Supreme Court No. 91567-9
Court of Appeals No. 71054-1-I

IN THE WASHINGTON STATE SUPREME COURT

CHRISTOPHER PIRIS,
Petitioner,

v.

ALFRED KITCHING, et. al,
Respondents.

ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR KING COUNTY

PETITION FOR REVIEW

Suzanne Lee Elliott
Attorney for Petitioner
1300 Hoge Building
705 Second Avenue
Seattle, WA 98104
(206) 623-0291

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Other Authorities

Rules

I.
IDENTITY OF PETITIONER

Petitioner Christopher Piris, through attorneys Suzanne Lee Elliott and John Rothschild, asks this Court to accept review of the Court of Appeals decision terminating review designated in Part II of this petition.

II.
COURT OF APPEALS DECISION

Piris seeks review of the published opinion filed in *Piris v. Kitching*, No. 71054-1-I, 2015 WL 1030587 (Wash. Ct. App. Mar. 9, 2015). *See* Exhibit 1.

III.
ISSUE PRESENTED FOR REVIEW

In a claim for attorney malpractice, is "actual innocence" relevant if the plaintiff's attorneys erred in calculating the plaintiff's sentencing range, the sentence was overturned on appeal but the plaintiff was not timely resentenced and these errors resulted in the plaintiff serving a sentence that was 13 months longer than the sentence lawfully, but belatedly, imposed on remand?

IV.
STATEMENT OF THE CASE

Christopher Piris pled guilty to first degree rape of a child. The crime was alleged to have occurred when Piris was 13 years old. The

victim was Piris's 10-year-old stepbrother. CP 175-187. Respondent Albert Kitching worked for the Society of Counsel for Accused Persons (SCRAP). He represented Piris in the Superior Court. CP 186, 191. Piris committed the offense while a juvenile, but charges were not filed until after he turned 18. CP 238. At his initial sentencing, defense counsel pointed out that if Piris had been convicted as a juvenile, his standard range would have been "up to 100 weeks" in detention. CP 239. Defense counsel argued that Piris's age at the time of the offense and the delay in reporting constituted mitigating factors. CP 240. The original sentencing judge did not find a basis to go below the standard range. But, after hearing the presentations of the State and defense, the judge said:

> What I am going to do, however, is I am going to sentence you to the bottom of the standard range which is...159 months.

CP 69. Unfortunately, the parties miscalculated that sentencing range as 159 to 211 months. CP 45. The correct sentencing range was 146 to 194 months.

Piris appealed. Eric Nielsen of Nielsen, Broman and Koch represented Piris in the Court of Appeals. In the appeal, after persuasively pointing out the error in the standard range, Mr. Nielsen urged a remand for resentencing. He wrote:

> If the trial court had understood the standard range to be 146 to 194 months, it seems likely that it would have imposed the bottom of the range – 146 months.

CP 88.

On February 14, 2000, the Court of Appeals reversed, in a per curiam opinion, the improperly calculated sentence. CP 193-194. That opinion states:

> Piris asks that his sentence be vacated and the case remanded for resentencing. The State concedes that Piris is entitled to be sentenced under the 1993 statute and agrees the case should be remanded for resentencing. We have reversed the record and find the State's concession is well taken.

CP 194.

Piris's sentence was vacated and the case was remanded for resentencing. According to Piris, he never heard from Nielsen regarding the reversal. His case was never set for resentencing. As a result, Piris served all 159 months.

In May 2012, Piris was summoned to the King County Superior Court for a probation violation. In reviewing the file, the new sentencing judge realized that the sentence had been vacated and Piris had never been resentenced. He then sentenced Piris to 146 months in jail. CP 199. No one appealed or challenged this new sentence.

Piris then sued both his trial and appellate lawyers alleging negligence. CP 151-155.

The lawyers moved for summary judgment on two grounds. First, they argued that Piris could not sue because he cannot "prove his actual innocence of the charges." Second, they argued there was no claim because Piris was sentenced "within the lawful range that could be imposed for the crimes he committed." CP 221-225. The trial court granted the motion stating: "the basis for the dismissal is the 'actual innocence' requirement as set out in *Ang v. Martin*, 154 Wn.2d 477, 483-484, 114 P.3d 637 (2005)." CP 249.

This timely appeal followed. CP 263-64. On March 9, 2015, the Court of Appeals entered a published opinion affirming the trial court. This decision will be discussed in more detail below.

V.
ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

A. THE COURT OF APPEALS OPINION IN THIS CASE CONFLICTS WITH THE *POWELL* DECISIONS.[1] RAP 13.4(B)(2).

The "issue of guilt or innocence is relevant, if the client's complaint is the fact of conviction, rather than the severity of the sentence or other consequences." 771 R. Mallen & J. Smith, Legal Malpractice §

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[1] *Powell v. Associated Counsel for Accused (Powell I)*, 125 Wn. App. 773, 106 P.3d 271, *review granted, cause remanded*, 155 Wn.2d 1024, 123 P.3d 120 (2005), and *Powell v. Associated Counsel for the Accused (Powell II)*, 131 Wn. App. 810, 129 P.3d 831 (2006) (opinion adhered to on reconsideration different panel of the Court of Appeals).

