SUPREME COURT NO.: 91567-9
COURT OF APPEALS NO.: 71054-1-I

IN THE WASHINGTON STATE SUPREME COURT

CHRISTOPHER PIRIS,

Petitioner,

v.

ALFRED KITCHING and JANE DOE KITCHING, husband and wife and their marital community; SOCIETY OF COUNSEL REPRESENTING ACCUSED PERSONS (SCRAP); ERIC NIELSEN and JANE DOE NIELSEN, husband and wife and their marital community; NIELSEN, BROMAN & KOCH P.L.L.C.,

Respondents.

RESPONDENTS NIELSEN AND NIELSEN BROMAN & KOCH P.L.L.C.'S ANSWER TO PETITION FOR REVIEW

Jeffrey P. Downer, WSBA No. 12625
Rosemary J. Moore, WSBA No. 28650
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I. IDENTITY OF RESPONDING PARTY

Defendants-Respondents Eric Nielsen and Nielsen Broman & Koch, P.L.L.C. (collectively Mr. Nielsen).

II. CITATION TO COURT OF APPEALS DECISION

Piris v. Kitching et al., 71054-1-I, 2015 WL 1030587 (Wash. Ct. App. Mar. 9, 2015).

III. ISSUE PRESENTED FOR REVIEW

Whether this Court should deny Plaintiff-Appellant Christopher Piris's Petition for Review under RAP 13.4(b) where:

1. Mr. Piris fails to establish any basis for review under RAP 13.4;

2. Mr. Piris fails to establish that the Court of Appeals' decision conflicts with any other reported Washington decision; and

3. This Court previously decided the question that this petition for review presents. Established Washington law and public policy require a legal malpractice plaintiff based on an underlying criminal matter to prove his actual innocence of the crimes of which he was charged.

IV. STATEMENT OF THE CASE

Mr. Nielsen adopts by reference his Statement of the Case in his Brief of Respondent to Division One of the Court of Appeals. However,

Mr. Piris makes factual assertions which require correction.

First, Mr. Piris mischaracterizes the record by claiming that Mr. Nielsen moved for summary judgment on two grounds. Mr. Nielsen asked the court to dismiss the claim because Mr. Piris is unable to prove the actual-innocence requirement. CP 1, 5-14. This is the sole ground on which Mr. Nielsen moved for summary judgment. CP 1, 6. Mr. Nielsen also pointed out that, because the sentence the trial court had imposed on Mr. Piris was within the lawful range for the crimes that Mr. Piris committed, CP 5, 8, 10, 13-14, the narrow exception to the innocence requirement that the Court of Appeals carved out in *Powell v. Associated Counsel for Accused*, 131 Wn. App. 810, 129 P.3d 831 (2006) does not apply to Mr. Piris's complaint.

Second, Mr. Piris offers factual statements that he fails to support with citations to the record and/or that the record entirely fails to support. The court should disregard all uncited statements. RAP 10.3(a)(5); *Hurlbert v. Gordon*, 64 Wn. App. 386, 399-401, 824 P.2d 1238 (1992).

V. ARGUMENT

A. Mr. Piris does not argue that grounds for review exist under RAP 13.4(b)(3) or (4).

Mr. Piris has asserted grounds for Supreme Court review under RAP 13.4(b)(1) and (2) only. He does not offer any argument in support of any other basis for this court to accept review. Mr. Piris therefore

concedes that review is not warranted under either RAP 13.4(3) or RAP 13.4(4).

B. Review is not warranted under any of the grounds in RAP 13.4.

Mr. Piris claims – wrongly – that grounds for review exist under RAP 13.4(1) and (2). Pursuant to RAP 13.4, a petition for review will be accepted by the Supreme Court only:

> (1) If the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or
>
> (2) If the decision of the Court of Appeals is in conflict with a decision of another division of the Court of Appeals ... .

RAP 13.4.

Mr. Piris's petition for review should be denied because it fails to satisfy either basis for Supreme Court review.

