replaces petition filed on 2/19/19

SUPREME COURT NO. 96856-0

Court of Appeals No. 35288-9-III

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent

v.

ALEJANDRO HERRERA CASTRO, Petitioner

PETITION FOR DISCRETIONARY REVIEW-CORRECTED

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Counsel for Petitioner
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Graham, WA
253-445-7920

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Washington State Cases

Constitutional Provisions

Statutes

Other Authorities

I. IDENTITY OF PETITIONER

Alejandro Herrera Castro, appellant below, petitions this Court for the relief designated in Part II.

II. DECISION OF COURT OF APPEALS

Mr. Herrera Castro seeks review of the unpublished decision, *State v. Herrera Castro,* issued January 17, 2019, by Division Three of the Court of Appeals. A copy of the Court's opinion is attached as Appendix A.

III. ISSUES PRESENTED FOR REVIEW

A. Post-*Blazina* and *Ramirez*, does the trial court act without authority when it imposes discretionary legal fees without conducting an individualized inquiry at a sentence correction hearing?

B. At a sentence correction hearing where the court imposed an additional twelve years of confinement for firearm enhancements, is the defendant entitled to allocute and request a mitigated sentence?

IV. STATEMENT OF THE CASE

In 2007 Alejandro Herrera Castro was convicted at a jury trial of three counts of first-degree kidnapping, one count of second-degree kidnapping, four counts of assault second degree, and one

count of harassment. CP 150-151. The court imposed sentence as follows:

Count 1- 77 months including a 36-month firearm enhancement
Count 2- 122 months including a 60-month firearm enhancement
Count 3- 111 months including a 60-month firearm enhancement
Count 4- 111 months including a 60-month firearm enhancement
Count 5- 69 months including a 36-month firearm enhancement
Count 6- 69 months including a 36-month firearm enhancement
Count 7- 69 months including a 36-month firearm enhancement
Count 8- 69 months including a 36-month firearm enhancement
CP 158.

The court ordered the time for serious violent offenses (Counts 2-4) to be served consecutive to one another, and the firearm enhancements of those counts to be served consecutive to the base sentence and each other. The court further ordered the firearm enhancements from counts 5-8 to be served concurrently with one another and concurrent to the firearm enhancement in counts 1 and 2. CP 158.

Mr. Herrera Castro appealed, and his convictions were affirmed in an unpublished decision issued on July 23, 2009. *See* Appeal No. 27244-3-III; 2009 WL 2187574. In 2012, Mr. Herrera

Castro filed a CrR 7.8 motion to modify and correct his judgment and sentence. CP 14-18. He raised, among other issues, the problem that his sentence was unclear, as the trial court had neglected to write in the total number of months of confinement. CP 14. The Court of Appeals dismissed his petition and issued a certificate of finality in October 2012. CP 21. In its dismissal order, the Court did not address his concern about facial invalidity based on the absence of a total number of months.

The following year Mr. Herrera Castro raised the same concern in a second personal restraint petition. CP 28. Mr. Herrera Castro argued the judgment and sentence were facially invalid because the total sentence was unclear. CP 30. The Court disagreed and outlined the sentence exactly as the trial court had imposed it, including the concurrent firearm enhancements. CP 30. The Court concluded the resulting judgment and sentence did not exceed the statutorily allowed duration and was not facially invalid on that basis. CP 30. The Court dismissed his petition as untimely and frivolous. CP 31. A certificate of finality was issued on May 31, 2013. CP 27.

On December 7, 2016, the State filed a CrR 7.8 motion to amend the sentence and judgment. CP 32-38. The State

contended the judgment and sentence was invalid on its face, as the firearm enhancements in counts 1, and 5-8 should have run consecutive to one another, not concurrent, as the sentencing court had ordered. CP 38.

