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COA No. 51897-0-II

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

SOPHEAP CHITH,

Petitioner.

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER

Petitioner, Sopheap Chith, appellant below, asks this Court to accept review of the Court of Appeals' decision terminating review that is designated in part B of this petition.

B. DECISION OF THE COURT OF APPEALS

Chith seeks review of the unpublished opinion of the Court of Appeals in *State v. Chith*, No. 51897-0-II, filed November 19, 2019. A copy of the decision is contained in Appendix A at pages A-1 through A-12.

C. ISSUES PRESENTED FOR REVIEW

1. A sentencing court errs when it operates under a mistaken belief that it does not have the discretion to impose an exceptional mitigated sentence for which a defendant may be eligible. Under *State v. McFarland*, a court may impose concurrent sentences for firearm-related convictions as an exceptional mitigated sentence, despite statutory language directing consecutive sentences. Is remand for resentencing required where the court believed it was required to impose consecutive sentences for multipole firearm enhancements?

2. Chith has a Sixth Amendment right to effective assistance of counsel at sentencing. A defendant who is denied the effective assistance of counsel at sentencing is entitled to remand for a new sentencing hearing. Is remand for resentencing required where defense counsel failed to seek an exceptional mitigated sentence under *McFarland*?

D. STATEMENT OF THE CASE

1. Procedural history:

Chith argued on direct appeal that (1) the sentencing court erred because it failed to recognize that it had the discretion to run his firearm sentencing enhancements concurrently under *State v. McFarland* 189 Wn.2d 473, 99 P.3d 1106 (2017) and *In re Personal Restraint of Mulholland*, 161 Wn.2d 322, 166 P.3d 677 (2007), (2) defense counsel's failure to argue that McFarland allowed the sentencing court to run the firearm sentencing enhancements concurrently violated his right to effective assistance of counsel, and (3) he was denied his right to be present at two post-resentencing hearings during which the sentencing court amended his judgment and sentence to reflect the correct length of total confinement. *State v. Chith*, No. 51897-0-II, 2019 WL 6131228, (Wash. Ct. App. Nov. 19, 2019) (unpublished). The Court of Appeals affirmed the sentence and also found that Chith was not deprived of effective assistance of counsel by his attorney's decision not to argue that *McFarland* allowed the sentencing court to run the firearm sentencing enhancements concurrently. Slip. op. at *1.

The case came on for a second resentencing on January 12, 2018, at which time defense counsel stated that he had met with Chith the previous day and requested a continuance in order to research *McFarland* and *In re Mulholland*. 1RP at 2. The court established a briefing schedule to

permit counsel time to file written materials. 1RP at 4. At a hearing on February 9, 2018, defense counsel told the court that after reading *Mulholland* and *McFarland*, “the two cases differentiates between a gun charge and a deadly weapon enhancement or a gun enhancement,” and that he had not briefed the issue regarding sentencing court discretion to order firearm enhancements to be served concurrently. 2RP at 13. Defense counsel stated, however, that Chith wanted to address the court regarding imposition of consecutive firearm enhancements on his own. 2RP at 13-14. Chith argued that the court has discretion to order an exceptional sentence downward and also to impose a concurrent sentence. 2RP at 23-24. The court imposed a total of 202 months including enhancements, and the sentence was affirmed by the Court of Appeals. *Chith*, slip op. at 12.

Chith now petitions this Court for discretionary review pursuant to RAP 13.4(b).

E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

The considerations that govern the decision to grant review are set forth in RAP 13.4(b). Petitioner believes that this court should accept review of these issues purupoint to RAP 13.4(b)(3) and (4).

1. THE SENTENCING COURT ERRED IN FAILING TO ADDRESS IMPOSITION OF CONCURRENT FIREARM ENHANCEMENTS.

The jury found firearm enhancements in count I (second degree assault), count VIII (violation of a protection order), and count IX (first

degree taking a motor vehicle). Clerk's Papers (CP) 26-27. Chith was sentenced to three consecutive firearm enhancements under RCW 9.94A.533(3)(e).¹

Following appeal from 2016 resentencing in *State v. Chith*, No. 48913-9-II, (Wash. Ct. App. Sep. 26, 2017) (*Chith II*) (unpublished), the case came on for resentencing on January 12, 2018. 1RP at 2-10. Defense counsel requested a continuance in order to brief the court's ability to impose concurrent enhancements in light of the Supreme Court decisions in *McFarland* and *Mulholland*. 1RP at 2. When the court reconvened on February 9, however, defense counsel had not briefed the issue and did not advance argument on the issue. 2RP at 12-14.

