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RECENT DEVELOPMENT

TOWARD A MORE EFFECTIVE STANDARD OF REVIEW: THE POTENTIAL EFFECT OF *BURDINE V. JOHNSON* ON LEGAL MALPRACTICE IN TEXAS

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"[D]efendants cannot be left to the mercies of incompetent counsel, and . . . judges should strive to maintain proper standards of performance by attorneys who are representing defendants in criminal cases in their courts."[1]

I. INTRODUCTION

Attorneys, as a whole, strive to represent their clients competently.[2] In fact, they are required to do so under the canons of professional conduct.[3] In Texas, the Disciplinary Rules of Professional Conduct require that lawyers be competent, prompt, and diligent in their representation.[4] However, since the beginning of the legal profession there have been lawyers who have not lived up to these ideals. In particular, there is a recent trend of cases in which criminal defendants have alleged ineffective assistance of counsel

1. McMann v. Richardson, 397 U.S. 759, 771 (1970).

2. *See* Strickland v. Washington, 466 U.S. 668, 688 (1984) (referring to the basic duties criminal defense attorneys owe their clients and indicating that an attorney's performance must be reasonable in light of these duties and the surrounding circumstances). *But see* Deborah L. Rhode, *Opening Remarks: Professionalism*, 52 S.C. L. REV. 458, 459-60 (2001) (illuminating the problematic definition of professionalism, particularly in light of vague standards of ethical conduct). According to Rhode, "[t]oo many members of the bench and bar view professional ethics largely as individual, not institutional, responsibilities." *Id.* at 467.

3. *See* MODEL RULES OF PROF'L CONDUCT PREAMBLE (1999) (describing duties attorneys owe to clients, the legal system, and to the administration of justice); *see also* John Leubsdorf, *Legal Malpractice and Professional Responsibility*, 48 RUTGERS L. REV. 101, 117-18 (1995) (explaining the importance of rules of professional conduct in deciding cases of legal malpractice).

4. *See* TEX. DISCIPLINARY R. PROF'L CONDUCT 1.01, *reprinted in* TEX. GOV'T CODE ANN., tit. 2, subtit. G app. A (Vernon 1998) (TEX. STATE BAR R. art. X, § 9) (requiring competent and diligent representation); MODEL RULES OF PROF'L CONDUCT R. 1.1, 1.3 (1999).

based on their attorneys sleeping through portions of their criminal trials.[5] Courts faced with sleeping-attorney cases have been unable to form a uniform analysis under the Supreme Court's standard of review for ineffective assistance of counsel.[6] While some courts find these attorneys to be presumptively ineffective, others continue to defer to the overall trial performance of sleeping attorneys in measuring effectiveness.[7]

The Fifth Circuit is the latest of the federal appellate courts to be confronted with a sleeping-attorney case.[8] In *Burdine v. Johnson*,[9] the court found that in Burdine's capital murder trial, his court appointed attorney, who slept during portions of the trial, was presumptively ineffective under standards established by the United States Supreme Court.[10] In its decision, the Fifth Circuit made an enormous stride toward creating a more effective standard of re-

5. *See* Burdine v. Johnson, 262 F.3d 336, 341 (5th Cir. 2001) (en banc) (finding presumptive ineffectiveness where a criminal defense attorney slept through portions of trial), *petition for cert. filed*, 70 U.S.L.W. 3246 (U.S. Sept. 21, 2001) (No. 01-495); United States v. Mejia-Mesa, 153 F.3d 925, 931 (9th Cir. 1998) (dismissing defendant's claim that counsel slept through jury instructions because it was not initially raised in the lower court); Tippins v. Walker, 77 F.3d 682, 687 (2d Cir. 1996) (allowing a presumption of prejudice where a district court found that the defense attorney slept through substantial portions of trial); United States v. Petersen, 777 F.2d 482, 484 (9th Cir. 1985) (refusing to find ineffective assistance of counsel due to the fact that the attorney did not sleep through substantial portions of trial); Javor v. United States, 724 F.2d 831, 833 (9th Cir. 1984) (creating per se rule for ineffectiveness); Ortiz v. Artuz, 113 F. Supp. 2d 327, 342 (E.D.N.Y. 2000) (finding no showing that counsel slept during portions of the trial); Prada-Cordero v. United States, 95 F. Supp. 2d 76, 81-82 (D.P.R. 2000) (relying on the Second Circuit's ruling in *Tippins* to conclude no ineffectiveness due to a sleeping attorney); United States v. Mittal, No. 98 CR. 1302(JGK), 2000 WL 1610799, at *7-8 (S.D.N.Y. Oct. 27, 2000) (refusing to grant a new trial due based on a claim that the defense attorney slept in trial); United States v. Muyet, 994 F. Supp. 550, 561 (S.D.N.Y. 1998) (concluding that alleged incidents of an attorney sleeping did not fall "below prevailing professional norms").

6. *See* Strickland v. Washington, 466 U.S. 668, 689 (1984) (requiring great deference be paid to any analysis of trial counsel ineffectiveness).

7. *See Burdine*, 262 F.3d at 344 (finding presumptive ineffectiveness under *Strickland v. Washington* and *United States v. Cronic* based on particular egregious facts of the case); *Javor*, 724 F.2d at 833 (creating a per se rule of ineffectiveness); *Tippins*, 77 F.3d at 687 (finding ineffectiveness, whether or not presumptive, in sleeping-attorney case).

8. *See Burdine*, 262 F.3d at 344 (concluding that Burdine's trial counsel was presumptively ineffective); Burdine v. Johnson, 234 F.3d 1339, 1339 (5th Cir. 2000) (agreeing to rehear Burdine's case en banc); Burdine v. Johnson, 231 F.3d 950, 964 (5th Cir. 2000) (rejecting claim of ineffectiveness due to speculative evidence that Burdine's attorney slept through critical stages of trial).

9. 262 F.3d 336 (5th Cir. 2001).

10. Burdine v. Johnson, 262 F.3d 336, 344 (5th Cir. 2001).

view for ineffective assistance of counsel.[11] In establishing a potential per se rule, however, the court did more than affect a criminal defendant's ability to prevail on appeal due to ineffective assistance of counsel. The *Burdine* decision should also affect a former criminal defendant's ability to prevail as a plaintiff in a legal malpractice civil action against his sleeping attorney.[12]

This Recent Development focuses on the impact of *Burdine v. Johnson* on the standard of review for legal malpractice causes of action in Texas based on the circuit court's adoption of a potential rule of presumption for ineffective assistance of counsel claims. Part II provides a background to the right to effective assistance of counsel, including the standard of review for ineffective assistance of counsel. Primarily, this section outlines Burdine's struggle to have his sleeping trial attorney recognized as ineffective. Additionally, cases similar to Burdine's in the Ninth and Second Circuits are considered. Part III examines the current state of the law with regard to the standard of review for legal malpractice in criminal cases, and the likelihood of a criminal defendant prevailing on a legal malpractice claim in Texas based on ineffective assistance of counsel. This section also considers the probability that a former criminal defendant would prevail in a legal malpractice suit by comparing the ineffective assistance of counsel standard of review with the standard for legal malpractice suits. Part IV analogizes *Burdine* to the standard of review for legal malpractice, and proposes either a presumption of negligence or a strict liability standard of review for legal malpractice tort actions based on ineffective assistance of counsel due to the presence of a sleeping trial attorney. This section also emphasizes the need for a presumption of negligence in light of professional responsibility standards. Finally, Part V reiterates the need for a revised standard of review in order to ensure that former criminal defendants are ade-

11. *See id.* at 348 (establishing that sleeping counsel may not "exercise judgment on behalf of client" and where the attorney's sleeping took place "during critical stages of trial," there is "insufficient basis for trusting the fairness that trial").