At the resentencing hearing, the court found the sentence was erroneous on its face. 5/2/17 RP 21-22. The court allowed the State's motion and added 144 months of firearm enhancements to Mr. Herrera Castro's sentence. CP 44. The court imposed the same legal financial obligations as had been imposed in 2008. The non-mandatory obligations included a $70 sheriff's return of service fee, a $500 appointed attorney recoupment fee, and a $2,211.56 jury demand fee. CP 46-47. The court made no individualized inquiry into Mr. Herrera Castro's ability to pay the fees in either the original sentencing (6/23/2008) or the resentencing hearing. (5/2/2017).

The court did not provide an opportunity for Mr. Herrera Castro to allocute before imposing sentence, and when Mr. Herrera Castro objected, the court ended the hearing. 5/2/17 RP 24. Mr. Herrera Castro appealed the court's rulings. CP 147.

The Court of Appeals declined to exercise its discretion under *Blazina*, noting that it was an unpreserved error. The Court

did, however, review the jury demand fee, finding it was not authorized by statute and remanded for correction. *Slip Op.* at 8.

The Court found the sentence correction hearing was merely ministerial and as a result Mr. Herrera Castro had no right to allocution. *Slip Op.* at 7.

V. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

A. Under *State v. Blazina, State v. Ramirez,* and RCW 10.01.160(3), The Statutory Amendments Should Apply To Individuals Whose Case Is On Appeal After Trial Court Action.

The question here is whether a case which is final on the merits, but returned to the trial court for sentence correction entitles the defendant to the benefit of the changes to legal financial obligation law under *Blazina, Ramirez,* and RCW 10.01.160(3).

Within the past four years, this Court has held that RCW 10.01.160(3) (2015) places an onus on the trial court to conduct an individualized inquiry into a defendant's future ability to pay before imposing discretionary legal financial obligations at sentencing. *State v. Blazina,* 182 Wn.2d 827, 839, 344 P.3d 680 (2015).

An adequate inquiry must include "consideration of mandatory factors set out in *Blazina,* including the defendant's incarceration and other debts, and the court rule GR 34 for

indigency. The trial court should also address what we described in *Blazina* as other 'important factors' relating to the defendant's financial circumstances including employment history, income, assets, and other financial resources, monthly living expenses, and other debts." *State v. Ramirez,* 191 Wn.2d 732, 734, 739, 426 P.3d 714 (2018).

After *Blazina* but prior to *Ramirez,* the State legislature amended RCW 10.01.160(3) to categorically prohibit the imposition of discretionary costs on indigent defendants. LAWS of 2018 ch. 269, § 6(3). In *Ramirez,* this Court held that the newly amended statute applied prospectively, because the statutory amendments pertain to costs and a case on direct review is not yet final. *Ramirez* 191 Wn.2d at 747.

Individuals who were sentenced pre-*Blazina* and are returned to the trial court for sentence correction should have the same right to review under *Blazina* and RCW 10.01.160(3) as those whose cases are on their first direct appeal because denial does not achieve legitimate state objectives.

Under a rational basis equal protection analysis, equal protection of the law is upheld unless it rests on grounds wholly

irrelevant to achievement of legitimate state objectives. U.S. Const. Amend. 14, § 1, Wash. Const. Art. 1, § 12.

The legitimate state objective in prohibiting accrual of interest and imposition of discretionary costs on indigent defendants is to allow defendants to re-enter society, not overly burdened by debt. Failure by indigent offenders to pay off debt means a retention of jurisdiction over released impoverished offenders long after they are released from prison, negative consequences for employment, housing, and finances, and a higher chance of recidivism. *Blazina,* 182 Wn.2d at 837[1].

Individuals, like Mr. Herrera Castro should have the opportunity to have their legal financial obligations reviewed. It is an arbitrary distinction to prevent indigent offenders from having them reviewed as they stand before the trial court for a sentence correction hearing.

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[1] In *Blazina* this Court held that each appellate court must make its own decision to accept discretionary review in the context of a claimed error not objected to at trial. *Blazina,* 182 Wn.2d at 835. This Court accepted review of *Blazina* on the basis of national and local cries for reform of a broken LFO system. *Id.*

B. Mr. Herrera Castro Was Wrongfully Denied An Opportunity To Petition The Trial Court For A Mitigated Sentence When He Was Denied Allocution.