26.13 (2007 Edition) (emphasis added). But "actual innocence" is "[usually][2] not relevant if the attorney's error concerns the extent or severity of the sentence." *Id.* Thus, where, as here, a plaintiff alleges that his attorney's negligence resulted in a sentencing error, he has met his initial burden if he alleges: (i) that defendant's negligence resulted in a legally impermissible sentence, and (ii) that he obtained post-conviction sentencing relief. *Id.*

In, *Powell II*, Division I, sensibly held that an allegation of actual innocence is not required where, as here, plaintiff complains that his attorney's negligence resulted in a sentencing error for which he obtained post-conviction sentencing relief. In that case, the court held that it is sufficient for a plaintiff to allege (i) that his attorney's negligence resulted in a sentencing error and (ii) that plaintiff obtained post-conviction sentencing relief. In so holding, the *Powell II* panel concluded that the policy reason underlying the "actual innocence" requirement is no longer applicable; that is, excusing plaintiff from the actual innocence requirement does not permit plaintiff to "profit from the [crime's] commission" because plaintiff is still required to serve the legally warranted sentence. *Powell II*, 131 Wn. App. at 813.

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[2] *See* fn. 13, Slip Opinion at 14.

More importantly, however, in excusing the actual innocence requirement in *Powell II*, that panel of Division I appropriately focus on the issue of proximate causation, finding that where, as here, an attorney's failure to object to a sentencing enhancement resulted in a higher sentence being imposed on plaintiff, the improper sentence was not the direct result of plaintiff's criminal behavior, but rather, it was the proximate result of his attorney's negligence. *Powell II*, 131 Wn. App. at 813 (finding that where defense attorney's error caused plaintiff to serve longer sentence than warranted, "[t]he harm caused by [plaintiff's] unlawful restraint was not the direct consequence of his own bad act"). In such circumstances, it is appropriate to permit plaintiff to assert a claim for legal malpractice without requiring him to allege actual innocence.

This case is indistinguishable from *Powell I* and *II*. In the *Powell* cases, the Court of Appeals held that because Powell served more than the maximum sentence for the crime he committed, harm caused by his unlawful restraint was not the direct consequence of his own bad act. The harm was caused by his lawyers' failure to properly ascertain the correct sentence.

The same is true here. Piris served the illegal sentence of 159 months. The additional 13 months he served was due, not to his behavior, but to errors committed by his lawyers.

In *Powell II*, the Court of Appeals noted that Powell's legal malpractice action did not discount or compete with the procedural protections afforded the criminal justice system. Powell secured his release from unlawful restraint using criminal justice procedures. But the criminal justice system provided him no remedy for the harm suffered by serving eight months longer than the crime required. *Powell II*, 131 Wn. App. at 814.

The same is true here. Piris filed a notice of appeal and his sentence was corrected by the Court of Appeals, Division I. But because of the failures of his attorneys, both in miscalculating his standard range initially and in failing to reset the matter for resentencing once the unlawful sentence was vacated, Piris suffered by serving 13 months longer than his crime required.

In *Powell II*, the court said that Powell's complaint was not that he simply "could have gotten a better deal." *Powell II*, 131 Wn. App. at 814. Powell was entitled to be lawfully sentenced.

The same is true here. Piris was entitled to be lawfully sentenced. The Court of Appeals recognized that illegality when it reversed and remanded Piris's case for a new sentencing hearing.

The negligence in this case, like *Powell II*, was "egregious." Piris served one year more than he should have simply because of his lawyers'

errors. The failure to properly calculate a sentence under the SRA is a not a common oversight. And certainly the failure to set the matter back on the calendar in the trial court after reversal is not a common "oversight." Moreover, errors that result in unlawful incarceration for 13 months beyond that provided for by law are "egregious" under any definition of that term.

B. THE COURT OF APPEALS OPINION CONFLICTS WITH THIS COURT'S OPINION IN *ANG V. MARTIN*

This Court has never considered a claim that rests solely on a claim of sentencing malpractice. But it has considered a claim of pretrial and trial malpractice in a criminal case. *Ang v. Martin*, 154 Wn.2d at 483. Ang makes it clear that the policy reasons for the imposition of actual innocence requirement for trial malpractice, do not apply to sentencing malpractice.

In *Ang*, the plaintiffs hired Martin and he and his co-counsel advised them to enter pleas of guilty. Shortly thereafter, the plaintiffs hired new counsel and successfully withdrew their guilty pleas and were acquitted at the subsequent criminal trial.

After the acquittal the Angs sued Martin and co-counsel. The trial court instructed the jury that the plaintiffs were required to prove that they were more than "not guilty," but rather, actually innocent of the crimes

charged. *Id* at 483. In the special verdict forms, the jury found one lawyer negligent but also found that the Angs had failed to prove actual innocence. The Angs appealed.

This Court held that the jury was properly instructed because in order to prove malpractice in a criminal case, the plaintiffs bear the burden of proving by a preponderance of the evidence each of the following:

> First, that there is an attorney-client relationship giving rise to a duty owed by a defendant to a plaintiff; Second, that plaintiffs have obtained a successful challenge to their convictions based on their attorneys failure to adequately defend them; Third, that plaintiff was innocent of the crimes charged; Fourth, that there is an act of omission by a defendant that breached the duty of care of an attorney; Fifth, that a plaintiff was damaged; and Sixth, that a breach of duty by a defendant is a proximate cause of a plaintiffs damages.

