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No. 91567-9

IN THE WASHINGTON STATE SUPREME COURT

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CHRISTOPHER PIRIS,  
Appellant,

v.

ALFRED KITCHING, et al.,  
Respondents.

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

The Honorable Richard D. Eadie, Judge

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*(Petitioner's)* APPELLANT'S SUPPLEMENTAL BRIEF

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**I.**  
**ASSIGNMENTS OF ERROR**

The trial court erred in concluding that, in a case alleging malpractice only at sentencing, Piris must first establish that he was “actually innocent” of the criminal charges. The Court of Appeals erred in affirming that conclusion.

**II.**  
**ISSUE PERTAINING TO ASSIGNMENTS OF ERROR**

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?

**III.**  
**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 Alfred 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, 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.

#### IV. ARGUMENT

A. THIS COURT SHOULD AFFIRM THE REASONING OF THE *POWELL*<sup>1</sup> DECISIONS AND HOLD THAT WHEN THE PLAINTIFF SUES HIS LAWYER ALLEGING ONLY MALPRACTICE AT SENTENCING, THE PLAINTIFF NEED NOT DEMONSTRATE “ACTUAL INNOCENCE” OF THE CRIME

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* § 26.13 (2007 Edition). But “actual innocence” is “[usually] not relevant if the attorney’s error concerns the extent or severity of the sentence.” *See*

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<sup>1</sup> *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.

*Piris v. Kitching*, 186 Wn. App. 265, 279, 345 P.3d 13, review granted, 183 Wn.2d 1017, 355 P.3d 1153 (2015). 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. 771 R. Mallen & J. Smith, *Legal Malpractice* § 26.13 (2007 Edition). Prior to Piris's appeal, the Court of Appeals adopted this sound analysis in *Powell I* and *II*.

Powell pleaded guilty to solicitation to deliver a material in lieu of a controlled substance in violation of RCW 69.50.401(c). The offense was a gross misdemeanor for which the maximum term of confinement is one year. But at the sentencing hearing, Powell was erroneously sentenced for a Class C felony to 38.25 months of confinement. Powell obtained post-conviction relief from this Court and the erroneous sentence was corrected. He was subsequently released after serving 20 months.

Powell promptly sued his lawyers. The trial court dismissed the legal malpractice action and he appealed. But the Court of Appeals reversed, concluding that even though, in some cases, a criminal defendant must demonstrate actual innocence in order to recover damages against his criminal defense lawyer, sentencing malpractice cases did not include such a requirement. The Court of Appeals said:

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 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.

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 (internal citations omitted).

The lawyers in *Powell* sought review in this Court just before the Court issued its decision in *Ang v. Martin*, supra. This Court entered a brief order granting review and remanding for consideration in light of *Ang. Powell v. Associated Counsel for Accused*, 155 Wn.2d 1024, 123 P.3d 120 (2005).

On remand, the Court of Appeals reiterated its previous position.

That court said:

Because the reasons articulated in *Ang* for requiring a plaintiff to prove his innocence as part of a legal malpractice claim are not applicable in Powell's situation, we reaffirm our prior opinion.

*Powell II*, 131 Wn. App. at 811. Again, the appellate court stated that none of the policy concerns that mandated the adoption of the "innocence" requirement in *Ang* were present in a case where the client's only argument was that trial counsel's negligence resulted in the client serving a sentence longer than that ultimately imposed in the case.

In *Powell II*, 131 Wn. App. at 813, the court reasoned that this Court's cases imposing an "innocence" requirement – including *Ang v. Martin* – stemmed from the defendants' representation during the guilt or innocence phase of the plaintiffs' criminal trials. In contrast, Powell did not contest his guilt, and the allegations of malpractice stemmed entirely from his attorneys' failure to object to the court sentencing him to a much longer sentence than allowed by law. This Court reasoned that the justifications for requiring proof of actual innocence do not apply in an action complaining about the severity of the sentence.

Although this case is indistinguishable from *Powell I* and *Powell II*, a different panel of the Court of Appeals abandoned their sound reasoning.

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 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.

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.

