 and accompanying text (citing examples of poor lawyering).

20. In fact, Justice Sandra Day O’Connor, the author of the landmark ineffective assistance of counsel case, *Strickland v. Washington*, 466 U.S. 668 (1984), discussed *infra* Part III.A.1, recently acknowledged that criminal defendants often receive inadequate legal representation. See Ken Armstrong & Steve Mills, *O’Connor Questions Fairness of Death Penalty: Justice Rethinking the Laws She Shaped*, CHI. TRIB., July 4, 2001, at N1.

21. Use of the term “level” is not meant to suggest the existence of some hierarchical relation. Rather, I use the term as a means of describing the differing paths or courses of action available to criminal defendants who have complaints concerning their legal representation.

22. Poor lawyer performance may constitute constitutionally ineffective assistance of counsel. Additionally, poor lawyer performance, although not necessarily constitutionally infirm, may be regarded as professional negligence. Finally, poor lawyer performance that, although not necessarily constitutionally infirm or poor enough to constitute professional negligence, may violate applicable ethical requirements and, thus, be appropriate for discipline by the applicable agency. See *infra* Part III.A–C.

23. See *infra* Part III.A.

24. See *infra* Part III.B.

25. See *infra* Part III.C.

26. See *infra* Part III.A.2.

27. See *infra* Part III.B.2.

28. See *infra* Part III.C.

As they currently exist, the “safeguards” at the constitutional, civil, and disciplinary levels provide little monitoring of the criminal defense bar. Left unwatched, there is little incentive or hope of improving the quality of criminal defense lawyering. After detailing a few examples of poor lawyering in Part II,²⁹ Part III of this article examines the “safeguards” currently in place at each level and discusses how the existence of these “safeguards” may erroneously lead one to believe that the system is actively monitoring criminal defense lawyering.³⁰ Part III.A examines the constitutional level and the difficulties inherent in bringing a successful ineffective assistance of counsel claim.³¹ Part III.B evaluates the difficulties that a criminal defendant may encounter at the civil level in bringing a successful criminal malpractice claim against his lawyer.³² Part III.C considers the current inadequate use of the disciplinary process as a means of monitoring the conduct of criminal defense attorneys.³³ Part IV suggests how the legal system may begin to monitor the conduct of criminal lawyers more effectively, an undertaking that will improve the quality of criminal defense lawyering generally.³⁴ These changes should include abolishing the collateral estoppel effect of an ineffective assistance of counsel claim to bringing a criminal malpractice action; abolishing the actual innocence prerequisite to bringing a criminal malpractice claim; permitting a criminal defendant to file an ineffective assistance of counsel claim and a criminal malpractice claim jointly; encouraging trial judges to be more conscientious in reporting and documenting poor criminal defense lawyering that they witness in their courts; and implementing an automatic referral system whereby lawyers accused of providing incompetent representation are routinely referred to the appropriate disciplinary body. Our system as it currently exists does a poor job of monitoring the conduct of criminal defense lawyers. Creating a system that has in

29. *See infra* Part II.

30. *See infra* Part III (discussing the existing safeguards against poor criminal defense lawyering).

31. *See infra* Part III.A (discussing the constitutional safeguard against poor criminal defense lawyering).

32. *See infra* Part III.B (discussing the civil safeguard against poor criminal defense lawyering).

33. *See infra* Part III.C (discussing the disciplinary safeguard against poor criminal defense lawyering).

34. *See infra* Part IV.

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place *meaningful* safeguards will necessarily improve the legal representation that criminal defendants receive.

II. UNCONSCIOUS, INEBRIATED, AND OTHERWISE INCOMPETENT LAWYERING

As puzzling as it may seem at first glance, arguably the most vulnerable of all clients—criminal defendants—too often run the risk of being subject to the worst that the legal profession has to offer.³⁵ Sadly, the conduct about which Calvin Burdine complained is not as rare as it should be.³⁶ Neither is bad lawyering a new phenomenon.³⁷

35. That is not to suggest that *all* criminal defense lawyering is poor. To the contrary, many fine lawyers practice criminal defense. However, at least two reasons help explain why this segment of the bar, as compared to other segments of the bar, has the potential to have more occurrences of what can only be characterized as poor lawyering. First, the conduct of criminal defense lawyers is largely left unmonitored, a fact that is the subject of this article. Second, clients of criminal defense lawyers are often individuals who are indigent or otherwise unable to pay the costs of increasingly high legal expenses. The quality of lawyering that one receives often directly correlates to one's economic situation. See generally Stephen B. Bright, *Counsel for the Poor: The Death Sentence Not for the Worst Crime but for the Worst Lawyer*, 103 YALE L.J. 1835 (1994) (explaining that the quality of a capital defendant's legal representation is directly related to the defendant's economic condition).

36. Unfortunately, claims of sleeping lawyers are not as uncommon as they should be. See, e.g., *Courtney v. United States*, 708 A.2d 1008, 1011–12 (D.C. Cir. 1998) (ruling that defendant did not receive ineffective assistance of counsel when his lawyer only slept through insignificant portions of his trial); *Tippins v. Walker*, 77 F.3d 682, 687 (2d Cir. 1996) (involving a defense attorney who slept every day of his client's criminal trial, sleeping through a critical prosecution witness and during damaging testimony presented by a co-defendant); *McFarland v. Texas*, 928 S.W.2d 482, 505–06 (5th Cir. 1996) (en banc) (holding that although one of defendant's two lawyers, a 72-year-old experienced attorney, took short naps during the afternoon sessions of the trial, defendant did not receive ineffective assistance of counsel); *Javor v. United States*, 724 F.2d 831, 833–34 (9th Cir. 1984) (holding that defendant received ineffective assistance of counsel because his attorney slept through substantial portions of his trial); *United States v. Muyet*, 994 F. Supp. 550, 560–63 (S.D.N.Y. 1998) (ruling that defendant did not receive ineffective assistance of counsel when both the defendant and attorneys for his co-defendants testified that the defendant's attorney slept frequently throughout the trial); *United States v. Reyes*, No. 90 Cr. 584 (CSH), 1991 WL 95395, at *5 (S.D.N.Y. May 30, 1991) (ruling that although attorney may have slept through portions of criminal defendant's trial, defendant could not establish under *Strickland* that his attorney's performance was deficient or that his case was prejudiced as a result); *Halverson v. State*, 372 N.W.2d 463, 466 (S.D. 1985) (holding that an attorney who admitted during hearing for post-conviction relief that he had slept during the plea agreement did not provide ineffective assistance of counsel); *Villarreal v. State*, No. 01-98-00858-CR, 2000 WL 190208, at *3 (Tex. App. Feb. 17, 2000) (ruling that defendant did not receive ineffective assistance of counsel even though his attorney may have slept through the majority of the testimony of the arresting officers and that his counsel's failure to cross-examine and object during that testimony is mere speculation of prejudice to his case); Bright, *supra* note 15, at 420–21 (noting that sleeping lawyer cases and cases involving other forms of poor criminal defendant representation are not

Although it is true that the majority of clients in the majority of cases are represented by adequate lawyers, instances of clients being represented by lawyers who, for whatever reason, are inept at the time of the representation occur more frequently than our system should tolerate.³⁸ Consider, for example, the representation of Perry

unique to Harris County, Texas but, rather, that equally shocking examples can be found throughout the country).

37. Incidents of poor lawyering have been reported in case law for many years. *See, e.g.*, *Hudspeth v. McDonald*, 120 F.2d 962 (10th Cir. 1941) (finding that defendant's attorney was drunk and asleep at various times throughout the criminal trial); *United States v. Butler*, 167 F. Supp. 102 (E.D. Va. 1957) (alleging that morphine-addicted attorney fell asleep several times throughout the criminal defendant's trial); *State v. Keller*, 223 N.W. 698, 699–700 (N.D. 1929) (involving a criminal defendant represented by a lawyer who was so intoxicated that he did not know what was transpiring at all times in the courtroom, who failed to examine the jury for cause, did not put any witnesses on for the defense, and made no argument to the jury); *O'Brien v. Commonwealth*, 74 S.W. 666, 669 (Ky. Ct. App. 1903) (involving a defendant convicted of murder represented by a lawyer who was so drunk throughout trial that, for example, at the time the case was to be argued before the jury, the arguments had to be postponed by the court to the next day).

38. *See supra* note 20 and accompanying text. For recent examples, see *Burnett v. Collins*, 982 F.2d 922, 930 (5th Cir. 1993) (involving a defendant convicted of aggravated robbery after being represented by attorney who allegedly smelled of alcohol during defendant's trial and entered a facility for treatment of alcohol abuse after the trial); *Bellamy v. Cogdell*, 974 F.2d 302, 303–04, 309 (2d Cir. 1992) (finding that an attorney's admitted physical and mental incapacity prior to trial, that resulted in immediate suspension from the practice of law based on incompetency after the trial, did not constitute ineffective assistance of counsel); *McDougall v. Dixon*, 921 F.2d 518, 534–35 (4th Cir. 1990) (involving a situation where one of defendant's attorneys, who had his law license suspended multiple times, was being treated for depression and suffered from migraine headaches so severe during his representation of defendant for capital murder that he had to visit local emergency rooms at least nine times during trial and take large quantities of medication that may have caused mental confusion and a hangover); *Smith v. Ylst*, 826 F.2d 872 (9th Cir. 1987) (involving a defendant convicted of murder while represented by an attorney who abused illegal drugs and suffered from alleged insane delusions that resulted in erratic and bizarre behavior and representation at trial); *Berry v. King*, 765 F.2d 451 (5th Cir. 1985) (involving a defendant convicted of capital murder while represented by an attorney who abused illegal drugs); *Young v. Zant*, 727 F.2d 1489 (11th Cir. 1984) (involving a defendant convicted of capital murder and sentenced to death while being represented by an attorney with an admitted drug problem); *Fowler v. Parratt*, 682 F.2d 746 (8th Cir. 1982) (involving a defendant convicted of embezzlement charges while being represented by an attorney who admitted to being an alcoholic and who suffered from blackouts during the representation); *Bonin v. Vasquez*, 794 F. Supp. 957 (C.D. Cal. 1992) (holding that defendant was not denied ineffective assistance of counsel despite the fact that his lawyer was addicted to drugs); *Pilchak v. Camper*, 741 F. Supp. 782 (W.D. Mo. 1990) (involving a defendant convicted of drug and weapons charges after being represented by a lawyer suffering from Alzheimer's disease at the time of trial); *Hernandez v. Wainwright*, 634 F. Supp. 241 (S.D. Fla. 1986) (finding that an attorney who was allegedly an alcoholic and impaired by alcohol during defendant's trial did not render ineffective assistance of counsel); *Pugach v. Mancusi*, 310 F. Supp. 691 (S.D.N.Y. 1970) (involving an attorney allegedly suffering from mental illness who became so disoriented and confused at times throughout the de-

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Bellamy. In the mid- to late-1980s, after almost fifty years in the profession, attorney Sidney J. Guran retired from practicing law.³⁹ At seventy-one years of age and under the care of a physician, Guran's health was declining.⁴⁰ His doctor diagnosed him as suffering from polyneuropathy, a neurological problem characterized, among other things, by peripheral motor weakness, unsteadiness on one's feet, and an inability to concentrate.⁴¹ In January of 1986, Perry Bellamy's mother retained the ailing Guran, in spite of his medical problems, to defend her son against murder charges.⁴² Although Guran had been retired from the practice of law for over a year, Guran agreed to the representation, a decision based in part on the fact that he had represented Perry numerous times in the past.⁴³

Several months later, in October of 1986, in an action unrelated to Bellamy's murder case, the Departmental Disciplinary Committee for the First Judicial Department (the "Committee") filed charges of professional misconduct against Guran.⁴⁴ Less than a month after being contacted by the Committee regarding the disciplinary charges, Guran's attorney sent a letter to the Committee in which he stated that Guran was mentally incapable of defending himself before the Committee and requested that the disciplinary proceedings be adjourned due to his client's compromised mental state.⁴⁵ Enclosed with the letter to the Committee was a letter from Guran's doctor indicating that treatment of Guran's medical conditions would take

defendant's trial that after each incident, the court made an informal inquiry of the attorney in the robing room and learned that the attorney suffered from mental fatigue); *Haney v. State*, 603 So. 2d 368 (Ala. Crim. App. 1991) (finding one of defendant's attorneys in contempt of court for appearing while drunk at criminal defendant's capital trial); *People v. Garrison*, 765 P.2d 419, 440 (Cal. 1989) (en banc) (involving a defense attorney in a capital murder trial who was an alcoholic at the time of the representation and who subsequently died from the disease); *State v. Coates*, 786 P.2d 1182, 1186-87 (Mont. 1990) (involving an attorney who used cocaine during defendant's representation).

39. *See Bellamy*, 974 F.2d at 303.

40. *Id.* at 303-04.

41. *Id.* at 303.

42. *Id.*

43. *Id.*

44. *Bellamy v. Cogdell*, 952 F.2d 626, 627 (2d Cir. 1991), *vacated by* 974 F.2d 302 (2d Cir. 1992) (en banc). The Departmental Disciplinary Committee for the First Judicial Department is the body responsible for pursuing disciplinary charges against attorneys within that jurisdiction. The Committee investigated Guran for professional misconduct in connection with an accusation of alleged conversion of funds. *Bellamy*, 952 F.2d at 627.

45. *Id.*

between three and six months and that during that time Guran would be mentally incapacitated.⁴⁶ One month later, the Committee petitioned for Guran's indefinite suspension from the practice of law while at the same time moving for an order immediately suspending him from practicing.⁴⁷

In response to the Committee's request of an immediate suspension, Guran attested, in sworn affidavit, that although the allegations of his physical and mental incapacity were in dispute, he should be permitted to represent Bellamy in his murder trial scheduled for the following month.⁴⁸ In requesting permission to help in Bellamy's representation, Guran stated that he would not try the case by himself but wanted to be available to assist a "competent attorney."⁴⁹ Guran promised not to take any cases other than Bellamy's.⁵⁰ The Committee granted his request.

Bellamy's trial took place approximately one month later. In spite of his agreement with the Committee, Guran represented Bellamy without any trial assistance from additional counsel.⁵¹ The jury pronounced Bellamy guilty of murder on January 24, 1987.⁵² In March 1987, the Committee unanimously suspended Guran from the practice of law in order "to protect the public" because, as Guran conceded, he was incapable of practicing law.⁵³

Bellamy knew nothing of these developments until after he was convicted by the jury. At his sentencing hearing for the murder conviction in April 1987, Bellamy, who had just learned of his lawyer's suspension, was sentenced to fifteen years to life.⁵⁴ Being his first opportunity to do so, it was at the sentencing hearing that Bellamy complained that Guran had been unfit to represent him properly at his murder trial due to Guran's mental condition. Bellamy's claims

46. *Id.* at 627–28.