The trial court ordered the sentences for the firearm enhancements in counts I, VIII and IX be served consecutively to each other pursuant to RCW 9.94A.533. 2RP at 26; CP 84-87, 99-101.

Chith was entitled to have the sentencing court consider an exceptional mitigated sentence under *McFarland*, *supra*. RCW 9.94A.589(1)(c) and RCW 9.41.040(6) provide that offenders shall serve

¹The statute provides in relevant part: "[n]otwithstanding any other provision of law, all firearm enhancements under this section are mandatory, shall be served in total confinement, and shall run consecutively to all other sentencing provisions, including other firearm or deadly weapon enhancements, for all offenses sentenced under this chapter.

consecutive sentences for certain firearm-related offenses, including first degree unlawful possession of a firearm and theft of a firearm. *In McFarland*, this Court held that notwithstanding the language of RCW 9.94A.589(1)(c) and RCW 9.41.040(6), a sentencing court has discretion to run firearm-related sentences concurrently as an exceptional downward sentence under RCW 9.94A.535(1)(g).²

A trial court's discretionary decision not to impose an exceptional sentence outside the standard range is generally not reviewable. *McFarland*, 189 Wn.2d at 56. But “this rule does not preclude a defendant from challenging on appeal the underlying legal determinations by which the sentencing court reaches its decision; every defendant is entitled to have an exceptional sentence actually considered.” *McFarland*, 189 Wn.2d at 56. And “[a] trial court errs when ... it operates under the ‘mistaken belief that it did not have the discretion to impose a mitigated exceptional sentence for which [a defendant] may have been eligible.’ ” *McFarland*, 189 Wn.2d at 56 (last alteration in original) (quoting *In re Pers. Restraint of Mulholland*, 161 Wn.2d 322, 333, 166 P.3d 677 (2007)). A court must recognize its

² RCW 9.94A.535(1)(g) provides that a sentencing court may impose an exceptional sentence below the standard range if it finds that “[t]he operation of the multiple offense policy of RCW 9.94A.589 results in a presumptive sentence that is clearly excessive in light of the purpose of this chapter, as expressed in RCW 9.94A.010.”

ability to impose an exceptional sentence regardless of arguments made by counsel. See *McFarland*, 189 Wn.2d at 56-57. “While no defendant is entitled to an exceptional sentence below the standard range, every defendant is entitled to ask the trial court to consider such a sentence and to have the alternative actually considered.” *State v. Grayson*, 154 Wn.2d 333, 342, 111 P.3d 1183 (2005). A sentencing court's failure to consider an exceptional sentence for which the defendant may be qualified is reversible error. *Id.* at 342.

In *McFarland*, the Washington Supreme Court, relying on its analysis in *In re Mulholland*, held that “in a case in which standard range consecutive sentencing for multiple firearm-related convictions ‘results in a presumptive sentence that is clearly excessive in light of the purpose of [the SRA],’ a sentencing court has discretion to impose an exceptional, mitigated sentence by imposing concurrent firearm-related sentences.” *McFarland*, 189 Wn.2d 47 at 55 (quoting RCW 9.94A.535(1)(g)).

The Court held that, notwithstanding the language in RCW 9.94A.589(1)(c) a sentencing court has discretion to run firearm-related sentences concurrently as an exceptional downward sentence under RCW 9.94A.535(1)(g). 189 Wn.2d at 53-55. Although the defendant in *McFarland* had not requested the sentencing court to impose an exceptional

downward sentence, our Supreme Court addressed the issue for the first time on appeal and held that remand for resentencing was appropriate because the “record suggest[ed] at least the possibility that the sentencing court would have considered imposing concurrent firearm-related sentences had it properly understood its discretion to do so.” 189 Wn.2d at 59.