12. *Compare id.* (creating a vehicle for criminal defendants to establish post-conviction relief based on ineffective assistance of counsel), *with* Peeler v. Hughes & Luce, L.L.P., 909 S.W.2d 494, 497-98 (Tex. 1995) (requiring exoneration upon direct appeal as a prerequisite to maintaining a legal malpractice action by former criminal defendant in Texas).

quately compensated for convictions caused by incompetent trial attorneys.

II. The Right to Counsel and Sleeping-Attorney Cases

In order to form a nexus between the Fifth Circuit's recent decision in *Burdine* and a state claim of legal malpractice, it is first necessary to understand the fundamental underpinnings of the holding in *Burdine*. Burdine's appeals through the state and federal judicial systems were based on allegations of ineffective assistance of counsel.[13] More than guaranteeing a mere right to counsel, the Sixth Amendment protects a criminal defendant's right to *effective* assistance of counsel.[14] The Supreme Court has devised a two-prong analysis by which claims of ineffective assistance must be reviewed, requiring the defendant to show both ineffectiveness and prejudice.[15] The decision in *Burdine* expands on a criminal defendant's ability to prevail under this standard of review by creating a potentially per se rule in cases in which the defendant's attorney slept through critical portions of the trial.[16]

A. *The Historical Development of the Right to Effective Assistance of Counsel*

The Sixth Amendment to the United States Constitution provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the [a]ssistance of [c]ounsel for his defen[s]e."[17] As early as the 1930's, the Supreme Court recognized

13. *See Burdine*, 262 F.3d at 339-40 (identifying Burdine's various appeals based on the fact that his trial attorney slept through portions of his trial).

14. *See* McMann v. Richardson, 397 U.S. 759, 771 & n.14 (1970) (granting the right of effective, competent counsel to all criminal defendants charged with felonies and recognizing the long jurisprudential precedence of the right to effective assistance of counsel).

15. *See* Strickland v. Washington, 466 U.S. 668, 687 (1984) (explaining that a criminal defendant must first show that his trial attorney performed deficiently, and then show that the attorney's incompetency prejudiced the defense).

16. *See Burdine*, 262 F.3d at 349 (explaining that although the court refused to create a per se rule for all instances of sleeping counsel, the presumption is warranted in cases like Burdine's where there are repeated instances of unconsciousness resulting in "egregious facts [being] found by the state habeas court"). This potential expansion of the presumption of ineffectiveness has previously been addressed by both the Second and Ninth Circuits. *See* Tippins v. Walker, 77 F.3d 682, 687 (2d Cir. 1996) (finding a presumption of prejudice); Javor v. United States, 724 F.2d 831, 833 (9th Cir. 1984) (creating a per se rule).

17. U.S. Const. amend. VI.

the special importance of the right to counsel.[18] In analyzing the constitutional nature of this fundamental right, the Court stated that a capital defendant is entitled to "the guiding hand of counsel at every step in the proceedings against him."[19] The question remained, however, whether this right to counsel included the right to effective assistance of counsel.

The Supreme Court finally acknowledged, in *McMann v. Richardson*,[20] that trial counsel must be effective in order to comply with the Sixth Amendment.[21] Recognizing that criminal defense attorneys must possess a wide range of competencies to defend their clients adequately,[22] the Court found that an attorney was not incompetent merely because he mistakenly believed that the admissibility of his client's confession could be raised after entering a plea of guilty.[23] While the Court acknowledged the trial court's inherent discretion in matters concerning trial counsel, the Court warned that to comply with the Sixth Amendment, trial counsel must nevertheless be competent.[24] Writing for the majority, Justice White proclaimed, "[D]efendants cannot be left to the mercies of incompetent counsel, and . . . judges should strive to maintain proper standards of performance by attorneys who are representing defendants in criminal cases in their courts."[25]

B. *The* Strickland *Standard of Review for Effective Assistance of Counsel*

Despite the holding in *McMann*, the Supreme Court did not pronounce a unified standard of review for determining whether trial counsel was ineffective until almost fifteen years later in *Strickland*

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18. *See* Powell v. Alabama, 287 U.S. 45, 68-69 (1932) (finding the right to counsel fundamental to due process of law); *see also* Gideon v. Wainwright, 372 U.S. 335, 343-45 (1963) (overruling prior precedent and creating a universal right to counsel for all indigent criminal defendants); Johnson v. Zerbst, 304 U.S. 458, 464-65 (1938) (stating that the right to be heard at trial would be meaningless if the right to counsel was not also required).

19. *Powell*, 287 U.S. at 69.

20. 397 U.S. 759 (1970).

21. McMann v. Richardson, 397 U.S. 759, 771 (1970).

22. *Id.*

23. *Id.* at 766, 770.

24. *See id.* at 771 (indicating that this issue of effective and competent counsel is confined to cases in which the criminal defendant faces felony charges).

25. *Id.*

v. Washington.[26] According to *Strickland*, criminal defendants, seeking to prove their attorneys ineffective, must demonstrate: (1) that the performance of trial counsel was deficient, and (2) that the performance prejudiced the defense.[27] The first prong of the test may be established only if the trial attorney made errors so serious that the attorney "was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment."[28] To meet the second prong of the test, the criminal defendant must prove that the outcome of the trial would have been different except for the deficient performance by the trial attorney.[29]

Unfortunately, the standard of review pronounced by the Court is extremely difficult for criminal defendants to meet due to the great deference paid to the trial attorney's overall performance.[30] In applying the *Strickland* standard, courts are required to view the performance of the trial attorney as if it were purposeful.[31] In fact, according to *Strickland*, courts must endeavor to "eliminate the distorting effects of hindsight . . . and to evaluate the conduct from counsel's perspective at the time."[32] Thus, courts must determine, under the *Strickland* analysis, whether the actions of the trial attorney were outside the range of assistance considered professionally competent.[33]

C. *Presumption of Prejudice Under the Sixth Amendment:* Burdine v. Johnson *and Other Sleeping-Attorney Cases*

The *Strickland* Court recognized that there are certain instances in which prejudice must be presumed under the Sixth Amend-

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26. *See* 466 U.S. 668, 687 (1984) (establishing the two-prong test for reviewing ineffective assistance of counsel claims).

27. *Id.*

28. *Id.*

29. *See id.* at 694 (referring to the "reasonable probability" standard). With regard to the prejudice prong, the Court also referred to an additional constitutional right implicated by the denial of counsel wherein the errors are so egregious that the criminal defendant is denied the right to a fair trial. *See id.* at 687; *cf.* U.S. CONST. amend. VI (guaranteeing the right to a fair trial).

30. *See Strickland*, 466 U.S. at 689 (stating that "[j]udicial scrutiny of counsel's performance must be highly deferential").

31. *See id.* (referring to the presumption afforded attorneys regarding their conduct at trial).

32. *Id.*

33. *Id.* at 690.

ment.[34] Generally, only a limited number of errors, such as conflict of interest, have been found to be presumptively ineffective under the second prong of the *Strickland* test.[35] Two federal circuit courts, however, have also held that attorneys who slept through portions of criminal trials were presumptively ineffective.[36] The Fifth Circuit recently joined the Second and Ninth Circuits, when it found that Burdine's trial counsel was similarly presumptively ineffective.[37]

1. Burdine's Original Trial and State Habeas Appeals

Calvin Burdine's journey through the Texas and federal court systems spans eighteen years.[38] Burdine was indicted for murder in 1983 and sentenced to death.[39] Attorney Joe Frank Cannon was appointed to defend Burdine.[40] The capital murder trial lasted six days, and ended with Burdine's conviction in January, 1984.[41] The Texas Court of Criminal Appeals affirmed the conviction on direct appeal,[42] and ultimately denied Burdine's first subsequent state writ of habeas corpus.[43] It was not until Burdine's second state writ for habeas corpus that a trial court finally entered findings of fact regarding Joe Cannon's instances of sleeping through "sub-

34. *See id.* at 692.