47. *Id.* at 628.

48. *Id.*

49. *Bellamy*, 952 F.2d at 628.

50. *See id.*

51. Although there was talk of Guran having attempted to acquire co-counsel, the record indicates that Guran may have never so intended. Guran lacked the funds to hire co-counsel because the retainer received from Bellamy's mother had long been spent. *See Bellamy v. Cogdell*, 974 F.2d 302, 312 (2d Cir. 1992) (Feinberg, J., dissenting).

52. *Bellamy*, 952 F.2d at 628.

53. *Id.*

54. Bellamy was sentenced to fifteen years to life for the murder conviction and five to fifteen years for a criminal weapon possession conviction. *Id.*

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went unheeded until he appealed to the Second Circuit Court of Appeals. The majority of the panel agreed that Bellamy had been denied the effective assistance of counsel in violation of the United States Constitution.⁵⁵ In so concluding, the panel reversed the lower court's denial of his request for habeas corpus based on ineffective assistance of counsel, ruling that "this is one of those rare instances where denial of effective counsel must be presumed as a matter of law, without any showing of prejudice."⁵⁶

In an acrimonious dissent, Judge Altimari disagreed.⁵⁷ Although Judge Altimari described Guran's inability to prepare for his own disciplinary hearing as "slightly . . . troublesome,"⁵⁸ Judge Altimari was of the opinion that such facts were "simply an insufficient basis upon which to conclude that Guran was not competent to defend Bellamy at the time of trial."⁵⁹ When Bellamy's case was reconsidered by the Second Circuit Court of Appeals sitting en banc, the majority of the court agreed with Judge Altimari and denied Bellamy relief.⁶⁰ Although Guran's lawyer, Guran's doctors, and Guran himself, as well as the state agency charged with policing the competence of local attorneys, declared that Guran was incompetent to practice law in the jurisdiction and was unable to defend *himself* in the disciplinary matter, the court in *Bellamy* held that Guran was constitutionally competent to defend *another*, namely, Perry Bellamy, against murder charges.

III. EXISTING "SAFEGUARDS" AGAINST POOR CRIMINAL DEFENSE LAWYERING

There are essentially three levels at which the conduct of a criminal defense attorney may be evaluated: (1) the constitutional level, where a criminal defendant has the right to bring an ineffective assistance of counsel claim based on the Sixth Amendment right guaranteeing assistance of counsel; (2) the civil level, where the criminal defendant has the right to pursue a criminal malpractice action against

55. *Id.* at 626.

56. *Id.* at 627.

57. *See id.* at 631 (Altimari, J., dissenting).

58. *Bellamy*, 952 F.2d at 635 (Altimari, J., dissenting).

59. *Id.* (Altimari, J., dissenting).

60. *See Bellamy*, 974 F.2d 302, 308-09 (2d Cir. 1992) (en banc) (vacating the opinion of the panel in a 7-6 decision and affirming the judgment of the district court denying and dismissing Bellamy's petition for writ of habeas corpus).

his lawyer; and (3) the disciplinary level, where the lawyer about whose conduct a criminal defendant might complain may be subject to disciplinary proceedings. Each of these levels represents independent courses of action that criminal defendants may pursue in order to complain of poor lawyering. Each course of action has its own procedures and remedies that, in theory, are not affected by the other available courses of action.⁶¹

The existence of these three independent courses of action provide the appearance that the legal system is actively monitoring criminal defense lawyering. This multi-tiered system suggests that the criminal defense bar has at least three independent opportunities to be put on notice regarding acceptable standards of conduct and that violation of those standards will lead to penalties for noncompliance. Under such apparently watchful eyes, the expectation is that the behavior of the criminal defense bar will necessarily endeavor to improve. The hope and promise is that criminal defendants are conscientiously shielded from poor lawyering as a matter of course. Unfortunately, hopes and promises quickly fade upon careful inspection of each of these potential courses of action. A close look reveals that these supposed protections actually afford little refuge to criminal defendants. More troublesome still is the fact that the imposition of sanctions on their egregiously deficient attorneys is even less common. In fact, these existing “safeguards” are so tragically inadequate that representations such as Calvin Burdine’s and Perry Bellamy’s are both inevitable and, on an intellectual level, easy to explain.

*A. The Constitutional “Safeguard” Against
Poor Criminal Defense Lawyering*

The first level at which the conduct of a criminal defense attorney may be monitored is the constitutional level.⁶² The Sixth Amendment guarantees that “[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial” and, at that

61. *But see* discussion *infra* Part III.B.2 (discussing the possible effect of an unsuccessful ineffective assistance of counsel claim on a potential criminal malpractice action).

62. Americans often consider the United States Constitution as providing the greatest protection from any unjust or egregious behavior that may threaten a citizen’s right to be free from unwarranted imprisonment. For example, the Fifth Amendment guarantees, in part, that no person shall “be deprived of life, liberty, or property, without due process of law.” U.S. CONST. amend V.

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trial, “to have the Assistance of Counsel for his defence.”⁶³ Over the years, many criminal defendants who have received inadequate legal representation have sought refuge in the Sixth Amendment’s guarantee of the assistance of counsel.⁶⁴ In our country’s history, the Sixth Amendment’s guarantee of the assistance of counsel has come to connote not just the presence of counsel on behalf of the criminal defendant, but rather the *effective* assistance of counsel.⁶⁵ Presently, a criminal defendant who believes that he has received representation falling below the constitutional guarantee of the Sixth Amendment can pursue what is known as an ineffective assistance of counsel claim. However, in its current form, an ineffective assistance of counsel claim protects criminal defendants from only the most egregious shortcomings of their lawyers.⁶⁶ Moreover, even in that narrow class of cases, ineffective assistance of counsel claims are inordinately difficult to win.⁶⁷

I. Ineffective assistance of counsel claims: Strickland v. Washington

*Strickland v. Washington*⁶⁸ is the preeminent ineffectiveness case decided by the United States Supreme Court. In 1976 in the state of Florida, David Washington stood trial for capital murder.⁶⁹ At his trial, he was represented by an experienced criminal defense lawyer.⁷⁰ In lieu of having a jury determine Washington’s guilt or innocence of the crimes charged, Washington pled guilty to three charges of capital murder.⁷¹ Because Washington’s counsel felt a sense of hopelessness about Washington’s case, at the sentencing phase of his

63. U.S. CONST. amend. VI.

64. Cf. Bright, *supra* note 35, at 1866 (describing the right to counsel as essential to the criminally accused).

65. See McMann v. Richardson, 397 U.S. 759, 771 n.14 (1970).

66. See William S. Geimer, *A Decade of Strickland’s Tin Horn: Doctrinal and Practical Undermining of the Right to Counsel*, 4 WM. & MARY BILL RTS. J. 91, 93 (1995) (discussing how, “contrary to its rhetoric in *Strickland*,” the Supreme Court has seriously undermined the right of indigent accused to have reasonable counsel); see also Bright, *supra* note 35, at 1857–66 (explaining that the Constitution does not require a criminally accused to be represented by able or effective counsel and describing this most fundamental of rights as receiving the least protection under the Constitution).

67. See *infra* Part III.A.2.

68. 466 U.S. 668 (1984).

69. *Id.* at 672.

70. *Id.*

71. *Id.*

trial—the phase of the proceedings at which the judge was called upon to decide whether Washington would be sentenced to life in prison or to death—the attorney failed to present character witnesses to testify on behalf of Washington although many were available, failed to request a psychiatric examination, and failed to present exculpatory evidence concerning Washington’s character and emotional state at the time he committed his crimes.⁷² Washington was sentenced to death.⁷³

After his case was affirmed on direct appeal,⁷⁴ Washington sought collateral relief in the Florida state courts, claiming that, *inter alia*, he had received ineffective assistance of counsel.⁷⁵ Washington based his claim on the deficiencies of his counsel at the sentencing phase.⁷⁶ Specifically, he complained that his lawyer’s failure to request a psychiatric report, failure to investigate and present character witnesses, failure to seek a pre-sentence investigation report, failure to present meaningful arguments to the sentencing judge, and failure to investigate the medical examiner’s reports or cross-examine the medical experts at the sentencing hearing prevented the judge from considering that Washington may have been chronically frustrated and depressed by his economic circumstances at the time.⁷⁷ Although this consideration would not have resulted in a finding that Washington was under the influence of extreme mental or emotional disturbance at the time, Washington contended that it would have provided evidence in mitigation of his sentence.⁷⁸

The Florida state courts denied his requests for relief.⁷⁹ Washington next filed for habeas relief in the federal courts. The federal trial court, based primarily upon the reasoning of the state courts that had entertained Washington’s previous appeals, held that there was not a likelihood or even a “significant possibility” that any of Washington’s counsel’s errors had affected the outcome of the sentencing proceeding.⁸⁰ In other words, the federal trial court ruled that, al-

72. *Id.* at 673.

73. *Id.* at 675.

74. *See* Washington v. State, 397 So. 2d 285 (Fla. 1981).

75. *Strickland*, 466 U.S. at 675.

76. *Id.*

77. *Id.* at 675–76.

78. *See id.*

79. *See id.* at 675.

80. *See id.* at 678–79.

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though Washington's counsel may have made errors, the state court judge would have sentenced Washington to death even absent counsel's errors and, therefore, there was no basis for relief.⁸¹

On appeal, Unit B of the former Fifth Circuit, now the Eleventh Circuit, sitting en banc, granted Washington's request for relief and remanded the case to the trial court.⁸² The State then appealed that ruling and filed a petition for writ of certiorari that was granted by the United States Supreme Court; a claim of ineffective assistance of counsel based on a violation of the Sixth Amendment had not previously been considered by the Court.⁸³

On behalf of the Court, Justice O'Connor described the constitutional right to be enjoyed by all criminal defendants:

The Sixth Amendment recognizes the right to the assistance of counsel because it envisions counsel's playing a role that is critical to the ability of the adversarial system to produce just results. An accused is entitled to be assisted by an attorney, whether retained or appointed, who plays the role necessary to ensure that the trial is fair.⁸⁴

Because counsel's role is not merely pro forma, "the Court has recognized that 'the right to counsel is the right to the effective assistance of counsel.'"⁸⁵ Judging any claim of ineffectiveness with an eye on ensuring that the defendant received a fair trial as its guide, the Court announced that "[t]he benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result."⁸⁶ To do so, Justice O'Connor explained that lower courts are to consider two issues: (1) whether counsel's performance was deficient and (2) whether counsel's deficient performance prejudiced the defense.⁸⁷

81. See *Strickland*, 466 U.S. at 678–79.

82. See *Washington v. Strickland*, 693 F.2d 1243, 1262–63 (11th Cir. 1982) (en banc). The court remanded the case in order for the district court to consider Washington's case based upon the Eleventh Circuit's newly announced standard of evaluation for ineffectiveness claims. See *id.* at 1263.

83. See *Strickland*, 466 U.S. at 683.

84. *Id.* at 685.

85. *Id.* at 686 (quoting *McMann v. Richardson*, 397 U.S. 759, 771 n.14 (1970)).

86. *Id.*

87. See *id.* at 687.

a. Strickland's deficiency prong. Regarding the deficiency determination, the Court advised that the proper measure of evaluating an attorney's performance "remains simply reasonableness under prevailing professional norms."⁸⁸ In an opinion issued the same day as *Strickland*, the Court ruled that there may at times exist "circumstances that are so likely to prejudice the accused that the cost of litigating their effect in a particular case is unjustified."⁸⁹ In such circumstances, prejudice to the defendant's case is presumed. The Court gave two examples of when such prejudice is presumed: (1) where the accused is completely denied the assistance of counsel and (2) where defense counsel entirely fails to subject the prosecution's case to meaningful adversarial testing.⁹⁰ In making this determination, reviewing courts are to be "highly deferential" in scrutinizing trial counsel's conduct.⁹¹ In fact, reviewing courts are to "strongly" presume that the complained-of conduct falls within reasonable professional norms and "the defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'"⁹²

b. Strickland's prejudice prong. Regarding the second prong or prejudice determination, the Court emphasizes that "[t]he purpose of the Sixth Amendment guarantee of counsel is to ensure that a defendant has the assistance necessary to justify reliance on the outcome of the proceeding."⁹³ With that in mind, the Court determined that a finding of prejudice "requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable."⁹⁴ To do so, the defendant "need not show

88. *Id.* at 688 ("Prevailing norms of practice as reflected in American Bar Association standards and the like . . . are guides to determining what is reasonable, but they are only guides."). Although a criminal defendant has a constitutional right to effective assistance of counsel, "the purpose of the effective assistance guarantee of the Sixth Amendment is not to improve the quality of legal representation, although that is a goal of considerable importance to the legal system. The purpose is simply to ensure that criminal defendants receive a fair trial." *Id.* at 689.

89. *United States v. Cronin*, 466 U.S. 648, 658 (1984) (footnote omitted).

90. *See id.* at 659.

91. *Strickland*, 466 U.S. at 689.

92. *Id.* (quoting *Michel v. Louisiana*, 350 U.S. 91, 101 (1955)).

93. *Id.* at 691–92.

94. *Id.* at 687. The Court did rule that in rare circumstances prejudice may be presumed, such as where the criminal defendant was actually denied counsel altogether or where the defendant's attorney was burdened by an actual conflict of interest. *See id.* at 691–93. However, absent those limited circumstances, the petitioner is required affirmatively to prove

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that counsel's deficient conduct more likely than not altered the outcome in the case,"⁹⁵ but rather that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.⁹⁶ The Court defined "reasonable probability" as a probability sufficient to undermine confidence in the outcome.⁹⁷ In other words, the relevant inquiry is whether, absent the errors, the factfinder would have had reasonable doubt with respect to the defendant's guilt.⁹⁸ Additionally, similar to the first prong's presumption of reasonable attorney performance, the Court instructed reviewing courts to indulge a strong presumption that the outcome of the petitioner's proceeding is reliable.⁹⁹

c. Applying Strickland's two-prong test. After *Strickland*, in order to prevail at bringing an ineffective assistance of counsel claim the petitioner must affirmatively prove both deficient performance and prejudice.¹⁰⁰ The petitioner's claim fails if the Court finds either prong lacking:

[T]here is no reason for a court deciding an ineffective assistance claim to approach the inquiry in the same order [set forth in the opinion] or even to address both components of the inquiry if the defendant makes an insufficient showing on one. In particular, a court need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies. . . . If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed.¹⁰¹

prejudice. *See id.* at 693.

