71054-1

71054-1

No. 91567-9

NO. 71054-1-I

COURT OF APPEALS STATE OF WASHINGTON
DIVISION I

FILED
COURT OF APPEALS DIV I
STATE OF WASHINGTON
2014 MAR 20 AM 10:46

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.,

Respondents.

BRIEF OF RESPONDENTS NIELSEN AND NIELSEN BROMAN & KOCH, P.L.L.C.

Jeffrey P. Downer, WSBA No. 12625
jpd@leesmart.com
Rosemary J. Moore, WSBA No. 28650
rjm@leesmart.com
Of Attorneys for Respondents
Nielsen and Nielsen, Broman & Koch PLLC

LEE SMART, P.S., INC.
1800 One Convention Place
701 Pike Street
Seattle, WA 98101-3929
(206) 624-7990

5611475.doc

TABLE OF CONTENTS

Page

I. INTRODUCTION 1

II. ASSIGNMENTS OF ERROR 2

III. STATEMENT OF THE CASE 2

A. In 1998, Mr. Piris pleaded guilty to two counts of child rape. 2

B. Mr. Nielsen successfully appealed the length of Mr. Piris's sentence. 4

C. Mr. Nielsen's representation of Mr. Piris ended when the appeal concluded. 6

D. Mr. Piris does not claim that he was innocent of the charges for which he was imprisoned. 7

E. Mr. Piris does not dispute that his sentence was within the lawful range that could be imposed for his crime. 7

IV. SUMMARY OF ARGUMENT 8

V. ARGUMENT 9

A. The trial court correctly dismissed Mr. Piris's claim of legal malpractice in a criminal case because Mr. Piris could not assert or prove his actual innocence. 9

B. As a matter of public policy, Washington courts hold that a criminal's own bad acts are the proximate cause of the alleged harm. 10

C. Mr. Piris's claim does not fall into the limited exception recognized in *Powell v. Associated Counsel for Accused*, because his sentence was well within the range the court could lawfully impose. 12

D. Mr. Piris's later re-sentencing does not bring him within the *Powell* exception 16

E. This court previously rejected the further exception that Mr. Piris urges. 17

F. Out-of-state cases cited in Mallen & Smith involve sentences that exceeded the maximum allowed by law, or either did not address or did not require actual innocence. 18

G. Washington long ago joined the clear majority of jurisdictions that require legal-malpractice plaintiffs to prove his actual innocence in the underlying criminal matter. 23

VI. CONCLUSION 27

TABLE OF AUTHORITIES
Table of Cases

Page(s)

Cases

Biberdorf v. Oregon, 243 F.Supp.2d 1145 (D. Or. 2002) 21

Bowdry v. Ochalla, 605 F.Supp.2d 1009, 1010-1011 (N.D. Ill. 2009).....19, 20

Jones v. Link, 493 F. Supp. 2d 765, 767 (E.D. Va. 2007) 20

Lanzilotti v. Greenberg, A-1608-10T2, 2011 WL 3300155 (N.J. Super. Ct. App. Div. Aug. 3, 2011).....22

Lawson v. Nugent, 702 F. Supp. 91, 95 (D. N.J. 1988) 20

State Cases

Ang v. Martin, 154 Wn.2d 477, 114 P.3d 637 (2005) ..... passim

Belford v. McHale Cook & Welch, 648 N.E.2d 1241, 1245 (Ind. App. 1995).....26

Berringer v. Steele, 133 Md. App. 442, 483-484, 758 A.2d 574 (2000)...21

Berschauer/Phillips v. Seattle School Dist. No. 1, 124 Wn.2d 816, 881 P.2d 986 (1994) 19

Cowiche Canyon Conservancy v. Bosley, 118 Wn.2d 801, 828 P.2d 549 (1992) 17

DeHeer v. Post-Intelligencer, 60 Wn.2d 122, 372 P.2d 193 (1962) 17

Falkner v. Foshaug, 108 Wn. App. 113, 29 P.3d 771 (2001) ..... passim

Fischer v. Longest, 99 Md. App. 368, 637 A.2d 517, 524 (1994) 21

Gebhardt v. O'Rourke, 444 Mich. 535, 510 N.W.2d 900 (1994).....18

Geddie v. St. Paul Fire & Marine Ins. Co., 354 So.2d 718, 719 (La. Ct. App.), *writ denied* 356 So.2d 1011 (La. 1978).....19

Hilario v. Reardon, 158 N.H. 56, 66, 960 A.2d 337 (2008).....21

Howarth v. State, Pub. Defender Agency, 925 P.2d 1330, 1331 (Alaska 1996) 24, 25

Johnson v. Babcock, 206 Or. App. 217, 222, 224, 136 P.3d 77 (2006) 22

Krahn v. Kinney, 43 Ohio St.3d. 103, 538 N.E.2d 1058 (1989).....