Here, as in *McFarland*, the sentencing court was operating under the mistaken belief that RCW 9.94A.589(1)(c) required consecutive sentences for the firearm enhancements. RCW 9.94A.589, the statute addressed in *McFarland*, provides in relevant part:

The offender *shall serve consecutive sentences for each conviction* of the felony crimes listed in this subsection (1)(c), and for each firearm unlawfully possessed.

RCW 9.94A.589(1)(c) (emphasis added).

In this case Chith received a very high sentence of almost 17 years, which consisted of 90 months for the three firearm enhancements. CP 31. The sentencing court never considered whether concurrent sentences for the firearm enhancements were appropriate because (1) the court apparently erroneously believed it had no discretion to impose concurrent firearm enhancements, and (2) because the argument for concurrent sentences was not made by defense counsel. 2RP at 13-14. The sentencing court should have considered the imposition of concurrent sentences. “Remand for

resentencing is often necessary where a sentence is based on a trial court's erroneous interpretation of or belief about the governing law.” *State v. McGill*, 112 Wn. App. 95, 100, 47 P.3d 173 (2002). The record need only establish “at least the possibility” that the court would have imposed a different sentence. *McFarland*, 189 Wn.2d at 58. This possibility exists in Chith's case.

2. CHITH’S TRIAL ATTORNEY RENDERED CONSTITUTIONALLY DEFICIENT REPRESENTATION WHEN HE FAILED TO ARGUE THAT MCFARLAND MAY PROVIDE A SENTENCING COURT DISCRETION TO ORDER CONCURRENT SENTENCES FOR FIREARM ENHANCEMENTS

Chith was denied effective assistance of counsel at sentencing when his attorney failed to apprise the trial court of the decision in *McFarland* and to seek an exceptional sentence in the form of concurrent sentences for the firearm enhancements.

Defendants in criminal proceedings have a constitutional right to effective assistance of counsel. See U.S. Const. amend. VI; Const. art. I, § 22.

A claim of ineffective assistance of counsel presents a mixed question of fact and law that we review de novo. *State v. Sutherby*, 165 Wn.2d 870, 883, 204 P.3d 916 (2009); *Strickland v. Washington*, 466 U.S. 668, 690, 104 S. Ct. 2052, 80 L.Ed. 2d 674 (1984). To prevail on a claim of

ineffective assistance of counsel, Chith must show that (1) his trial counsel's representation was deficient and (2) his trial counsel's deficient representation prejudiced him. *Strickland*, 466 U.S. at 687; *State v. Thomas*, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987).

The first prong is met by a defendant showing that the performance falls “ ‘below an objective standard of reasonableness.’ ” *State v. Grier*, 171 Wn.2d 17, 33, 246 P.3d 1260 (2011) (quoting *Strickland*, 466 U.S. at 688). A defendant alleging ineffective assistance must overcome “a strong presumption that counsel's performance was reasonable.” *State v. Kylo*, 166 Wn.2d 856, 862, 215 P.3d 177 (2009). “ ‘When counsel's conduct can be characterized as legitimate trial strategy or tactics, performance is not deficient.’ ” *Grier*, 171 Wn.2d at 33 (quoting *Kylo*, 166 Wn.2d at 862-63). The second prong is met if the defendant shows that there is a substantial likelihood that the misconduct affected the verdict. *State v. Lewis*, 156 Wn. App. 230, 240, 233 P.3d 891 (2010). A failure to make either showing terminates review of the claim. *Thomas*, 109 Wn.2d at 225-26.

At sentencing, counsel's failure to cite or argue relevant caselaw supporting an exceptional sentence downward constitutes ineffective assistance of counsel. *State v. McGill*, 112 Wn. App. 95, 102, 47 P.3d 173 (2002). Where counsel fails to apprise the court of the relevant case law and

use it to argue for an exceptional mitigated sentence, the trial court cannot make an informed decision. *Id.* at 101-02.

In this case, defense counsel provided ineffective assistance by failing to prepare briefing and present argument in support of concurrent firearm enhancements in counts I, VIII, and IX. The sentencing court anticipated argument from counsel regarding extension of *McFarland* to cases involving firearm enhancements, but at the hearing on February 9, defense counsel did not make an argument for concurrent enhancements, leaving Chith to argue on his own for concurrent enhancements. 2RP at 23-24. Counsel provided deficient performance by failing to argue that the relatively new *McFarland* case provides grounds for extension of the ruling to firearm enhancements. Defense counsel had no valid strategic reason for failing to present Chith's position in the best possible light and to analogize the facts of his case to that of *McFarland*.