Id. This Court held that when it came to determining the "legal cause of that harm, a court may consider, among other things, the public policy implications of holding the defendant liable." *Id.*

Thus, the Court concluded that for policy reasons, unless the plaintiff can establish his or her actual innocence, their guilt will be considered the "cause in fact" of the injury. Those policy reasons included prohibiting criminals from benefiting from their own bad acts, maintaining respect for our criminal justice system's procedural protections, removing the harmful chilling effect on the defense bar,

preventing suits from criminals who may be guilty, but argue that they could have gotten a better deal, and preventing a flood of nuisance litigation.

The Court of Appeals conclusion in this case misapplies the policy considerations set forth in *Ang* to the question of sentencing malpractice. The public policy considerations that assign the "cause in fact" to the defendant's criminal conduct simply do not apply to malpractice at sentencing rather than malpractice committed at or before trial. The Court of Appeals got it wrong when it held that it was Piris's own "perfidy" that resulted in both the incorrect sentence and the failure to insure that resentencing took place after the reversal. It was not. It was his lawyer's negligence.

The Court of Appeals fn. 12 is particularly concerning. The footnote states that there is the potential for a flood of criminal malpractice suits because sentencing law is complex. Yet, there is nothing in the record to suggest that there is an epidemic of malpractice in this area. Many areas of legal practice are complex but when lawyers make mistakes in those other areas, their clients are permitted to sue them. And, presumably, there are few cases where an illegal sentence is reversed on appeal because the lawyer did not know the law and where that reversal

goes unnoticed by the defendant's trial and appellate lawyers and the trial court for 12 years.

The Court of Appeals opinion actually damages respect for our criminal justice system's procedural protections. Lawyers have a duty to exercise reasonable care to avoid mistakes that damage their clients. It appears that in all other practice areas, plaintiffs whose lawyers commit malpractice are entitled to redress for their injury. But the Court of Appeals concludes that a person who served an unlawful sentence as a result of his lawyer's negligence has no remedy. This kind of unfairness does not inspire confidence.

In truth, the Court of Appeals opinion abandons a central premise of tort liability, the deterrence of unreasonable or negligent behavior, without any rational basis for doing so. There should be disincentives – such as malpractice litigation – for lawyers who fail to maintain competence in their practice area and who fail to properly follow through for their clients. This Court should reject the notion that criminal defendants are never entitled to recover for sentencing malpractice.

VI.
CONCLUSION

Under the Court of Appeals opinion, criminal defendants who serve an illegal sentence have no redress for their injury against the person

who actually caused the injury. This conclusion is in conflict with other decisions from this Court and the Court of Appeals. And no public policy can justify the result the Court of Appeals reached. For the reasons stated above, review should be granted.

DATED this 1 day of April, 2015.

Respectfully submitted,

Suzanne Lee Elliott

Suzanne Lee Elliott, WSBA #12634
Attorney for Christopher Piris

CERTIFICATE OF SERVICE

I hereby certify that on the date listed below, I served by First Class United States Mail, postage prepaid, one copy of this brief on the following:

Ms. Rosemary Moore
Lee Smart P.S., Inc.
701 Pike Street
Seattle, WA 98101

Mr. Christopher Howard
Averil Rothrock
Schwabe Williamson & Wyatt
1420 Fifth Avenue, Suite 3400
Seattle, WA 98101

Mr. David Hackett
King County Prosecutor's Office
500 Fourth Avenue, Suite 900
Seattle, WA 98104

04/01/2015
Date

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2015 WL 1030587
Only the Westlaw citation is currently available.
Court of Appeals of Washington,
Division 1.

Christopher PIRIS, Appellant,
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; and King County, Respondents.

No. 71054-1-I. | March 9, 2015.

Synopsis
Background: Former client brought legal malpractice action, naming as defendants his criminal defense attorney, the attorney who represented him on his appeal, and the county. The Superior Court, King County, Richard D. Eadie, J., granted summary judgment in favor of all defendants, and former client appealed.

[Holding:] The Court of Appeals, Lau, J., held that former client failed to satisfy the innocence requirement necessary to maintain criminal legal malpractice action.

Affirmed.

West Headnotes (4)

[1] **Attorney and Client**
Conduct of Litigation

Former client who alleged a sentencing error failed to satisfy the innocence requirement in order to maintain criminal legal malpractice action against criminal defense attorney, attorney who represented him on appeal, and county, even though the court's miscalculation of the offender score rendered former client's original sentence unlawful, where client pled guilty to two charges of rape, did not claim to be innocent, and the original sentence did not exceed the maximum that could lawfully have been imposed.

Cases that cite this headnote

[2] **Attorney and Client**
Conduct of Litigation

In criminal malpractice cases, proof of innocence is an indispensable element of a plaintiff's cause of action.

Cases that cite this headnote

[3] **Attorney and Client**
Conduct of Litigation

Postconviction relief is a prerequisite to maintaining a criminal legal malpractice suit and proof of innocence is an additional element a criminal defendant/malpractice plaintiff must prove to prevail at trial in his legal malpractice action.