Nielson v. Spanaway Gen. Med. Clinic, Inc., 135 Wn.2d 255, 956 P.2d 312 (1998) 9

Owens v. Harrison, 120 Wn. App. 909, 86 P.3d 1266 (2004) ..... passim

Paulsen v. Cochran, 356 Ill. App. 3d 354, 826 N.E.2d 526 (2005) 19, 21, 25, 26

Powell v. Associated Counsel for Accused, 125 Wn. App. 773, 106 P.3d 271 (2005) 13

Powell v. Associated Counsel for Accused, 131 Wn. App. 810, 129 P.3d 831 (2006) ..... passim

Shaw v. State, Dept. of Admin., 861 P.2d 566, 772 (Alaska 1993) .....

Stevens v. Bispham, 316 Or. 221, 239, 851 P.2d 556 (1993) 21, 22

Wiley v. Cty. of San Diego, 19 Cal. 4th 532, 966 P.2d 983 (1998) 23, 24, 26

Statutes

Former RCW 9.94A.310 .....4, 5, 13, 15
RCW 9.94A.360 .....4, 5, 13, 15
RCW 9.94A.390 3
RCW 9A.20.021 .....13, 15
RCWA 9A.44.073 .....13, 15

Rules and Regulations

RAP 10.3(a)(5) 17

Other Authority

Mallen & Smith, *Legal Malpractice* § 27.13 (2013).....18

I. INTRODUCTION

Defendants-Respondents Eric Nielsen and Nielsen Broman & Koch, P.L.L.C. (collectively Mr. Nielsen) ask that this court affirm the trial court's entry of summary judgment of dismissal of all claims of Plaintiff-Appellant Christopher Piris. Mr. Piris was charged with three counts of first-degree rape of a child. He pleaded guilty to two of those three counts. He now sues his former criminal-defense attorneys on the theory that he served 13 more months in prison than he should have served and that his criminal-defense attorneys negligently failed to avoid that excessive prison time. Defendants-Respondents deny those allegations.

Notably, Mr. Piris does not claim that he was innocent of the crimes for which he was sentenced or that he should not have pleaded guilty. His sole complaint is that his sentence was too long and he may have spent longer in jail than he otherwise would have. Equally noteworthy, unlike the sentence at issue in *Powell v. Associated Counsel for Accused*, 131 Wn. App. 810, 129 P.3d 831 (2006), the sentence of which Mr. Piris complains was well below the maximum sentence allowed by law for his crimes and well within the sentencing guidelines for those crimes. Under settled Washington law, Mr. Piris's failure to prove, or even to allege, his innocence of first-degree rape of a child as a matter of law defeats his claims against Mr. Nielsen.

II. ASSIGNMENTS OF ERROR

Assignments of Error

Mr. Nielsen assigns no error to the trial court's decision.

Issues Pertaining to Assignments of Error

Mr. Nielsen disagrees with Mr. Piris's Statement of Issues and believes that the issue is more properly stated as follows:

Whether the trial court properly dismissed Mr. Piris's claim of legal malpractice, where: (1) Mr. Piris, who was a criminal defendant in the underlying action, does not assert and cannot prove his actual innocence of the underlying criminal matter; and (2) his sentence was within the lawful range that could be imposed for the crimes he committed.

III. STATEMENT OF THE CASE

A. In 1998, Mr. Piris pleaded guilty to two counts of child rape.

In December 1997, Christopher Piris was charged with three counts of first-degree rape of a child between September 27, 1990 and September 27, 1993. CP 40-43. In September 1998, Mr. Piris pleaded guilty to two counts of Rape of a Child in the First Degree. CP 27, 29-37. He had previously been sentenced on counts of assault, forgery, taking a motor vehicle, theft, burglary and possession of stolen property. CP 49, 56, 58.

Mr. Piris's trial lawyer was Defendant Alfred Kitching, who was employed by Defendant Society of Counsel Representing Accused Persons (SCRAP), a public-defender agency. CP 37, 47, 53, 57. Attorney Michael Frost associated with Mr. Kitching as co-counsel. CP 55.

On or around September 25, 1998, Mr. Piris and Mr. Kitching signed a Statement of Defendant on Plea of Guilty, which stated that the standard sentencing for Mr. Piris's crime was 159 months to 211 months confinement and that the maximum sentence for the crimes with which he was charged was life imprisonment and/or a fine of $50,000. CP 29-37.