Regarding the second *Strickland* prong, prejudice may be established where a trial court cannot make an informed decision nor exercise its discretion because the court is unaware of the bounds of or nature of its discretion. *McGill*, 112 Wn.App. at 102. Where counsel is ineffective for failing to argue for an exceptional downward sentence, remand is proper if the record indicates the sentencing court would have considered the sentence

had it known it could. *McGill*, 112 Wn. App. at 100.

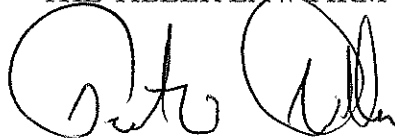
Chith's enhancements totaled 90 months---fully 44.5 percent of his total sentence of 202 months. If two or more enhancements had been ordered to be served concurrent, his overall sentence would have been significantly reduced. Chith's attorney provided ineffective assistance of counsel by failing to brief and argue for extension of the reasoning of *McFarland*. For the foregoing reasons, Chith submits that review should be granted.

F. CONCLUSION

For the foregoing reasons, this Court should grant review to correct the above-referenced errors in the unpublished opinion of the court below.

DATED: December 13, 2019.

Respectfully submitted,
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CERTIFICATE OF SERVICE

The undersigned certifies that on December 13, 2019, that this Appellant's Petition for Review was sent by the JIS link to Derek Bryne, Clerk of the Court, Court of Appeals, Division II, 950 Broadway, Ste. 300, Tacoma, WA 98402, and copies were mailed by U.S. mail, postage prepaid, to the following:

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This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Centralia, Washington on December 13, 2019.



PETER B. TILLER

APPENDIX A

November 19, 2019

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON,

Respondent,

v.

SOPHEAP CHITH,

Appellant.

No. 51897-0-II

UNPUBLISHED OPINION

CRUSER, J. — Sopheap Chith appeals his sentences following his second resentencing. He argues that (1) the sentencing court erred because it failed to recognize that it had the discretion to run his firearm sentencing enhancements concurrently under *State v. McFarland*¹ and *In re Personal Restraint of Mulholland*,² (2) defense counsel's failure to argue that *McFarland* allowed the sentencing court to run the firearm sentencing enhancements concurrently violated his right to effective assistance of counsel, and (3) he was denied his right to be present at two post-resentencing hearings during which the sentencing court amended his judgment and sentence to reflect the correct length of total confinement. In his statement of additional grounds for review³ (SAG), Chith contends that the trial court erred when it failed to properly instruct the jury on the

¹ 189 Wn.2d 47, 399 P.3d 1106 (2017).

² 161 Wn.2d 322, 166 P.3d 677 (2007).

³ RAP 10.10.

firearm sentencing enhancements at trial and that the firearm sentencing enhancements violate the prohibition against double jeopardy with respect to three of his convictions because the use of a firearm was an element of those offenses. These issues either have no merit or are not properly before us because they relate to Chith's convictions rather than his resentencing. Accordingly, we affirm Chith's sentences.

FACTS

I. BACKGROUND FACTS

The background facts for this case are set out in Chith's first appeal:

On February 5, 2013, Mr. Chith stole a silver Honda Civic from the parking lot of a Puyallup apartment complex. Mr. Chith and his girlfriend, Tiffany LaPlante, drove the car to an apartment complex in Spanaway, where the pair joined Sothea Chum and Nicole Shoemaker; they began removing the Civic's tires before Mr. Chith left, fearing capture. People noticed Mr. Chith on the way to Spanaway. Gabriel Colbern sat at a red light at a busy intersection, waiting to turn left, when he saw Mr. Chith across the intersection. Mr. Chith stood outside the Civic, which was stopped at a red light. He appeared to be yelling at the person inside the car. When the light changed, Mr. Chith got back in his car and turned right, directly in front of Mr. Colbern's car. Mr. Colbern noted Mr. Chith was gesturing angrily at his passenger. Ms. LaPlante later told officers Mr. Chith was upset with her, got out of the car, returned, and head-butted her.