Cases that cite this headnote

[4] **Sentencing and Punishment**
Prior or Subsequent Misconduct

A sentencing court acts without authority when it imposes a sentence based on a miscalculated offender score.

Cases that cite this headnote

Appeal from King County Superior Court; Honorable Richard D. Eadie, J.

Attorneys and Law Firms

John Rothschild, Attorney at Law, Suzanne Lee Elliott, Attorney at Law, Seattle, WA, for Appellant.

Christopher Holm Howard, Averil Budge Rothrock, Allison Kathleen Krashan, Schwabe Williamson & Wyatt PC, Rosemary Jane Moore, Jeffrey Paul Downer, Lee Smart PS Inc, David J. Hackett, King County Administration Building, Seattle, WA, for Respondent.

PUBLISHED OPINION

LAU, J.

*1 ¶ 1 Christopher Piris appeals the trial court's dismissal on summary judgment of his legal malpractice suit against his former attorneys and King County arising from his underlying criminal case. Piris contends the trial court erred when it determined that he failed to allege and prove his innocence of first degree rape of a child, a necessary requirement to maintain his legal malpractice lawsuit. We conclude that Piris's negligence allegations fall outside the narrow exception to the innocence requirement we recognized in *Powell v. Associated Counsel for Accused,* 125 Wash.App. 773, 106 P.3d 271 (2005) (*Powell* I), and *Powell v. Associated Counsel for Accused,* 131 Wash.App. 810, 129 P.3d 831 (2006) (*Powell* II). We affirm summary judgment dismissing as a matter of law Piris's legal malpractice claim.

FACTS

¶ 2 The material facts are not disputed. In 1997, the State charged Christopher Piris with three counts of first degree rape of a child based on crimes he committed when he was 13 years old. By the time he was charged with the offenses in Superior Court, Piris was 19 years old. Piris was represented at trial by attorney Alfred Kitching from the Society of Counsel Representing Accused Persons (SCRAP). [1]

¶ 3 On September 25, 1998, Piris pleaded guilty to two counts of first degree rape of a child. His statement of defendant on plea of guilty indicated a standard sentencing range for the crimes as 159 to 211 months of confinement.

¶ 4 At sentencing in May 1999, the trial court denied Piris's request for a 48–month exceptional sentence below the standard range. The court imposed a low-end sentence explaining:

> THE COURT: ... Mr. Piris, I have considered these requests for exceptional sentence, and it's the conclusion of this court that there are not facts in this file that would support an exceptional sentence.
>
> There are certainly—this file represents a tragedy undoubtedly in your life and a tragedy in the lives of many of your family. Be that as it may, I just do not feel there are facts in this file that will support an exceptional sentence down. What I am going to do, however, is I am going to sentence you at the bottom of the standard range which is —Mr. Rogers, I hope I'm correct on this—is 159 months.

¶ 5 Piris appealed the length of his sentence. Attorney Eric Nielsen, from Nielsen, Broman and Koch law firm was appointed to represent Piris on his appeal. Nielsen successfully argued on appeal that the standard range sentence of 159 to 211 months was erroneous because the trial court used the version of RCW 9.94A.360 in effect at the date of the sentencing hearing instead of the version in effect at the date the offenses were committed. This statute was amended in 1997, about two years before Piris was sentenced. Under the correct version of the statute, Piris's offender score calculation yielded an offender score of 6 rather than 7 and a standard range of 146 to 194 months rather than 159 to 211 months of confinement. Former RCW 9.94A.310 (1993).

*2 ¶ 6 In a February 14, 2000 per curiam opinion, we vacated Piris's sentence and remanded for resentencing based on the sentencing error. On the same day, the court clerk's office mailed a cover letter and a copy of the opinion to Nielsen and a prosecutor in the King County Prosecuting Attorney's Office. The cover letter was addressed to Eric Nielsen at Nielsen's then business address and to Gary Ernsdorff at the King County Prosecuting Attorney's Office. The same cover letter shows both the sentencing judge and Piris were copied in on the letter and opinion. [2] Piris was never resentenced.

¶ 7 In 2010, Piris was released from prison after serving his original sentence. In May 2012, he was summoned to King County Superior Court for a probation violation. While reviewing Piris's file, a superior court judge discovered that Piris had never been resentenced. [3] The judge imposed a low-end sentence of 146 months, with credit for all time previously served. The record is silent as to the resentencing court's rationale for the sentence imposed.

¶ 8 **Piris** sued Kitching, Kitching's employer (SCRAP), Nielsen, and the Nielsen Broman & Koch law firm, alleging malpractice. [4] In a second amended complaint, **Piris** named King County as a defendant.

¶ 9 In September 2013, Nielsen moved to dismiss **Piris's** lawsuit on summary judgment, alleging that **Piris** "cannot prove, and does not assert, his actual innocence of the crimes of which he was convicted. Therefore, his claims of legal

malpractice is barred under Washington law." King County and Kitching joined in the motion.