35. *See* Cuyler v. Sullivan, 446 U.S. 335, 346 (1980) (finding that an actual conflict of interest renders per se ineffective assistance of counsel); Holloway v. Arkansas, 435 U.S. 475, 488 (1978) (requiring reversal if the trial court improperly requires joint representation even though there has been a timely objection); Perillo v. Johnson, 205 F.3d 775, 781 (5th Cir. 2000) (affirming that the *Cuyler* standard for ineffective assistance of counsel is applicable in cases in which the defendant alleges an actual conflict of interest).

36. *See* Tippins v. Walker, 77 F.3d 682, 687 (2d Cir. 1996) (presuming prejudice when counsel was asleep during trial); Javor v. United States, 724 F.2d 831, 833 (9th Cir. 1984) (allowing a presumption of prejudice for any case where an attorney is found to have slept throughout a substantial portion of the proceedings).

37. Burdine v. Johnson, 262 F.3d 336, 341 (5th Cir. 2001) (en banc), *petition for cert. filed*, 70 U.S.L.W. 3246 (U.S. Sept. 21, 2001) (No. 01-495).

38. *See id.* at 339-40 (outlining the procedural history of Burdine's case).

39. *Id.* at 338-39.

40. Burdine v. Johnson, 231 F.3d 950, 952 (5th Cir. 2000).

41. *See Burdine*, 262 F.3d at 338 (reporting that the total time expended for Burdine's trial was a mere twelve hours and fifty-one minutes).

42. *See* Burdine v. Texas, 719 S.W.2d 309, 314-20 (Tex. Crim. App. 1986) (considering issues such as sufficiency of the evidence, the admission of murder scene photographs, voluntariness of the plea, and jury instructions).

43. *Burdine*, 231 F.3d at 952 (citing *Ex parte* Burdine, Writ No. 16,725-02 (Tex. Crim. App. Dec. 12, 1994)).

stantial portions" of the trial.[44] Despite the Texas Court of Criminal Appeals's finding that the record supported this conclusion, the court once again denied Burdine's state writ concluding that he failed to meet the onerous burden under the *Strickland* standard of review for ineffective assistance of counsel.[45]

2. Burdine's Federal Habeas Corpus Appeal

Burdine entered the federal judicial arena in April 1995, when the United States District Court for the Southern District of Texas granted his motion to stay execution, noting "that the Texas Court of Criminal Appeals altogether failed to provide any justification for its rejection of the trial court's conclusions of law while approving the findings of fact."[46] In 1999, Burdine sought federal habeas corpus relief with the federal district court, claiming that Cannon's performance was ineffective under *Strickland* in violation of the Sixth Amendment.[47] The court recounted the testimony of three jurors and the trial court clerk who had testified before the state court during Burdine's second state writ for habeas corpus.[48] All

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44. *Id.* (citing *Ex parte* Burdine, Cause No. 37944-B (183rd Dist. Ct. Harris County, Tex. Apr. 3, 1995)).

45. *Ex parte* Burdine, 901 S.W.2d 456, 456 (Tex. Crim. App. 1995); *see* Burdine v. Johnson, 66 F. Supp. 2d 854, 856 (S.D. Tex. 1999) (quoting the Texas Court of Criminal Appeals finding with regard to *Strickland*); *Burdine*, 262 F.3d at 340 (indicating that the opinion of the Texas Court of Criminal Appeals's decision was only one page and went unsigned by the court); *see also* Strickland v. Washington, 466 U.S. 668, 687 (1984) (indicating that a criminal defendant must show that the outcome of the trial was prejudiced by the ineffective performance of trial counsel). Three judges dissented from the opinion of the Texas Court of Criminal Appeals, recognizing the jurisprudential importance of the case because of the lack of precedent with regard to the application of the standard of review for ineffective assistance of counsel to sleeping attorney cases. *Ex parte* Burdine, 901 S.W.2d at 457-58 (Maloney, J., dissenting) (joined by Baird and Overstreet, J.J.).

46. *Burdine*, 66 F. Supp. 2d at 856.

47. *Id.*; *see also* 28 U.S.C.S § 2254(a), (e) (Law. Co-Op. 1992 & Supp. 2001) (authorizing federal courts to hear federal writs of habeas corpus if a person is being held by a state in violation of the Constitution).

48. *Burdine*, 66 F. Supp. 2d at 857. The court also reexamined the testimony of the prosecutor at Burdine's capital murder trial and the trial court judge. *Id.* at 857-58. While both of these individuals testified that they were unaware of Cannon sleeping or nodding off during the state trial, both also testified that these acts may have occurred when court etiquette required them to focus their attention elsewhere. *See id.* According to the now-former prosecutor:

> "[M]ost of the time" when he [the prosecutor] was questioning witnesses or seeking to admit evidence, his attention was focused on the witness stand, piece of evidence, or "something else other than defense counsel." [However], [the prosecutor] admitted

four witnesses testified that Cannon nodded off or fell asleep at various times during the trial.[49] The state trial judge's clerk further testified that she had seen Cannon fall asleep during other trials and that she "knew that he had this problem."[50] In his defense, Cannon testified that he had never fallen asleep during any trial.[51] In response to this testimony and the subsequent findings of fact issued by the state court, the district court found it to be "*conclusively* established by the record presented . . . and developed through an evidentiary hearing, the record and hearings in the courts below, and both Texas courts' explicit rulings that Cannon did, in fact, sleep on *multiple* occasions and for differing lengths of time during Burdine's trial."[52]

In his subsequent analysis of Cannon's effectiveness, the judge relied on two key decisions closely related to *Strickland.* First, the court found support in determining sleeping counsel presumptively ineffective under the decision in *United States v. Cronic.*[53] In *Cronic*, the Supreme Court explained that if a criminal defendant is denied counsel during a "critical" part of the trial, thereby meeting the first prong of the *Strickland* analysis, then the second prong must be presumed.[54]

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that he was "looking at either the Judge, the witnesses or the jurors most of the time" [and would] [o]nly "on occasion" . . . "glance over to the defense side of the counsel table."

Id. Similarly, the now-former district judge stated that while he was aware of Cannon closing his eyes during the trial, he was distracted by other tasks, including drafting the jury charge by hand during the trial. *Id.* at 858. Additionally, "as a general practice in his court, when one side's counsel was questioning a witness or presenting evidence, he would focus his attention on [that] . . . lawyer." *Burdine*, 66 F. Supp. 2d at 858.

49. *Id.* at 857-58. The jury foreperson, "testified that on several occasions he saw Cannon 'nod off or perhaps doze, . . . catch himself dozing . . . [he] just kind of dozed off for a few minutes.'" *Id.* at 857. The foreperson noted that the periods of sleep occurred while the prosecutor was questioning witnesses or presenting evidence. *Id.* This testimony was confirmed by two other jurors. *Id.* Finally, the judge's clerk testified that she saw Cannon drift to sleep, particularly toward the middle phase of trial, stating "'I saw it happened a lot . . . He was asleep. He had his head down, not totally down, but down.'" *Burdine*, 66 F. Supp. 2d at 858.

50. *Id.*

51. *Id.* at 859.

52. *See id.* at 861 (emphasis added).

53. *See* United States v. Cronic, 466 U.S. 648, 659 n.25 (1984) (announcing that there are certain Sixth Amendment situations in which prejudice is presumed); Strickland v. Washington, 466 U.S. 668, 692 (1984).

54. *Cronic*, 466 U.S. at 659-60; *see also Strickland*, 466 U.S. at 703 (Brennan, J., concurring in part and dissenting in part) (recognizing constructive denial of counsel and citing

Next, the court relied on the Second Circuit's decision in *Tippins v. Walker*,[55] under which that court found a sleeping trial attorney presumptively ineffective under *Strickland*.[56] Based on the Second Circuit's analysis, the *Burdine* court found that Cannon's periods of sleep qualified as "prolonged lapse[s]," where he was "actually unconscious," and that Cannon slept while the prosecutor "was either presenting evidence or eliciting testimony from a state witness."[57] Thus, the court concluded that Cannon's performance at Burdine's capital murder trial was not only was unconstitutional,[58] but also per se ineffective.[59]

In 2000, the State of Texas appealed the district court opinion to the United States Court of Appeals for the Fifth Circuit.[60] Relying initially on the testimony of the prosecutor and the trial judge, the Fifth Circuit concluded that it could not clearly discern whether Cannon actually slept through any portion of the trial.[61] The court

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Ninth Circuit case in which the attorney slept through portions of the trial); Javor v. United States, 724 F.2d 831, 834 (9th Cir. 1984) (stating that "unconscious or sleeping counsel is equivalent to no counsel at all"). In fact, the Fifth Circuit has held that such denial of counsel may be satisfied by either actual or constructive denial of counsel. Childress v. Johnson, 103 F.3d 1221, 1228 (5th Cir. 1997).