Mr. Colbern followed Mr. Chith, noting he drove erratically, weaving and fishtailing in and out of lanes. Mr. Colbern saw Mr. Chith fire two shots from the car, shattering the driver's side window, prompting Mr. Colbern to call the police. Mr. Colbern continued to follow Mr. Chith until he stopped in a center turn lane near a junior high school. Mr. Chith tried to wave Mr. Colbern past him, but Mr. Colbern stayed where he was. Mr. Chith then fired two or three shots at or near Mr. Colbern in an attempt to scare Mr. Colbern. Mr. Chith resumed driving, firing two more shots "just toward the neighborhood that was there." Report of Proceedings at 293-94. Mr. Chith drove on, running a red light. A school bus full of children hit Mr. Chith's car, loosening the rear bumper. Mr. Chith still continued to drive, however Mr. Colbern lost sight of the car. Mr. Colbern remained on the phone with the police during this time.

Anna Monroe saw Mr. Chith near a busy intersection as she drove home from work. She drove behind Mr. Chith, who was driving aggressively. She saw Mr. Chith extend his arm out the driver's window and fire two shots into the air. Ms. Monroe lost sight of Mr. Chith when his car turned left.

The State charged multiple crimes. A jury found Mr. Chith guilty of the following counts: (I) second degree assault with a firearm enhancement; (II) drive-by shooting; (III) unlawful possession of a stolen vehicle with a firearm enhancement; (IV) second degree unlawful possession of a firearm; (V) reckless driving; (VI) hit and run; (VII) third degree driving with a suspended license; (VIII) violation of a court order with a firearm enhancement; (IX) first degree taking of a motor vehicle without permission with a firearm enhancement; and (X) witness intimidation with a firearm enhancement. The trial court dismissed count III, ruling it merged with count IX. The court sentenced Mr. Chith to concurrent standard range sentences on the felonies plus four firearm enhancements for a total sentence of 228 months. Without findings, the court ordered a substance abuse evaluation and treatment as a community custody condition. Mr. Chith appealed.

State v. Chith, No. 33002-8-III, slip op. at 2-3 (Wash. Ct. App. July 9, 2015) (*Chith I*) (unpublished), <http://www.courts.wa.gov/opinions/pdf/330028.unp.pdf>.

II. FIRST AND SECOND APPEAL AND FIRST RESENTENCING

In his first appeal, Chith raised several issues related to his convictions and argued that the trial court erred when it imposed substance abuse treatment as a community custody condition. *Id.* at 1. In an unpublished opinion, Division Three of this court reversed the witness intimidation conviction (count X) for insufficient evidence and “remand[ed] for the trial court to resentence on the community custody condition.” *Id.* at 1-2. Chith was resentenced on April 15, 2016.

Chith appealed from the April 15, 2016 resentencing. *State v. Chith*, No. 48913-9-II, slip op. at 1 (Wash. Ct. App. Sep. 26, 2017) (*Chith II*) (unpublished), <http://www.courts.wa.gov/opinions/pdf/D20%2048913-9-II%20Opinion.pdf>. In his second appeal, Chith argued that

(1) the sentences on four of his convictions exceed the statutory maximums for those offenses, (2) the trial court should have dismissed the possession of a stolen vehicle charge with prejudice rather than without prejudice after finding that double jeopardy barred the court from sentencing him on both his possession of a stolen vehicle and his first degree taking a motor vehicle without permission convictions, and (3) his amended judgment and sentence contain[ed] various scrivener’s errors.

Id. at 1.

On September 26, 2017, in an unpublished opinion, we reversed the sentences on the second degree assault conviction with a firearm sentencing enhancement (count I), the drive-by shooting conviction (count II), the violation of a court order conviction with a firearm sentencing enhancement (count VIII), and the first degree taking of a motor vehicle without permission conviction with a firearm sentencing enhancement (count IX). *Id.* at 1. We remanded the matter for the trial court to resentence Chith on those counts, “to vacate the possession of a stolen vehicle conviction,” and “to correct any remaining scrivener’s errors in the judgment and sentence.” *Id.* at 2.