In *State v. McFarland,* 189 Wn.2d 47, 399 P.3d 1106 (2017), this Court held that a statutory analysis supporting the Court's decision in *Mulholland,* applies to sentencing for multiple firearm related offenses under RCW 9.94A.589(1)(c). At the time that Mr. Herrera Castro was initially sentenced, the trial court ran the serious violent offenses consecutive to one another and 144 months of firearm enhancements concurrent with one another. (6/23/08 RP 26-27; 5/2/17 RP 20). The record shows a confused judge, prosecutor and defense attorney. (6/23/08 RP 17-22). The trial court deliberately imposed the low end of the sentencing range. (6/23/08 RP 22). The trial court said, "I will impose the consecutive sentences as mandated by law…". (6/23/08 RP 22). And then imposed concurrent sentences for some of the firearm related offenses.

At the sentence correction hearing in 2017, the trial court said, 'These firearm enhancements, you argue, run consecutive, and *the judge had no authority to run them concurrent in any way; he was mandated to run them consecutive*. Correct?" (5/2/17 RP

6). And again, "[w]here Judge Jorgenson wrote in the judgment and sentence 'the firearm enhancements of Counts 5 through 8 will run concurrently—and concurrently with Count 2.' That's what the state argues *was not just error, but the judge had no authority to- to do that by law; there was no discretion allowed, that was just an error."* (5/2/17 RP 20).

The sentence correction court was incorrect under *Mulholland* and *McFarland.* The court indeed had the discretion to consider whether running the firearm related offenses concurrently. RCW 9.94A.535 authorizes concurrent sentencing as an exceptional sentence for multiple firearm convictions under RCW 9.94A.589(1)(c). The Hard Time for Armed Crime Act does not preclude exceptional sentences downward. When RCW 9.94A.589 (1)(c) was enacted, it was after the Hard Time for Armed Crime Act, and this Court has held "[w]e presume the Legislature is aware of its prior enactments and judicial construction of them." *McFarland,* 189 Wn.2d at 55.

A trial court errs when it operates under the erroneous belief that it does not have the discretion to impose a mitigated exceptional sentence for which a defendant may be eligible. *State v. Mulholland,* 161 Wn.2d 322, 333, 166 P.3d 677 (2007).

Here, Mr. Herrera Castro had no opportunity to bring this error to the trial court's attention because he was not given an opportunity to speak. The court was aware Mr. Herrera Castro wanted both a new attorney and to speak. The court simply said, "I've made my ruling, I've signed the judgment and sentence. And you have the right to appeal." (5/2717 RP 23).

This Court has the authority to address arguments belatedly raised when necessary to produce a just resolution. *McFarland,* 189 Wn.2d at 57. Because Mr. Herrera Castro was unable to argue the case for a lawful mitigated exceptional sentence under RCW 9.94A.545, this Court should remand with instructions to allow Mr. Herrera Castro to speak on his own behalf for an exceptional downward sentence.

VI. CONCLUSION

Based on the foregoing facts and authority, Mr. Herrera Castro respectfully asks this Court to grant his petition for review.

Respectfully submitted this 20th day of February 2019.

/s/ Marie J. Trombley
WSBA 41410

CERTIFICATE OF SERVICE

I, Marie Trombley, certify under penalty of perjury of the laws of the State of Washington and the United States, that on February 20, 2019, I sent an electronic copy, by prior agreement between the parties, or sent by USPS mail, first class, postage prepaid, a true and correct copy of the Petition for Discretionary Review-Corrected to the following:

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APPENDIX A

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CASE # 352889
State of Washington v. Alejandro Herrera Castro
GRANT COUNTY SUPERIOR COURT No. 071004397

Counsel:

Enclosed please find a copy of the opinion filed by the Court today.