95. *Id.* at 693.

96. *See id.* at 694.

97. *Strickland*, 466 U.S. at 694. The Court based its test for prejudice on the test for materiality of exculpatory information not disclosed to the defense by the prosecution. *Id.* (citing *United States v. Agurs*, 427 U.S. 97, 104, 112–13 (1976)).

98. *Id.* at 695. If one is challenging one's death sentence, as was Washington's case, the legally relevant inquiry is whether there is a reasonable probability that, absent the errors, the sentencer would not have sentenced the defendant to death. *Id.*

99. *See id.* at 696.

100. Although *Strickland* is a capital case, the ineffective assistance of counsel inquiry fashioned by the Court is the same when applied in noncapital contexts as well. *See, e.g., Nix v. Whiteside*, 475 U.S. 157 (1986).

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

However, after announcing the appropriate two-prong test to be applied in determining all ineffectiveness claims, the Court emphasized that the principles it established in *Strickland* should not be interpreted as establishing mechanical rules.¹⁰² Rather, the Court stressed, “[i]n every case the court should be concerned with whether, despite the strong presumption of reliability, the result of the particular proceeding is unreliable because of a breakdown in the adversarial process that our system counts on to produce just results.”¹⁰³

2. *The ineffectiveness of Strickland*

When the Supreme Court granted certiorari to entertain the issue of a criminal defendant’s right to receive the effective assistance of counsel, there was initially great cause for hope and enthusiasm. Unfortunately, any thoughts of optimism were fleeting.¹⁰⁴ The unfortunate aftermath of *Strickland* is that a criminally accused’s right to the effective assistance of counsel does not have much substance to it at all.¹⁰⁵ The *Strickland* court announced that the Sixth Amendment’s purpose is not to grade a criminal defense attorney’s performance or to improve the quality of legal representation generally.¹⁰⁶ However, even though the Court professed to fashion a test that would lead to the just review of ineffective assistance of counsel claims, it is doubtful whether ineffective assistance of counsel claims are currently *justly* reviewed.¹⁰⁷

102. *Id.* at 696.

103. *Id.*

104. *Cf.* Bright, *supra* note 35, at 1860 (“[O]ne cannot help but wonder what progress has been made since the Supreme Court held that there is a right to counsel in capital cases in *Powell v. Alabama*.”).

105. *See* Geimer, *supra* note 66, at 94–95 (“*Strickland* has been roundly and properly criticized for fostering tolerance of abysmal lawyering.”); *see also* Bright, *supra* note 35, at 1859 (indicating that much less than mediocre lawyering passes muster under *Strickland* in death penalty cases); Richard L. Gabriel, Comment, *The Strickland Standard for Claims of Ineffective Assistance of Counsel: Emasculating the Sixth Amendment in the Guise of Due Process*, 134 U. PA. L. REV. 1259 (1986) (discussing how the *Strickland* decision effectively emasculates the Sixth Amendment).

106. *See Strickland*, 466 U.S. at 689, 697; *see also* Bright, *supra* note 15, at 420 (opining that the difficulty of a criminal defendant obtaining relief under the Sixth Amendment “speaks volumes about the [criminal justice system’s] lack of commitment to fairness”).

107. *See* Geimer, *supra* note 66, at 97–106 (evaluating the facts of *Powell v. Alabama* under the *Strickland* standard and concluding that had *Strickland* been already decided, the appellants in *Powell* would have lost: “the possibility that the actual performance of [the Scottsboro attorneys] might be constitutionally sufficient today demonstrates graphically the magnitude of *Strickland*’s destructive legacy”).

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Indeed, as a result of *Strickland*, it is more accurately stated that criminal defense lawyering has in fact been weakened in several aspects, affording criminal defendants little, if any, constitutional protection from bad lawyering.¹⁰⁸ First, the *Strickland* court encourages reviewing courts not to speak of incompetent legal representation in many situations, thereby eliminating an opportunity for courts to discuss and put defense lawyers on notice regarding unacceptable lawyering activities.¹⁰⁹ Second, the Court set in place strong presumptions that unnecessarily favor poor lawyering conduct.¹¹⁰ Further, as a result of *Strickland*, an ineffective assistance of counsel claim is essentially rendered a viable claim available only to the truly innocent criminal defendant.¹¹¹ Finally, a *Strickland* challenge requires the cooperation of the attorney about whom the petitioner complains.¹¹² Any one of these reasons individually makes bringing a successful ineffective assistance of counsel claim—even where one received deplorable legal assistance—an arduous task. Taken together, they make *Strickland* challenges exceedingly difficult to win.¹¹³ In fact, as explained below, these reasons together contribute to the reality that the vast majority of ineffective assistance of counsel claims

108. See Bright, *supra* note 15 (discussing the criminal justice system's lack of commitment to the Sixth Amendment's promise of a right to counsel).

109. See *infra* Part III.A.2.a.

110. See *infra* Part III.A.2.b.

111. See *infra* Part III.A.2.c.

112. See *infra* Part III.A.2.d.

113. There are far too many examples of egregious defense lawyering that have passed constitutional muster. See, e.g., Bellamy v. Cogdell, 974 F.2d 302 (2d Cir. 1992) (holding that attorney's admitted physical and mental incapacity prior to trial that resulted in immediate suspension after the trial did not constitute ineffective assistance of counsel); Smith v. Ylst, 826 F.2d 872 (9th Cir. 1987) (holding that attorney who smoked marijuana and who was apparently mentally ill before and during the trial, as evidenced by the fact that he argued paranoid theories of the case to the jury that were never developed at trial, was found to have provided effective assistance of counsel despite the fact that the presiding judge noted the attorney's erratic behavior and the attorney's associate, private investigator, legal secretary, his client, and others testified to the attorney's mental delusions and erratic behavior); Hernandez v. Wainwright, 634 F. Supp. 241, 249–50 (S.D. Fla. 1986) (holding that an attorney who spoke only English did not render ineffective assistance of counsel even though he was unable to communicate with his Spanish-speaking client, who was convicted of murder and armed robbery, during pre-trial meetings because the court found no nexus between the language barrier and the requisite deficiency of performance and prejudice required by *Strickland*); see also Coates v. McCormick, 5 F.3d 535 (9th Cir. 1993) (unpublished table decision) (holding that an attorney who used cocaine during the representation did not provide defendant with ineffective assistance of counsel pursuant to *Strickland*).

are denied even when the claims concern deplorable legal assistance.¹¹⁴

a. Considering prejudice before performance disserves the legal profession. At the outset, a subtle—yet admittedly difficult¹¹⁵—problem presented by *Strickland* is the Court's express pronouncement that courts reviewing ineffectiveness claims need not even reach the issue of deficient performance if it can be established that the alleged error had no effect on the judgment received.¹¹⁶

Although we have discussed the performance component of an ineffectiveness claim prior to the prejudice component, there is no reason for a court deciding an ineffective assistance claim to approach the inquiry in the same order or even to address both components of the inquiry if the defendant makes an insufficient showing on one. In particular, a court need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies. . . . *If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed.*¹¹⁷

The Court's expectation was right—many ineffectiveness cases are dispensed with based on lack of prejudice to the defendant's case, without discussing counsel's deficient performance.¹¹⁸ Encouraging the disposition of ineffectiveness claims without a discussion of deficient performance provides a disservice to legal professionalism. Strongly inviting the judiciary—some of the most influential members of the legal profession—not even to speak of poor lawyering is

114. See Martin C. Calhoun, Comment, *How to Thread the Needle: Toward a Checklist-Based Standard for Evaluating Ineffective Assistance of Counsel Claims*, 77 GEO. L.J. 413, 414–16 (1988) (discussing the fact that ineffective assistance of counsel claims rarely succeed).

115. I say that it is a difficult problem because it is well established that courts should refrain from rendering advisory opinions. I recognize that to ask courts to speak of something that will not ultimately affect the disposition of the case—such as speaking of deficient performance in the face of no prejudice—is not helpful to the task at hand of considering the effectiveness of the legal counsel to the case at bar. As such, it is unnecessary and advisory. However, I believe that commentary by reviewing courts of lawyering conduct serves the useful purpose of shedding light on acceptable or unacceptable criminal defense lawyering.

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

117. *Id.* (emphasis added).

118. See, e.g., *Keller v. Larkins*, 251 F.3d 408 (3d Cir. 2001) (denying ineffective assistance of counsel relief by finding no prejudice without discussing counsel's alleged deficient performance); *United States v. Caggiano*, 899 F.2d 99 (1st Cir. 1990) (same); *United States v. Fulford*, 825 F.2d 3 (3d Cir. 1987) (same).

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unfortunate¹¹⁹ and ultimately harmful to the legal profession.¹²⁰ Acknowledging and criticizing poor lawyering benefits the profession inasmuch as it provides the profession with examples of lawyering that are unacceptable and makes it clear that such shoddy performances will not be ignored or glossed over.

b. Strickland's strong presumptions are unreasonably burdensome. The presumptions that the Court put in place in *Strickland* make it very difficult for an ineffective assistance of counsel claimant to prevail.¹²¹ In order to prevail, the petitioner must overcome two separate presumptions: (1) the strong presumption that his lawyer's conduct was within the wide range of reasonable professional assistance and (2) the strong presumption that the outcome of the proceeding is reliable. In other words, a *Strickland* petitioner does not start on level ground in establishing an ineffective assistance of counsel claim. Rather, the *Strickland* petitioner starts in a hole of sorts and is required to climb out of that hole by overcoming each of these presumptions in order to reach level ground.¹²² After overcoming the strong presumptions, the petitioner must still go further in order to prove that he was constitutionally harmed.

It is unreasonable to presume that a person convicted of a criminal offense and now complaining of ineffective assistance of counsel

119. See *Strickland*, 466 U.S. at 713 (Marshall, J., dissenting) (opining that "little will be gained and much may be lost" by the majority's opinion in *Strickland*).

120. Cf. Bright, *supra* note 35, at 1879–80 ("[L]awyers must continue to bear witness to the shameful injustices which are all too routine in capital cases. The uninformed and the indifferent must be educated and reminded of what is passing for justice in the courts.").

121. Cf. *id.* at 1862 ("In applying *Strickland*, courts indulge in presumptions and assumptions that have no relation to the reality of legal representation for the poor, particularly in capital cases.").

122. The majority's opinion describes the presumptions as "strong" and "heavy," suggesting that a defendant must do more than simply meet the burden of proving his ineffectiveness claim. As Justice Marshall commented in his dissent:

The range of acceptable behavior defined by "prevailing professional norms," seems . . . sufficiently broad to allow defense counsel the flexibility they need in responding to novel problems of trial strategy. To afford attorneys more latitude, by "strongly presuming" that their behavior will fall within the zone of reasonableness, is covertly to legitimate convictions and sentences obtained on the basis of incompetent conduct by defense counsel.

Strickland, 466 U.S. at 713 (Marshall, J., dissenting) (citations omitted). However, it is important to keep in mind that the *Strickland* standards should not establish mechanical rules. The primary consideration should be whether "the result of the particular proceeding is unreliable because of a breakdown in the adversarial process that our system counts on to produce just results." *Id.* at 696. With this primary consideration in mind, certainly a *heavy* and *strong* presumption that a lawyer's conduct was reasonable is inappropriate.

received reasonable assistance. It is unreasonable to presume that the outcome of a convicted criminal's proceeding was reliable when he is before a court complaining about his lawyer's conduct at that very proceeding. To do so is to presume the very thing about which the petitioner complains. To presume so is to presume too much. The existing presumptions make the *Strickland* petitioner's burden far too heavy. However, that is not to suggest that it would be reasonable to presume that the petitioner received inadequate representation either. Rather, it is merely to suggest that there should be no presumption either way.

The historical bases for these presumptions are intriguing, as it is unclear upon what bases such presumptions are premised.¹²³ The result of applying these presumptions can, at times, be odd as well. When a client has a lawyer who is, at a minimum, awake, attentive, and unimpaired, the *Strickland* Court presumptions makes some sense. However, in truly bizarre cases—such as where one's lawyer is seriously impaired or unconscious during the representation due to drug or alcohol use—one should have a viable ineffective assistance of counsel claim without having to climb out of a hole and prove that seriously impaired or unconscious lawyering falls outside the realm of reasonable assistance.¹²⁴ For example, there are critical differences between a conscious lawyer and one who is not.¹²⁵ A lawyer

123. See Calhoun, *supra* note 114, at 427 (suggesting that the Court's decision granting such great deference to trial counsel was made because the Court was overly concerned with judicial economy and attorney reputation while being unconcerned about the competence of criminal defense lawyers).

124. See Jeffrey L. Kirchmeier, *Drink, Drugs, and Drowsiness: The Constitutional Right to Effective Assistance of Counsel and the Strickland Prejudice Requirement*, 75 NEB. L. REV. 425 (1996) (discussing the rare sleeping counsel cases and suggesting that in such circumstances prejudice be presumed).

125. It should go without saying that a deceased person—who when alive was a lawyer—propped up in counsel's chair throughout one's trial cannot provide adequate representation. See David L. Bazelon, *The Realities of Gideon and Argersinger*, 64 GEO. L.J. 811, 818–19 (1976) (“[T]he sixth amendment demands more than placing a warm body with a legal pedigree next to an indigent defendant.”). Indeed, representation by a deceased lawyer is, in fact, no representation at all. In unconscious lawyer cases, the question must then become whether an unconscious lawyer should be strongly presumed to be more akin to a deceased lawyer who is physically present during a criminal defendant's trial or an awake but poor lawyer. Certainly, the unconscious lawyer is more like the dead one. The fact that, following *Strickland*, reasonable minds can differ on this issue is astounding. *But see, e.g.*, *Burdine v. Johnson*, 262 F.3d 336, 396 (5th Cir. 2001) (Barksdale, J., dissenting) (“The majority maintains such an unconscious attorney is no different from one who is physically absent. The flaw in its analysis is that it assumes . . . that [the sleeping lawyer] was always so deeply and soundly asleep that he was always ‘unconscious.’”); see also Jeffrey L. Kirchmeier, *supra* note 124, at 474 (“In order for

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who is both present and conscious is available and able to exercise his or her judgment, be that judgment for better or worse.¹²⁶ A lawyer who is both present and conscious is able to consider the wide and varying range of strategies and tactics available, even if that lawyer does not exercise use of such strategies and tactics prudently.¹²⁷ A client whose lawyer was seriously impaired or unconscious during his legal proceeding should not have to overcome the strong presumptions that he received reasonable legal assistance and that the outcome of his proceeding is reliable.

