September 25, 2019

Via E-Filing
Supreme Court of Texas
Supreme Court Building
201 W 14th St., Room 104
Austin, Texas 78711

RE: *Guy James Gray v. Patricia Skelton*, No. 18-0386:

TO THE HONORABLE SUPREME COURT OF TEXAS:

The Texas Public Policy Foundation (the "Foundation") submits this *amicus curiae* letter brief to invite the Court to reconsider the *Peeler* doctrine. Under the doctrine announced in *Peeler v. Hughes & Luce*, those convicted of a criminal offense may not recover against their defense attorneys for legal malpractice unless "they have been exonerated on direct appeal, through post-conviction relief, or otherwise." 909 S.W.2d 494, 498 (Tex. 1995). This Court should reconsider its decision in *Peeler* for at least three reasons: 1) in imposing its own preferred policy views, the Court went far beyond its proper judicial role; 2) the policy rationales underlying the *Peeler* decision are themselves unsound; and 3) *Peeler* renders other doctrines, including *Hughes* tolling, practically unworkable.

The Foundation is a non-profit, non-partisan research organization dedicated to promoting liberty, personal responsibility, and free enterprise through academically-sound research and outreach. Since its inception in 1989, the Foundation has emphasized the importance of limited government, free market competition, private property rights, and freedom from regulation. In accordance with its central mission, the Foundation has hosted policy discussions, authored research, presented legislative testimony, and drafted model ordinances to reduce the burden of

government on Texans. Specifically, the Foundation seeks to further criminal justice reform policymaking within the scope of its mission through its Center for Effective Justice and Right on Crime, the trademarked name of the Foundation's national criminal justice reform project. The Foundation has paid all costs and fees incurred in the preparation of this brief.

A lawyer in Texas is held to the standard of care which would be exercised by a reasonably prudent attorney. *Cosgrove v. Grimes*, 774 S.W.2d 662, 664 (Tex. 1989). An action for negligence is based on four elements. *Id.* at 665. The plaintiff must prove that (1) the defendant owed him a duty, (2) the defendant breached that duty, and (3) this breach proximately caused (4) the plaintiff to suffer damages. *Id.* This negligence standard should be applied to all forms of legal representation, including criminal defense.

In imposing an innocence requirement on convicted persons pursuing legal malpractice claims, the *Peeler* plurality relied upon and repeatedly referenced public policy concerns. *See, e.g.*, 909 S.W.2d at 495 ("The public policy of this State dictates that Peeler's own conduct is the sole cause of her indictment and conviction"); *id*. at 497-98 ("Because of public policy, we . . hold that plaintiffs who have been convicted of a criminal offense may negate the sole proximate cause bar to their claim for legal malpractice in connection with that conviction only if they have been exonerated"). But these considerations did not arise from the legislature's own articulated policy preferences as a means for the Court to, for example, interpret an ambiguous statute or regulation. Rather, the Court instituted its own policy preferences, untethered to any value judgments made by the legislature.

Instead of attempting to honor a policy announced by the legislature, the Court rested its decision on the decisions of courts outside of Texas interpreting their own state's laws. *See generally* 909 S.W.2d at 497; *id*. at 501 (Phillips, C.J., dissenting) ("To support this absolutist position, the Court relies on decisions from at least ten other states, which hold that a plaintiff's criminal conduct is solely responsible for the fine, prison sentence, or social stigma resulting from his or her conviction"). From these decisions in other states, the Court gleaned two underlying policy rationales: 1) "that public policy prohibits convicts from profiting from their illegal conduct"; and 2) "that allowing civil recovery for convicts impermissibly shifts responsibility for the crime away from the convict." *Id*. at 498.

As this Court has held in other contexts, this sort of policymaking is decidedly outside of the proper role of the judiciary. *See Morath v. Tex. Taxpayer & Student Fairness Coal.*, 490 S.W.3d 826, 886 (Tex. 2016) ("Lawmakers decide if laws pass, and judges decide if those laws pass muster"). The judicial branch's role "is not to second-guess the policy choices that inform our statutes or to weigh the effectiveness of their results." *In re Allen*, 366 S.W.3d 696, 708 (Tex. 2012) (quoting *McIntyre v. Ramirez*, 109 S.W.3d 741, 748 (Tex. 2003)). Accordingly, the Court should "decline to usurp legislative authority by issuing reform diktats from on high, supplanting lawmakers' policy wisdom with" its own. *See Morath*, 490 S.W.3d at 886. If the policy announced in *Peeler* turns out to be sound, the Texas legislature is free to pass a law limiting tort liability to only those circumstances in which the plaintiff has been proven innocent. But imposing such a rule through the court system goes far beyond "the province and duty of the judicial department to say what the law is." *See Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

Furthermore, there is good reason to doubt that something akin to the *Peeler* doctrine would pass the legislature, as its underlying rationales are themselves unsound. While the first articulated rationale is that convicts should not profit from their illegal conduct, in many contexts the invocation of "profit" is a complete misnomer. Perhaps the best example of this comes in the context of sentencing, where there is certainly no "profit" in being assessed a punishment that is commensurate with the actual crime committed. To the extent that criminal defense counsel causes the imposition of a punishment above and beyond these bounds through negligent representation, the convict's civil suit does not seek a profit, but instead compensation for an unjust loss. And as detailed below, a civil judgment in no way allows a defendant to "profit" by shifting criminal responsibility to his attorney. Liability for attorney malpractice is distinct and separate from a punishment imposed for a crime.