At the sentencing hearing which was held on May 14, 1999 Judge Charles Mertel exercised his discretion to deny the defense's request for an exceptional sentence below the standard range. CP 66, 69; RCW 9.94A.390. Mr. Piris was sentenced to serve 159 months for both counts concurrently with credit for time served solely for that matter. CP 55-57.

According to the trial transcript, Judge Mertel said that he would impose "the bottom of the standard range which is – Mr. Rogers, I hope I'm correct on this – is 159 months." CP 66, 69. Mr. Rogers, the attorney for the prosecution, confirmed this; Mr. Kitching remained silent. *Id.*

In June 1999, Mr. Kitching filed a Notice of Appeal on behalf of Mr. Piris. CP 77.

B. Mr. Nielsen successfully appealed the length of Mr. Piris's sentence.

On July 20, 1999, the clerk of the Court of Appeals issued a letter in Court of Appeals Cause No. 44783-1-1 stating that Nielsen, Broman & Koch PLLC was appointed to represent Mr. Piris in the appeal pursuant to an Order of Indigency. CP 79.

The appeal filed by Mr. Nielsen was limited to an appeal of the length of the sentence. CP 81-89. Mr. Nielsen argued that the standard sentencing range of 159 to 211 months that the trial court had used was incorrect because the trial court had determined the sentencing range by reference to the version of RCW 9.94A.360 in force at the date of the hearing instead of the version in force at the date the offenses were committed. *Id.* RCW 9.94A.360 was revised in 1997. Based on Mr. Piris's criminal history, under the revised statute, each of his previous juvenile felony adjudications counted for half a point, for a total of 4.5 points. His current conviction counted for three points, resulting in a total offender score of 7.5 points, which rounded down to 7. CP 83-84. With a seriousness level of 11, this resulted in a standard range sentence of 159 to 211 months. *Id.* (The seriousness levels range from 1 to 15, 15 being the most serious. Former RCW 9.94A.310.)

On appeal, Mr. Nielsen argued that the trial court should have

calculated the sentencing range using the version of RCW 9.94A.360 that was in force between 1990 and 1993, when the crimes were committed. CP 86-88. He pointed out that the earlier version provided that, in general, prior juvenile convictions entered or sentenced on the same date should count as one offense. CP 84. Accordingly, Mr. Nielsen argued, the three counts of forgery entered on August 9, 1995 and the two counts of assault and possession of stolen property entered on February 1, 1996 should have been counted as one offense for each date. CP 85. This reduced the number of prior adjudications to 6, making a total of 3 offender score points. *Id.* Adding 3 points for his current conviction, Mr. Piris's offender score was reduced from 7 to 6. *Id.* With a seriousness level of 11, the standard sentencing range was 146 to 194 months, not 159 months to 211 months. Former RCW 9.94A.310.

This court issued its decision on February 14, 2000. The court granted Mr. Piris's appeal, vacated his sentence, and remanded the case for resentencing. CP 91-93. This court sent a copy of the court's decision and the cover letter to Mr. Piris and to Mr. Nielsen. *Id.* Mr. Nielsen also sent a copy to Mr. Piris, explaining the decision and stating that a resentencing hearing would be scheduled in the trial court. CP 98-99.

This court issued its mandate on April 7, 2000. CP 95. The case was remanded to King County Superior Court for proceedings in

accordance with the appellate opinion attached to the Mandate. *Id.*

C. Mr. Nielsen's representation of Mr. Piris ended when the appeal concluded.

Mr. Nielsen's retention ended upon issuance of the mandate. CP 98, 119, ¶4.2. Mr. Nielsen sent a copy of the mandate to Mr. Piris, informing him that Mr. Nielsen was closing his file. CP 99. He also sent a copy of the mandate to King County Office of Public Defense, informing that office of the decision and that Mr. Piris would need to be represented at the resentencing hearing. *Id.* Mr. Nielsen then closed his file. *Id.*

Neither the trial court nor the prosecuting attorney scheduled the case for resentencing.

Mr. Piris was released on about August 3, 2010. CP 136-137. At a hearing on May 7, 2012, Mr. Piris's sentence was reduced from 159 to 146 months by a different judge. CP 126-131.

The actual length of time Mr. Piris remained in custody solely due to the rape charges is uncertain. From the date of trial to the date of his release is not quite 11 years three months (135 months). He was in custody prior to the sentencing hearing but part of that period was in connection with other charges or convictions. CP 143. (At the time he was charged, Mr. Piris was in jail due to a forgery warrant. *Id.*)

D. Mr. Piris does not claim that he was innocent of the charges for which he was imprisoned.

Mr. Piris does not claim he was innocent of the crime of which he was convicted. CP 21-24; Appellant's brief. His sole complaint is that his sentence was too long and he may have spent longer in jail than he otherwise would have done. *Id.*

E. Mr. Piris does not dispute that his sentence was within the lawful range that could be imposed for his crime.

Mr. Piris mischaracterizes the record by claiming that Mr. Nielsen moved for summary judgment on two grounds.