III. SECOND RESENTENCING, THIRD APPEAL, AND SUBSEQUENT ORDERS

The second resentencing hearing was set for January 12, 2018. At this hearing, the sentencing court continued the resentencing until February 9 to allow the parties to research and present the court with briefing regarding whether *McFarland* and *Mulholland* applied to Chith’s firearm sentencing enhancements.

At the February 9 resentencing hearing, the parties presented the sentencing court with an agreed order correcting the judgment and sentence but reserved the discussion of whether *McFarland* and *Mulholland* applied to Chith’s firearm sentencing enhancements because Chith disagreed with defense counsel’s conclusion that those cases did not apply. Defense counsel advised the court that he had not submitted briefing on the matter because he had an obligation not to file a frivolous motion but that Chith disagreed with his assessment of the cases.

After discussing the other errors in the judgment and sentence, the sentencing court heard from Chith regarding whether *McFarland* and *Mulholland* applied to his case. Chith argued that

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under *McFarland*, the sentencing court should consider imposing “an exceptional sentence downward” and that the court had “the discretion to” run his firearm sentencing enhancements concurrently.⁴ 2 Verbatim Report of Proceedings (VRP) at 24. After hearing from Chith, the sentencing court announced that “[a]ll the firearms [enhancements] are to run consecutively as per statute.” *Id.* at 26.

The sentencing court’s February 9, 2018 order corrected a variety of scrivener’s errors, dismissed without prejudice the conviction for possession of a stolen vehicle on double jeopardy grounds, and adjusted several of the remaining sentences to ensure that they were within the statutory maximum for each offense. The sentencing court did not amend the portion of the April 15, 2016 judgment and sentence that ran the firearm sentencing enhancements on counts I, VIII, and IX consecutively to each other. Despite amending the terms of confinement on several of the charges, the sentencing court did not amend total number of months of total confinement to reflect the amended sentences. On February 9, Chith appealed the February 9, 2018 order.

On February 14, the sentencing court entered a motion and order correcting the February 9 order and the April 15, 2016 judgment and sentence. The February 14 order amended the judgment and sentence to show that the total number of months of total confinement was 202 months. Chith asserts that he was not present at the February 14 hearing, and the State does not challenge this assertion.

On September 12, the sentencing court entered yet another motion and order correcting the April 15, 2016 judgment and sentence. The September 12, 2018 order corrected the judgment and

⁴ Chith did not specify whether he wanted the sentencing court to run the enhancements concurrent to each other or to the base sentences.

sentence again; this time it showed the total months of total confinement was 204 months. Chith asserts that he was not present at the September 12 hearing, and the State does not challenge that assertion.

DISCUSSION

I. DIRECT APPEAL

Chith argues that (1) the sentencing court erred by failing to recognize that it had the discretion to run his firearm sentencing enhancements concurrently under *McFarland* and *Mulholland*, (2) defense counsel's failure to argue that *McFarland* and *Mulholland* applied to his firearm sentencing enhancements deprived him of his right to effective assistance of counsel, and (3) he was denied his right to be present at the February 14, 2018 and September 12, 2018 hearings. These arguments fail.

A. SENTENCING COURT'S ABILITY TO ORDER CONCURRENT SENTENCING ENHANCEMENTS

Chith first argues that we should remand this matter for resentencing because the sentencing court failed to recognize that it had the discretion to impose concurrent firearm sentencing enhancements under *McFarland* and *Mulholland*. We disagree.

RCW 9.94A.533(3)⁵ governs adjustments to standard sentences relating to firearm enhancements. It provides,

The following additional times shall be added to the standard sentence range for felony crimes committed after July 23, 1995, if the offender or an accomplice was armed with a firearm as defined in RCW 9.41.010 and the offender is being sentenced for one of the crimes listed in this subsection as eligible for any firearm

⁵ The legislature has amended RCW 9.94A.533 numerous times since the date of the offenses at issue in this case. See LAWS OF 2018, ch. 7 § 8; LAWS OF 2016, ch. 203 § 7; LAWS OF 2015, ch. 134 § 2; LAWS OF 2013, ch. 270 § 2. Because none of these amendments changed the portions of RCW 9.94A.533 that are relevant to this appeal, we cite to the current version of the statute.

enhancements based on the classification of the completed felony crime. If the offender is being sentenced for more than one offense, the firearm enhancement or enhancements must be added to the total period of confinement for all offenses, regardless of which underlying offense is subject to a firearm enhancement.