55. 77 F.3d 682 (2d Cir. 1996).

56. *See* Tippins v. Walker, 77 F.3d 682, 685 (2d Cir. 1996) (adopting the Ninth Circuit's per se rule in *Javor v. United States* for ineffectiveness based on the presence of an attorney sleeping through "substantial portions" of trial). The Second Circuit expanded on the *Javor* rule by creating a three-step test to determine whether the sleeping attorney is ineffective, requiring a determination of whether the periods of sleep were repeated and/or prolonged, whether the attorney was unconscious, and whether the interests of the criminal defendant were at stake during the periods of sleep. *Id.* at 687.

57. *Burdine*, 66 F. Supp. 2d at 866; *see Tippins*, 77 F.3d at 687 (outlining the three-step analysis for defining "substantial portion" of trial).

58. *Burdine*, 66 F. Supp. 2d at 866.

59. *See id.* at 864 (adopting the Ninth Circuit's per se ineffective sleeping counsel rule modified by the *Tippins* three-prong test). The district judge affirmed his order for Burdine's release from the unconstitutional confinement pending the state's appeal of the September 1999 decision to the Fifth Circuit. *See* Burdine v. Johnson, 87 F. Supp. 2d 711, 718 (S.D. Tex. 2000) (indicating concern at the state's failure to treat Burdine's case with the requisite seriousness that should be afforded criminal defendants subject to such unlawful custody).

60. Burdine v. Johnson, 231 F.3d 950 (5th Cir. 2000).

61. *See id.* at 958-59 (referring to the testimony of the prosecutor and judge, and distinguishing other per se cases because "circumstances justifying [the] presumption are clearly discernible"). The court relied on the timespan between the original trial and the first appeal based on ineffective assistance of counsel as support for denying Burdine's relief. *Id.* at 958. Before considering the merits of Burdine's ineffective assistance of counsel claim, the majority attempted to dismiss it as violative of the *Teague* nonretroactivity

dismissed applicability of the Ninth and Second Circuit decisions, which had previously found similar actions of sleeping presumptively ineffective, because "Cannon's sleeping was *not* nearly so obvious."[62] Thus, the Fifth Circuit concluded that Cannon was not ineffective under the prejudice prong of the *Strickland* test, and that Burdine was not entitled to per se protection based on speculative instances of sleeping.[63] Less than two months after this decision, the Fifth Circuit retracted its judgment and ordered that the case be reheard en banc.[64]

3. Burdine's Trial Attorney is Found Presumptively Ineffective

The Fifth Circuit reheard Burdine's case in 2001.[65] Writing for the majority this time, a previously dissenting judge quoted decisions of the Second and Ninth Circuit Courts on similar sleeping-attorney cases,[66] and announced that "[u]nconscious counsel

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doctrine for federal collateral review. *Id.* at 956-57 (explaining that the claims seemed to fall outside the doctrine due to the absence of violations of fundamental fairness and the possibility of raising the issues on direct appeal). The majority formulated its conclusion because Burdine's ineffective assistance of counsel claim had not been raised until eleven years after the original trial. *Id.* at 956. The court reluctantly concluded, however, that "it would seem that Burdine's claim does *not* fall within the quite narrow *Teague* exception . . . [b]ut, out of an abundance of caution, we will assume that it does and, therefore, address the merits of his claim." *Burdine*, 231 F.3d at 958.

62. *Id.* at 960.

63. *See id.* at 964 (dismissing Burdine's claims and vacating the habeas relief granted by the district court). The dissenting opinion reasoned that Burdine's ineffective assistance of counsel claims did not fall within the *Teague* doctrine because the state court's findings of fact were undisputed, and the claim merely sought to enforce the right to effective assistance of counsel protected by the Sixth Amendment. *Id.* at 965-66 (Benevides, J., dissenting). Contrary to the opinion of the majority, Judge Benevides applied the proper deference to the findings of the state trial court, thereby allowing him to conclude that Cannon did sleep through trial. *Id.* at 968 (stating that Cannon was unreliable exclusively based on these factual findings). Judge Benevides, therefore, concluded that a presumption of prejudice was warranted under *Strickland*. *See Burdine*, 231 F.3d at 970 (Benevides, J., dissenting) (indicating that he would have affirmed Judge Hittner's federal habeas relief).

64. *See* Burdine v. Johnson, 234 F.3d 1339, 1339 (5th Cir. 2000) (announcing the court's decision to rehear the case en banc occurred due to the petition of one member of the court agreed to by a majority of the other members). Thus, the case would be reheard by all fourteen active members of the court. *Id.*

65. Burdine v. Johnson, 262 F.3d 336, 338 (5th Cir. 2001) (en banc), *petition for cert. filed*, 70 U.S.L.W. 3246 (U.S. Sept. 21, 2001) (No. 01-495).

66. *See id.* at 349 (presenting the majority opinion as written by Judge Benevides).

equates to no counsel at all."[67] In response to the State's argument that Cannon's mere presence should subject his performance to a prejudice analysis, the court responded that an attorney who sleeps through critical portions of trial is equivalent to an attorney being physically absent from the trial.[68] Based on this analysis, the Fifth Circuit finally declared Burdine's trial counsel presumptively ineffective under *Strickland*.[69] The court did, however, explicitly limit its finding to Burdine's situation.[70] The decision states:

> [W]e decline to adopt a per se rule that any dozing by defense counsel during trial merits a presumption of prejudice. Our holding, that the repeated unconsciousness of Burdine's counsel through not insubstantial portions of the critical guilt-innocence phase of Burdine's capital murder trial warrants a presumption of prejudice, is limited to the egregious facts found by the state habeas court in this case.[71]

Still, it appears that in cases with similar "egregious" acts of trial counsel sleeping through critical stages of trial, the Fifth Circuit will arrive at the same conclusion in the future, thus effectively creating a per se rule for similarly offensive sleeping-attorney cases.[72]

4. Analogous Sleeping-Attorney Cases

Perhaps surprisingly, an attorney sleeping during a capital murder trial is not unique. Rather, it is merely one example of a disturbing trend in recent cases faced by a growing number of courts across the country, both at the trial and appellate levels.[73] Similar

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67. *Id.* (defining unconsciousness as occurring where the attorney does not exercise any judgment on behalf of the client).

68. *Id.*

69. *See id.* at 350 (vacating Burdine's capital murder conviction because Burdine's trial counsel was presumptively ineffective).

70. *Burdine*, 262 F.3d at 349.

71. *Id.*

72. *See id.* (arguing that the Fifth Circuit will likely make the same ruling when faced with similar facts and conduct by the counsel).