¶ 10 The trial court granted the summary judgment in favor of all the defendants. In its written order, the court reasoned, "The basis for the dismissal is the 'actual innocence' requirement as set out in *Ang v. Martin,* 154 Wash.2d 477[, 114 P.3d 63] (2005) ." The court also denied **Piris's** subsequent reconsideration motion. **Piris** appealed.[5]

ANALYSIS

[1] ¶ 11 **Piris** maintains the trial court erred by applying the "actual innocence" requirement "in a case alleging malpractice at sentencing...." Appellant's Br. at 1. He argues, "A plaintiff in a legal malpractice action alleging sentencing errors only is not required to demonstrate 'actual innocence.' " Appellant's Reply Br. at 1. **Piris** does not contend he is innocent of the crimes for which he was convicted. He relies mainly on the narrow exception to the innocence requirement we adopted in *Powell* I and *Powell* II.

¶ 12 This court reviews de novo a trial court's decision to dismiss a complaint on summary judgment. *Powell,* 125 Wash.App. at 775, 106 P.3d 271. The parties agree that this issue should be decided as a matter of law. Legal issues are reviewed de novo. *State v. Williams,* 96 Wash.2d 215, 220, 634 P.2d 868 (1981).

[2] ¶ 13 In criminal malpractice[6] cases, proof of innocence is an indispensable element of a plaintiff's cause of action. In *Falkner v. Foshaug,* 108 Wash.App. 113, 29 P.3d 771 (2001), addressing an issue of first impression, we held that a plaintiff alleging legal malpractice occurring during representation in a criminal matter must establish postconviction relief and demonstrate his innocence by a preponderance of the evidence, in addition to the elements of a civil legal malpractice claim. The core dispute in this case involves the innocence element. Because **Piris** entered a knowing and voluntary guilty plea, he cannot allege his innocence in this civil malpractice action. *Falkner,* 108 Wash.App. at 120, 29 P.3d 771. The actual innocence requirement is one of two proximate cause requirements a malpractice plaintiff must establish. *Ang v. Martin,* 154 Wash.2d 477, 482, 114 P.3d 637 (2005). The other—postconviction relief—is not at issue here.

*3 [3] ¶ 14 The innocence requirement is based on compelling public policy considerations.

> Requiring a defendant to prove by a preponderance of the evidence that he is innocent of the charges against him will prohibit criminals from benefiting from their own bad acts, maintain respect for our criminal justice system's procedural protections, remove the harmful chilling effect on the defense bar, prevent suits from criminals who "may be guilty, [but] ... could have gotten a better deal," and prevent a flood of nuisance litigation. These considerations all support our conclusion that postconviction relief is a prerequisite to maintaining the suit and proof of innocence is an additional element a criminal defendant/malpractice plaintiff must prove to prevail at trial in his legal malpractice action.

Falkner, 108 Wash.App. at 123–24, 29 P.3d 771 (footnotes omitted) (alteration in original).

¶ 15 In *Owens v. Harrison,* 120 Wash.App. 909, 86 P.3d 1266 (2004), Owens appealed a trial court order dismissing his malpractice lawsuit on summary judgment. He argued trial court error premised on requiring him to allege and prove he was innocent of the crime for which he was convicted as part of his criminal malpractice claim and the dismissal of his breach of contract claim. Owens argued that we should "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 ." *Owens,* 120 Wash.App. at 914, 86 P.3d 1266. We declined to carve out an exception citing our holding in *Falkner.* "*Falkner* requires a criminal malpractice plaintiff to establish actual innocence for public policy reasons, and we see no reason to depart from that holding here. Because Owens fails to allege or establish his innocence, the trial court properly granted summary judgment." *Owens,* 120 Wash.App. at 915, 86 P.3d 1266 (footnote omitted).

¶ 16 In *Ang,* the Angs were indicted on 18 criminal counts related to social security fraud. The Angs initially rejected a plea offer from the State. After conferring with their attorney, however, they accepted what they considered a less favorable deal before the government concluded its case. The Angs hired new counsel to review the plea. The new attorney determined the government had not met its burden of proof at trial and that there was no benefit to the plea agreement. The Angs then successfully moved to withdraw their pleas and were acquitted on all counts. *Ang,* 154 Wash.2d at 479–80, 114 P.3d 637.

¶ 17 The Angs sued their former attorneys for malpractice. Responding to two special verdict forms, the jury found that the Angs failed to prove by a preponderance of the evidence they were innocent of all the criminal charges. The Angs appealed. We affirmed. Citing *Falkner,* our Supreme Court held that a plaintiff bringing a malpractice action against a criminal defense attorney must establish his or her actual innocence of the underlying charge by a preponderance of the evidence. Related to the legal causation aspect of proximate causation, our supreme court explained:

> ***4** Legal causation ... presents a question of law: "It involves a determination of whether liability *should* attach as a matter of law given the existence of cause in fact." To determine whether the cause in fact ... should also be deemed the legal cause of [plaintiff's] harm, a court may consider, among other things, the public policy implications of holding the defendant liable.

Ang, 154 Wash.2d at 482, 114 P.3d 637 (citation omitted) (quoting *Hartley v. State,* 103 Wash.2d 768, 779, 698 P.2d 77 (1985)). Otherwise, the court wrote, the plaintiff's own bad acts should be considered the cause of the injury: "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 Wash.2d at 485, 114 P.3d 637.