An actual innocence requirement for sentencing errors grants criminal defense lawyers complete immunity. A defendant whose only claim is that he has served more time than is lawful will never have a remedy because he has made no challenge to the conviction itself. Any rule providing a lawyer with complete immunity for sentencing errors should be based on solid public policy concerns or empirical data. The defendants provide neither. Their only argument is that public policy should prevent Piris from "benefiting" from his own bad acts. But here, Piris gets no "benefit" if he prevails. He only receives compensation for the loss of liberty directly related to his lawyer's negligence. "That's not profiting any more than a person injured in a motor vehicle collision 'profits' from a damage award for the harm he or she has suffered." *Mashaney v. Bd. of Indigents' Def. Servs.*, 313 P.3d 64, 87 (Kan. Ct. App. 2013), *review granted* (Aug. 28, 2014), *aff'd in part, rev'd in part*, 355 P.3d 667 (Kan. 2015).

Piris is not asking this Court to overrule its previous precedent in *Ang v. Martin*, *supra*. But, shortly after this Court granted review in this case, the Kansas Supreme Court held that in legal malpractice in a criminal case the client is not required to establish his actual innocence of

the criminal charges in order to recover for legal malpractice. *Mashaney v. Bd. of Indigents' Def. Servs.*, supra. The reasoning in *Mashaney* is instructive even in regard to Piris's request for the application of *Powell's* more limited rule.

Jason Mashaney was charged with committing sexual misconduct with his 5-year-old daughter. He was charged with aggravated criminal sodomy and two counts of aggravated indecent liberties with a child. The first trial resulted in a mistrial. Mashaney was retried and convicted on all three counts. The trial court denied Mashaney's post-trial motion for relief due to ineffective assistance of counsel. The trial court sentenced Mashaney to prison. Mashaney appealed his conviction. An appellate court affirmed the conviction and the supreme court denied review. Mashaney moved for relief due to ineffective assistance of appellate counsel. A trial court denied the motion, but an appellate court reversed and remanded for an evidentiary hearing. On remand, the trial court set aside Mashaney's convictions. A retrial was scheduled. Mashaney then entered an Alford plea of guilty to two counts of attempted aggravated battery and one count of aggravated endangering of a child. The trial court imposed a 72-month prison sentence, which was less than the time Mashaney had already served. Mashaney was released from custody.

Mashaney filed a legal malpractice action against his criminal defense lawyers alleging that, as a result of their malpractice, he was incarcerated for nearly eight years, even though he was innocent of the charges. The intermediate Kansas appellate court affirmed the dismissal of the malpractice suit on the ground that Mashaney could not show his actual innocence of the criminal charges. The Kansas Supreme Court reversed.

The Kansas Court relied heavily on the dissenting opinion in the intermediate appellate court authored by Judge Acheson. *See Mashaney v. Board of Indigents' Defense Services*, 355 P.3d 667 (Kan., 2015). Item by item, that Court rejects the “shaky foundation” upon which the actual innocence rule was built. The Court held that the actual innocence rule divides the factually guilty from the actually innocent for purposes of bringing suit against their lawyers even when criminal defendants in both groups have a right to competent lawyers and acquittal if the State does not prove its case. *Id.* at 681. The Court points out that, in essence, the actual innocence rule “essentially” grants criminal defense lawyers immunity even for the most egregious errors. *Id.* at 682. The Court concludes that:

[T]he actual innocence rule neither advances substantial public policy objectives rooted in legal doctrine nor facilitates the resolution of malpractice claims against

criminal defense lawyers based on the existing tort law. Rather, it simply reflects a value judgment that a group of criminal defendants—those who may have committed offenses—should be deprived of a civil remedy against their lawyers when a given lawyer’s abysmal performance resulted in a given defendant’s conviction and incarceration

*Mashaney*, 355 P.3d at 686, quoting *Mashaney*, 49 Kan.App.2d 596, 638, 313 P.3d 64 (Atcheson, J., dissenting).

Again, while Piris is not asking this Court to reverse *Ang*, the Kansas Supreme Court decision provides additional support for concluding that the public policy considerations that might support an actual innocence rule do not extend to sentencing malpractice.