Regarding the presumption against deficient performance, the *Strickland* Court explicitly stated that the prevailing norms of acceptable behavior are reflected in the various professional standards in place in the various jurisdictions, but the Court also stated that those standards are only to be guides in determining what is reasonable behavior for a lawyer.¹²⁸ Such a ruling is understandable if the Court is seeking to avoid unnecessary federal interference with State regulation of its own bar.¹²⁹ However, the Court's pronouncement essentially provides that the constitutionality of lawyers' conduct is to be guided by the *actual conduct* of the profession itself. The Court stated that acceptable conduct of lawyering pursuant to the Sixth Amendment relies "on the legal profession's maintenance of standards sufficient to justify the law's presumption that counsel will fulfill the role in the adversary process that the Amendment envisions. The proper measure of attorney performance remains simply reasonableness under prevailing professional norms."¹³⁰ This says nothing

the right to counsel to have meaning, the person representing the defendant must do more than just breathe.").

126. See Kirchmeier, *supra* note 124, at 466 ("The evil lies not in what counsel did, but in what counsel could have done had he or she been alert.").

127. See *id.* (describing actions by unconscious counsel as clearly not strategic).

128. See *Strickland*, 466 U.S. 668, 688 (1984). This hardly seems appropriate. Criticizing *Strickland* in the specific arena of capital offenses, one scholar writes:

There is no basis for the presumption of competence in capital cases where the accused is represented by counsel who lacks the training, experience, skill, knowledge, inclination, time, and resources to provide adequate representation in a capital case. The presumption should be just the opposite—where one or more of these deficiencies exist, it is reasonable to expect that the lawyer is not capable of rendering effective representation.

Bright, *supra* note 35, at 1863.

129. See, e.g., *Nix v. Whiteside*, 475 U.S. 157, 189–90 (1986) (Blackmun, J., concurring).

130. *Strickland*, 466 U.S. at 688 (citation omitted). "The debilitating ambiguity of an

more than that lawyer conduct is to be evaluated by what lawyers do. As such, it is not helpful.¹³¹

It is true that criminal defense lawyers should be afforded wide latitude in making tactical decisions regarding trial strategy and that care should be taken not to impinge unnecessarily upon States' interests in regulation of their own bar.¹³² However, it must also be possible to fashion some objective constitutional standards that provide a floor below which effective lawyering should not fall.¹³³

c. Strickland claims are reserved for the innocent. Strickland v. Washington effectively renders an ineffective assistance of counsel claim a privilege of the innocent.¹³⁴ The *Strickland* Court ruled that

'objective standard of reasonableness' in this context is illustrated by the majority's failure to address important issues concerning the quality of representation mandated by the Constitution." *Id.* at 708 (Marshall, J., dissenting).

131. It is doubtful that the Court would determine the constitutional standards of an alleged violation of the Fourth Amendment's prohibition against unreasonable search and seizure provision by using existing police department practices as a guide. Moreover, would the Court, in determining whether the police acted reasonably, rule that a presumption—much less a *strong* presumption—should be placed in favor of a police officer's conduct in a Fourth Amendment context? Most assuredly not. See HAZARD, KONIAK, AND CRAMPTON, *THE LAW AND ETHICS OF LAWYERING* 49 (3d ed. 2000) (teacher's manual). But that is precisely what the *Strickland* Court does, explicitly providing that a strong presumption be placed in favor of a criminal defense lawyer's conduct. See *Strickland*, 466 U.S. at 689 ("[A] court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'" (quoting *Michel v. Louisiana*, 350 U.S. 91, 101 (1955))). Although I agree with the Court that there is a wide range of acceptable lawyer conduct, to presume that a lawyer acted acceptably if the lawyer did not violate any internally created rules is nonsense. And to go further by placing the burden of overcoming that strong presumption on the criminal defendant goes too far. See *id.* at 707 (Marshall, J., dissenting) ("[T]he majority's efforts are unhelpful . . . [and not] likely to improve the adjudication of Sixth Amendment claims.").

132. See *Strickland*, 466 U.S. at 688–90 (discussing the fact that there are countless ways in which a criminal defense attorney may defend a case and that the same conduct that may be deficient in one setting may be brilliant in another). But "[t]o tell lawyers and the lower courts that counsel for a criminal defendant must behave 'reasonably' and must act like 'a reasonably competent attorney' is to tell them almost nothing." *Id.* at 707–08 (Marshall, J., dissenting) (citation omitted).

133. See *id.* at 709 (Marshall, J., dissenting) (explaining that there are many aspects of a criminal defense attorney's job that are amenable to judicial oversight). This is a very important issue that I hope to consider in greater detail in the future, as it is beyond the scope of this article.

134. "[T]he assumption on which the Court's holding rests is that the only purpose of the constitutional guarantee of effective assistance of counsel is to reduce the chance that innocent persons will be convicted." *Id.* at 711 (Marshall, J. dissenting). See Calhoun, *supra* note 114, at 428–34 (describing the *Strickland* standard as having a "guilty anyway" attitude).

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an attorney's poor performance prejudices a defendant's case in a constitutionally meaningful way only when the decision reached by the trier of fact would likely have been different absent the attorney errors.¹³⁵ Although in *Strickland* the petitioner's claim concerned his attorney's conduct at the sentencing phase of his trial,¹³⁶ outside the capital sentencing context the prejudice inquiry is essentially the same. When a defendant complains of counsel's errors during the guilt/innocence phase of a proceeding, reviewing courts consider whether the defendant would not have been convicted of the offense absent counsel's errors.¹³⁷

Establishing *Strickland* prejudice is a difficult task for the petitioner who is actually innocent of the offense of conviction,¹³⁸ and it is an even *more* daunting task for the convicted defendant who actually committed the offense of conviction. The obvious consequence is that the "guilty anyway" defendant, the defendant who likely would not have been acquitted of the charged offense even with adequate representation, will have serious difficulty in bringing a

135. See *Strickland*, 466 U.S. at 696. *But cf.* *United States v. Cronin*, 466 U.S. 648, 658 (1984). In *Cronin*, the Court stated that the Sixth Amendment was implicated when a defendant was challenging the reliability of the *trial process* itself, as opposed to challenging the reliability of the *result*, as discussed in *Strickland. Id.*

136. See *supra* Part III.A.1 (describing the factual background of *Strickland*).

137. See, e.g., *Bellamy v. Cogdell*, 974 F.2d 302 (2d Cir. 1992) (finding that although criminal defendant was represented at his murder trial by a seventy-two year old attorney whose license had recently been suspended because attorney was suffering from admitted physical and mental incapacity prior to defendant's trial, defendant did not receive ineffective assistance of counsel, based in part on the fact that the jury considered evidence of guilt and deliberated for five days before convicting defendant); *King v. Strickland*, 748 F.2d 1462, 1464–65 (11th Cir. 1984) (granting defendant relief for ineffective assistance of counsel because, inter alia, unlike the "clear guilt" of the defendant in *Strickland*, here the defendant may not have been guilty and a skilled attorney may have been able to convince a jury and a court not to mete out the harsh sentence).

138. It is important to distinguish between *legal* innocence and *actual* innocence. To say that one is *legally* innocent of a crime is to say that based on the evidence presented in a court of law, the State failed to meet its burden of proving the defendant's guilt beyond a reasonable doubt. The determination of legal innocence is grounded on one of the bedrock principles of our criminal justice system—that one is presumed innocent until proven guilty. The determination of legal innocence equates with a finding of "not guilty." Legal innocence does not mean that a defendant did not really commit the crime with which he has been charged. Rather, legal innocence means that the defendant was not determined by that jury during that court proceeding to be guilty beyond a reasonable doubt.

To say that one is actually innocent of a crime is to say that the defendant did not "do it." It says more than that the defendant was not guilty—legally innocent—of the charge. It means that the defendant actually did not commit the charged offense. It means that the State has charged the wrong person with the crime.

successful ineffective assistance of counsel claim even if the representation that he received was deplorable.¹³⁹

The suggestion that prejudice to one's case can be determined after the fact is troublesome in its own right.¹⁴⁰ But to define prejudice in such a manner as to extend the privilege of the effective assistance of counsel only to those who are, practically speaking, innocent of the charged offense goes too far.¹⁴¹ Constitutional rights should extend, not only to the actually innocent, but also to "guilty" defendants as well.¹⁴² *All* individuals should enjoy Sixth Amendment rights and, accordingly, have the right to the effective assistance of counsel. *All* accused are entitled to receive constitutionally sound representation.¹⁴³ To have an ineffective assistance of counsel claim available only to those who are innocent—as is the current state of the law—is misguided and offensive.¹⁴⁴ The right to effective assistance of counsel should be recognized, not for its own sake but for the effect it has

139. This is not to suggest that a guilty defendant cannot bring an ineffective assistance of counsel claim when, for example, his sentence would have been lessened but for his counsel's deficient representation. It is merely to suggest that the "guilty" defendant will likely have great difficulty proving that the outcome of his proceeding would have been favorably different.

140. Seriously considering the issue of whether the prejudice requirement should be dispensed with altogether in ineffective assistance of counsel claims exceeds the scope of this article. It is, however, a topic worthy of thorough consideration. *See, e.g., Strickland*, 466 U.S. at 712 (Marshall, J., dissenting) ("[A] showing that the performance of a defendant's lawyer departed from constitutionally prescribed standards requires a new trial regardless of whether the defendant suffered demonstrable prejudice thereby."); *id.* at 710 (Marshall, J., dissenting) ("The difficulties of estimating prejudice after the fact are exacerbated by the possibility that evidence of injury to the defendant may be missing from the record precisely because of the incompetence of defense counsel.").

141. *See Geimer, supra* note 66, at 131–39 (suggesting that once a criminal defendant demonstrates deficient performance, his conviction or sentence should be upheld only upon a showing by the prosecution that the denial of counsel was harmless beyond a reasonable doubt).

142. *See Strickland*, 466 U.S. at 711 (Marshall, J., dissenting) ("The majority contends that the Sixth Amendment is not violated when a manifestly guilty defendant is convicted after a trial in which he was represented by a manifestly ineffective attorney. I cannot agree. Every defendant is entitled to a trial in which his interests are vigorously and conscientiously advocated by an able lawyer.").

143. *See United States v. Cronin*, 466 U.S. 648, 657 n.19 (1984) (discussing that the Sixth Amendment requires counsel to "hold the prosecution to its heavy burden of proof beyond a reasonable doubt," even in the absence of a theory of defense).

144. *See Powell v. Alabama*, 287 U.S. 45, 68–69 (1932) (discussing the importance of one's constitutional right to counsel, even when one is not an intelligent and educated person with a perfect defense).

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on the ability of the criminally accused—*all* criminally accused—to receive a fair trial.¹⁴⁵

d. Relying on cooperation of defense counsel is necessary yet problematic. Another impediment to bringing a successful ineffective assistance of counsel claim is the difficulty involved in obtaining the cooperation of the lawyer about whom the defendant is complaining. The cooperation of the defense lawyer is critical, greatly increasing the likelihood of success of the ineffective assistance of counsel claim.¹⁴⁶ A successful claim often inquires into defense counsel's conversations and interactions with the defendant.¹⁴⁷ Therefore, it is unlikely to be successful without the cooperation of the criminal defense attorney about whom the defendant is complaining.¹⁴⁸

However, criminal defense attorneys whose conduct is the subject of ineffectiveness claims may have good reason to cooperate less than fully in a former client's ineffective assistance of counsel claim for good reason. Criminal defense attorneys have at least three powerful incentives for not cooperating to the fullest extent possible.

First is the issue of pride and reputation. A client's former attorney will be less than enthusiastic about helping a former client publicly criticize his representation. An ineffective assistance of counsel claim is an attack on a lawyer's work. As such, a successful ineffective assistance of counsel claim will necessarily have an adverse effect on a lawyer's reputation. It is understandable that many lawyers would be reluctant or altogether unwilling to participate actively in such an undertaking.

Second, in many jurisdictions, failed ineffective assistance of counsel claims operate to shield a criminal defense attorney from civil liability.¹⁴⁹ As discussed more fully below, without a successful ineffective assistance of counsel claim, in the majority of jurisdictions the

145. See *Cronic*, 466 U.S. at 658.

146. See David M. Siegel, *My Reputation or Your Liberty (or Your Life): The Ethical Obligations of Criminal Defense Counsel in Postconviction Proceedings*, 23 J. LEGAL PROF. 85 (1998–99) (indicating that a lawyer's duty of competency requires assisting the former client to probe into the quality of the previous assistance).

147. See *Strickland*, 466 U.S. at 691 (stating that "inquiry into counsel's conversations with the defendant may be critical" to an ineffectiveness assistance of counsel claim).

148. See Susan P. Koniak, *Through the Looking Glass of Ethics and the Wrong with Rights We Find There*, 9 GEO. J. LEGAL ETHICS 1, 7 (1995) (discussing the fact that an ineffective assistance of counsel claim is unlikely to succeed if the criminal defense lawyer vigorously contests the action).

149. See, e.g., *infra* Part III.B (discussing criminal malpractice actions).

ability to sue one's criminal defense attorney for criminal malpractice is, in most instances, eliminated.¹⁵⁰ Thus, the criminal defense attorney seeking to avoid malpractice liability has a powerful incentive not to cooperate or otherwise be helpful to a former client seeking to prove an ineffectiveness claim.¹⁵¹

The third reason for not cooperating is to forestall attorney discipline proceedings. Ineffective assistance of counsel claims draw attention to a lawyer's conduct. Although bringing or prevailing in an ineffective assistance of counsel claim does not automatically trigger disciplinary proceedings in any jurisdiction, a successful claim certainly brings added attention to questionable lawyer conduct that would likely have otherwise gone unnoticed by the appropriate disciplinary body. An attorney's cooperation in a former client's ineffective assistance of counsel claim only aids in bringing attention to the lawyer's misconduct.

Maintaining reputation, shielding oneself from civil liability, and averting attention of disciplinary proceedings all provide powerful disincentives for a lawyer to participate in a former client's ineffective assistance of counsel claim. The chances of success for an ineffectiveness claim are remote even with the lawyer's assistance, but without it, the chances of success are virtually nil.