73. *See* Tippins v. Walker, 77 F.3d 682, 685 (2d Cir. 1996) (discussing whether a sleeping lawyer presents "*per se* denial of effective assistance of counsel"); Javor v. United States, 724 F.2d 831, 833-34 (9th Cir. 1984) (finding a violation of an individual's Sixth Amendment right to counsel when the defendant receives "*no* legal assistance during a substantial portion of his trial"); Ortiz v. Artuz, 113 F. Supp. 2d 327, 342 (E.D.N.Y. 2000) (refusing to find prejudice where attorney slept, but not repeatedly, through times when the defendant's interests were at stake); United States v. Muyet, 994 F. Supp. 550, 560-61 (S.D.N.Y. 1998) (rejecting defendant's claim of ineffective assistance of counsel based on a sleeping trial attorney).

to *Burdine*, the Ninth and Second Circuit Courts have released key decisions finding that sleeping attorneys are presumptively ineffective under *Strickland*.[74]

a. *Javor v. United States*

The Ninth Circuit decided *Javor v. United States*[75] in 1984.[76] Ten years after his conviction for possession and sale of heroin,[77] Javor petitioned the federal district court for habeas corpus relief based on ineffective assistance of counsel.[78] Similar to *Burdine*, a magistrate judge entered findings of fact concluding that Javor's attorney "was asleep or dozing, and not alert to proceedings, during a substantial part of the trial."[79] Nevertheless, the magistrate judge declined relief because Javor failed to show prejudice.[80]

On appeal, the Ninth Circuit concluded that an attorney who sleeps through substantial portions of trial is per se ineffective.[81] Rather than indicating that these acts reveal incompetence by an attorney, however, the court found that such actions were equivalent to *no counsel at all*.[82] Thus, the court announced that no prejudice analysis is necessary in such cases due to the "'unguided speculation'" of the actions about nonexistent counsel.[83]

b. *Tippins v. Walker*

Similar to *Javor*, the Second Circuit found sleeping counsel presumptively ineffective in *Tippins v. Walker*.[84] After his conviction for the sale and possession of cocaine,[85] Tippins moved to have the

74. *Tippins*, 77 F.3d at 690; *Javor*, 724 F.2d at 833.

75. 724 F.2d 831 (9th Cir. 1984).

76. Javor v. United States, 724 F.2d 831, 835 (9th Cir. 1984).

77. *Id.* at 832.

78. *See id.* (recounting Javor's appellate process from his original conviction in 1965, to his original federal habeas writ in 1975).

79. *Id.*

80. *Id.*

81. *See Javor*, 724 F.2d at 833.

82. *Id.* at 834; *cf.* McFarland v. State, 928 S.W.2d 482, 505 (Tex. Crim. App. 1996) (en banc) (declining to extend *Javor* to sleeping counsel because the criminal defendant had additional counsel, and thus "was never without counsel").

83. *Javor*, 724 F.2d at 834-35.

84. Tippins v. Walker, 77 F.3d 682, 684-85 (2d Cir. 1996); *see* United States v. DiTommaso, 817 F.2d 201, 216 (2d Cir. 1987) (stating that "sleeping counsel is tantamount to no counsel at all").

85. *Tippins*, 77 F.3d at 684.

judgment vacated because his attorney slept during his trial.[86] Although the motion was denied, his subsequent federal writ of habeas corpus was granted by the district court based on a finding that his trial counsel was per se ineffective.[87]

In affirming the lower court's decision, the Second Circuit based its decision on the finding that the attorney "was repeatedly unconscious at trial for periods of time in which the defendant's interests were at stake."[88] Essentially, the court conducted a three-part analysis of the repeated and prolonged periods of sleep, the unconsciousness, and the interest at stake.[89] While the court declined to create a per se rule for all sleeping-attorney cases, it stated that such ineffective counsel was equivalent to no counsel.[90]

III. THE STANDARD FOR LEGAL MALPRACTICE SUITS BASED ON INEFFECTIVE ASSISTANCE OF COUNSEL

In these types of sleeping-attorney cases, the former criminal defendants may attempt to seek redress in the civil arena for damages based on ineffective assistance of counsel. A civil tort claim brought by a former criminal defendant against his attorney alleging legal malpractice is often referred to as criminal malpractice.[91] As a cause of action, the elements of this type of legal malpractice claim vary from state to state.[92] There are, however, some basic elements that are universally present, including: the presence of the lawyer, the neglect of a duty by the lawyer owed the criminal defendant, and loss to the defendant caused by the lawyer's neg-

86. *Id.*

87. *Id.* at 684-85.

88. *Id.* at 687.

89. *Id.* at 687-90.

90. *See Tippins*, 77 F.3d at 687-90. Unlike *Burdine*, the trial judge at Tippin's criminal proceeding was aware of the attorney's sleeping and even reprimanded him. *Id.* at 690.

91. *See* Berringer v. Steele, 758 A.2d 574, 591 (Md. Ct. Spec. App. 2000) (referring to the differentiation between civil and criminal malpractice); David H. Potel, Comment, *Criminal Malpractice: Threshold Barriers to Recovery Against Negligent Criminal Counsel*, 1981 DUKE L.J. 542, 542 (1981) (indicating the increasing prevalence of criminal malpractice suits).

92. *See* David H. Potel, Comment, *Criminal Malpractice: Threshold Barriers to Recovery Against Negligent Criminal Counsel*, 1981 DUKE L.J. 542, 546 (1981) (recognizing that courts have not been uniform in the application of threshold issues for criminal malpractice actions).

lect.[93] These elements mirror the duty, breach, causation, and damage elements necessary to any civil tort claim rooted in negligence.[94] A former criminal defendant seeking to hold his criminal trial attorney civally liable for ineffective assistance of counsel must, therefore, meet each of these requirements in order to prevail.[95]

A. *Definition of Legal Malpractice in Texas Criminal Cases*

The Texas Supreme Court has outlined the elements a former criminal defendant must satisfy to prevail in a criminal malpractice cause of action in Texas.[96] In *Peeler v. Hughes & Luce, L.L.P.*,[97] the court stated that the "plaintiff must prove that (1) the attorney owed the plaintiff a duty, (2) the attorney breached that duty, (3) the breach proximately caused the plaintiff's injuries, and (4) damages occurred."[98] The primary issue before the *Peeler* court was whether a former criminal defendant could prove proximate cause, absent a showing of innocence to the criminal charges.[99] Failure to

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93. *See Berringer*, 758 A.2d at 591 (referring primarily to the employment of the lawyer by the criminal defendant); *see also* Peeler v. Hughes & Luce, L.L.P., 909 S.W.2d 494, 496 (Tex. 1995) (setting forth the standard requirements for recovery on a legal malpractice claim).

94. *See Peeler*, 909 S.W.2d at 496 (defining the elements of criminal malpractice as including duty, breach, causation, and damages); David H. Potel, Comment, *Criminal Malpractice: Threshold Barriers to Recovery Against Negligent Criminal Counsel*, 1981 DUKE L.J. 542, 542-43 (1981) (stating that the elements of civil and criminal malpractice are identical). The *Peeler* court also noted that the Fourth Court of Appeals in Texas previously held that these four elements apply in both civil and criminal cases. *Peeler*, 909 S.W.2d at 497.

95. *See* David H. Potel, Comment, *Criminal Malpractice: Threshold Barriers to Recovery Against Negligent Criminal Counsel*, 1981 DUKE L.J. 542, 542-43 (1981) (recognizing that each of the elements of legal malpractice must be established to prevail).

96. *See* Peeler v. Hughes & Luce, L.L.P., 909 S.W.2d 494, 496-97 (Tex. 1995) (indicating the case was one of first impression).

97. 909 S.W.2d 494 (Tex. 1995).

98. Peeler v. Hughes & Luce, L.L.P., 909 S.W.2d 494, 496 (Tex. 1995). *See also* David J. Beck, *Legal Malpractice in Texas Chapter V: Nature of Legal Malpractice*, 43 BAYLOR L. REV. 43, 48 (1991) (explaining the standard of care relevant to legal malpractice causes of action); *cf.* Streber v. Hunter, 221 F.3d 701, 722 (5th Cir. 2000) (outlining the four elements used by the Fifth Circuit in reviewing legal malpractice cases from Texas).