Mr. Nielsen moved for summary judgment because Mr. Piris does not claim that he was innocent of the charges of which he was convicted. CP 1, 5-14. He is therefore unable to prove the actual innocence requirement. This is the sole ground on which Mr. Nielsen asked the court to dismiss the claim. CP 1, 6. Mr. Nielsen also pointed out that the sentence imposed by the trial court was within the lawful range for the crimes that Mr. Piris committed. CP 5, 8, 10, 13-14. Therefore, the narrow exception to the innocence requirement that was 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. This was not a separate independent ground for dismissal.

IV. SUMMARY OF ARGUMENT

The superior court properly dismissed Mr. Piris's complaint of legal malpractice because there is no evidence that Mr. Piris were innocent of the crimes for which he was convicted; nor does he claim that he was innocent of those crimes. Therefore, he cannot meet all the essential elements that a plaintiff must prove in a legal malpractice claim arising out of criminal proceedings. As a matter of public policy under Washington law, a criminal's own conduct, not that of his defense attorneys, is the cause of his damage, and his malpractice complaint must be dismissed. *Ang v. Martin*, 154 Wn.2d 477, 483-484, 114 P.3d 637 (2005); *Falkner v. Foshaug,* 108 Wn. App. 113, 118, 29 P.3d 771 (2001); *Owens v. Harrison,* 120 Wn. App. 909, 915, 86 P.3d 1266 (2004).

Contrary to Mr. Piris's assertion his case does not fall within the narrow exception carved out in *Powell v. Associated Counsel for Accused*, 131 Wn. App. 810, 129 P.3d 831 (2006,) because his sentence was less than the maximum sentence that could lawfully be imposed for his crimes. It was also within the standard sentencing guidelines for those offenses.

The out-of-state authority that Mr. Piris cites relies on cases from jurisdictions which do not require proof of actual innocence, where the sentence imposed exceeded the maximum that could be legally imposed, or where actual innocence was not raised as a defense. Out-of-state courts

that require actual innocence have, like Washington, applied the rule to errors affecting sentence.

Mr. Piris is an offender who claims he should have "gotten a better deal." As such, his claim falls squarely within the policy reasons why Washington law bars his malpractice claims.

V. ARGUMENT

A. The trial court correctly dismissed Mr. Piris's claim of legal malpractice in a criminal case because Mr. Piris could not assert or prove his actual innocence.

An appellate court engages in *de novo* review of an order of summary judgment. *Nielson v. Spanaway Gen. Med. Clinic, Inc.,* 135 Wn.2d 255, 261, 956 P.2d 312 (1998). The court should affirm the trial court's dismissal of Mr. Piris's complaint because Mr. Piris cannot prove an essential element of his claim of legal malpractice, namely, his actual innocence of the crime of which he was convicted.

It is well settled in Washington that where the alleged legal malpractice occurred in a criminal matter, the client must prove both post-conviction relief **and** his actual innocence. *Ang v. Martin*, 154 Wn.2d at 483-84; *Falkner v. Foshaug,* 108 Wn. App. at 118; *Owens v. Harrison,* 120 Wn. App. at 915.

Because it is undisputed that Mr. Piris was guilty of the crimes of which he was convicted and for which he was sentenced, the trial court

correctly dismissed his claim as a matter of law. CP 21-24.

This was an appropriate issue for summary judgment because there are no disputed material facts; this is purely an issue of law that should be determined by the court.

B. As a matter of public policy, Washington courts hold that a criminal's own bad acts are the proximate cause of the alleged harm.

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,* 120 Wn. App. at 913.

Thus, the sentence Mr. Piris served had "everything to do with" his own criminal conduct. A defense attorney's negligence is not "the cause of the former client's injury as a matter of law, unless the plaintiff former client proves that he did not commit the crime." *Falkner* , 108 Wn. App. at 120. "The public policy behind this requirement is that 'regardless 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." *Id.*

In *Ang*, 154 Wn.2d at 480, the criminal defendants the Angs were acquitted on all counts of fraud; in their later legal-malpractice claim the jury found they had failed to prove their actual innocence of all the criminal charges against them.