RCW 9.94A.533(3).

RCW 9.94A.533(3)(e) further provides,

Notwithstanding any other provision of law, all firearm enhancements under this section are mandatory, shall be served in total confinement, and shall run consecutively to all other sentencing provisions, including other firearm or deadly weapon enhancements, for all offenses sentenced under this chapter.

In *State v. Brown*, our Supreme Court addressed “whether a sentencing court could impose an exceptional sentence downward below the time specified under [former] RCW 9.94A.310(4) [1996] for a deadly weapon enhancement.” 139 Wn.2d 20, 22, 983 P.2d 608 (1999), *overruled in part on other grounds by State v. Houston-Sconiers*, 188 Wn.2d 1, 391 P.3d 409 (2017). Former RCW 9.94A.310(4)(e) provided,

Notwithstanding any other provision of law, any and all deadly weapon enhancements under this section are mandatory, shall be served in total confinement, and shall not run concurrently with any other sentencing provisions.

Former RCW 9.94A.310(4)(e) was subsequently recodified as former RCW 9.94A.510(4)(e) (2002) and is currently codified as RCW 9.94A.533(3)(e). LAWS OF 2001, ch. 10 § 6; LAWS OF 2002, ch. 290 § 10.

The *Brown* court held that the “absolute language” of the statute deprived the sentencing court of discretion to impose an exceptional sentence regarding such enhancements. 139 Wn.2d at 29. The court reasoned as follows:

While *Brown*’s arguments foster preservation of judicial discretion in sentencing, [former] RCW 9.94A.310(4)(e) clearly provides that an offender’s sentence cannot be reduced below the times specified in [former] RCW 9.94A.310(4)(b). If [former] RCW 9.94A.310(4)(e) is to have any substance, it must mean that courts

may not deviate from the term of confinement required by the deadly weapon enhancement.

Id.

Although our legislature has amended the enhancement statutes several times, it has not amended the relevant statutory language since *Brown* was decided 20 years ago. “[T]his court presumes that the legislature is aware of judicial interpretations of its enactments and takes its failure to amend a statute following a judicial decision interpreting that statute to indicate legislative acquiescence in that decision.” *State v. Otton*, 185 Wn.2d 673, 685-86, 374 P.3d 1108 (2016) (quoting *City of Federal Way v. Koenig*, 167 Wn.2d 341, 348, 217 P.3d 1172 (2009)).

Relying on *McFarland* and *Mulholland*, Chith argues that the sentencing court has discretion to depart from mandatory consecutive firearm enhancement sentences despite the statutory language requiring consecutive sentences. This argument is not persuasive.

In *Mulholland*, our Supreme Court held that the plain language of RCW 9.94A.535 and .589 authorizes concurrent exceptional sentences to be imposed for multiple serious violent offenses when the court identifies substantial and compelling reasons to do so, even though RCW 9.94A.589(1)(b) states that sentences for such crimes must be consecutive. 161 Wn.2d at 329-30. In *McFarland*, our Supreme Court similarly held that RCW 9.94A.535 and .589(1)(c) permit the sentencing court to impose exceptional concurrent sentences for firearms-related convictions. 189 Wn.2d at 54-55.

But neither *Mulholland* nor *McFarland* addresses firearm sentencing enhancements and nothing in either of these cases overrules or undermines *Brown*. In fact, in *McFarland*, the court expressly distinguished firearm sentencing *enhancements* from sentences for *firearm-related convictions*, noting that the primary purpose of RCW 9.94A.533 was to ensure that *enhancements*

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were served consecutively. *McFarland*, 189 Wn.2d at 55 (citing *State v. Conover*, 183 Wn.2d 706, 714, 355 P.3d 1093 (2015)). The fact *Mulholland* or *McFarland* do not undermine *Brown* and *McFarland* distinguishes sentencing enhancements from firearm-related convictions shows that *Mulholland* and *McFarland* do not apply to firearm sentencing enhancements.