Furthermore, nothing in RAP 13.4 or in Washington law entitles Mr. Piris to review by this Court simply because he disagrees with the Court of Appeals' decision:

> [I]t is a mistake for a party seeking review to make the perceived injustice the focus of attention in the petition for review. RAP 13.4(b) says nothing in its criteria about correcting isolated instances of injustice. This is because the Supreme Court, in passing upon petitions for review, is not operating as a court of error. Rather, it is functioning as the highest policy-making judicial body of the state. ...
>
> The Supreme Court's view in evaluating petitions is global in nature. Consequently, the primary focus of a petition for review should be on why there is a compelling

> need to have the issue or issues presented decided *generally*. The significance of the issues must be shown to transcend the particular application of the law in question. Each of the four alternative criteria of RAP 13.4(b) supports this view. The court accepts review sparingly, only approximately 10 percent of the time. Failure to show the court the "big picture" will likely diminish the already statistically slim prospects of review.

Wash. Appellate Prac. Deskbook § 27.11 (1998) (italics in original).

C. The Court of Appeals' decision follows established Supreme Court precedent.

The Court of Appeals' decision does not conflict with any Supreme Court decision. Mr. Piris falsely claims that it conflicts with *Ang v. Martin,* 154 Wn.2d 477, 114 P.3d 637 (2005).

As a matter of public policy, Washington courts hold that a criminal's "own bad acts, not the alleged negligence of defense counsel, should be regarded as the cause in fact of their harm." *Ang*, 154 Wn.2d at 485. "[P]roving actual innocence, not simply legal innocence, is essential to proving proximate causation, both cause in fact and legal causation." *id.* at 484 (quoting *Falkner,* 108 Wn. App. at 115); *see also Owens v. Harrison,* 120 Wn. App. 909, 913, 86 P.3d 1266 (2004).

In *Ang,* this Court held that a criminal malpractice plaintiff must prove his actual innocence of the underlying crime to prove proximate causation.

> [P]roving actual innocence, not simply legal innocence, is essential to proving proximate causation, both cause in fact

> and legal causation. ... Unless criminal malpractice plaintiffs can prove by a preponderance of the evidence their actual innocence of the charges, their own bad acts, not the alleged negligence of defense counsel, should be regarded as the cause in fact of their harm.

Ang, 154 Wn. 2d at 484-85 (citing *Falkner v. Foshaug*, 108 Wn. App. 113, 115, 29 P.3d 771 (2001)).

The Court of Appeals in this case followed *Ang* by recognizing that Mr. Piris is a criminal who cannot prove actual innocence, and whose own bad acts, not the alleged negligence of his defense attorneys, should be regarded as the cause in fact of his harm.

> Here, Piris's own criminal conduct led to his conviction and subsequent sentence. His criminal history led to an offender score calculation that yielded a 146 to 194 month standard range sentence. A sentence of 159 months falls within this standard range.

Piris v. Kitching, ___ Wn. App. ___, 345 P.3d 13, slip op. at 7 (Mar. 9, 2015).

Mr. Piris asserts: "*Ang* makes it clear that the policy reasons for the imposition of actual innocence requirement for trial malpractice, do not apply to sentencing malpractice." This bald assertion is false. In *Ang*, this Court said nothing that would limit its holding to a specific type of criminal malpractice. Instead, in *Ang*, this Court enunciated five public policy reasons for imposing the actual innocence requirement. *Ang,* 154 Wn. 2d at 484-85:

> Likewise, if criminal malpractice plaintiffs cannot prove their actual innocence under the civil standard, they will be unable to establish, in light of significant public policy considerations, that the alleged negligence of their defense counsel was the legal cause of their harm. Summarizing the policy concerns, the *Falkner* court observed that, "[r]equiring a defendant to prove by a preponderance of the evidence that he is innocent of the charges against him will **[1] prohibit criminals from benefiting from their own bad acts, [2] maintain respect for our criminal justice systems procedural protections, [3] remove the harmful chilling effect on the defense bar, [4] prevent suits from criminals who may be guilty, [but] could have gotten a better deal, and [5] prevent a flood of nuisance litigation.**"

Id. (quoting *Falkner v. Foshaug*, 108 Wn. App. 113, 123-124, 29 P.3d 771 (2001)) (numerals and emphasis added).