The Washington Supreme Court emphasized that "[u]nless 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." *Id.* sat 485. "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." *Id.*

The *Ang* Court quoted with approval the five policy concerns articulated in *Falkner*. "[R]equiring 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 systems 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**." *Id.*

(emphasis added) (quoting *Falkner,* 108 Wn. App. at 123-24).

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.

His claim falls squarely within the five policy reasons that Washington courts have 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.

C. Mr. Piris's claim does not fall into the limited exception recognized in *Powell v. Associated Counsel for Accused*, because his sentence was well within the range the court could lawfully impose.

Mr. Piris argues that these policy concerns do not apply to him because he complains of an overlong sentence. On the contrary, his claim falls squarely within the types of claim that are disapproved of by our courts: he is a criminal who claims he should have received a lighter sentence. Therefore, his claim is prohibited under Washington law.

Further, the **narrow** exception to this rule that this court recognized in *Powell v. Associated Counsel for Accused*, 131 Wn. App. at 814-15 does **not** apply to Mr. Piris's claim because Mr. Piris's original

sentence fell **within** the range the court could lawfully impose. Former RCW 9.94A.310; former RCW 9.94A.360; RCW 9A.20.021; RCWA 9A.44.073.

In *Powell*, 131 Wn. App. at 814, Mr. Powell served a sentence that exceeded the maximum sentence that could be lawfully imposed for the crime he had committed.[1] 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.* This court held that because Mr. Powell's "allegations of malpractice stem[med] entirely from his attorneys' failure to object to the court sentencing him to a much longer sentence than allowed by law," "the five policy-based reasons for the actual innocence requirement" did not apply to Mr. Powell's claim. *Id.* at 814.

The court cited the same policy-based reasons that were articulated in *Ang,* 154 Wn.2d at 484-85, and *Falkner,* 108 Wn. App. at 123-24:

---

[1] Mr. Piris also relies on *Powell v. Associated Counsel for Accused*, 125 Wn. App. 773, 106 P.3d 271 (2005) *rev. granted, cause remanded*, 155 Wn.2d 1024, 123 P.3d 120 (2005) ("*Powell I*"). *Powell I* was decided before the Supreme Court's decision in *Ang* and was remanded to this court for reconsideration after the *Ang* decision. The decision in *Powell I* was also based upon the fact that "Powell has served substantially more time than the trial court was authorized to impose for a gross misdemeanor." *Id.* at 777.

> (1) to prohibit criminals from benefiting from their own bad acts; (2) to maintain respect for our criminal justice system's procedural protections; (3) to remove the harmful chilling effect on the defense bar; (4) to prevent lawsuits from criminals who may be guilty, but could have gotten a better deal; and (5) to prevent a flood of nuisance litigation.

Id. at 814 (citing *Ang,* 154 Wn.2d at 484-85, and *Falkner,* 108 Wn. App. at 123-24).

The *Powell* court held that none of those policy reasons 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 actions.

Id. at 814 (citations omitted).

> This is not a situation where the guilty criminal simply "could have gotten a better deal." Powell was entitled to be lawfully sentenced. There was no authorization for the court to issue a sentence longer than 12 months.

Id. (citations omitted).

In allowing Mr. Powell's claim to go forward, the court 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 **lawful**. His complaint is that he may have served more than 146 months. However, his sentence was not longer than the term that was allowed by statute for the crimes he committed. As of when 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.*

Mr. Piris's case is no different from that of a guilty person who could have walked free based on a technical defense. Under Washington law, Mr. Piris must prove both post-conviction relief and actual innocence. *Ang*, 154 Wn.2d at 483-84; *Falkner,* 108 Wn. App. at 118.

D. Mr. Piris's later re-sentencing does not bring him within the *Powell* exception.

Mr. Piris attempts to avoid this inevitable result by wrongly arguing that because the court resentenced him to 146 months in 2012 that was his "lawful" sentence; therefore, he argues, any other sentence was not lawful. However, this mis-states *Powell* which held explicitly that the plaintiff must prove his actual innocence except where the sentence served was "longer than the maximum term allowed by statute." *Id.* at 815.

Except for these narrow circumstances, Washington requires both elements: actual innocence and post-conviction relief. Mr. Piris, however, met only one of the two additional requirements, post-conviction relief.

If Mr. Piris's theory was correct, then the actual innocence requirement would rarely apply when the plaintiff obtained post-conviction relief. Thus the exception would swallow up the rule. In contrast, the court anticipated the exception would apply infrequently. *Id.* at 814-815. Mr. Piris misstates *Powell* to reach such a conclusion.

