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Supreme Court Reaffirms “Actual Innocence” Requirement For Malpractice Claims from Criminal Cases

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The Washington Supreme Court recently reaffirmed the requirement that a plaintiff in a legal malpractice claim arising from a criminal case prove that the plaintiff was actually innocent of the crime involved. The “actual innocence” requirement presents a high bar for claimants because, as the Supreme Court explained in *Ang v. Martin*, 154 Wn.2d 477, 484-85, 114 P.3d 637 (2005), it means more than just “legal innocence” in the sense of having a conviction reversed or otherwise vacated. As the Supreme Court defined it in *Ang*, “actual innocence” means just that: a malpractice claimant must show that the claimant did not do the crime charged.

The Supreme Court reaffirmed the broad sweep the “actual innocence” requirement in *Piris v. Kitching*, ___ Wn.2d ___, 375 P.3d 627 (2016). In *Piris*, the plaintiff had plead guilty to a felony and was sentenced to a long prison term. On appeal in the underlying criminal case, Piris argued successfully that the trial court had miscalculated the sentence and the Court of Appeals remanded for resentencing. The resentencing, however, did not occur and by the time the trial court itself discovered that fact 12 years later Piris had already served all 159 months of his prison term. The trial court corrected its error by reducing Piris’

sentence to 146 months. He then sued his trial and appellate counsel for malpractice, arguing that he had served 13 months longer than he should have.

Citing *Ang*'s "actual innocence" requirement, the trial court in the subsequent malpractice case granted summary judgment for the defendants and the Court of Appeals affirmed. Reaffirming *Ang*, the Supreme Court agreed. In doing so, the Supreme Court distinguished *Powell v. Associated Counsel for the Accused*, 131 Wn. App. 810, 815, 129 P.3d 831 (2006). In *Powell*, the Court of Appeals concluded that the "actual innocence" requirement did not apply when a criminal defendant was sentenced to a longer period than the statute involved permitted—reasoning that "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." By contrast, the Supreme Court in *Piris* held that *Powell*'s narrow exception did not apply when—as was the case with *Piris*—the court had the requisite authority to impose the sentence involved even if an appellate court concluded later that the trial court had misapplied the pertinent standards. Given the unusual circumstances in *Powell*, *Piris* effectively casts the sentencing exception very narrowly. As a result, the "actual innocence" requirement will continue to present a very high bar for most potential criminal malpractice claimants.

ABOUT THE AUTHOR

Mark J. Fucile of Fucile & Reising LLP handles professional responsibility, regulatory and attorney-client privilege issues for lawyers, law firms and corporate and governmental legal departments throughout the Northwest. Mark has chaired both the WSBA Committee on Professional Ethics and its predecessor, the WSBA Rules of Professional Conduct Committee. Mark is also a former member of the Oregon State Bar Legal Ethics Committee and is a current member of the Idaho State Bar Section on Professionalism & Ethics. Mark writes the monthly Ethics Focus column for the Multnomah (Portland) Bar's *Multnomah Lawyer*, the quarterly Ethics & the Law column for the WSBA *NWLawyer* and is a regular contributor on legal ethics to the WSBA *NWSidebar* blog. Mark is a contributing author/editor for the current editions of the OSB *Ethical Oregon Lawyer*, the WSBA *Legal Ethics Deskbook* and the WSBA *Law of Lawyering in Washington*. Before co-founding Fucile & Reising LLP in 2005, Mark was a partner and in-house ethics counsel for a large Northwest regional firm. He also teaches legal ethics as an adjunct for the University of Oregon School of Law at its Portland campus. Mark is admitted in Oregon, Washington, Idaho, Alaska and the District of Columbia. He is a graduate of the UCLA School of Law. Mark's telephone and email are 503.224.4895 and Mark@frllp.com.