3. Monitoring of criminal defense lawyering at the constitutional level is ineffective

At the constitutional level, a criminal defendant may bring an ineffective assistance of counsel claim as a means of enforcing one's Sixth Amendment right to effective assistance of counsel. However, the *Strickland* standards effectively leave criminal defendants a right without a remedy because ineffective assistance of counsel claims require that petitioners overcome strong and heavy presumptions favoring their former lawyers, virtually require petitioners to be able to establish their innocence, and almost entirely depend on the willingness of their former defense attorneys to forego their own interests

150. See *infra* Part III.B.2.

151. See Koniak, *supra* note 148, at 7 (explaining how the collateral estoppel rule operates to provide criminal defense attorneys a powerful incentive to oppose an ineffectiveness challenge to a former client's conviction).

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and admit to egregious professional misconduct. This explains why the vast majority of these claims are in large part unsuccessful.¹⁵²

As articulated by the *Strickland* court, the purposes of the Sixth Amendment include protecting the adversarial system and ensuring that the criminally accused receive a “fair” trial. However, the apparent constitutional remedy for poor lawyering is, in actuality, not freely available. For the reasons discussed above, even the criminally accused who have been victimized by the worst kind of legal representation are likely to find an ineffective assistance of counsel claim, practically speaking, unavailable. It is difficult to trust the integrity of our adversarial system and to believe that the criminally accused receive a fair trial when the means by which Sixth Amendment rights are enforced is in large part an illusion. The reality is that criminal defense lawyering at the constitutional level is not effectively monitored.

B. The Civil “Safeguard” Against Poor Criminal Defense Lawyering

The second level at which the conduct of a criminal defense attorney may be monitored is the civil level. Criminal defendants dissatisfied with their legal representation may sue their former lawyer in negligence for legal malpractice.¹⁵³ Criminal malpractice actions—malpractice actions brought against criminal defense attorneys by their former clients—have been said to be the primary means upon which courts rely to enforce the competence of criminal defense lawyers.¹⁵⁴ In fact, court decisions and ethics opinions alike have opined that legal malpractice actions are the most appropriate venue in which to ensure competent lawyering.¹⁵⁵ However, for the most part, courts have failed to use civil penalties to impose any real obligation

152. See Calhoun, *supra* note 114, at 414–16 (explaining and providing statistics to support the argument that ineffective assistance of counsel claims rarely succeed).

153. See Meredith J. Duncan, *Legal Malpractice by Any Other Name: Why a Breach of Fiduciary Duty Claim Does Not Smell as Sweet*, 34 WAKE FOREST L. REV. 1137, 1140–48 (1999) (describing that although the classic malpractice action is grounded in negligence, other malpractice actions are available such as claims for breach of fiduciary duty).

154. See Koniak, *supra* note 148, at 6 (discussing the malpractice action as the primary method relied upon by courts to enforce the competence of lawyers).

155. See, e.g., Florida Bar v. Neale, 384 So. 2d 1264, 1265 (Fla. 1980) (holding that a malpractice action is the appropriate means by which to condemn a lawyer guilty of neglect); ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 335, at n.1 (1974); see also Koniak, *supra* note 148, at 6 (asserting that ensuring reasonably competent lawyering has long been held to be the domain of malpractice).

of competence on criminal defense attorneys.¹⁵⁶ Although some of the various purposes of tort law are to deter and punish careless conduct that injures another, the courts, by virtue of the illogical rules that remain in place, essentially preclude criminal defendants victimized by incompetent lawyering from utilizing the tort system as a means of deterring and punishing poor criminal defense lawyering. Criminal defendants who have been victimized by negligent lawyering are too often collaterally estopped from bringing a criminal malpractice action at the civil level because courts erroneously conclude that ineffective assistance of counsel claims and criminal malpractice claims are equivalent actions.¹⁵⁷ Some of those courts put a criminal malpractice action even further out of reach by requiring a showing of actual innocence prior to permitting recovery for criminal malpractice.¹⁵⁸ As a result, for the most part, the conduct of criminal defense attorneys is not scrutinized in a meaningful way at the civil level.

1. The requirements of criminal malpractice claims

As with all negligence actions, in order to hold a defendant liable for malpractice the plaintiff must prove by a preponderance of the evidence that the defendant breached a duty of care which the defendant owed the plaintiff and that breach caused a cognizable harm to the plaintiff.¹⁵⁹

Regarding the duty component of the plaintiff's case, an attorney owes his client a duty to perform as the reasonably prudent attorney would perform under the same or similar circumstances.¹⁶⁰ All things considered, this reasonably prudent attorney standard is low. By this standard, to avoid civil liability, a lawyer need only act as the minimally competent attorney, a standard usually established by expert

156. See Koniak, *supra* note 148, at 5 (“[C]ase law generally demonstrates so little commitment to [a criminal defense attorney’s] obligation to provide competent representation in the criminal context that it is difficult to describe legal ethics as defined by the courts as including such an obligation.”).

157. See *infra* Part III.B.2 (discussing how the doctrine of collateral estoppel operates to prevent one from bringing a criminal malpractice action).

158. See *infra* Part III.B.2.b (discussing that a showing of actual innocence is too often required to bring a criminal malpractice action).

159. See Duncan, *supra* note 153, at 1140–45 (explaining the requirements of a classic professional negligence action).

160. See *id.* at 1142–43 (discussing the applicable standard of care for a professional negligence action).

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testimony.¹⁶¹ In order to establish breach, the malpractice plaintiff must prove that the attorney failed to meet that standard.¹⁶² If able to establish duty and breach, the malpractice plaintiff undertakes the most difficult component of any legal malpractice action, that of establishing that the attorney's breach of the standard of care caused a cognizable harm to the plaintiff. The causation component requires the plaintiff to prove that the lawyer's breach caused in fact and proximately caused actual harm to the plaintiff.¹⁶³

Establishing harm in any legal malpractice action—whether the underlying complained of representation was civil or criminal—is quite challenging. In the typical legal malpractice action where the underlying complained-of representation is civil, the malpractice plaintiff must prove a case within a case.¹⁶⁴ For example, if the malpractice plaintiff claims that as the plaintiff in the underlying civil suit he lost to a defendant because of his lawyer's negligent conduct, the malpractice plaintiff must not only prove that his lawyer breached a duty of care but that that very breach caused him to lose the lawsuit.¹⁶⁵ In order to do so, the malpractice plaintiff must establish that he would have prevailed in the underlying action but for his lawyer's incompetent representation.¹⁶⁶

Similarly, in the criminal malpractice context—where a criminal defendant sues his former attorney in negligence—the malpractice plaintiff has the same task; he must prove that his lawyer's breach caused harm to him. However, in the criminal context the showing of harm is arguably more difficult than proof of harm in the civil malpractice context because in criminal malpractice claims, proof of harm generally require a showing that, from the plaintiff's vantage

161. *See id.* (explaining that a professional negligence action usually requires expert testimony).

162. *See id.* (discussing the duty and breach components of a professional negligence action).

163. Causation in fact generally requires a finding that the plaintiff's harm would not have occurred but for the lawyer's breach. Proximate causation is a more abstract concept, as it is a determination of the appropriateness of holding a defendant civilly liable for a harm that the defendant did in fact cause.

164. *See* Duncan, *supra* note 153, at 1143–44 (describing the case-within-a-case requirement in a typical legal malpractice action).

165. *See id.*

166. Additionally, as a component of the malpractice action, the plaintiff must prove that he would have been able to collect the amount of the judgment that the finder of fact would have awarded to him but for lawyer's breach.

point, the result of the underlying criminal representation would have been favorably different. Proof either that the criminal malpractice plaintiff would not have been convicted in the underlying representation or that the malpractice plaintiff would have received a lesser sentence upon conviction but for counsel's breach of the standard of care is generally required.¹⁶⁷

Successfully bringing a malpractice action against an attorney—whether it be civil or criminal—is difficult even in the best of circumstances. The standard of care by which lawyers must conduct themselves is so dismally low that most attorneys rarely come close to falling below the applicable standard of care. Of those few that can be proven to have breached that standard, most still stand a good chance of avoiding liability in negligence due to the arduous causation and harm components of a legal malpractice claim. The picture is extremely bleak for criminal defendants who seek to sue their former attorneys for malpractice. As discussed below, criminal defense attorneys are virtually immunized from malpractice liability by a tort system apparently bent on protecting criminal defense lawyers from malpractice liability.¹⁶⁸ Senseless impediments are in place that all but completely insulate criminal defense attorneys from liability, and our tort system is virtually emasculated as a vehicle for sanctioning and deterring incompetent criminal defense lawyering.¹⁶⁹

2. The impediment to bringing criminal malpractice actions: The doctrine of collateral estoppel

In the majority of jurisdictions a plaintiff is barred from pursuing a criminal malpractice action if that plaintiff has not first obtained post-conviction relief.¹⁷⁰ In these jurisdictions, an unsuccessful effort

167. In many jurisdictions, courts do not reach the issue of actual causation in criminal malpractice actions because they hold, as a matter of law, that the criminal defendant is the sole proximate cause of any harm suffered due to a conviction. *See infra* Part III.B.2.b. However, it is important to note that the issue of proximate causation is a different inquiry than the issue of actual harm in a malpractice action. In jurisdictions that do not hold that a criminal defendant is the sole proximate cause of any conviction, the finding of actual harm is essential to maintenance of the malpractice action.

168. *See Koniak, supra* note 148, at 6–10 (explaining that criminal defense attorneys are less likely to be held liable for malpractice than are their civil counterparts and have what amounts to special immunity to perform incompetently).

169. This may explain why attorney malpractice insurance is quite inexpensive and why it is relatively easy to underwrite and monitor.

170. Post-conviction relief may take several forms, including habeas relief, reversal of the

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at post-conviction relief operates as collateral estoppel for the criminal defendant seeking to bring a malpractice action against his former attorney.¹⁷¹ Because the vast majority of individuals pursuing an ineffective assistance of counsel claim are unsuccessful,¹⁷² a large majority of those who may be inclined to pursue a criminal malpractice claim are collaterally estopped from doing so.

The doctrine of collateral estoppel is a procedural means by which a party can prevent another party from relitigating issues that were decided in a previous lawsuit.¹⁷³ It is a discretionary device said to be necessitated by judicial economy and fairness.¹⁷⁴ The appropriateness of applying the doctrine in any particular case rests on whether the party against whom estoppel is sought previously had a full and fair opportunity to litigate the issue.¹⁷⁵ This determination is

conviction on direct appeal, or the grant of a new trial. *See, e.g.*, Koniak, *supra* note 148, at 6–7 (noting that state courts are all but unanimous in holding that a criminal defendant who loses an ineffectiveness claim is collaterally estopped from suing for malpractice); Peeler v. Hughes & Luce, 909 S.W.2d 494, 495 (Tex. 1995) (“[W]ithout first establishing that she has been exonerated by direct appeal, post-conviction relief, or otherwise, Peeler cannot sue her [criminal defense] attorney.”).

171. *See, e.g.*, Shaw v. State, 861 P.2d 566 (Alaska 1993) (holding that a criminal malpractice claim does not accrue until the plaintiff obtains post-conviction relief); Stevens v. Bispham, 851 P.2d 556 (Or. 1993) (holding that, for statute of limitations purposes, the legal malpractice action did not accrue until the date on which the conviction was set aside and the client was released); Bailey v. Tucker, 621 A.2d 108 (Pa. 1993) (stating that a plaintiff will not prevail in a criminal malpractice action unless he has first obtained post-trial relief).

172. *See* discussion *supra* Part III.B (stating that most petitioners who bring an ineffective assistance of counsel claim are unsuccessful).

173. *See* 18 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 4402 (1981); Eli J. Richardson, *Taking Issue with Issue Preclusion: Reinventing Collateral Estoppel*, 65 MISS. L.J. 41, 53–58 (1995) (explaining that the effect of collateral estoppel is that the estopped party may not relitigate the precluded issue); *see also* John Bernard Corr, *Supreme Court Doctrine in the Trenches: The Case of Collateral Estoppel*, 27 WM. & MARY L. REV. 35, 36 (1985) (explaining the doctrine of collateral estoppel); Laura Gaston Dooley, *The Cult of Finality: Rethinking Collateral Estoppel in the Postmodern Age*, 31 VAL. U. L. REV. 43 (critiquing the appropriateness of the doctrine of collateral estoppel inasmuch as the doctrine circumvents the power of the community to speak in given contexts).

174. *See* Richardson, *supra* note 173 (explaining the ultimate objective of the doctrine of collateral estoppel as reducing litigation); *see also* Corr, *supra* note 173, at 38–39 (discussing the history of collateral estoppel as set forth in the Supreme Court’s decision *Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation*, 412 U.S. 303 (1971)); Dooley, *supra* note 173, at 51–63 (describing the benefit of applying the collateral estoppel doctrine as the “been there, done that” rationale and opining that our system justifies the use of collateral estoppel because of the fear of different decisionmakers in different contexts making inconsistent findings).

175. *See* Corr, *supra* note 173, at 36–37 (explaining that courts have discretion to apply collateral estoppel if an issue has previously been litigated fully and fairly).

not defined by any one test¹⁷⁶ but commonly requires a showing that (1) the issue sought to be precluded in the current suit is identical to the one involved in the prior litigation, (2) the issue was actually litigated in the former suit, (3) the issue was a critical and necessary part of the former judgment, and (4) the party sought to be prevented from relitigating the issue had a full and fair opportunity to litigate the issue in the former proceeding.¹⁷⁷ In criminal malpractice actions, the defendant criminal defense lawyer seeks to use the doctrine of collateral estoppel to preclude his former client from litigating the issue of the lawyer's negligence. In many jurisdictions, courts have concluded that a previous failed ineffective assistance of counsel claim collaterally estops a criminal malpractice plaintiff from litigating the issue of his former attorney's negligence. Courts so holding base their decision on a finding that ineffective assistance of counsel claims and criminal malpractice claims involve the determination of identical issues. As discussed below, the problem with this conclusion is that it is simply wrong.

a. Standards of care, actual harm, and Strickland presumptions are not equivalent findings. The majority of courts who have considered the issue have incorrectly concluded that the deficient performance requirement of an ineffective assistance of counsel claim¹⁷⁸ and a breach of the standard of care requirement of a criminal malpractice claim¹⁷⁹ involve identical factual issues.¹⁸⁰ Likewise, these courts have incorrectly concluded that proving prejudice in an ineffective assis-

176. See Richardson, *supra* note 173, at 49 (explaining that collateral estoppel elements vary from court to court).

177. See, e.g., Parklane Hosiery Co. v. Shore, 439 U.S. 322 (1979); DeWeese v. Town of Palm Beach, 688 F.2d 731, 733 (11th Cir. 1982); Stovall v. Price Waterhouse Co., 652 F.2d 537, 540 (5th Cir. 1981); see also Richardson, *supra* note 173, at 47–50 (discussing the elements of collateral estoppel). Some courts define the elements of collateral estoppel as consisting of an inquiry similar to determining (1) whether the issue is identical to an issue in the earlier proceeding; (2) whether the issue was actually litigated in the earlier proceeding; and (3) whether the determination of the issue in the earlier proceeding was a critical and necessary part of that judgment. See *id.* at 49.