Mr. Piris also argues that collateral estoppel bars his former

attorneys from disputing that the 146 months was his lawful sentence. He cites no authority as to why his former attorneys were in privity with him in 2012. Where no authorities are cited, this court may assume that counsel, after diligent search, has found none. *DeHeer v. Post-Intelligencer,* 60 Wn.2d 122, 126, 372 P.2d 193 (1962). This court therefore should disregard this uncited argument. *Cowiche Canyon Conservancy v. Bosley,* 118 Wn.2d 801, 809, 828 P.2d 549 (1992); RAP 10.3(a)(5). Moreover, Mr. Piris's argument is beside the point because his original sentence was well below the maximum that could be imposed by law.

E. This court previously rejected the further exception that Mr. Piris urges.

This court already has refused to carve out a further exception to the "actual innocence" requirement in circumstances similar to this case.

In *Owens v. Harrison,* 120 Wn. App. at 914, the plaintiff asked this court "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." In *Owens,* 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. *Id.* This court 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.

F. Out-of-state cases cited in Mallen & Smith involve sentences that exceeded the maximum allowed by law, or either did not address or did not require actual innocence.

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. However, that is not the law in Washington.

The 2013 edition of Mallen & Smith is not so dogmatic. Mallen & Smith, *Legal Malpractice* § 27.13 (2013). It states that guilt is "usually" not relevant. Further, the handful of cases it cites (which includes *Powell*)

almost exclusively concern claims (1) where the plaintiff's additional sentence exceeded the maximum sentence that was lawfully permitted by statute; (2) where the need to prove actual innocence was not required by that state; or (3) where it was not raised as a defense. These cases therefore are readily distinguishable and indeed are not proper precedent. *See Berschauer/Phillips v. Seattle School 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.

Thus, in *Geddie v. St. Paul Fire & Marine Ins. Co.,* 354 So.2d 718, 719 (La. Ct. App.), *writ denied* 356 So.2d 1011 (La. 1978) the plaintiff was incarcerated under a four-year sentence for a crime which had a maximum penalty of two years. The additional confinement was illegal. *Id.* at 719; *see also Paulsen v. Cochran,* 356 Ill. App. 3d 354, 363, 826 N.E.2d 526 (2005). Further, Louisiana does not have an actual-innocence requirement, and plaintiff's guilt was not raised as a defense. *Geddie,* 354 So.2d at 719; *Paulsen,* 356 Ill. App. 3d at 362.

In *Bowdry v. Ochalla,* 605 F.Supp.2d 1009, 1010-1011 (N.D. Ill. 2009) the plaintiff alleged that he received a mandatory supervised release term of two years, the maximum that could be imposed for a Class 2

felony, instead of one year, the maximum that could be imposed for a Class 3 felony for which he should have been convicted. *Id.*; 730 ILCS 5/5-8-1. Thus, the alleged malpractice involved an unlawful probationary period. Further, actual innocence was not raised as a defense, and the court did not consider Mr. Bowdry's state law claims. *Id.* at 1015. The claim was dismissed on other grounds, for lack of jurisdiction for a § 1983 claim; the court did, however, note that Mr. Bowdry suffered no damage as his arrest occurred within the first year of the supervisory release. *Id.* at 1010-11, n.1.

In *Jones v. Link*, 493 F. Supp. 2d 765, 767 (E.D. Va. 2007) the total sentence imposed also exceeded the correct sentencing range. Mr. Jones was charged with three counts; the first two ran concurrently, the third ran consecutively; the court should have applied a range of 51 to 63 months to all three counts; because it unlawfully applied a firearm enhancement, the court wrongly applied an 87 to 108 months range to the second count. *Id.* As a result, Mr. Jones was sentenced to a total of 147 months, whereas the highest sentence that could be imposed in total for the three counts was 126 months *Id.* Thus in *Jones*, unlike in this case, the erroneous sentence exceeded the lawful maximum.

In *Lawson v. Nugent,* 702 F. Supp. 91, 95 (D. N.J. 1988), plaintiff was permitted to present evidence of emotional distress where he claimed

increased incarceration of 20 months due to his lawyer's negligence. Again, the issues of innocence and whether it was a preliminary requirement to a malpractice action were not raised.

Berringer v. Steele, 133 Md. App. 442, 483-484, 758 A.2d 574 (2000) and *Fischer v. Longest*, 99 Md. App. 368, 381, 637 A.2d 517, 524 (1994) are both Maryland cases; Maryland does not have an actual-innocence requirement. Further, in *Berringer,* the attorneys had failed to follow their client's instructions. *Id.* at 483-84, 507; *see also Paulsen v. Cochran,* 356 Ill. App. 3d at 363. In *Fischer*, the claim was dismissed on other grounds.