As for the second articulated rationale involving the shifting of responsibility, the facts of *Peeler* itself are illustrative. In that case, Peeler's defense attorney failed to communicate an offer of absolute transactional immunity, which was subsequently rescinded and resulted in the plaintiff pleading guilty. But, of course, no one suggested that criminal liability should be imposed on defense counsel for this inaction. There was no proposal for the attorney to atone for his oversight by serving the punishment in the plaintiff's stead. Such a suggestion would rightfully be met with ridicule. Instead, the criminal liability would have remained where it belonged, with the convicted individual. In contrast, the responsibility imposed on the defense

attorney would have been purely civil and have resulted entirely from his own negligence.

Finally, as demonstrated in this case, *Peeler* unnecessarily wreaks havoc on other, more sound legal doctrines, such as the *Hughes* rule. The *Hughes* rule tolls the statute of limitations on a legal malpractice claim "until all appeals on the underlying claim are exhausted." *Hughes v. Mahaney & Higgins*, 821 S.W.2d 154, 157 (Tex. 1991). In the instant case, the Fourth Court of Appeals agreed with Skelton's argument that "limitations cannot accrue on a legal malpractice claim against a criminal defense attorney until after the attorney's former client has had a reasonable opportunity to seek habeas corpus relief to challenge the conviction." *Skelton v. Gray*, 547 S.W.3d 272, 278 (Tex. App.—San Antonio 2018). The lower court reasoned that because any legal malpractice suit "would require the plaintiff to overcome the application of the *Peeler* doctrine by either the absence of a conviction or exoneration," the plaintiff in this case "could not have sued Gray for malpractice until her conviction had been vacated through the habeas corpus proceeding." *Id*. While that result may be preferable to effectively barring all suits in similar circumstances by imposing both the *Peeler* doctrine and a strict application of the statute of limitations, it still fails to address Petitioner's valid concerns.

Specifically, Petitioner observes that "Texas has no deadline for filing post-conviction relief following a criminal conviction, and thus there is no time limit on a criminal defendant's ability to sue her defense attorney for malpractice arising out of the initial representation." *Id*. at 279; *see also* Petitioner's Brief on the Merits at 6-7, *Guy James Gray v. Patricia Skelton* (No. 18-0386) ("Because Texas has no deadline for filing postconviction proceedings, and a defendant may file multiple habeas proceedings over time, the court of appeals' new tolling rule could extend limitations for legal malpractice claims indefinitely"). This is not a minor objection, as the important purpose underlying the statute of limitations is to "establish a point of repose and to terminate stale claims." *See Murray v. San Jacinto Agency, Inc.*, 800 S.W.2d 826, 828 (Tex. 1990).

Rather than rework or create a new exception to the *Hughes* rule as a way to avoid its policymaking in *Peeler*, this Court should eliminate this legal issue by reconsidering and rejecting the *Peeler* doctrine. That this Court once stepped into

the purview of the legislature in 1995, should not be cause to reaffirm this judicial policymaking today.

Respectfully submitted,

/s/Robert Henneke
ROBERT HENNEKE
Texas Bar No. 24046058
TEXAS PUBLIC POLICY FOUNDATION
901 Congress Avenue
Austin, Texas 78701
Telephone: (512) 472-2700
Facsimile: 512) 472-2728
rhenneke@texaspolicy.com

CERTIFICATE OF COMPLIANCE

I hereby certify that this document complies with the typeface requirements of Tex. R. App. P. 9.4(e) because it has been prepared in a conventional typeface no smaller than 14-point for text and 12-point for footnotes. This document also complies with the word-count limitations of Tex. R. App. P. 9.4(i), because it contains 1,473 words, excluding any parts exempted by Tex. R. App. P. 9.4(i)(l).

/s/Robert Henneke
ROBERT HENNEKE

CERTIFICATE OF SERVICE

The undersigned certifies that a true and correct copy of this instrument was served by electronic service pursuant to the Texas Rules of Appellate Procedure upon the following counsel of record on September 25, 2019:

Jane M.N. Webre
Scott Douglas & McConnico, LLP
jwebre@scottdoug.com
303 Colorado Street, Suite 2400
Austin, Texas 78701-2589
Counsel for Petitioner

Leslie Sara Hyman
Pulman, Cappuccio & Pullen, LLP
lhyman@pulmanlaw.com
2161 NW Military Hwy., Suite 400
San Antonio, Texas 78213
Counsel for Respondent

Richard G. Wilson
Kerr Wilson, PC
rwilson@tkalaw.com
16676 Northchase Drive, Suite 410
Houston, Texas 77060

/s/Robert Henneke
ROBERT HENNEKE