178. See *supra* Part III.A.1.a (describing the deficiency prong of an ineffective assistance of counsel claim).

179. See *supra* Part III.B.1 (describing the breach of the standard of care requirement of a criminal malpractice claim).

180. See, e.g., Hockett v. Breunig, 526 N.E.2d 995, 1003 (Ind. Ct. App. 1988) (Shields, J., concurring) (finding that *Strickland's* deficient performance determination is the same as the criminal malpractice standard); Alberici v. Tinari, 542 A.2d 127, 131–32 (Pa. Super. Ct. 1988) (same).

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tance of counsel claim and harm in a criminal malpractice claim are identical determinations. Concluding that deficient performance and a breach of the standard of care are equivalent findings and that prejudice and harm are equivalent findings have led these courts to conclude mistakenly that collateral estoppel is appropriately applied in a criminal malpractice action brought subsequent to an ineffective assistance of counsel claim.

Proving that a lawyer failed to perform reasonably under prevailing professional norms¹⁸¹ may, upon superficial consideration, sound much like proving that a lawyer failed to perform as the reasonably prudent lawyer would under the same circumstances.¹⁸² Similarly, proving that a lawyer's deficient conduct prejudiced his client's case¹⁸³ may sound much like proving that a lawyer's breach of a standard of care caused harm to the malpractice plaintiff. However, a more thorough consideration reveals otherwise. Because of the presumptions of *Strickland*¹⁸⁴ that burden a defendant in an ineffective assistance case, proving deficient performance and prejudice in such a case is far more demanding than merely establishing the negligence of counsel in a criminal malpractice action.¹⁸⁵

As discussed earlier, to prevail in a claim of ineffective assistance of counsel, the petitioner is required to establish *constitutionally* deficient performance.¹⁸⁶ In doing so, the petitioner must work against the strong presumption that his counsel's performance fell within reasonable professional norms.¹⁸⁷ The petitioner does not begin his ineffective assistance of counsel claim on level ground. Rather, the ineffective assistance of counsel petitioner must overcome the strong presumption that his lawyer's conduct was reasonable.

181. A *Strickland* petitioner is required to do so to satisfy the deficiency prong of an ineffective assistance of counsel claim. *See supra* Part III.A.1.a (discussing the deficiency prong of an ineffective assistance of counsel claim).

182. A criminal malpractice plaintiff is required to do so to establish breach of the standard of care in a criminal malpractice action. *See supra* Part III.B.1 (discussing the requirements of bringing a criminal malpractice action).

183. This is required of the petitioner bringing an ineffective assistance claim. *See supra* Part III.A.1 (discussing requirements of an ineffective assistance of counsel claim).

184. *See supra* Part III.A.2 (describing the *Strickland* presumptions).

185. This is not to suggest that there are not other distinctions between proving deficiency and proving breach of the standard of care.

186. *See supra* Part III.A.1.a (describing the deficiency prong of an ineffective assistance of counsel claim).

187. *See supra* Part III.A.2.a (describing presumptions related to the deficiency prong of a *Strickland* challenge).

In comparison, the criminal malpractice plaintiff, in proving that the defendant failed to perform as the reasonably prudent attorney would perform under the same or similar circumstances, is unburdened by any such presumptions.¹⁸⁸ Rather, the criminal malpractice plaintiff begins on level ground in seeking to prove that his lawyer's conduct was unreasonable.¹⁸⁹

Similarly, proving prejudice in an ineffective assistance of counsel claim and proving harm in a criminal malpractice claim are not identical determinations. Because of the burdensome *Strickland* presumptions, the ineffective assistance of counsel petitioner seeking to establish prejudice has a heavier burden than does the criminal malpractice plaintiff seeking to establish harm. As previously discussed, in determining prejudice in an ineffective assistance of counsel claim, courts are to indulge a strong presumption that the outcome of the petitioner's case is reliable; the court is to presume that the result of the criminal trial is correct and just. In order to establish prejudice, then, the petitioner must start from the presumption that no harm in fact occurred and prove the contrary, a great burden indeed.

In comparison, the criminal malpractice plaintiff must prove that he suffered actual harm from his attorney's breach of the standard of care. In so doing, the criminal malpractice plaintiff starts with a clean slate, free from any presumption that such harm did not occur. Obviously, establishing that his lawyer's conduct in some measurable manner injured his case and thereby caused him actual harm is a difficult task but one that is easier than that of the ineffective assistance of counsel petitioner.

These distinctions are critical. The *Strickland* presumptions make it much harder for the ineffective assistance of counsel petitioner to prove that his lawyer provided constitutionally deficient performance than it is for the criminal malpractice plaintiff to establish breach of the standard of care. Likewise, because of the *Strickland* presumptions it is much more difficult for the ineffective assistance of counsel petitioner to establish prejudice than it is for the criminal malpractice plaintiff to prove harm sufficient to support a negligence action.¹⁹⁰

188. See *supra* Part III.B.1 (describing the requirements of a criminal malpractice claim).

189. See Koniak, *supra* note 148, at 8 (explaining that *Strickland* sets out presumptions that make it much more difficult for the ineffective assistance of counsel petitioner to meet his burden of showing substandard lawyer performance than for the civil plaintiff to show negligent conduct).

190. See Koniak, *supra* note 148, at 9 (stating that it is much more difficult to establish

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It is possible that a malpractice plaintiff's proof of his attorney's misconduct could fall short of *Strickland's* heightened requirements but might nonetheless satisfy ordinary tort standards of negligence. An ineffective assistance of counsel claim, or what may be termed *constitutional* malpractice, requires a finding of *ultra*-incompetence. Consequently, it is entirely inappropriate for courts to equate the two findings. It is clear that the petitioner has a significantly heavier burden of persuasion with respect to these issues in the ineffective assistance of counsel claim.¹⁹¹ Proving breach of the standard of care and proving deficient performance are not identical processes or findings; nor are proving actual harm and prejudice identical. Accordingly, findings regarding deficient performance and prejudice stemming from an ineffective assistance of counsel claim should not be treated as the identical issues as the determination of breach of the standard of care and harm in negligence actions for collateral estoppel purposes.¹⁹²

b. Requiring a showing of actual innocence is unreasonable. A further cause for concern is that in addition to the rule in the majority of jurisdictions that a failed ineffective assistance of counsel claim operates to collaterally estop a criminal defendant from pursuing a criminal malpractice claim, many jurisdictions also require that a criminal malpractice plaintiff prove that the plaintiff was actually innocent of the charges against which the attorney defended him.¹⁹³

prejudice in an ineffective assistance of counsel claim than it is to establish actual harm in a criminal malpractice suit).

191. The doctrine of collateral estoppel is a discretionary doctrine, and many reasons have been articulated to encourage courts not to apply the doctrine in various circumstances. See RESTATEMENT (SECOND) OF JUDGMENTS § 28 (1980). For instance, one of the legal exceptions to collateral estoppel is particularly compelling here: it is clear that "the party against whom preclusion is sought had a significantly heavier burden of persuasion with respect to the issue in the initial action than in the subsequent action." RESTATEMENT (SECOND) OF JUDGMENTS § 28(4) (1980).

192. See *Kerkman v. Varnum, Riddering, Schmidt & Howlett*, 519 N.W.2d 862, 863 (Mich. 1994) (rejecting the collateral estoppel rule because of the higher standard required of *Strickland* challenges due to the presumptions as opposed to the ordinary criminal malpractice standard).

193. See, e.g., *Shaw v. State*, 861 P.2d 566 (Alaska 1993); *Wiley v. County of San Diego*, 966 P.2d 983 (Cal. 1998) (holding that in order to bring a criminal malpractice action against the public defender, the client was required to prove that he was actually innocent of the charge for which he was convicted); *Rowe v. Schreiber*, 725 So. 2d 1245, 1249 (Fla. Dist. Ct. App. 1999) (holding that the criminal defendant must prove that he was innocent of the underlying crime in order to prevail on a claim of criminal malpractice against his attorney); *Lamb v. Manweiler*, 923 P.2d 976 (Idaho 1996); *Moore v. Owens*, 698 N.E.2d 707 (Ill. App. Ct.

These jurisdictions suggest that without a showing of actual innocence, the criminal malpractice plaintiff is the sole proximate cause of his predicament.¹⁹⁴ Liability for any harm suffered by the criminal defendant is not, as a matter of law, extended to his lawyer, even if the lawyer performed incompetently. This is troubling.

This actual innocence requirement makes the tort system only available to the innocent individual who apparently was unjustly accused.¹⁹⁵ However, the fact that a criminal defendant has committed the criminal offense with which he has been charged does not mean that he cannot suffer a cognizable harm by virtue of incompetent representation.¹⁹⁶ The fact that a person has committed the charged offense does not necessarily ensure that the jury will find him legally guilty. This is the difference between legal innocence and actual innocence.¹⁹⁷ In other words, when represented by non-negligent counsel, a criminal defendant who actually committed the charged

1998); *Glen v. Aiken*, 569 N.E.2d 783 (Mass. 1991); *State ex rel. O'Blennis v. Adolph*, 691 S.W.2d 498 (Mo. Ct. App. 1985) *Mahoney v. Shaheen, Cappiello, Stein & Gordon, P.A.*, 727 A.2d 996 (N.H. 1999); *Gill v. Blau*, 651 N.Y.S.2d 182 (N.Y. App. Div. 1996); *Stevens v. Bispham*, 851 P.2d 556 (Or. 1993); *Peeler v. Hughes & Luce*, 909 S.W.2d 494 (Tex. 1995); *Reimann v. Ginsberg*, 592 N.W.2d 319 (Wis. Ct. App. 1999) (unpublished table decision).

194. *See, e.g., Shaw*, 861 P.2d at 572 (Alaska 1993) (“[I]f plaintiffs engaged in the criminal conduct they are accused of, then they alone should bear full responsibility for the consequences of their acts, including imprisonment. Any subsequent negligent conduct by a plaintiff’s attorney is superseded by the greater culpability of the plaintiff’s criminal conduct.”); *Wiley*, 966 P.2d 983 (holding that for public policy reasons, a guilty defendant’s criminal conduct must be considered to be the sole proximate cause of his imprisonment); *Peeler*, 909 S.W. at 499 (ruling that criminal conduct of a defendant who is unable to prove his actual innocence is the sole proximate cause of his indictment and conviction for that offense).

195. It does so in a manner that is more blatant than the manner in which the prejudice requirement of *Strickland* renders an ineffective assistance of counsel claim a privilege of the innocent. *See supra* Part III.A.2.c (describing how ineffective assistance of counsel claims are essentially a claim for the innocent).

196. *See Koniak, supra* note 148, at 10 (explaining that a criminal defendant who committed the charged offense can be harmed by a lawyer’s breach of the standard of care by, for example, the lawyer failing to move for the exclusion of damaging evidence or a confession, failing to communicate a plea offer made by the State, or failing to investigate or present a defense); *cf. Peeler*, 909 S.W.2d 494 (involving complaint by criminal defendant that she suffered harm because, prior to the time that she pled guilty, her attorney failed to convey a more favorable plea offer to her).

197. A criminal defendant acquitted of the charges is not determined by the jury to be innocent of the charges. Rather, a criminal defendant acquitted of the charges against him is found not guilty by the finder of fact, a finding that does not necessarily reflect actual innocence but instead represents the jury’s determination that the State failed to meet its burden of proof of finding the defendant guilty of each and every element of the criminal offense of which the defendant was charged.

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offense may ultimately be rendered not guilty—legally innocent—of the offense.¹⁹⁸ But the same criminal defendant represented by incompetent counsel does not have that same opportunity. In our criminal justice system, which is grounded on the principle that a defendant is legally innocent until proven guilty beyond a reasonable doubt of the charged offense, not allowing all defendants to bring criminal malpractice claims is a cognizable harm and should be recognized as such.¹⁹⁹

Permitting only actually innocent criminal defendants to avail themselves of the tort system exposes *all* criminal defendants—whether innocent or not—to representation by lawyers who have the dangerous freedom of practicing without accountability. Moreover, and perhaps more importantly, even a criminal defendant who has actually committed the criminal offense with which he has been charged is entitled not only to legal representation in his defense but to non-negligent legal representation. Requiring actual innocence in the pursuit of a criminal malpractice claim prevents non-innocent criminal defendants from being entitled to adequate legal representation.²⁰⁰ This is a bizarre and utterly unprincipled outcome in which those persons most in need of adequate legal representation are exposed to the greatest risk of inadequate representation. The tragic result is that criminal defendants run the risk of being represented by

198. It is a principle upon which our justice system is based: “It is better that ten guilty persons escape than that one innocent suffer.” 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 27 (1862).

199. This may be comparable to the loss of chance doctrine of tort law, a doctrine recognized in a few jurisdictions in medical malpractice cases. The loss of chance doctrine enables a plaintiff to establish causation in fact when a defendant’s negligent conduct possibly, but not probably, caused in fact the harm which the plaintiff suffered. *See, e.g.*, *Herskovits v. Group Health Coop. of Puget Sound*, 664 P.2d 474 (Wash. 1983) (en banc) (allowing plaintiff to recover in negligence for loss of chance); *see also* Polly A. Lord, Comment, *Loss of Chance in Legal Malpractice*, 61 WASH. L. REV. 1479 (1986) (exploring adoption of the loss of chance doctrine in legal malpractice).

200. *See generally* Koniak, *supra* note 148. The author explains the difference between establishing actual innocence and showing damages in a malpractice action as follows:

Please note that [the requirement of actual innocence] is quite different from the ordinary requirement in malpractice cases that a plaintiff must show damages. . . . A corporate civil defendant found liable [for the wrongful death of a child], whose lawyer failed [to perform competently], need not establish that it did not in fact cause the wrongful death of the child to prevail in a malpractice suit, but merely that the result in the case would more likely than not have been different *but for* the errors.