In *Hilario v. Reardon,* 158 N.H. 56, 66, 960 A.2d 337 (2008) the New Hampshire court expressly upheld the actual innocence requirement when "a criminal defendant claims he received a longer sentence than that which he might otherwise have obtained." As a rare exception, the court did not impose the requirement where the attorney filed a motion that upset the plea agreement without his client's instructions.

Biberdorf v. Oregon, 243 F.Supp.2d 1145 (D. Or. 2002) concerned a plaintiff's claim that he was not given credit for time in custody before trial. In *Biberdorf*, the actual-innocence requirement was not raised. In *Stevens v. Bispham,* 316 Or. 221, 239, 851 P.2d 556 (1993), the court held that to pursue a legal-malpractice claim, the plaintiff must prove he was

exonerated in post-conviction proceedings, in addition to proving duty, breach, and causation. Discussion that this might not apply to sentencing was dicta only. *Id.* at 232; *cf. id.* at 226, 239. In contrast, in *Johnson v. Babcock*, 206 Or. App. 217, 222, 224, 136 P.3d 77 (2006), the court permitted a legal-malpractice case to proceed because, as in *Powell,* the sentence exceeded the legal maximum: a 30-year sentence was imposed where the maximum permissible term was six years and eight months.

Mallen & Smith cite an unpublished case *Lanzilotti v. Greenberg,* A-1608-10T2, 2011 WL 3300155 (N.J. Super. Ct. App. Div. Aug. 3, 2011) in which the Court of Appeals affirmed dismissal of Mr. Lanzilotti's legal-malpractice claim in part because he had **not** been exonerated of the crime for which he was sentenced.

Finally, Mr. Piris cites Mallen & Smith for the statement that a legal-malpractice plaintiff who complains of an excessive sentence has met his initial burden if he prove: (1) that defendant's negligence resulted in a legally impermissible sentence; and (2) that he obtained post-conviction relief. Mr. Piris, however, is able to meet only the second of these criteria.

G. Washington long ago joined the clear majority of jurisdictions that require legal-malpractice plaintiffs to prove his actual innocence in the underlying criminal matter.

Washington long ago joined the clear majority of jurisdictions that require the legal-malpractice plaintiff who was a criminal defendant to prove his actual innocence.

In legal-malpractice cases based on underlying criminal matters, the clear majority of out-of-state courts that have considered the question, like Washington, require proof of 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, 536-537, 966 P.2d 983 (1998) (citations omitted). Common to all these decisions are considerations of public policy. *Id.*; *Ang,* at 484-85. "Allowing civil recovery for convicts impermissibly shifts responsibility for the crime away from the convict." *Wiley,* 19 Cal. 4th at 537.

> [I]f plaintiffs engaged in the criminal conduct they are accused of, then they alone should bear full responsibility for the consequences of their acts, including imprisonment. Any subsequent negligent conduct by a plaintiff's attorney is superseded by the greater culpability of the plaintiff's criminal conduct. Accordingly, "[t]hese cases treat a defendant attorney's negligence as not the cause of the former client's injury as a matter of law, unless the plaintiff former client proves that he did not commit the crime."

Id. at 537-38.

> Regardless of the attorney's negligence, a guilty defendant's conviction and sentence are the direct consequence of his own perfidy. The fact that nonnegligent counsel "could have done better" may warrant postconviction relief, but it does not translate into civil damages, which are intended to make the plaintiff whole.

Id. at 539.

> In the criminal malpractice context by contrast, a defendant's own criminal act remains the ultimate source of his predicament irrespective of counsel's subsequent negligence.

Id. at 540.

Out-of-state courts require proof of actual innocence where the alleged criminal malpractice involves a longer lawful sentence. For example, in *Howarth v. State, Pub. Defender Agency,* 925 P.2d 1330, 1331 (Alaska 1996), the plaintiff pleaded guilty on his attorney's advice; he was sentenced to 10 years' imprisonment. He had served nearly seven years when the court granted his motion to withdraw the plea and plead to a lesser charge, based on ineffective assistance of counsel for failing to consider certain evidence. *Id.* He was resentenced to four years under a plea agreement. *Id.* The Alaska Supreme Court affirmed the trial court's dismissal of his legal-malpractice action because his criminal guilt was undisputed. *Id.* at 1331. Therefore, the legal cause of the plaintiff's sentence was his own intentional criminal conduct, despite the fact that his attorney's conduct as to sentencing was negligent. *Id.* The maximum

lawful sentence Mr. Howarth could have received for his crime was ten years, and the seven years he served was well within this limit. *Id.* at 1333; *see also Paulsen v. Cochran,* 356 Ill. App. 3d at 362-63.