Each of these five policy reasons applies equally to a criminal whose malpractice claim arises from "sentencing malpractice" as to malpractice arising from the liability part of criminal proceedings while policy reason number four speaks directly to persons who serve a longer sentence within the maximum allowed by law than they might otherwise have done. Contrary to Mr. Piris's assertion, the Court of Appeals' decision in this action, far from conflicting with *Ang,* properly applies the principles and policies that this Court mandated in *Ang.*

Mr. Piris then claims that this Court has never considered a claim that rests solely on a claim of sentencing malpractice, asserting that *Ang* concerned a claim of pretrial and trial malpractice. However, this case

involves the alleged pretrial and trial malpractice of Mr. Kitching and of SCRAP. More fundamentally, the policy reasons apply equally to "sentencing malpractice." *Falkner* illustrates that Mr. Piris advances a distinction without a difference. While Mr. Falkner based his malpractice claim on his attorney's failure to investigate and prepare the defense case, like Mr. Piris he complained that he spent too long in prison. *Falkner v. Foshaug,* 108 Wn. App. at 116-17. He served nearly six years in prison; after his conviction was vacated based on ineffective assistance of counsel and he was retried on a lesser charge having entered an *Alford* plea, Mr. Falkner was eventually sentenced to only 41 months and was immediately released because he had served more time than that. *Id.* This Court considered the *Falkner* case when reaching its decision in *Ang.*

D. The Court of Appeals' decision in this case does not conflict with the Court of Appeals' decisions in *Powell I* and *Powell II.*

Mr. Piris asserts that the Supreme Court should accept review because the March 9, 2015 opinion conflicts with other decisions in the Court of Appeals. RAP 13.4(b)(2). Specifically, Mr. Piris asserts that the decision conflicts with *Powell v. Associated Counsel for Accused,* 125 Wn. App. 773, 106 P.3d 271 (2005) (*Powell I*), and *Powell v. Associated Counsel for Accused,* 131 Wn. App. 810, 129 P.3d 831 (2006) (*Powell II*).

This is also incorrect. On the contrary, the Court of Appeals' decision is consistent with its decisions in *Powell I* and *Powell II* as well as its earlier rulings in *Falkner v. Foshaug,* 108 Wn. App. 113, 29 P.3d 771 (2001) and in *Owens v. Harrison,* 120 Wn. App. 909, 86 P.3d 1266 (2004).

As set forth in Mr. Nielsen's earlier briefs, he has no quarrel with *Powell I* and *Powell II.* Unfortunately, Mr. Piris tries to stretch those rulings beyond their actual holdings.

In *Powell,* 131 Wn. App. at 814, Mr. Powell alleged that he served a sentence that exceeded the maximum sentence that could be lawfully imposed for the crime he had committed. Mr. Powell committed a gross misdemeanor, for which the maximum term of confinement was one year. *Id.* at 812. "At the sentencing hearing, Powell was erroneously sentenced for a Class C felony to 38.25 months of confinement." *Id.* "However, by the time Powell was released from prison, he had been incarcerated for over 20 months." *Id.*

The *Powell* court held that none of the policy-based reasons that were articulated in *Ang,* 154 Wn.2d at 484-85 and *Falkner,* 108 Wn. App. at 123-24, applied because Mr. Powell served a sentence that **exceeded** the maximum sentence that could be lawfully imposed for the crime he had committed. *Id.* at 814. Therefore, Powell's lawsuit implicated none of

these policy concerns. *Id.*

> Powell will not benefit from his own bad act. He paid for his crime by serving the maximum prison sentence that could be lawfully imposed. His unlawful restraint beyond that period was not a consequence of his own bad actions.

Powell, 131 Wn. App. at 814.

In allowing Mr. Powell's claim to go forward, the Court of Appeals made it clear that it was carving out a "very limited" exception to the general rule that applied **only** where the plaintiff served a sentence that exceeded the correct maximum term. *Id.* at 814-15.

> Finally, recognizing a limited exception to the rule requiring proof of actual innocence should not cause a flood of nuisance litigation. The highly unusual alleged facts of this case, whereby an alleged egregious error by defense counsel allowed a defendant to be sentenced to a term substantially longer than the maximum term allowed by statute, and the defendant actually served time in prison **beyond the correct maximum term**, are not likely to occur with any frequency.
>
> Powell's case is more akin to that of an innocent person wrongfully convicted than of a guilty person attempting to take advantage of his own wrongdoing. Therefore, under the facts of this case, we adopt a very limited exception to the rule requiring proof of actual innocence in a legal malpractice case stemming from a criminal matter.