Id. at 10.

defense attorneys who practice without accountability—at least insofar as civil liability is concerned.

3. Monitoring of criminal defense lawyering at the civil level is essentially unavailable

Criminal defense attorneys are virtually immune from civil liability. For the reasons previously discussed, on a practical level, criminal malpractice actions are unnecessarily unavailable to persons who may have been harmed by incompetent criminal defense lawyering. Many justifications are offered for restricting criminal malpractice actions in this manner; however, none of them withstand scrutiny.²⁰¹ Some say that facilitating criminal malpractice actions would encourage the filing of frivolous suits or that it would lessen the use of plea bargains.²⁰² Others suggest that it would render the defense bar unwilling to exercise its own independent legal judgment or, worse still, provide a disincentive for practitioners to practice criminal defense work.²⁰³ However, the most oft-stated reason for hindering a criminal malpractice plaintiff's ability to bring a claim is that a guilty defendant should not, for public policy reasons, be entitled to receive damages from his attorney's failure to procure an acquittal or lesser sentence.²⁰⁴ Particularly in jurisdictions that require a showing of actual innocence in order to bring a criminal malpractice action, the objection is that it is imprudent to allow non-innocent people to benefit from the legal system by allowing them to bring a malpractice action. The reasoning is that a person who has been adjudged

201. *See id.* at 12 (explaining that the excuses and justifications for the way that the system operates in failing to provide the effective monitoring of criminal defense attorneys “demands nothing of criminal defense lawyers, accepting almost all actual performance as adequate performance”). “It demands nothing of the rest of us, allowing us to continue to pride ourselves on guaranteeing the right of counsel in criminal cases, while not paying enough to ensure that indigent criminal defendants receive competent representation.” *Id.*

202. *See id.* (noting that “the fear of frivolous malpractice suits may be driving the adoption of these hurdles for criminal defendants”).

203. *See id.* (“[T]his argument boils down to nothing more than an admission that we do not pay these lawyers enough to demand that they be competent.”).

204. *See Carmel v. Lunney*, 511 N.E.2d 1126, 1128 (N.Y. 1987) (concluding that public policy prevents a criminal defendant who cannot assert his innocence from maintaining a criminal malpractice action against his former defense lawyer); Susan M. Treyz, Note, *Criminal Malpractice: Privilege of the Innocent Plaintiff?*, 59 *FORDHAM L. REV.* 719, 732 (1991) (discussing the trend of some courts to justify the actual innocence requirement in criminal malpractice suits as ensuring that guilty criminal defendants do not receive windfall damages for their attorney's failure to procure an acquittal).

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guilty of a criminal offense has forfeited various societal privileges, one being the right to pursue a criminal malpractice action.²⁰⁵

The problem with this articulation in particular is that it is impossible to determine whether a person would have been rendered legally innocent if competent counsel had represented him. It simply is not the case that every person who has actually committed an offense can be found guilty beyond a reasonable doubt of the offense if represented by non-negligent counsel. How can or why should a criminal defendant have to establish after a conviction that he was actually innocent before being afforded an opportunity to complain of incompetent legal representation? Can it truly be, as it seems, that we care only for the innocent person mistakenly entangled within the criminal justice system? It seems counterintuitive and illogical to suggest so.

Some courts claim that it is not judicially economical to allow criminal malpractice plaintiffs to bring negligence suits because the criminal system provides a remedy in the form of an ineffective assistance of counsel claim.²⁰⁶ Others have reasoned that it is illogical and unreasonable to allow a criminal defendant the opportunity to collect from his counsel for malpractice if he has failed in his ineffective assistance of counsel claim.²⁰⁷ What is illogical and unreasonable is that

205. See Koniak, *supra* note 148, at 11 (discussing the rights-based perspective that is used to justify the innocence hurdle and pointing out that criminal defendants who may have actually “done it” do “not lose the right to sue and collect damages for other wrongs experienced in the criminal justice system, like police brutality”). It is suggested in such circumstances that the criminal defendant’s criminal act is the sole proximate cause of his predicament irrespective of his counsel’s negligence, or that if the defendant was factually guilty, then no legally cognizable harm can be established to support the malpractice action. *See id.*

206. *See, e.g.,* Shaw v. State, 816 P.2d 1358, 1361 (Alaska 1991) (stating that “the requirement of post-conviction relief promotes judicial economy because many issues litigated in the quest for post-conviction relief will be duplicated later in the legal malpractice action”); Coscia v. McKenna & Cuneo, 25 P.3d 670, 675–76 (Cal. 2001) (opining that many of the issues litigated in a claim for ineffective assistance of counsel would be duplicated in a legal malpractice action); Steele v. Kehoe, 747 So.2d 931, 933 (Fla. 1999) (outlining policy arguments, such as the preservation of judicial economy, for having the prerequisite of post-conviction relief in order to maintain a legal malpractice claim); Rowe v. City of Fort Lauderdale, 15 Fla. L. Weekly 236 (Fla. Dist. Ct. App. 2002) (noting that remedies for ineffective assistance of counsel are available and that the requirement of appellate or post-conviction relief for a malpractice claim promotes judicial economy by avoiding the relitigation of supposedly settled issues).

207. *See* Zeidwig v. Ward, 548 So. 2d 209 (Fla. 1989); Robert J. Hoffman, *Legal Malpractice in the Criminal Context: Is Postconviction Relief Required?*, 47 FLA. B.J. 66, 66 (2000) (indicating that one of the key policy reasons that Florida courts have cited in barring a crimi-

these courts have, by an unconcerned attitude for the interests of criminal defendants or an unsatisfactory consideration of the legally relevant issues, mistakenly concluded that these actions are essentially equivalent. However, as indicated above,²⁰⁸ these courts are in error because the requirements of an ineffective assistance of counsel case far exceed those that should govern a criminal malpractice action.

The excessive concern behind each of these rationales for the rights of deficient criminal defense counsel has profound negative consequences going far beyond the injustice engendered in specific cases. By hindering the use of the tort system as a means of monitoring criminal defense lawyering, the system has foreclosed yet another means for assuring that a criminal defendant will receive competent representation. Instead, criminal defense—the backbone of our fundamental liberties—is transformed into an area where the inept, the indifferent, the incompetent, and even the unprincipled practitioners among us can continue to sully our profession with impunity. The apparent civil remedy for poor lawyering is, in actuality, an illusion. The reality is that too often there is no civil check on errant defense lawyers at all.

C. The Disciplinary “Safeguard” Against Poor Criminal Defense Lawyering

1. The disciplinary process

The third level at which the conduct of a criminal defense attorney may be monitored is the disciplinary level. The legal profession—like many other professions—has anticipated its share of incompetence.²⁰⁹ As a result, every jurisdiction has adopted some version of either the American Bar Association (“ABA”) *Model Rules of Professional Conduct* or the ABA *Model Code of Professional Responsibility*,

nal defendant from bringing a malpractice action against his lawyer is the fact that doing so would be unreasonable and illogical).

208. See *supra* Part III.B.2.a (distinguishing an ineffective assistance of counsel claim from a criminal malpractice action).

209. In every jurisdiction, the appropriate state bar has enacted rules of professional conduct that govern the lawyers practicing within that jurisdiction. Every code of professional conduct contains provisions mandating that lawyers practicing within the jurisdiction be competent or be subject to discipline. See, e.g., Preamble to MODEL RULES OF PROF’L CONDUCT: A Lawyer’s Responsibilities (1983) (“In all professional functions, a lawyer should be competent, prompt and diligent.”); *id.* R. 1.1 (requiring that all lawyers be competent).

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ethical guidelines by which lawyers must conduct themselves. Additionally, every jurisdiction has a body charged with the responsibility of enforcing the applicable ethical rules or codes. Sanctions for violating ethical standards range anywhere from private reprimand to permanent disbarment.²¹⁰

2. Monitoring of criminal defense lawyering at the disciplinary level is underutilized

The disciplinary process is rarely used as a means of ensuring that clients receive competent lawyering.²¹¹ In fact, ethics opinions and decisions alike have indicated that the disciplinary process should not be used to ensure that clients receive competent lawyering.²¹² This is unfortunate because, as long as the other levels at which defense lawyering may be safeguarded—namely, the constitutional level and the civil level—remain essentially illusory, the disciplinary level is the most easily accessible means by which criminal defendants can begin to be protected against bad lawyering.²¹³

To date, not one jurisdiction seems actively to use the disciplinary process to protect criminal defendants from incompetent criminal defense representation, even though doing so could help to compensate for the shortcomings of the constitutional and civil safeguards.²¹⁴ Neither bringing nor prevailing at an ineffective assistance

210. See generally Leslie C. Levin, *The Emperor's Clothes and Other Tales About the Standards for Imposing Lawyer Discipline Sanctions*, 48 AM. U. L. REV. 1 (1998) (discussing various problems associated with imposing sanctions against lawyers for professional misconduct).

211. See Anne M. Voigts, *Narrowing the Eye of the Needle: Procedural Default, Habeas Reform, and Claims of Ineffective Assistance of Counsel*, 99 COLUM. L. REV. 1103, 1125–26 (indicating that ineffective or incompetent counsel have little to fear from state ethics boards); see also Koniak, *supra* note 148, at 6 (discussing the fact that discipline for lawyer incompetence is rare and generally reserved for situations that involve either multiple instances of incompetence or incompetence coupled with other lawyer misconduct).

212. See Koniak, *supra* note 148, at 6 (citing Florida Bar v. Neale, 384 So. 2d 1264, 1265 (Fla. 1980) and ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 335, at n.1 (1974)).

213. See Geimer, *supra* note 66, at 95–96 (recommending upgrading ethics codes and rules of professional responsibility in order to more effectively improve criminal defense lawyering because “the state of the right to counsel today calls for more . . . radical responses”); cf. Koniak, *supra* note 148, at 9 (pointing out that the fact that courts do not protect criminal defendants’ rights in the courts could be a little more palatable if the system protected those same rights through another means, like through the disciplinary process).

214. See Koniak, *supra* note 148, at 9 (“[H]aving adopted the collateral estoppel rule for malpractice actions, not one court has made the slightest move to find some other method of demonstrating commitment to the obligation that lawyers provide competent representation to

of counsel claim or a criminal malpractice claim subjects the lawyer involved to any disciplinary proceedings whatsoever.²¹⁵ This is unfortunate because in the absence of constitutional or tort remedies the disciplinary process is an ideal starting place to move toward ensuring competent levels of legal professionalism in criminal defense lawyering.²¹⁶ Referral of poor criminal defense lawyering to appropriate disciplinary bodies is far too infrequent.²¹⁷ The failure of our system to do so renders the disciplinary system woefully inadequate at protecting criminal defendants against poor lawyering.

IV. TOWARD AN EFFECTIVE MEANS OF SAFEGUARDING AGAINST POOR CRIMINAL DEFENSE LAWYERING

Recall the pitifully inadequate representations of Calvin Burdine and Perry Bellamy.²¹⁸ Calvin Burdine's lawyer *slept* through substantial portions of his capital murder trial, yet it took sixteen years of appeal before a sharply divided court ruled that the legal representation he received was constitutionally inadequate. The representation that Perry Bellamy received was never determined to be inadequate at any level; he lost his ineffective assistance of counsel claim, as do the vast majority of those who pursue ineffectiveness claims. As a result, he and others like him, in the majority of jurisdictions, are unable to pursue a criminal malpractice claim against their attorneys. Moreover, in the majority of jurisdictions, the offending lawyers will likely not face any disciplinary sanction.

This situation is intolerable. The most vulnerable of all clients—criminal defendants who often have no voice—need the very best

criminal defendants.”); Treyz, *supra* note 200, at 732 (discussing that “[s]tate bar associations are often reluctant to impose sanctions for attorney incompetence”).

215. See Koniak, *supra* note 148, at 9–10 (“The lawyer may experience some degree of humiliation, assuming peers read the court decision reversing the defendant’s conviction. But that is it.”); see also Irwin D. Miller, *Preventing Misconduct by Promoting the Ethics of Attorneys’ Supervisory Duties*, 70 NOTRE DAME L. REV. 259 (1994) (describing the disciplinary process as passive and reactive until it is made aware of professional misconduct, at which point the disciplinary process is triggered).

216. See Treyz, *supra* note 204, at 732 (describing the state bar level as the only method of assuring competent legal professionalism in the criminal defense context).

217. This may also be related in small part to the sad fact that, in this day and age, seemingly few take legal ethics and notions of legal professionalism seriously. See generally STEVEN L. CARTER, *INTEGRITY* (1996) (discussing the decline of ethics and morality in society generally).

218. See *supra* Part II (discussing in detail the representations of Calvin Burdine and Perry Bellamy).

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lawyering and protection from poor lawyering.²¹⁹ However, they are the ones who too often receive the very worst our profession has to offer.²²⁰

A criminally accused's constitutional right to receive legal representation is embodied in the Sixth Amendment. In *Strickland v. Washington*,²²¹ the United States Supreme Court explained the contours of this right in detail. However, as previously explained, because of the now-familiar two-prong test of *Strickland*, it is exceedingly difficult for a petitioner to prove that he received constitutionally inept representation. The consequences of this are far reaching because failure of an ineffective assistance of counsel claim often adversely affects any possible criminal malpractice claim, and effective disciplinary review is inadequate.

Making changes to our current system of monitoring criminal defense lawyering presents many challenges. However, one thing *is* clear—as long as the United States Supreme Court leaves *Strickland* intact, it is imperative that the legal system take additional steps to ensure that criminal defendants receive the competent counsel to which they are entitled. These steps should include implementing an automatic referral system of reporting instances of poor criminal defense lawyering; abolishing the collateral estoppel effect of a *Strickland* challenge on a criminal malpractice action; abolishing any requirement of a showing of actual innocence in bringing a criminal malpractice claim; permitting a claimant to file a *Strickland* claim and criminal malpractice claim at the same time; and encouraging trial judges to document and report instances of poor criminal defense lawyering.

A. Implementing an Automatic Referral System

A strong disciplinary process provides the easiest means by which our system can begin what may be a long process of seeking to protect criminal defendants against poor lawyering. By starting with the disciplinary process to keep an eye on criminal defense attorneys, the

219. See Koniak, *supra* note 148 (providing an excellent discussion of how the ethical obligations articulated and imposed by the courts provide little protection of the most powerless and vulnerable clients).