99. *See Peeler*, 909 S.W.2d at 497-98 (requiring such proof on public policy grounds). According to the *Peeler* court, such a showing on innocence must be "on direct appeal, through post-conviction relief, or otherwise." *Id.* Therefore, such proof maybe shown not only through factual innocence but also acquittal or the grant of a writ of habeas corpus. *See id.*; *see also* Owens v. Harmon, 28 S.W.3d 177, 179 (Tex. App.—Texarkana 2000, no pet.) (extending *Peeler* to criminal case in which the defendant maintained innocence from

provide such satisfaction essentially means that the conviction, or injury, occurred solely based on the illegal conduct of the defendant with no possibility of mitigation based on the attorney's negligent conduct.[100]

The *Peeler* court held that proof of innocence is required in the form of exoneration through direct appeal or some other post-conviction relief.[101] To allow otherwise "'would indeed shock the public conscience, engender disrespect for courts[,] and generally discredit the administration of justice.'"[102] Thus, absent an affirmative showing of innocence, a former criminal defendant is deemed to remain the sole proximate cause of the conviction, and the criminal malpractice suit cannot be maintained.[103] This ruling begs the

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the onset of criminal proceedings); Barnum v. Munson, Munson, Pierce & Cardwell, P.C., 998 S.W.2d 284, 286 (Tex. App.—Dallas 1999, pet. denied) (affirming the trial court's finding that the defendant's claim was frivolous because defendant's conviction had not been overturned); Saks v. Sawtelle, Goode, Davidson & Troilo, P.C., 880 S.W.2d 466, 470 (Tex. App.—San Antonio 1994, writ denied) (refusing to allow recovery on legal malpractice grounds where injuries were the result of a knowing and willful criminal act); Garcia v. Ray, 556 S.W.2d 870, 872 (Tex. Civ. App.—Corpus Christi 1977, writ dism'd) (refusing to allow a criminal defendant to prevail in criminal malpractice action where the defendant did not allege innocence). Prior to the decision by the Texas Supreme Court in *Peeler*, the Corpus Christi Court of Appeals stated, "[a]lthough we are not un-mindful of the general rule that a judgment in a criminal prosecution is not a bar to a subsequent civil action arising from the same transaction . . . [there could not] be an opposite result maintained in a civil court where such action was based on the same adjudicated question." *Id.*

100. *See Peeler*, 909 S.W.2d at 498 (explaining that cause in fact from the illegal conduct results if the conduct was a "substantial factor" to the conviction). Generally, cause in fact in legal malpractice cases is a question of fact in which the jury may consider custom within the legal profession, specialization, ethical guidelines, and the circumstances of the particular case. David J. Beck, *Legal Malpractice in Texas Chapter V: Nature of Legal Malpractice*, 43 BAYLOR L. REV. 43, 50 (1991).

101. *Peeler*, 909 S.W.2d at 498; *see* Ronald E. Mallen, *Legal Malpractice and the Criminal Defense Lawyer*, 9 CRIM. JUST. 2, 5 (1994) (referring to the differentiation mode between "actual" guilt to a crime and "legal" guilt based on the criminal conviction).

102. *Id.* at 497 (quoting State *ex rel.* O'Bennis v. Adolf, 691 S.W.2d 498, 504 (Mo. Ct. App. 1985)).

103. *See id.* at 498 (requiring exoneration as a matter of law). Texas is not alone in its requirement for some form of post-conviction relief as a prerequisite to prevailing in a criminal malpractice cause of action. *Compare* Mylar v. Wilkinson, 435 So. 2d 1237, 1239 (Ala. 1983) (denying malpractice relief due to failure to show that the result of trial would have been different but for the attorney's malpractice), *and* Wiley v. County of San Diego, 966 P.2d 983, 991 (Cal. 1998) (requiring criminal defendant to prove innocence by a preponderance of the evidence), *and* Steele v. Kehoe, 747 So. 2d 931, 933 (Fla. 1999) (imposing post-conviction or appellate relief as a precondition to a legal malpractice claim by a criminal defendant), *and* Gomez v. Peters, 470 S.E.2d 692, 695 (Ga. Ct. App. 1996) (clarifying that a criminal defendant who acknowledges his guilt cannot pursue a malpractice ac-

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question of whether the requirement of proximate cause can be bypassed when defense counsel has been found presumptively ineffective. If it can be assumed that a convicted criminal defendant represented by ineffective assistance of counsel is, in effect, legally

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tion against his attorney), *and* Kramer v. Dirksen, 695 N.E.2d 1288, 1290 (Ill. App. Ct. 1998) (finding policy reasons for requiring post conviction relief persuasive and concluding that such a showing is necessary under Illinois law), *and* Ray v. Stone, 952 S.W.2d 220, 224 (Ky. Ct. App. 1997) (finding the defendant was the sole proximate cause of his conviction and therefore had no ability to prevail in legal malpractice), *and* Glenn v. Aiken, 569 N.E.2d 783, 785-86 (Mass. 1991) (stating that the former criminal defendant client "has the burden in this case to prove his innocence"), *and* Berringer v. Steele, 758 A.2d 574, 591-97 (Md. Ct. Spec. App. 2000) (explaining different jurisdiction approaches and aligning itself with the majority requiring a showing of innocence), *and* Johnson v. Schmidt, 719 S.W.2d 825, 826 (Mo. Ct. App. 1986) (finding legal malpractice suit premature until criminal defendant obtains post conviction relief), *and* Rodriguez v. Nielsen, 609 N.W.2d 368, 374 (Neb. 2000) (requiring proof of innocence to prevent a former criminal defendant from profiting by the criminal conduct), *and* Morgano v. Smith, 879 P.2d 735, 737 (Nev. 1994) (requiring some showing by the criminal defendant that the conviction was not caused merely by his own illegal conduct), *and* Mahoney v. Shaheen, Cappiello, Stein & Gordon, P.A., 727 A.2d 996, 998-99 (N.H. 1999) (requiring proof by a preponderance of the evidence of actual innocence), *and* Carmel v. Lunney, 511 N.E.2d 1126, 1128 (N.Y. 1987) (enunciating that "for so long as the determination of his guilt of that offense remains undisturbed, no cause of action will lie"), *and* Stevens v. Bispham, 851 P.2d 556, 561 (Or. 1993) (adopting post conviction relief rule on public policy grounds), *and* Bailey v. Tucker, 621 A.2d 108, 113 (Pa. 1993) (stating that civil relief is allowable only if an "*innocent person*" is convicted based on attorney negligence), *and* Gibson v. Trant, 58 S.W.3d 103, 108 (Tenn. 2001) (requiring proof of the additional element of post-conviction relief in criminal malpractice causes of action), *and* Adkins v. Dixon, 482 S.E.2d 797, 801 (Va. 1997) (concluding that a "post-conviction ruling adverse to the defendant will prevent a recovery for legal malpractice"), *and* Falkner v. Foshaug, 29 P.3d 771, 773 (Wash. Ct. App. 2001) (concluding that both post-conviction relief and proof of innocence are prerequisites to the maintenance of a criminal malpractice cause of action), *and* Harris v. Bowe, 505 N.W.2d 159, 162 (Wis. Ct. App. 1993) (requiring proof of innocence and denying relief where defendant voluntarily pleaded guilty), *with* Shaw v. State, 816 P.2d 1358, 1360 (Alaska 1991) (declining to require actual innocence as a prerequisite to prevailing in criminal malpractice causes of action), *and* Gebhardt v. O'Rourke, 510 N.W.2d 900, 908 (Mich. 1994) (holding that post-conviction relief is not a prerequisite to the maintenance of a criminal malpractice suit), *and* Krahn v. Kinney, 538 N.E.2d 1058, 1061 (Ohio 1989) (refusing to declare proof of innocence as an additional element in criminal malpractice claims based on ineffective assistance of counsel). *Cf.* Brewer v. Hagemann, 771 A.2d 1030, 1032-33 (Me. 2001) (reviewing differing jurisdictional approaches to proof of innocence in criminal malpractice cases, but stating that "[t]he situation presented by this case does not require us to consider departing from the standard elements"). *But cf.* David H. Potel, Comment, *Criminal Malpractice: Threshold Barriers to Recovery Against Negligent Criminal Counsel*, 1981 DUKE L.J. 542, 547-48 (1981) (advancing the proposition that requiring proof of innocence in criminal malpractice suits is inappropriate based on the differentiation between legal and moral culpability).