A party need not file a motion for reconsideration as a prerequisite to discretionary review by the Supreme Court. RAP 13.3(b); 13.4(a). If a motion for reconsideration is filed, it should state with particularity the points of law or fact which the moving party contends the court has overlooked or misapprehended, together with a brief argument on the points raised. RAP 12.4(c). Motions for reconsideration which merely reargue the case should not be filed.

Motions for reconsideration, if any, must be filed within twenty (20) days after the filing of the opinion. Please file the motion electronically through the court's e-filing portal or if in paper format, only the original motion need be filed. If no motion for reconsideration is filed, any petition for review to the Supreme Court must be filed in this court within thirty (30) days after the filing of this opinion (may be filed by electronic facsimile transmission). The motion for reconsideration and petition for review must be <u>received</u> (not mailed) on or before the dates they are due. RAP 18.5(c).

Sincerely,

Renee S Townsley

Renee S. Townsley
Clerk/Administrator

RST:jab
Enclosure

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JANUARY 17, 2019
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WA State Court of Appeals, Division III

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE

STATE OF WASHINGTON, Respondent, v. ALEJANDRO HERRERA-CASTRO, Appellant.	)	No. 35288-9-III UNPUBLISHED OPINION

SIDDOWAY, J. — Alejandro Herrera-Castro appeals the 2017 amendment of the judgment and sentence entered in connection with his 2008 convictions for several crimes and associated firearm enhancements. The amendment was entered in response to a State motion to correct the facial invalidity in a judgment and sentence that ran four firearm enhancements concurrently. He contends that he was wrongly denied an opportunity to allocute and that the court erred in failing to conduct an individualized inquiry into his ability to pay the discretionary legal financial obligations (LFOs) carried forward into the amended judgment and sentence.

Mr. Herrera-Castro's *Blazina*[1] challenge was not raised in the hearing and his

[1] *State v. Blazina*, 182 Wn.2d 827, 833, 344 P.3d 680 (2015).

contention that he had a right to allocute is predicated on the assumption that the hearing on the CrR 7.8 motion was a resentencing, which it was not. Mr. Herrera-Castro's arguments do, however, point out a further facial invalidity: a statutorily unauthorized jury demand fee of $2,211.56. As long as we are reviewing and affirming correction of what had been a facially invalid judgment and sentence, we will direct the trial court to further correct the jury demand fee. We deny Mr. Herrero-Castro's appeal including challenges raised in a pro se statement of additional grounds, with the exception of remanding with directions to reduce the jury demand fee to a statutorily authorized amount.

FACTS AND PROCEDURAL BACKGROUND

In October 2007, Mr. Herrera-Castro was convicted of one count of second degree kidnapping, three counts of first degree kidnapping, four counts of second degree assault, and one count of harassment. Firearm enhancements were imposed for all but the harassment count. The sentencing data set forth in the judgment and sentence reflected correct standard ranges, enhancements, and "[t]otal standard range[s] (including enhancements)" for each crime. Clerk's Papers (CP) at 153-54 (capitalization omitted). The court sentenced Mr. Herrera-Castro to confinement for the low end of the total standard range (including enhancements) for each crime.

At the sentencing hearing, the trial court stated it was going to "impose consecutive sentences as mandated by law." Report of Proceedings (RP) (June 12, 2008)

at 22. Yet toward the end of the hearing the State asked that "the firearm enchantments in [counts] 5 through 8," the assault counts, "run concurrently to each other and to count 2," a first degree kidnapping count. *Id.* at 27. In completing the judgment and sentence the court made the handwritten notation, "[T]he firearm enhancements of counts 5-8 will run concurrently and concurrently with count #2." CP at 158. The court also overlooked a blank for identifying the "[a]ctual number of months of total confinement ordered." *Id.*

In October 2012, Mr. Herrera-Castro filed a CrR 7.8 motion that contended in part that because of the failure to complete the months of total confinement ordered, the total length of his sentence was unclear.[2] This court—to whom the motion was referred for treatment as a personal restraint petition (PRP)—dismissed the petition as untimely and frivolous, focusing on portions of the judgment and sentence that were facially valid, without any reference to the trial court's handwritten notations.