¶ 18 The court also cited with approval *Falkner* 's public policy rationale supporting an actual innocence requirement: (1) prohibiting criminals from benefitting from their own bad act, (2) maintaining respect for the criminal justice system, (3) removing the harmful chilling effect on the defense bar, (4) preventing suits from criminals who may be guilty but could have gotten a " 'better deal,' " and (5) preventing a flood of nuisance litigation. *Ang,* 154 Wash.2d at 485, 114 P.3d 637 (quoting *Falkner v. Foshaug,* 108 Wash.App. at 123, 29 P.3d 771).

¶ 19 In two related cases, *Powell* I and *Powell* II, we considered whether plaintiff in a criminal malpractice action alleging a sentencing error against his defense attorney must prove by a preponderance of the evidence he was actually innocent of the crime. *Powell* I was decided while *Ang* was pending before the Supreme Court. Powell pleaded guilty to solicitation to deliver a material in lieu of a controlled substance, a gross misdemeanor with a maximum sentence of 12 months. *Powell* I, 125 Wash.App. at 774, 106 P.3d 271. But at sentencing, the trial court sentenced Powell for a class C felony to 38.25 months of confinement. After he discovered the error, he filed a personal restraint petition. Our Supreme Court granted the petition on the ground that the trial court acted outside its authority and remanded for resentencing. By the time he was released, Powell had served 20 months in prison. He sued his criminal defense attorney for legal malpractice and claimed damages for the time he served in prison beyond 12 months. Defendants responded with a CR 12(b)(6) motion to dismiss his lawsuit, arguing *Falkner* 's actual innocence rule applied. The trial court agreed, granted the motion, and dismissed his lawsuit. Powell appealed. We reversed and remanded for reinstatement of Powell's criminal malpractice claim. We agreed with Powell that application of the actual innocence rule in his case was unfair. We compared Powell's situation to that of an innocent person wrongfully convicted:

> Although we have no particular quarrel with the innocence requirement generally, we agree with Powell that its application in this case is unfair. And we observe that postconviction relief, in this instance, has not entirely provided Powell with what competent representation arguably should have afforded in the first instance. Powell has served substantially more time than the trial court was authorized to impose for a gross misdemeanor. We conclude that the blind application of the innocence requirement to the facts of this case would go beyond the public policy to be served by the innocence requirement.
>
> ***5** The policy to be served is that regardless of the attorney's negligence, a guilty defendant's conviction and sentence are the direct result of his own perfidy, and no one should be permitted to take advantage of his own wrong. But "an innocent person wrongfully convicted due to inadequate representation has suffered a compensable injury because in that situation the nexus between the malpractice and palpable harm is sufficient to warrant a civil action, however inadequate, to redress the loss."
>
> Powell's situation is closer to that of an innocent person wrongfully convicted than of a guilty person attempting to take advantage of his own wrongdoing. Powell has no quarrel with having been incarcerated for the period of time justified by the gross misdemeanor that he pleaded guilty to having committed. In sum, we decline to extend the innocence requirement to these facts, for to do so would not serve the public policy....

Powell I, 125 Wn.App. at 777–78 (citations omitted) (quoting *Wiley v. County of San Diego,* 19 Cal.4th 532, 539, 966 P.2d 983, 79 Cal.Rptr.2d 672 (1998)).

¶ 20 Powell appealed. The Supreme Court remanded the case for reconsideration in light of *Ang.*[7] In *Powell* II, we adhered to our rationale in *Powell* I, noting that in *Ang,* our Supreme Court cited *Falkner* approvingly and concluded that a criminal malpractice plaintiff must prove actual innocence. *Ang,* 154 Wash.2d at 486, 114 P.3d 637.

> But neither *Falkner* nor *Ang* requires dismissal of Powell's complaint. In those cases, the plaintiffs' allegations of malpractice stemmed from the defendants' representation during the guilt or innocence phase of the plaintiffs' criminal trials. In contrast, Powell does not contest his guilt, and the allegations of malpractice stem entirely from his attorneys' failure to object to the court sentencing him to a much longer sentence than allowed by law. The justifications for requiring proof of actual innocence do not apply to Powell's case.

Powell, 131 Wash.App. at 813, 129 P.3d 831 (footnote omitted).

¶ 21 "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 Wash.App. at 814, 129 P.3d 831.[8]

[4] ¶ 22 **Piris** analogizes his situation to *Powell.* He contends that as in *Powell,* the sentencing error was not the direct consequence of his own bad act. Instead, the error committed by his attorney resulted in the court's imposition of an unlawful sentence of 159 months, resulting in an additional 13 months served. He asserts, "Just as in *Powell,* the sentence exceeded the maximum that could lawfully be imposed." Appellant's Reply Br. at 4. **Piris** correctly quotes the rule that "a sentencing court acts without authority ... when it imposes a sentence based on a miscalculated offender score." *In re Pers. Restraint of Goodwin,* 146 Wash.2d 861, 868, 50 P.3d 618 (2002). But that rule is not helpful here in resolving the question of whether *Powell* 's narrow exception applies in this case.

***6** ¶ 23 We conclude that *Powell* is distinguishable from the present case. In *Powell,* we acknowledged the rarity of Powell's sentencing error as a factor justifying the narrow exception to the actual innocence requirement. There, the court mistakenly imposed a felony sentence rather than a gross misdemeanor sentence. We noted that the maximum term of confinement for a gross misdemeanor is limited by statute to one year.[9] But Powell was sentenced for a class C felony to 38.25 months of confinement.