> The force he set in motion with his sexual assault in no sense became exhausted or remote after he served the first four years of his sentence. The maximum lawful sentence he could have received for his crime was ten years and the seven years he served was well within this limit.

Howarth, 925 P.2d at 1333.

> Howarth sexually assaulted L.M. He is precluded from denying this because he has been convicted of sexually assaulting L.M. and the conviction stands. Because of this assault he was sentenced. We assume that if his attorney had not been negligent his sentence would have been four years and that because of the attorney's negligence the sentence was seven years. Howarth's intentional criminal conduct is a legal cause of the entire period of his imprisonment. Howarth has no redress against his attorney because Howarth's conduct was intentional and in violation of the criminal law, whereas his attorney's was merely negligent. To use the words of *Shaw*, "subsequent negligent conduct by a plaintiff's attorney is superseded by the greater culpability of the plaintiff's criminal conduct." *Shaw*, 861 P.2d at 572.

Id. at 1336-37 (citing *Shaw v. State, Dept. of Admin.,* 861 P.2d 566, 772 (Alaska 1993)).

In *Paulsen*, 356 Ill. App. 3d at 361-63, the plaintiff asked the court to carve out an exception to the actual-innocence rule and to "allow a cause of action for legal malpractice when a criminal defendant has pled guilty but does not believe that his attorney negotiated the best possible

sentence." He claimed that his former attorneys were responsible for his signing a plea agreement that "caused him to "[overpay] his debt to society" and receive an "excessively harsh" sentence." *Id.* at 358. The Illinois Court of Appeals rejected the request, noting, among other things, that the cases cited by plaintiff all came from states where actual innocence was not required to bring a malpractice action; that they were in any event distinguishable (for example, the excessive sentence was unlawful); and that Mr. Paulsen could not allege in good faith that his sentence and fine exceeded the maximum permitted. *Id.* at 362-63.

Similarly, in *Belford v. McHale Cook & Welch,* 648 N.E.2d 1241, 1245 (Ind. App. 1995), the Indiana appellate court held that because the plaintiff's sentence was within the range of possible sentences, a cause of action for legal malpractice could not be stated. *Paulsen,* 356 Ill. App. 3d at 362 (citing *Belford,* 648 N.E.2d at 1245). The decision was reached even though Indiana has no actual-innocence requirement. *Wiley,* 19 Cal. 4th at 537-38.

Similarly, 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

In accordance with established Washington precedent, this court should affirm the dismissal of Mr. Piris's legal-malpractice claim against Mr. Nielsen because he cannot prove his actual innocence. *Ang v. Martin*, 154 Wn.2d at 484; *Falkner,* 108 Wn. App. at 115; *Owens v. Harrison,* 120 Wn. App. at 913-15; *Powell v. Associated Counsel*, 131 Wn. App. at 814-15. Any other decision is contrary to settled and well reasoned Washington law and would impermissibly shift responsibility for Mr. Piris's crimes to his defense attorneys.

Respectfully submitted this 19th day of March, 2014.

LEE SMART, P.S., INC.

By: Rosemary Moore

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.

5611475.doc

DECLARATION OF SERVICE

The undersigned certifies under penalty of perjury under the laws of the State of Washington, that on March 19, 2014, I caused service of the foregoing pleading on each and every attorney of record herein via legal messenger:

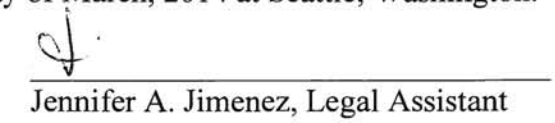
Counsel for Petitioner
Mr. John Rothschild
705 Second Avenue, Suite 1100
Seattle, WA 98104

Co-Counsel for Petitioner
Ms. Suzanne Lee Elliott
Hoge Building
705 Second Avenue, Suite 1300
Seattle, WA 98104-1741

Counsel for Alfred Kitching and Jane Doe Kitching and Society of Counsel Representing Accuses Person
Mr. Christopher H. Howard
Ms. Allison K. Miller
Mr. Averil Rothrock
Schwabe Williamson & Wyatt, P.C.
U.S. Bank Centre
1420 Fifth Avenue, Suite 3400
Seattle, WA 98101-4010

Counsel for King County
David J. Hackett
Daniel T. Satterberg, Prosecuting Attorney
Civil Division, Litigation Section
900 King County Administration Building
500 Fourth Avenue
Seattle, WA 98104

DATED this 19th day of March, 2014 at Seattle, Washington.



Jennifer A. Jimenez, Legal Assistant

5611475.doc