Id. at 815 (emphasis added).

In contrast, Mr. Piris's sentence here was **within** the maximum permitted by law. His complaint is that he may have served more than 146 months. However, his sentence of 159 months was not longer than

the term that was allowed by statute for the crimes he committed. At the time he committed those crimes, the **standard** sentencing range was 146 to 194 months, while the maximum penalty was life imprisonment and/or a $50,000 fine. Former RCW 9.94A.310; former RCW 9.94A.360; RCW 9A.20.021.

Rape of a Child in the First Degree is a class A felony for which the maximum penalty is life imprisonment and/or a $50,000 fine. RCW 9A.44.073; RCW 9A.20.021. This was the maximum penalty at the time Mr. Piris committed and was sentenced for his crimes. *Id.*

Because the time Mr. Piris served did not exceed the maximum prison sentence permitted by law for his crime, his claim does not fall within the very narrow exception carved out by *Powell I* and *II.*

Nor was the attorneys' alleged conduct in this matter "egregious." It did not involve a failure to advise the court that it was sentencing the plaintiff for a felony, when he committed a misdemeanor, as in *Powell. Powell,* 131 Wn. App. at 814. Further, as appellate counsel, Mr. Nielsen did not participate in the original sentencing in the trial court and his retainer ended upon issuance of the mandate, remanding the case to the trial court. CP 77, 79, 98, 119, ¶4.2. He had no duty to ensure the trial court set the matter for resentencing. *Id.* (Notwithstanding this, he informed the Office of Public Defense and Mr. Piris of the decision. CP

91-93, 99. The Court of Appeals also informed Mr. Piris of its decision. *Id.*)

Even more importantly, another reported Court of Appeals decision refutes Mr. Piris's argument entirely. In *Owens v. Harrison,* 120 Wn. App. at 914-16, the Court of Appeals refused to carve out a further exception to the "actual innocence" requirement in circumstances similar to this case.

In *Owens,* 120 Wn. App. at 914, the plaintiff asked the Court of Appeals "to carve out an exception to the innocence requirement where defense counsel fails to convey a plea offer and, as a result, the defendant receives an increased sentence." Mr. Owens made a successful post-conviction challenge to a portion of his conviction. *Id.* at 913. However, his legal-malpractice claim could not survive summary judgment "because he pled guilty to two charges, and he does not claim to be innocent," so that he could not satisfy the actual-innocence requirement. *Id.* Mr. Owens cited cases from Michigan and Ohio in which defense counsel failed to convey an offer of immunity and a plea offer, respectively. *Id.* (citing *Falkner,* 108 Wn. App. at 119 n. 11 (citing *Gebhardt v. O'Rourke*, 444 Mich. 535, 510 N.W.2d 900 (1994); *Krahn v. Kinney*, 43 Ohio St.3d 103, 538 N.E.2d 1058 (1989))). However, Michigan and Ohio do not require proof of actual innocence in malpractice actions arising from criminal

cases. *Id.* The Court of Appeals rejected Mr. Owens's argument and affirmed dismissal of his claim:

> But the Michigan and Ohio cases did not address the public policy rationale upon which we specifically based our holding in *Falkner*. Footnote 11 simply commented on other jurisdictions' rejection of the innocence requirement, a requirement we nonetheless decide to adopt.

Owens, 120 Wn. App. at 914; *see also id.* at 916.

Mr. Piris's claim that the Court of Appeals' decision conflicts with another decision of that court is baseless. It is impossible to reconcile Mr. Piris's attempt to broaden the narrow *Powell* exception with the Court of Appeals' holding in *Owens v. Harrison.*

The law is already well settled as to when a criminal defendant may bring a legal-malpractice claim against his criminal-defense lawyers. This Court and the Court of Appeals both have considered and decided that question. There is no need of a further authoritative determination by this Court, because the issue presented by Mr. Piris falls well within the Court's decision in *Ang* and the Court of Appeals' decision in *Owens* and *Falkner.*

Mr. Piris does not claim he was innocent of the crime for which he was sentenced or that he should not have pleaded guilty. CP 21-24. His sole complaint is that his sentence was too long and that he was in prison longer than he should have been. Thus, the sentence Mr. Piris served had

"everything to do with" his own criminal conduct.