In 2016, the Department of Corrections contacted the State for assistance in construing Mr. Herrera-Castro's 2008 sentence. The State's review caused it to conclude that the judgment and sentence was facially invalid because the handwritten notation provided for firearm enhancements to run concurrently in violation of RCW 9.94A.533(e). The State thereafter filed its own CrR 7.8 motion, asking that the

[2] Mr. Herrera-Castro had timely appealed his 2008 convictions, which were affirmed. *State v. Herrera-Castro*, noted at 151 Wn. App. 1021 (2009) (unpublished).

judgment and sentence be amended to correct its facial invalidity. Its proposed correction was for "counts 2, 3, and 4 [the first degree kidnapping counts], plus all firearm enhancements [to] run[ ] consecutively to each other, and the remainder of the counts [to] run[ ] concurrent to each other and the other counts, for a total sentence of 164 months of base sentence and 360 months of firearm enhancements." CP at 38.

Mr. Herrera-Castro opposed the State's motion. Without citing any authority, his original written opposition requested "a full resentencing hearing." CP at 83. In a second response to the State's motion, he argued that the State was collaterally estopped based on this court's dismissal of his October 2012 PRP, because the dismissal order had found no facial invalidity in the judgment and sentence. CP at 84.

At the hearing on the State's motion, the trial court granted the requested relief. Mr. Herrera-Castro's lawyer did not renew the suggestion in his written opposition that his client was entitled to a full resentencing. He did make his collateral estoppel argument, but the trial court correctly concluded that the concurrent sentencing problem "was not before [the Court of Appeals]" in connection with Mr. Herrera-Castro's October 2012 PRP. RP (May 2, 2017) at 20.

Mr. Herrera-Castro's lawyer stated toward the end of the hearing that his client was "wanting to address the court. I told him no, he cannot address the court. But he wants a new attorney 'cause I'm not doing anything for him." RP (May 2, 2017) at 23.

The trial court did not allow Mr. Herrera-Castro to speak. It told him it had made

its ruling and had signed the amended judgment and sentence. When Mr. Herrera-Castro refused to sign the amended judgment and sentence, the trial court told him, "Mr. Herrera Castro, we're done here. Your next argument would be with the Court of Appeals." *Id.* at 24.

Mr. Herrera-Castro appeals.

ANALYSIS

Allocution

Mr. Herrera-Castro's first assignment of error is to the court's asserted denial of his right to allocute at the 2017 hearing.

"Allocution is a statutory right, and we . . . review questions of statutory construction de novo." *State v. Hatchie*, 161 Wn.2d 390, 395, 166 P.3d 698 (2007). RCW 9.94A.500(1) provides that the right to allocute exists when the court "conduct[s] a sentencing hearing," during which the court "shall . . . allow arguments" from, among others, "the offender." The Washington Supreme Court has observed that "the text of [RCW 9.94A.500] is limited to sentencing hearings." *State v. Canfield*, 154 Wn.2d 698, 705, 116 P.3d 391 (2005). The State argues that the hearing on its CrR 7.8 motion was not a sentencing hearing.

"Sentencing hearing" is not a defined term under the Sentencing Reform Act of 1981, chapter 9.94A RCW. *See* RCW 9.94A.030. But RCW 9.94A.500(1) provides that a sentencing hearing is something done "[b]efore imposing a sentence upon a defendant,"

during which

> [t]he court shall consider the risk assessment report and presentence reports, if any, including any victim impact statement and criminal history, and allow arguments from the prosecutor, the defense counsel, the offender, the victim, the survivor of the victim, or a representative of the victim or survivor, and an investigative law enforcement officer as to the sentence to be imposed.

Thus described, a sentencing hearing is a particular type of hearing—it is not just any hearing having something to do with a sentence. Its essential characteristics are (1) the court's consideration of information that will inform its exercise of discretion (2) in imposing a sentence.