¶ 24 We viewed the error in *Powell* as particularly egregious because he served in excess of the statutory maximum sentence that could legally be imposed given the misdemeanor offense for which he pleaded guilty. The sentencing error in this case is qualitatively dissimilar to the error in *Powell.* **Piris's** correct offender score was 6 rather than 7 and yielded a standard range of 146 to 194 months instead of a standard range of 159 to 211 months. Generally, a sentencing court has lawful discretionary authority to impose any sentence falling within the correct standard range.[10] The court rejected **Piris's** request for an exceptional sentence of 48 months. It imposed a "bottom end" sentence of 159 months. It declined to impose the State's high-end recommendation of 211 months. While it is correct that miscalculation of the offender score renders the sentence unlawful, a sentence of 159 months falls within the 146 to 194 months standard range for **Piris's** offense. Unlike in *Powell,* **Piris's** original sentence of 159 months did not exceed "the maximum that could lawfully be imposed" as was the case in *Powell.* Appellant's Reply Br. at 4. It is not disputed that the original sentencing court here could have lawfully imposed up to the high end of the standard range.

¶ 25 **Piris's** assertions rely on the unfounded assumption that the original sentencing court would have imposed the bottom end of 146 months if informed of the correct standard range.[11] That assertion rests on mere speculation. Given the record here, it is impossible to know whether the original sentencing court would have imposed 146 months or 159 months based on a correct offender score calculation. In essence, whether the appropriateness of 159 months drove the court's original sentencing decision or the desire to impose the lowest possible sentence remains an unanswered question.

¶ 26 Recognizing the uniqueness of the sentencing error in *Powell,* we observed,

> 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, 131 Wash.App. at 815, 129 P.3d 831 (emphasis added).

¶ 27 We also noted with concern that

> Powell's claim presents an allegation of particularly egregious attorney negligence—failure to advise the court that it was sentencing Powell for a felony, when he committed a misdemeanor. We do not imagine that this is a common oversight by defense attorneys. Carving a narrow exception to the rule requiring proof of actual innocence will not dissuade attorneys from pursuing careers in criminal defense.

***7** *Powell,* 131 Wash.App. at 814, 129 P.3d 831 (footnote omitted).

¶ 28 We concluded by holding, "[U]nder 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." *Powell,* 131 Wash.App. at 815, 129 P.3d 831 (emphasis added). *Powell* leaves no doubt that the innocence exception granted in that case was grounded in a rare sentencing error—a defendant who mistakenly is sentenced to a felony when he committed a gross misdemeanor. [12]

¶ 29 *Falkner* requires a criminal malpractice plaintiff to establish actual innocence for public policy reasons. *Falkner,* 108 Wash.App. at 123–24, 29 P.3d 771. "The public policy behind this requirement is that '[r]egardless of the attorney's negligence, a guilty defendant's conviction and sentence are the direct consequence of his own perfidy,' and, thus, cannot be the basis for civil damages." *Falkner,* 108 Wash.App. at 120, 29 P.3d 771 (alteration in original) (footnotes omitted) (quoting *Wiley,* 79 Cal.Rptr.2d 672, 966 P.2d at 986)). 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.

¶ 30 **Piris** also relies on a 2008 publication of the *Legal Malpractice* treatise by Ronald Mallen and Jeffrey Smith to argue that the " 'issue of guilt or innocence is relevant, if the client's complaint is the fact of conviction, *rather than the severity of the sentence or other consequences.* But 'actual innocence' is 'not relevant if the attorney's error concerns the extent or severity of the sentence.' " Appellant's Br. at 4–5 (citation omitted) (quoting 3 RONALD E. MALLEN & JEFFREY M. SMITH, LEGAL MALPRACTICE § 26.13 (2007 ed.)). [13] , [14]

¶ 31 None of the case authorities cited in *Legal Malpractice* for this statement apply to the present case. Unlike the facts here, those cases 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. **Piris** cites no controlling authority where a court carved out an exception to the actual innocence requirement for a sentencing error similar to the present facts.

¶ 32 Given our dispositive resolution of this issue, we need not address **Piris's** claim regarding collateral estoppel, King County's statute of limitations argument, or the motion to strike. [15]

CONCLUSION

¶ 33 For the reasons discussed above, we decline to extend *Powell* 's narrow innocence exception to **Piris's** case. **Piris** cannot satisfy the innocence requirement because he pleaded guilty to two charges and he does not claim to be innocent. Accordingly, his criminal malpractice claim fails to survive summary judgment.

¶ 34 We affirm.

WE CONCUR: SPEARMAN, C.J., and BECKER, J.

Footnotes

1 Attorney Michael Frost associated with Kitching as co-counsel. Frost is not a party in this action.

2 **Piris's** brief argues, "According to **Piris**, he never heard from Nielsen regarding the reversal." Appellant's Br. at 3. There is no citation to record facts.