innocent, then the attorney's negligence *is* the actual proximate cause of the injury or conviction.[104]

B. *Probability of a Criminal Defendant Prevailing Under a Legal Malpractice Theory*

Based on the standards described above, it is virtually impossible for a former criminal defendant to prevail in a criminal malpractice cause of action.[105] Similar to the barriers faced by criminal defendants seeking to overturn convictions based on ineffective assistance of counsel,[106] civil litigants seeking to hold ineffective trial attorneys liable for criminal convictions face near impossible odds. In addition to being required to demonstrate their innocence,[107] those pursuing criminal malpractice suits must also overcome collateral estoppel and the great deference paid to trial attorneys.[108] As well, former criminal defendants may face unsympathetic jurors and questions of why money damages are necessary when the freedom previously gained in the criminal arena seems the decisive remedy.[109]

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104. *See* David H. Potel, Comment, *Criminal Malpractice: Threshold Barriers to Recovery Against Negligent Criminal Counsel*, 1981 DUKE L.J. 542, 547-48 (1981) (arguing that the burden on criminal malpractice plaintiffs should be a demonstration of legal, rather than actual innocence, and contending that "[a]s a tort action, criminal malpractice should focus on the activity of the alleged tortfeasor, not on the conduct of the victim").

105. *See* William J. Stuntz, *The Uneasy Relationship Between Criminal Procedure and Criminal Justice*, 107 YALE L.J. 1, 61-62 (1997) (explaining the deferential standards of review implemented by the appellate courts in reviewing constitutional claims by criminal defendants).

106. *See* Strickland v. Washington, 466 U.S. 668, 689 (1984) (purposefully creating a deferential standard of review for cases in which a criminal defendant seeks to review the conviction based on ineffective assistance of counsel); William J. Stuntz, *The Uneasy Relationship Between Criminal Procedure and Criminal Justice*, 107 YALE L.J. 1, 62 (1997) (referring to the standard for ineffective assistance of counsel in criminal cases as difficult to meet).

107. *See, e.g.*, David H. Potel, Comment, *Criminal Malpractice: Threshold Barriers to Recovery Against Negligent Criminal Counsel*, 1981 DUKE L.J. 542, 545-46 (1981) (referring to the requirement of innocence as an additional element in criminal malpractice beyond the four basic legal malpractice elements of duty, breach, causation, and damages).

108. *Id.* at 551-53. Other obstacles may include immunity for attorneys appointed by the court and immunity for attorneys with regard to errors of judgment. *Id.* at 556-63.

109. *See* John Leubsdorf, *Legal Malpractice and Professional Responsibility*, 48 RUTGERS L. REV. 101, 153 (1995) (discussing compensation from attorneys and asking, "[w]hy should the client receive a windfall, more than would have been recovered even with the help of a faultless lawyer?").

1. Collateral Estoppel

In criminal malpractice causes of action, collateral estoppel may preclude the suit if the criminal defendant previously sought and failed to obtain post-conviction relief through a criminal appeal based on an ineffective assistance of counsel claim.[110] Two essential requirements must be met in order for a former criminal defendant to be estopped from relitigating ineffective assistance of counsel in the civil arena: (1) the issues must be identical and actually must have been adjudicated in the criminal context, and (2) the criminal defense attorney must have had a fair opportunity to answer the issue in the criminal context.[111] While either of the two elements of ineffective assistance of counsel defined in *Strickland* may serve as the basis for a collateral attack, the deference afforded trial attorneys often precludes a finding that either the attorney was inadequate or that the attorney's performance prejudiced the defense.[112] Therefore, the criminal malpractice plaintiff is as likely to be estopped as a criminal defendant is likely *not* to prevail in a criminal ineffective assistance of counsel claim. However, in those cases where a criminal defendant is successful in establishing that his defense attorney was presumptively ineffective, the former defendant should be able to prevail in a malpractice suit.

2. Deference Paid to Trial Attorney

In *Strickland*, the Supreme Court specifically held that great deference must be paid to criminal defense attorneys in reviewing ineffective assistance of counsel claims.[113] In fact, when considering the prejudice prong of the *Strickland* analysis, this deference often is relied upon by courts when holding that counsel is not ineffec-

110. David H. Potel, Comment, *Criminal Malpractice: Threshold Barriers to Recovery Against Negligent Criminal Counsel*, 1981 DUKE L.J. 542, 551 (1981).

111. *Id.*

112. *See id.* at 553 (referring to the difficulty in proving ineffective assistance of counsel based on the deferential analysis of trial performance).

113. *See* Strickland v. Washington, 466 U.S. 688, 689 (1984) (warning that "[i]t is all too tempting for a defendant to second-guess counsel's assistance after conviction . . . and it is all too easy for a court . . . to conclude that a particular act or omission of counsel was unreasonable").

tive.[114] This deferential analysis performed in appellate review is echoed in the Texas Supreme Court's decision in *Peeler*. The proof of innocence requirement set forth in *Peeler* is based on the assumption that it is the defendant's illegal conduct, and not the trial performance of the attorney, that remains the sole proximate cause of the conviction.[115] Thus, a former criminal defendant may only prevail in a criminal malpractice cause of action if the attorney's performance was so egregious as to negate this assumption.[116]

The dissenting opinion in *Peeler* argues that proof of innocence should not be the only means of demonstrating proximate cause.[117] In *Peeler*, the plaintiff contended that it was her attorney's failure to convey the prosecutor's offer of immunity that was actually the proximate cause of her conviction.[118] Therefore, "whether Peeler actually committed the crimes with which she was charged is . . . irrelevant."[119] Although the dissenting opinion limits its notion of expanding proximate cause to include the attorney's conduct to the facts of the case,[120] an analogy can be drawn to applying similar leeway where a successful criminal appeal is achieved through a showing that the trial attorney was presumptively ineffective. Because criminal malpractice is a tort action, the focus should be on the alleged tortfeasor, rather than on the conduct of the plaintiff.[121]

IV. *BURDINE V. JOHNSON* BLURS THE LINES OF THE PREJUDICE PRONGS

In *Burdine*, the Fifth Circuit directly limited the rule it set forth for ineffective assistance of counsel based on the presence of a

114. *See, e.g.*, Roe v. Flores-Ortega, 528 U.S. 470, 478 (2000) (declining to find per se prejudice where attorney failed to file notice of appeal without consulting defendant); McFarland v. State, 928 S.W.2d 482, 504-07 (Tex. Crim. App. 1996) (en banc) (refusing to find ineffective assistance of counsel based on, among other factors, the attorney's failure to impeach certain testimony, elicit certain testimony, make certain peremptory strikes, and rehabilitate certain jurors).

115. *See* Peeler v. Hughes & Luce, L.L.P., 909 S.W.2d 494, 498 (Tex. 1995) (referring to the illegal conduct as cause in fact of the injury suffered).

116. *Id.*

117. *Id.* at 501 (Phillips, C.J., dissenting).

118. *Id.*

119. *Id.*

120. *Peeler*, 909 S.W.2d at 501.

121. David H. Potel, Comment, *Criminal Malpractice: Threshold Barriers to Recovery Against Negligent Criminal Counsel*, 1981 DUKE L.J. 542, 548 (1981).

sleeping trial attorney to the specific, egregious facts present at Burdine's trial.[122] Because the holding was promulgated on the explicit findings of fact made by the trial court, however, a "quasi" or potential per se rule may be applied to future cases. That is to say, the *Burdine* rule would appear to apply in any similar case in which a trial attorney is found to have slept repeatedly through trial.[123]

A. *The Potential Effect of* Burdine *on Legal Malpractice Suits in Texas*

Similar to its application in criminal appeals based on ineffective assistance of counsel, the presumption of ineffectiveness set forth in *Burdine* should apply directly to a former criminal defendant's ability to prevail in a civil suit for legal malpractice based on the same scenario. Generally, trial defense attorneys in Texas may be subject to legal malpractice for a variety of reasons, including failure to appear on the date set for trial, failure to appear at all, failure to notify the defendant of the date set for trial, failure to file a responsive pleading, or drawing a note usurious on its face.[124] The Fifth Circuit's decision in *Burdine* should serve to expand the list from which negligence of a trial attorney may be presumed.[125] Thus, by establishing post-conviction relief based on ineffective assistance of counsel pursuant to *Burdine*, a former criminal defendant will have necessarily established innocence as required by the Texas Supreme Court in *Peeler*. The applicability of the *Burdine* rule would serve as a collateral attack on the validity of the criminal conviction, and the federal rule would be persuasive authority in the civil proceeding.