Thus, the sentencing court did not err when it refused to impose concurrent firearm enhancement sentences. Accordingly, this argument fails.

B. INEFFECTIVE ASSISTANCE OF COUNSEL

Chith also argues that he was deprived of effective assistance of counsel because defense counsel failed to argue that *McFarland* gave the sentencing court discretion to impose concurrent firearm enhancements. We disagree.

The Sixth Amendment to the United States Constitution and article I, section 22 of the Washington Constitution guarantee a criminal defendant the right to effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 685-86, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); *State v. Thomas*, 109 Wn.2d 222, 229, 743 P.2d 816 (1987). An appellant claiming ineffective assistance of counsel bears the burden of establishing that (1) counsel's performance was deficient and (2) the deficient performance resulted in prejudice. *State v. Grier*, 171 Wn.2d 17, 32-33, 246 P.3d 1260 (2011). Defense counsel's representation is deficient if it falls "below an objective standard of reasonableness." *Grier*, 171 Wn.2d at 33 (quoting *Strickland*, 466 U.S. at 688).

Chith cannot show either deficient performance or prejudice because, as discussed above, the argument that the sentencing court had discretion to run the firearm sentencing enhancements concurrently would not likely have succeeded. *State v. Brown*, 159 Wn. App. 1, 17, 248 P.3d 518

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(2010). Additionally, Chith cannot establish prejudice because the sentencing court allowed him to present argument on this issue and Chith does not show that counsel's argument would have been any more effective. Accordingly, Chith's ineffective assistance of counsel argument fails.

C. RIGHT TO BE PRESENT

Chith next argues that he was denied his constitutional right to be present at all critical stages of the proceedings because he was not present at the February 14, 2018 and September 12, 2018 hearings. We disagree.

As a preliminary matter, Chith has not filed notices of appeal from the February 14 or September 12, 2018 orders, nor has he attempted to amend his February 9, 2018 notice of appeal to include these orders. But the State addresses these orders in its response and does not argue this issue is outside the scope of the notice of appeal. Therefore, in order to serve the ends of justice pursuant to RAP 1.2, we briefly address Chith's argument that his right to be present was violated with respect to these orders.

We review whether an appellant's constitutional right to be present was violated de novo. *State v. Irby*, 170 Wn.2d 874, 880, 246 P.3d 796 (2011).

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).

State v. Ramos, 171 Wn.2d 46, 48, 246 P.3d 811 (2011).

Here, the February 14, 2018 and September 12, 2018 orders did not alter the sentences in any way, they merely corrected a mathematical error, which involved no exercise of discretion

whatsoever. Accordingly, Chith had no constitutional right to be present at either proceeding and this argument fails.

II. SAG

In his SAG, Chith contends that the trial court erred when it failed to properly instruct the jury on the firearm sentencing enhancements. Because this is an appeal from the February 9, 2018 resentencing and the resentencing court exercised its independent judgment only in relation to the resentencing, we cannot address this issue. *State v. Gregory*, 192 Wn.2d 1, 31, 427 P.3d 621 (2018) (“An issue that could have been appealed in an earlier proceeding is reviewable under RAP 2.5(c)(1) in a later appeal following remand of the case *only* if the trial court, on remand and in the exercise of its own independent judgment, considered and ruled again on that issue.”).

Chith also asserts that under *Apprendi v. New Jersey*,⁶ *Blakely v. Washington*,⁷ and *Ring v. Arizona*⁸ the imposition of the firearm sentencing enhancements violated the prohibition against double jeopardy with respect to the second degree assault (count I), violation of a court order (count VIII), and first degree taking a motor vehicle without permission (count IX) convictions, because the use of the firearm was also an element of these offenses. Our Supreme Court expressly rejected this argument in *State v. Kelley*, 168 Wn.2d 72, 84, 226 P.3d 773 (2010). Accordingly, this claim fails.

⁶ 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000).

⁷ 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004).

⁸ 536 U.S. 584, 122 S. Ct. 2428, 153 L. Ed. 2d 556 (2002).

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We affirm Chith's sentences.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.




CRUSER, J.

We concur:



WORSWICK, P.



GLASGOW, J.

THE TILLER LAW FIRM

December 13, 2019 - 4:24 PM

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