B. A SENTENCE THAT EXCEEDS THE STANDARD SENTENCING RANGE AS SET FORTH IN RCW 9.94A IS A SENTENCE THAT EXCEEDS “THE MAXIMUM TERM ALLOWED BY STATUTE”

In the Court of Appeals, the respondents hung their hat on the notion that Piris cannot sue his lawyers because the “exception” to “the innocence requirement” applies only to “circumstances where the defendant was sentenced to and served a sentence beyond the maximum sentence authorized by Washington law.” Brief of Respondent Kitching at

14. They then assert that Piris did not serve “a sentence longer than that authorized by Washington law.” *Id.* They are wrong.<sup>2</sup>

The Sentencing Reform Act (SRA) became effective in 1984. It attempted to create more certainty and uniformity in sentencing, to make sentencing more dependent upon the crime committed and criminal history of the offender, and to reduce the discretion of trial judges. David Boerner & Roxanne Lieb, *Sentencing Reform in the Other Washington*, 28 *Crime & Just.* 71, 84-87 (2001). The SRA utilizes objective criteria to establish sentencing ranges.

Under Washington’s SRA, the first step in a SRA sentencing proceeding is to determine the sentencing range. The SRA directs the trial court to determine an offender score and seriousness level for each conviction being sentenced. The defendant’s offender score is calculated using prior and other current offenses under the statutory formula of RCW 9.94A.525. The seriousness level of the offense is determined by RCW 9.94A.515. The sentencing grid in RCW 9.94A.510 then prescribes a

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<sup>2</sup> The respondents also assert that Piris does not dispute that his 1999 sentence was lawful. That, too, is wrong. Piris has consistently argued his sentence in 1999 was unlawful. In *State v. Piris*, 44783-1-I, respondents Nielsen and Nielsen Broman and Koch, argued that: “A sentencing court acts without statutory authority when it imposes a sentence based on a miscalculated offender score.” CP 85.

standard sentencing range based on the offender score and seriousness level.

The difference of a single point may add or subtract years to an offender's sentence. Therefore, our Supreme Court has stated that an accurate interpretation and application of the SRA is of "great importance to both the State and the offender." *In re LaChapelle*, 153 Wn.2d 1, 6, 100 P.3d 805, 808 (2004). The Court has stated:

[A] sentencing court acts *without statutory authority ... when it imposes a sentence based on a miscalculated offender score.*" Moreover, a sentence that is based upon an incorrect offender score is a fundamental defect that inherently results in a miscarriage of justice. This is true even where the sentence imposed is actually within the correct standard range, if the trial court had indicated its intent to sentence at the low end of the range, and the low end of the correct range is lower than the low end of the range determined by using the incorrect offender score.

*In re Goodwin*, 146 Wn.2d 861, 868, 50 P.3d 618, 622 (2002) (citations omitted, emphasis added). In another case, the Supreme Court found that a judgment and sentence was invalid when it was plain that the trial judge had miscalculated the petitioner's offender score and sentenced the offender based on a washed out prior offense. *In re LaChapelle*, 153 Wn.2d at 6. Sentences based upon incorrect offender scores are not only appealable, but can be reviewed via a personal restraint petition.

The sentence imposed on Piris in 1999 was invalid on its face and without statutory authority. It was unlawful. Just as in *Powell*, the sentence exceeded the maximum that could lawfully be imposed.

The Court of Appeals held that that the original sentence imposed was lawful because it was, by happenstance, within the lawful standard range.

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. That assertion rests on mere speculation.

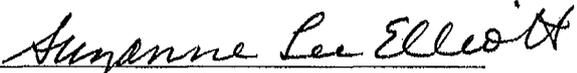
*Piris v. Klitching*, 186 Wn. App. at 277. But it was not speculation because the sentence imposed on remand was 146 months. Moreover, even though the original sentencing judge had since retired, as quoted above, he was quite clear that based upon the facts of this case, Piris should be sentenced to the bottom of any lawful standard range.

## V. CONCLUSION

There are no sound policy reasons for requiring Piris to demonstrate "actual innocence" before he can sue his lawyers for a sentencing error that unlawfully deprived him of his liberty for more than a year. For the reasons argued above, this Court should reverse the summary judgment order dismissing Piris's claims of attorney malpractice.

DATED this 26<sup>th</sup> day of October, 2015.

Respectfully submitted,

  
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**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:

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Dear Sir/Madame:

Enclosed for filing in the Washington State Supreme Court in *Christopher Piris v. Alfred Kitching, et. al.*, Supreme Court No. 91567-9, is the **Appellant's Supplemental Brief**.

Feel free to contact me with any questions or concerns.

Thank you for your kind attention to this matter.

Best,

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