Such a meaning is supported by well-settled analogous case law addressing when a correction to a judgment and sentence requires the defendant's presence. As our Supreme Court explained in *State v. Ramos*,

> A defendant has a constitutional right to be present at sentencing, including resentencing. *State v. Rupe*, 108 Wn.2d 734, 743, 743 P.2d 210 (1987). However, when a hearing on remand involves only a ministerial correction and no exercise of discretion, the defendant has no constitutional right to be present. *See State v. Davenport*, 140 Wn. App. 925, 931-32, 167 P.3d 1221 (2007).

171 Wn.2d 46, 48, 246 P.3d 811 (2011). *Ramos* involved a remand to correct a judgment and sentence to state the specific term of community placement. The court explained that if the length of the term was dictated by statute, the hearing on remand would be purely ministerial. *Id.* at 49. But the trial court was also directed to specify terms of placement

that would be discretionary, not ministerial, so the defendant's presence would be constitutionally required.

Under the plain language of RCW 9.94A.500(1) and the case law dealing with a defendant's required presence, the hearing on the State's CrR 7.8 motion was not a sentencing hearing. The narrow subject matter of the State's motion was a request to correct the running of the firearm enhancements to conform to RCW 9.94A.533(e). The information required by RCW 9.94A.500(1) to be considered at a sentencing hearing was irrelevant and the court would merely be *correcting*, not *imposing*, a sentence. The right to allocute provided by RCW 9.94A.500(1) did not apply.

Discretionary LFOs

Mr. Herrera-Castro next argues that the trial court failed to engage in an individualized inquiry into Mr. Herrera-Castro's current and future ability to pay before imposing discretionary LFOs. He also points out that imposition of one of the discretionary LFOs—a $2,211.56 jury demand fee—exceeded the trial court's authority.[3]

The State chooses to object based on RAP 2.5(a), which provides that a defendant must object to a trial court's finding that he has the present and future ability to pay in

[3] At Mr. Herrera-Castro's 2008 sentencing, he was ordered to pay a $500 victim assessment and $2,481.56 identified as court costs (a $200 criminal filing fee, $70 sheriff service fee, and $2,211.56 jury demand fee). In amending the judgment and sentence in 2017, the trial court carried the LFOs forward without modification.

order to preserve a claim of error. RAP 2.5(a); *Blazina*, 182 Wn.2d at 833 ("[u]npreserved LFO errors do not command review as a matter of right"). "[A] defendant has the obligation to properly preserve a claim of error" and "appellate courts normally decline to review issues raised for the first time on appeal." *Id.* at 830, 834.

We decline to exercise our discretion to entertain a cost issue that was not raised in the trial court with one exception: we will review the challenge to the $2,211.56 jury demand fee.

Chapter 10.01 RCW permits the trial court to impose costs on a convicted defendant and provides that costs are "limited to expenses specially incurred by the state in prosecuting the defendant" and "cannot include expenses inherent in providing a constitutionally guaranteed jury trial." RCW 10.01.160(2). RCW 10.46.190 provides that a person convicted of a crime shall be liable for the costs of the proceedings against him, including "a jury fee as provided for in civil actions for which judgment shall be rendered and collected." Finally, RCW 36.18.016(3)(b) provides that "[u]pon conviction in criminal cases a jury demand charge of one hundred twenty-five dollars for a jury of six, or two hundred fifty dollars for a jury of twelve may be imposed as costs."[4] The jury

[4] We cite the current versions of the statutes because the relevant language remains unchanged from the versions in effect at the time of Mr. Herrera-Castro's sentencing on June 23, 2008. *See* former RCW 10.01.160(2) (2008), LAWS OF 2008, ch. 318, § 2; former RCW 10.46.190 (2005), LAWS OF 2005, ch. 457, § 12; and former RCW 36.18.016(3)(b) (2007), LAWS OF 2007, ch. 496, § 204.

demand fee cannot exceed $125 for a 6-person jury or $250 for a 12-person jury. *State v. Hathaway*, 161 Wn. App. 634, 653, 251 P.3d 253 (2011); *see also State v. Earls*, 51 Wn. App. 192, 197-98, 752 P.2d 402 (1988) (only the statutory jury fee, not the compensation paid jurors, can be recouped), *abrogated on other grounds by State v. Hartz*, 65 Wn. App. 351, 355, 828 P.2d 618 (1992).