3 The original sentencing judge had since retired.

4 We refer to Nielsen and his law firm as "Nielsen." We refer to Kitching and SCRAP as "Kitching."

5 On August 21, 2014, Nielsen filed a motion to strike portions of **Piris's** reply brief.

6 "Criminal malpractice" refers to legal malpractice that occurs when an attorney defends a criminal defendant. *Falkner,* 108 Wash.App. at 118 n. 6, 29 P.3d 771 (citing Otto M. Kraus & Ronald E. Mallen, *The Misguiding Hand of Counsel—Reflections on "Criminal Malpractice,"* 21 UCLA L.REV. 1191, 1191 n. 2(1974)).

7 *Ang* was pending before our Supreme Court when we decided *Powel* I. After deciding *Ang,* our Supreme Court granted Powell's petition for review and remanded for reconsideration.

8 Following our remand in *Powell* II, the defendants moved for summary judgment. They first argued that, under case law and a sentence doubling statute in effect at the time, Powell's offense was actually a class C felony. Second, they asserted that Powell could not establish that any negligence caused him damage. Finally, they argued that the malpractice action failed because it was not supported by any expert testimony establishing a breach of the standard of care. *Powell v. Associated Counsel for Accused,* 146 Wash.App. 242, 247, 191 P.3d 896 (2008). The superior court granted the motion to dismiss Powell's claims. *Powell,* 146 Wash.App. at 247, 191 P.3d 896. We affirmed. *Powell,* 146 Wash.App. at 250, 191 P.3d 896.

9 RCW 9A.20.021(2):

> Gross misdemeanor. Every person convicted of a gross misdemeanor in Title 9A RCW shall be punished by imprisonment in the county jail for a maximum term fixed by the court of up to three hundred sixty-four days or by a fine in an amount fixed by the court of not more than five thousand dollars, or by both such imprisonment and fine.

10 Generally, a defendant is precluded from appealing a sentence within the standard range. RCW 9.94A.585(1); *State v. Mail,* 121 Wash.2d 707, 710, 854 P.2d 1042 (1993).

11 **Piris's** contentions that his case is controlled by *Powell* rests on the assumption that the original sentencing court undoubtedly would have imposed the "bottom end sentence" of 146 months.

12 We note with concern the potential for opening a floodgate of criminal malpractice lawsuits involving claims of sentencing errors given the ever-increasing complexities of the Sentencing Reform Act (SRA).

> "The difference of a single point may add or subtract three years to an offender's sentence. Therefore, the accurate interpretation and application of the SRA is of great importance to both the State and the offender. Because each offense must be analyzed under the law in effect at the time the offense was committed, each time the SRA is amended, it adds an additional level of complexity to the task of courts, as well as the prosecution, the defense, and the Department of Corrections. *State v. Jones,* 118 Wash.App. 199, 76 P.3d 258 (2003), is illustrative. In *Jones,* the trial court was required to analyze and attempt to harmonize three separate amendments to the SRA. As Judge Dean Morgan observed in *Jones,* "[i]t is extremely difficult to identify what statute applies to a given crime, much less to coordinate that statute with others that may be related." Id. at 211–12, 76 P.3d 258. Since the SRA was adopted in 1981, it has been amended by 181 session laws.[4] The complexity and difficulty applying the SRA is exacerbated by each successive change to the SRA. Interpreting and harmonizing amendments to the SRA has increasingly occupied the time of both trial and appellate courts. In all likelihood this trend will continue. In the 58th legislature alone, 97 bills were introduced, which proposed a total of 262 changes to the SRA. Notwithstanding constant modifications to the law, courts strive to make the law clear, understandable, and predictable.
>
> FN"FN4. *Jones,* 118 Wash.App. at 211 n. 32, 76 P.3d 258 (listing 175 session laws that amended the SRA; however, absent from this list was Uws of 2003, ch. 53). The 58th legislature also amended the SRA with five session laws in 2004. LAWS OF 2004, ch. 38; LAWS OF 2004, ch. 94; LAWS OF 2004, ch. 121; LAWS OF 2004, ch. 166; LAWS OF 2004, ch. 176. In all, the 58th legislature considered 97 bills that would have amended the SRA. Of those 97 bills considered, 14 were enacted, www.leg.wa.gov /pub/billinfo/2003–04/chapter_to_bill_table.htm (last checked May 11, 2004); www.leg.wa.gov/wsladm /billinforl/rcw_sl_ selections.cfm?year=03 (last checked May 11, 2004); www.leg.wa.gov/wsladm/ billinfol/rcw_sl_selections.cfm (last checked May 11, 2004); www.l eg.wa.gov/wsladm/billinfo/rcw_to-biil_table.cfm (last checked May 11, 2004)." *In re Pers. Restraint of Christopher LaChappelle,* 153 Wash.2d 1, 7, 100 P.3d 805 (2004).

13 The 2008 version has been revised and no longer states that rule as absolute. It presently reads, "Guilt *usually* is not relevant if the attorney's error concerns the extent or severity of the sentence." 3 RONALD E. MALLEN & JEFFREY M. SMITH, LEGAL MALPRACTICE § 27.13, at 1057 (2008 ed.) (emphasis added).

14 Nielsen cites the 2013 version of Mallen and Smith, also stating that guilt is "usually" not relevant. Br. of Resp't Nielsen at 18.

15 Nielsen filed a motion to strike in this court on August 21, 2014. In it, he alleges that certain statements made by **Piris** are unsupported or misstatements of the respondents' position.

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