In sum, Mr. Piris's claim falls squarely within the five policy reasons that this Court has articulated for prohibiting a criminal who cannot prove his innocence from bringing a malpractice claim against his defense attorneys. Mr. Piris wants to be compensated because, he claims, he could have gotten a better deal.

E. Washington long ago joined the clear majority of jurisdictions that require criminal legal-malpractice plaintiffs to prove their actual innocence.

Washington long ago joined the clear majority of jurisdictions that require legal-malpractice plaintiffs, based on underlying criminal matters, to prove their actual innocence as an additional element of proof. *Falkner,* 108 Wn. App. at 118-19; *Wiley v. Cty. of San Diego,* 19 Cal. 4th 532, 536-37, 966 P.2d 983 (1998) (citations omitted).

Courts of other states likewise also require proof of actual innocence where the alleged criminal malpractice involves a longer sentence within the maximum that could be imposed. For example, see *Howarth v. State, Pub. Defender Agency,* 925 P.2d 1330, 1331-1331 (Alaska 1996), (dismissal of legal-malpractice action because plaintiff's criminal guilt was undisputed; the seven years served was well within the maximum lawful sentence of ten years); *accord Paulsen v. Cochran,* 356 Ill. App. 3d 354, 361-63, 826 N.E.2d 526 (2005).

Mr. Piris cites an alleged statement from the 2007 edition of Mallen & Smith that actual innocence is not relevant where the alleged error concerns the extent or severity of the sentence. As the Court of Appeals' decision and Mr. Nielsen's Court of Appeals brief point out, later editions of Mallen & Smith are not so dogmatic. Further, the cases cited therein involve (1) sentences exceeding the statutory maximum, (2) jurisdictions that do not require proof of actual innocence, or (3) cases where actual innocence was not raised as a defense or was waived by the defendant. *Piris v. Kitching*, slip op. at 7.

These cases therefore are readily distinguishable and indeed are not proper precedent. *See Berschauer/Phillips v. Seattle Sch. Dist. No. 1,* 124 Wn.2d 816, 825, 881 P.2d 986 (1994) (a legal theory that merely lurks in the record lacks precedential authority). Because they are not on point and are contrary to Washington precedent, these cases lack even persuasive authority.

Mr. Piris's sentence was within the standard sentencing range for the offenses he committed. He therefore is not entitled to bring this legal-malpractice claim under settled Washington law requiring proof of actual innocence, or under the narrow *Powell* exception to that rule.

VI. CONCLUSION

Mr. Piris has not presented grounds under RAP 13.4 on which this Court should grant review. Accordingly, Mr. Nielsen respectfully requests that Mr. Piris's Petition for Review be denied.

Respectfully submitted this 30th day of April, 2015.

LEE SMART, P.S., INC.

By: _____
Jeffrey P. Downer, WSBA No. 12625
Rosemary J. Moore, WSBA No. 28650
Of Attorneys for Respondents Nielsen
and Nielsen, Broman & Koch P.L.L.C.

DECLARATION OF SERVICE

The undersigned certifies under penalty of perjury under the laws of the State of Washington, that on April 30, 2015, I caused service of the foregoing pleading on each and every attorney of record herein via legal messenger:

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DATED this 30th day of April, 2015 at Seattle, Washington.

Jennifer A. Jimenez, Legal Assistant

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Please also find Respondent Nielsen's Answer Opposing Discretionary Review which is also being filed and served by messenger.
Sincerely

Rosemary J. Moore | Attorney at Law | VCard | Email | Bio

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Subject: Piris v. Kitching, et al./No. 91567-9: Filing Answer Opposing Discretionary Review

Dear Clerk:

Attached please find Respondent SCRAP and Al Kitching's Answer Opposing Discretionary Review to be filed with the court.

Thank you,

Mary

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