Mr. Herrera-Castro's case was tried to a jury. We remand to the trial court to amend the judgment and sentence by reducing the jury demand fee to an amount consistent with the statutory limitation.[5]

STATEMENT OF ADDITIONAL GROUNDS

In a pro se statement of additional grounds, Mr. Herrera-Castro raises three. The second—a claim that his right to allocute was denied, is adequately addressed by counsel and will not be reviewed further. RAP 10.10(a).[6]

His first and third are similar. Citing *State v. Graham*, 181 Wn.2d 878, 337 P.3d 319 (2014), he contends that the trial court could have run his serious violent offenses concurrently had it imposed an exceptional sentence. Citing *State v. McFarland*, 189 Wn.2d 47, 399 P.3d 1106 (2017), he contends the trial court could have run his firearm

[5] Probably $250, but a criminal defendant in superior court can waive the presumptive 12-person jury. CrR 6.1(b).

[6] Mr. Herrera-Castro's complaint that his lawyer was ineffective for failing to challenge the denial of allocution fails because there was no right to allocute.

enhancements concurrently had it imposed an exceptional sentence.[7] He argues that his lawyer provided ineffective assistance at the CrR 7.8 hearing by failing to request an exceptional sentence.

Effective assistance of counsel is guaranteed by both the Sixth Amendment to the United States Constitution and article I, section 22 of the Washington Constitution. *Strickland v. Washington*, 466 U.S. 668, 685-86, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); *State v. Estes*, 188 Wn.2d 450, 457, 395 P.3d 1045 (2017). To demonstrate ineffective assistance of counsel, a defendant must show two things: "(1) defense counsel's representation was deficient, i.e., it fell below an objective standard of reasonableness based on consideration of all the circumstances; and (2) defense counsel's deficient representation prejudiced the defendant, i.e., there is a reasonable probability that, except for counsel's unprofessional errors, the result of the proceeding would have been different." *State v. McFarland*, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995) (emphasis omitted).

As already explained, the hearing on the State's motion to correct the facially invalid judgment was not a sentencing hearing. Given the narrow issue presented by the

[7] We note that *McFarland* dealt with the exceptional concurrent sentencing of firearm-related offenses, not firearm enhancements. 189 Wn.2d at 52-55. *Cf. State v. Brown*, 139 Wn.2d 20, 983 P.2d 608 (1999), *overruled on other grounds by State v. Houston-Sconiers*, 188 Wn.2d 1, 21, 391 P.3d 409 (2017); *but cf. State v. Houston-Sconiers*, 188 Wn.2d at 39 (Madsen, J., concurring in result only).

State's motion, Mr. Herrera-Castro's lawyer had no basis for responding with a request for relief from the 2008 sentence. Any legal basis that Mr. Herrera-Castro has for relief from the 2008 judgment and sentence must be raised by his own collateral attack in compliance with applicable statutes or court rules. *See* RAP 16.3(a) (personal restraint petition as an original action in the appellate courts); RCW 7.36.030 (habeas corpus as a form of relief in superior court); CrR 7.8 (relief from judgment or order). No deficient representation is shown.

We affirm the trial court but remand with directions to correct the judgment and sentence by reducing the jury demand fee to a statutorily authorized amount.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

Siddoway, J.

WE CONCUR:

Korsmo, J.

Pennell, A.C.J.

MARIE TROMBLEY

February 20, 2019 - 12:28 PM

Transmittal Information

Filed with Court:	Court of Appeals Division III
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