Additionally, the reasoning followed by the Fifth Circuit in *Burdine* used to find trial counsel ineffective under the *Strickland* stan-

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122. Burdine v. Johnson, 262 F.3d 336, 349 (5th Cir. 2001) (en banc), *petition for cert. filed*, 70 U.S.L.W. 3246 (U.S. Sept. 21, 2001) (No. 01-495).

123. *See id.*; *see also* Strickland v. Washington, 466 U.S. 668, 692 (1984) (referring to the case-by-case analysis courts generally perform when confronted with possible facts from which a presumptive denial of counsel under the Sixth Amendment may have occurred).

124. David J. Beck, *Legal Malpractice in Texas Chapter V: Nature of Legal Malpractice*, 43 BAYLOR L. REV. 43, 56 (1991).

125. *See* Jeffrey Levinson, *Don't Let Sleeping Lawyers Lie: Raising the Standard for Effective Assistance of Counsel*, 38 AM. CRIM. L. REV. 147, 172 (2001) (indicating that expansion of the per se application of *Strickland* is warranted where the attorney's acts are "so egregious" and "because of the cost to human life").

dard of review is analogous to reasoning that could be followed by Texas state courts deciding criminal malpractice causes of action. According to the Fifth Circuit, a "constructive denial of counsel occurs when a criminal defendant must navigate a critical stage of the proceedings against him without the aid of 'an attorney dedicated to the protection of his client's rights under our adversarial system of justice.'"[126] Similarly, a civil court could find counsel guilty of legal malpractice for sleeping through substantial portions of trial based on the theory that counsel was constructively denied.[127]

B. *Presumed Prejudice and Professional Responsibility Standards*

The presumption of prejudice in criminal malpractice cases based on the presence of sleeping trial attorneys is also appropriate under the Texas Rules of Disciplinary Procedure.[128] According the Rules, attorneys admitted to practice in Texas must be both competent and diligent in their representation of clients.[129] Although deference is generally afforded trial attorneys under *Strickland*,[130] a per se application of the prejudice prong in legal malpractice actions is necessary in light of the professional and ethical error committed by trial attorneys who sleep at trial.[131] In *Peeler*, the Texas

126. Childress v. Johnson, 103 F.3d 1221, 1229 (5th Cir. 1997) (quoting United States v. Swanson, 943 F.2d 1070, 1075 (9th Cir. 1991)).

127. *See* Ronald E. Mallen, *Legal Malpractice and the Criminal Defense Lawyer*, 9 CRIM. JUST. 2, 3 (1994) (stating that wrongful conviction predicated upon attorney dereliction "requires that [the defendant] be compensated for the wrong which has occurred"); John Leubsdorf, *Legal Malpractice and Professional Responsibility*, 48 RUTGERS L. REV. 101, 111 (1995) (indicating that a legal malpractice standard should be based on what attorneys should do rather than actions performed).

128. *See* John Leubsdorf, *Legal Malpractice and Professional Responsibility*, 48 RUTGERS L. REV. 101, 107 (1995) (arguing that the standard of professional responsibility that applies in disciplinary or other proceedings should parallel those applied in legal malpractice suits).

129. TEX. DISCIPLINARY R. PROF'L CONDUCT 1.01, *reprinted in* TEX. GOV'T CODE ANN., tit. 2, subtit. G app. A (Vernon 1998) (TEX. STATE BAR R. art. X, § 9).

130. Strickland v. Washington, 466 U.S. 668, 692 (1984).

131. *See id.* at 688 (outlining duties owed by attorneys in the representation of criminal defendants); Cuyler v. Sullivan, 446 U.S. 335, 356 (1980) (analyzing an ineffective assistance of counsel claim based on conflict of interest in light of professional responsibility standards); Perillo v. Johnson, 205 F.3d 775, 801 (Tex. 2000) (finding a Sixth Amendment violation of effective assistance of counsel based in part on the Texas Disciplinary Rules of Professional Conduct); John Leubsdorf, *Legal Malpractice and Professional Responsibility*,

Supreme Court stated that supplementing the elements of legal malpractice with the proof of innocence was effective to strike a "proper balance between protecting the strong public policies of preventing convicts from escaping the consequences of . . . their illegal acts and holding defense attorneys responsible for their professional negligence."[132] Based on this reasoning, the presence of a sleeping attorney so egregious as to result in a reversal of the criminal conviction is surely sufficient to warrant the imposition of civil damages upon the same attorney.

V. CONCLUSION

The increasing number of criminal cases in which the defense attorney is found to have slept through portions of trial has recently led federal appellate courts to find trial attorneys presumptively ineffective under the *Strickland* standard of review.[133] Similarly, courts are justified in finding these same attorneys presumptively negligent in legal malpractice suits. The Fifth Circuit's recent opinion in *Burdine* presents Texas courts with the perfect vehicle for finding sleeping attorneys presumptively negligent in legal malpractice suits brought by former criminal defendants based on ineffective assistance of counsel. Thus, the finding of presumption in *Burdine* should be expanded into the civil arena to ensure proper compensation of former criminal defendants for torts arising from ineffective trial representation.

The creation of such a rule allowing presumption of ineffectiveness is important to both criminal and civil law for several reasons.[134] First, the rule allows a former criminal defendant to be compensated adequately for his trial attorney's incompetence that

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48 RUTGERS L. REV. 101, 117 (1995) (stating that rules of professional conduct are clearly relevant in malpractice actions).

132. Peeler v. Hughes & Luce, L.L.P., 909 S.W.2d 494, 500 (Tex. 1995).

133. *See* Deborah L. Rhode, *Access to Justice*, 69 FORDHAM L. REV. 1785, 1801 (2001) (stating that "[i]nstances of courtroom napping are sufficiently common that an entire jurisprudence has developed to determine how much dozing is constitutionally permissible").

134. *Cf.* Jay William Burnett & Catherine Greene Burnett, *Ethical Dilemmas Confronting a Felony Trial Judge: To Remove or Not to Remove Deficient Counsel*, 41 S. TEX. L. REV. 1315, 1353 (2000) (referring to the fact that even if a criminal defendant prevails in a civil suit, damages in the form of the actual conviction would still be incurred).

led to his conviction.[135] Second, a finding of presumption complies with the Supreme Court's determination that all criminal defendants are guaranteed effective assistance of counsel.[136] Third, the potential for tort liability may deter criminal defense attorneys from engaging in this type of unacceptable behavior. According to the Texas Supreme Court in the *Peeler* decision, even if innocence is established, the former criminal defendant still has the burden of "obtaining a factfinding that but for the legal negligence, plaintiffs would not have been convicted."[137] Conviction based on ineffective sleeping counsel is just such a circumstance, and a presumption of negligence is warranted in subsequent legal malpractice causes of action.

135. *See* Ferri v. Ackerman, 444 U.S. 193, 205 (1979) (holding that federal law provides no immunity for court-appointed attorneys in legal malpractice suits brought by former criminal defendants).

136. *See* U.S. CONST. amend. VI (enunciating right to counsel); McMann v. Richardson, 397 U.S. 759, 771 (1970) (providing for the right to effective assistance of counsel).

137. *Peeler*, 909 S.W.2d at 498 n.3.