220. Cf. Bright, *supra* note 35, at 1863 (explaining that the legal representation of capital defendants is often very poor).

221. 466 U.S. 668 (1984).

overall quality of criminal defense lawyering may begin to improve. As a starting point, an automatic referral system should be implemented. This referral system would operate to report automatically the conduct of any lawyer who is the subject of an ineffective assistance of counsel claim or a criminal malpractice claim to the appropriate disciplinary body. At that point, a screening panel of the disciplinary body set up for this purpose would first review the merits of the claim to ensure that only the viable claims of criminal defense lawyer misconduct move forward in the process. If the screening panel determines that the lawyer's alleged conduct merits further review, the lawyer's case would then be sent for complete investigation and review by the appropriate disciplinary body. That body would evaluate and, if necessary, sanction the offending lawyer. Having this automatic referral system would ensure that instances of poor representation of criminal defendants are not overlooked by the body charged with enforcing the applicable disciplinary rules.

B. Abolishing the Collateral Estoppel Effect of Strickland Challenges on Criminal Malpractice Claims

Another step in the direction of improving our system's ability to effectively monitor criminal defense lawyering is for courts to abolish the rule in the majority of jurisdictions that an ineffective assistance of counsel claim operates to bar any subsequent criminal malpractice claim. Application of the collateral estoppel doctrine is inappropriate. The courts applying the collateral estoppel rule fail to comprehend real and significant distinctions between issues relevant to an ineffective assistance of counsel claim and a criminal malpractice claim. Issues germane to both actions are similar but are not identical enough to justify or merit an ineffective assistance of counsel claim collaterally estopping a criminal malpractice claim.²²²

C. Abolishing the Actual Innocence Requirement for Bringing a Criminal Malpractice Claim

Courts should also abolish the actual innocence requirement for bringing a criminal malpractice claim that exists in many jurisdictions. The actual innocence rule makes the tort system available only to the innocent. However, both the innocent *and* the guilty accused

222. See *supra* Part III.B.2.

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of a criminal offense are entitled to non-negligent legal representation. A guilty defendant may be harmed by negligent legal representation. If a criminal malpractice action plaintiff can prove a measurable, cognizable harm caused by the incompetent legal representation he received—even in the absence of proof of actual innocence—the criminal malpractice plaintiff should be able to proceed in negligence against his former attorney.

Permitting only actually innocent criminal defendants to avail themselves of the tort system exposes *all* criminal defendants—whether innocent or not—to representation by lawyers who have the dangerous freedom of practicing law without accountability. Lawyers who practice law without accountability run the risk of providing the worst legal representation.

*D. Allowing the Joint Filing of Strickland Challenges
and Criminal Malpractice Claims*

An alternative solution for courts unwilling to abolish the collateral estoppel rule is to either permit a claimant to file his ineffective assistance of counsel claim and criminal malpractice action simultaneously or to allow the statute of limitations on the malpractice action to be tolled until his attempt at post-conviction relief is resolved. Although ineffective assistance of counsel claims and criminal malpractice claims are distinct causes of action, the conduct underlying both claims may prove to be identical.²²³ Therefore, permitting both causes of action to go forward simultaneously may conserve judicial resources by reducing the litigation of the same or similar legal issues.²²⁴ Alternatively, permitting the statute of limitations for the malpractice action to be tolled until the post-conviction relief is obtained would also promote judicial economy and the conservation of judicial resources in the same manner.²²⁵ Permitting the joint filing

223. *See supra* Part III.B.2 (explaining the distinction between ineffective assistance of counsel claims and criminal malpractice actions).

224. *Cf. Shaw v. State*, 816 P.2d 1358, 1360 (Alaska 1991) (considering the issue of whether the interest of judicial economy is furthered by tolling the statute of limitations for a criminal malpractice action until post-conviction relief is granted to prevent duplicative findings in the subsequent malpractice action); *Gebhardt v. O'Rourke*, 510 N.W.2d 900, 905 (Mich. 1994) (same).

225. *See Shaw*, 816 P.2d at 1360 (ruling that the statute of limitations for the criminal malpractice action is tolled until the claimant obtains post-conviction relief); *Carmel v. Lunney*, 511 N.E.2d 1126, 1128 (N.Y. 1987) (tolling the statute of limitations for the criminal malpractice action and explaining that certain “aspects of criminal proceedings make criminal

of these claims would be more efficient, would preserve judicial resources, and would dissipate any collateral estoppel concerns.

E. Encouraging Trial Judges to Document and Report Instances of Poor Criminal Defense Lawyering

Judges before whom ineffective assistance of counsel claims or criminal malpractice claims are filed should refer any questionable lawyer behavior about which the petitioner or plaintiff complain to the appropriate disciplinary body.²²⁶ Judges must remain mindful that attorney conduct in violation of the disciplinary rules may give rise to entirely different questions than the issues presented in ineffective assistance of counsel claims or criminal malpractice actions. In other words, attorneys may be found to have rendered constitutional representation under *Strickland* and may be found not to have committed malpractice, while at the same time be determined to have violated applicable ethical rules. Judges should refer all credible allegations of attorney misconduct to the appropriate disciplinary body.

Additionally, trial judges should ensure that a detailed record is developed at the trial level describing the behavior of criminal defense lawyers who provide deficient or poor representation that trial judges observe firsthand. This is an ideal place for a tactic similar to the post-*Swain*, pre-*Batson*²²⁷ requirement meted out by Illinois courts, which required, in order that a record be developed, publication of appellate opinions where it was alleged that the prosecution

malpractice cases unique, and policy considerations require different pleading and substantive rules” for criminal malpractice claims).

226. See Geimer, *supra* note 66, at 112 (noting the unfortunate fact that trial judges have failed to be recognized as guardians of defense counsel competence). Judicial canons in the vast majority of jurisdictions require judges to do so. See, e.g., MODEL CODE OF JUDICIAL CONDUCT (2000). A version of the *Model Code of Judicial Conduct* has been adopted in most state and federal jurisdictions.

227. For recent discussions of the significance of the *Batson* and *Swain* decisions, see generally Edward S. Adams & Christian J. Lane, *Constructing a Jury That Is Both Impartial and Representative: Utilizing Cumulative Voting in Jury Selection*, 73 N.Y.U. L. REV. 703,

720–728 (1998); Abbe Smith, “Nice Work if You Can Get It”: “Ethical” Jury Selection in Criminal Defense, 67 FORDHAM L. REV. 523 (1998).

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used its peremptory challenges to exclude Blacks from the jury.²²⁸ As one court noted:

[W]e believe that we have an obligation to make it possible for defendants to track the appellate cases where it is alleged that prosecutors are systematically excluding blacks from jury service solely because of their race, and to make it possible for defendants to track the prosecutors who are involved in those cases so that defendants may determine whether the prosecutors are systematically excluding blacks from juries solely because of their race “in case after case.” If this relevant information is not available to defendants, the exacting test in *Swain* becomes illusory for the test could hardly be applied, let alone satisfied.²²⁹

Similarly, to assist in ensuring that criminal defendants receive adequate legal representation, courts that witness abysmal criminal defense lawyering should “seize the high ground”²³⁰ and ensure that a record of the lawyer’s conduct is developed.

Finally, courts should publish all opinions addressing ineffective assistance of counsel or criminal malpractice claims. Even when a criminal defendant does not prevail in his claim, there is value in denouncing instances of poor lawyering. The legal profession as a whole will only benefit when judges and other lawyers in positions of prominence evaluate and denounce instances of poor professional behavior. Public discussion criticizing poor legal representation, if nothing more, puts members of the bar on notice that shoddy representation is unacceptable and will be exposed. Even if representation cannot be subject to constitutional or civil penalties, reviewing and judging it as unacceptable may serve the greater good of improving legal professionalism, as it places all members of the bar on notice as to what is and is not acceptable while at the same time encouraging conscientious members of the bar to strive to do better.

228. The court stated:

[W]e believe that when the issue of a prosecutor’s systematic exclusion of citizens from jury service solely because of their race is raised, we should not cower but rather we should seize the high ground on the issue and discuss it freely and with conviction to the end that prosecutors are no longer permitted to systematically exclude citizens from serving on juries solely because of their race, gender or ethnicity.

People v. Frazier, 469 N.E.2d 594, 597 (Ill. App. Ct. 1984) (footnote omitted).

229. *Id.* (quoting *Swain v. Alabama*, 380 U.S. 202, 223 (1965)) (explaining that the reason for the court enacting this measure is to make up for the shortcomings of the legislature failing to do so).

230. *Id.*

The adoption of any or all of these proposed measures—implementing an automatic referral system; abolishing the collateral estoppel effect of a *Strickland* challenge; abolishing the actual innocence requirement; allowing joint filing of *Strickland* and criminal malpractice claims; and encouraging trial judges to document and report instances of poor criminal defense lawyering—could initiate the transformation of our current system from its present failing state to a genuine check on inadequate criminal defense lawyering.

V. CONCLUSION

Poor criminal defense lawyering may be described (1) as constitutionally infirm representation,²³¹ (2) as professional negligence²³² (although not necessarily constitutionally infirm conduct), and (3) as a violation of applicable ethical or disciplinary rules²³³ (although not necessarily constitutionally infirm representation or professionally negligent conduct). Each of these levels has, in theory, mechanisms for assessing the conduct of criminal defense attorneys and providing such relief as justice may require: (1) an ineffective assistance of counsel claim,²³⁴ (2) a criminal malpractice claim,²³⁵ and (3) a disciplinary action against the attorney,²³⁶ respectively. Although these remedies give the appearance of protecting criminal defendants from poor lawyering, each remedy is actually illusory. As a result, the current system fails to protect criminal defendants, even from egregiously inadequate counsel.

Although *Strickland* has contributed to this truth, *Strickland* alone is not completely to blame for the shortcomings of the system.²³⁷ Members of the bar, including the judiciary, need to claim

231. See *supra* Part III.A.

232. See *supra* Part III.B.

233. See *supra* Part III.C.

234. See *supra* Part III.A.1.

235. See *supra* Part III.B.1.

236. See *supra* Part III.C.

237. See Geimer, *supra* note 66, at 97 (explaining that although *Strickland* is not directly responsible for the undermining of the right to counsel, its doctrine has played a significant part). There are several pre-*Strickland* opinions that describe the same types of deplorable lawyering discussed in this article. See, e.g., *United States v. Katz*, 425 F.2d 928 (2d Cir. 1970) (holding that criminal defendant's attorney who slept during co-counsel's examination of witness did not prevent the defendant from receiving a fair trial and did not fail in his duty of loyalty or in elementary skill); *Hudspeth v. McDonald*, 120 F.2d 962 (10th Cir. 1941) (finding no Sixth Amendment violation despite the fact that criminal defendant's attorney was drunk

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responsibility for this problem within our legal system.²³⁸ A criminal defendant's rights—the right to the effective assistance of counsel and the right to pursue a remedy in the civil courts—ring hollow without a system operating to ensure that those rights are well protected. The participants of the bar, judiciary, and criminal justice system should move toward actively improving the quality of legal representation for the criminally accused, without regard to a particular criminal defendant's actual innocence or guilt.²³⁹ Our current system exhibits a lack of commitment to the rights of the criminally accused.

The system as it currently exists provides little monitoring of the criminal defense bar. Left unwatched, there is little incentive or hope of improving the quality of criminal defense lawyering. Establishing a system that effectively monitors the conduct of criminal defense attorneys will improve this portion of the bar. Even minor changes could have significant positive effects.

Beneficial strides can be made toward the goal of improving the quality of criminal defense representation by first eliminating the requirement in the majority of jurisdictions that post-conviction relief be successfully attained prior to bringing a criminal malpractice claim.²⁴⁰ As an alternative, jurisdictions should consider allowing

and asleep at times throughout his trial; court ruled that criminal defendant was not denied the right to have effective assistance of competent counsel because he had counsel of his own choosing and made no attempt to change his counsel during the representation); *United States v. Butler*, 167 F. Supp. 102 (E.D. Va. 1957) (holding that there was no suggestion that criminal defendant's morphine addicted attorney's alleged naps throughout trial was prejudicial to defendant).

238. See Koniak, *supra* note 148, at 25 (quoting *Strickland* in stating that the Sixth Amendment relies upon the legal profession's maintenance of standards sufficient to justify the law's presumption that counsel will fulfill the role in the adversary process that the Constitution envisions); Bright, *supra* note 35, at 1866–69 (asserting that the criminal justice system has failed to keep the promise of *Gideon v. Wainwright* and indicating that although it is the constitutional duty of the state to provide counsel to the poor, members of the judiciary and the bar have a special responsibility to uphold the rule of law in the face of public outrage and revulsion, a responsibility that they often fail to discharge). Although almost no one cares about members of society who commit heinous offenses receiving mediocre legal representation, “this reality does not excuse the constitutional responsibility of the judiciary and members of the legal profession to ensure that even the most despised defendants still receive the highest quality legal representation in proceedings that will determine whether they live or die.” *Id.* at 1878.

239. See Bazelon, *supra* note 125, at 811 (discussing how the “battle for equal justice is being lost in the trenches of the criminal courts where the promise of *Gideon v. Wainwright*, 372 U.S. 335 (1963),] and *Argersinger v. Hamilin*, 407 U.S. 25 (1972),] goes unfulfilled”).

240. See *supra* Part IV.B (proposing the abolition of the collateral estoppel effect of a *Strickland* challenge on a criminal malpractice claim).

claimants to file ineffective assistance of counsel claims and criminal malpractice claims at the same time.²⁴¹ Additionally, claims of ineffective assistance of counsel or criminal malpractice should, as a matter of routine, trigger some type of review by the appropriate disciplinary body.²⁴² The judiciary can assist in efforts toward improving criminal defense lawyering by referring questionable lawyering to the appropriate disciplinary board while at the same time ensuring that a detailed record is developed below.²⁴³ Criminal defendants deserve no less. After all, criminal defense attorneys represent clients for whom our Constitution expressly affords protection.²⁴⁴ “[L]awyers in criminal courts are necessities, not luxuries.”²⁴⁵

241. *See supra* Part IV.D (suggesting the joint filing of ineffective assistance of counsel claims and criminal malpractice claims).

242. *See supra* Part IV.A (suggesting the implementation of an automatic referral system).

243. *See supra* Part IV.E (describing the responsibility of judges).

244. “In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence.” U.S. CONST. amend VI.

245. *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963).