NO. 89869-3

(COA 31020-5-III)

IN THE WASHINGTON SUPREME COURT

STATE OF WASHINGTON,

Respondent,

v.

JASON GRAHAM,

Petitioner.

PETITION FOR REVIEW

Appeal from the Spokane County Superior Court
The Hon. Maryann C. Moreno, Superior Court Judge
No. 02-1-00202-2

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I. IDENTITY OF PETITIONER

Petitioner Jason Graham asks the Court to accept review of the Court of Appeals decision described in part II below.

II. COURT OF APPEALS DECISION

Graham seeks review of the Court of Appeals published decision in *State v. Graham*, No. 31020-5-III, ___ Wash. App. ___, 314 P.3d 1148 (December 26, 2013). A copy of the court's slip opinion is attached to this petition.

III. ISSUES PRESENTED FOR REVIEW

1. In addressing an issue of first impression, the Court of Appeals—without allowing oral argument by the parties—issued a published decision concluding that the "multiple offense policy" mitigating factor set forth in RCW 9.94A.535(1)(g) does not apply to multiple serious violent offenses which would otherwise be subject to RCW 9.94A.589(1)(b). Does this issue present a significant question of law under the Sentencing Reform Act which should be decided by this Court?

2. In its interpretation of the "multiple offense policy" mitigating factor set forth in RCW 9.94A.535(1)(g), the Court of Appeals disregarded numerous statutory construction decisions of this Court which were cited by Graham in his briefing. Should review be granted where the

Court of Appeals' refusal to apply basic principles of statutory construction conflicts with this Court's decisions in *State v. Cooper*, 176 Wash.2d 678, 294 P.3d 704 (2013); *State v. Delgado*, 148 Wash.2d 723, 63 P.3d 792 (2003); *In Re PRP of Mulholland*, 161 Wash.2d 322, 166 P.3d 677 (2007); *State v. Flores*, 164 Wash.2d 1, 186 P.3d 1038 (2008); *In Re PRP of Sietz,* 124 Wash.2d 645, 880 P.2d 34 (1990); and *State v. Breaux*, 167 Wash. App. 166, 273 P.3d 447 (2012) (among many others)?

3. This Court has never articulated the appropriate legal standard which governs application of the "multiple offense policy" mitigating factor set forth in RCW 9.94A.535(1)(g). The Courts of Appeals which have addressed the issue have generally held that this mitigating factor applies if the *incremental harm* caused by the additional offenses is "nonexistent, trivial or trifling." In Graham's case, the trial court misstated this standard as whether "the *additional current charges* are nonexistent, trivial, or trifling." In the decision at issue the Court of Appeals failed to discuss the standard at all. Should this Court accept review to articulate a governing standard for this important question of law under the Sentencing Reform Act?

IV. STATEMENT OF THE CASE

Procedural History

Jason Graham was convicted by a jury in 2003 of two counts of attempted first degree murder, four counts of first degree assault, one count of second degree assault, one count of first degree unlawful possession of a firearm, one count of first degree possession of stolen property, and one count of taking a motor vehicle without permission. All of the charges stemmed from a single incident which occurred in January 2002—an incident in which no one other than Mr. Graham himself was injured. On August 18, 2003, the trial court sentenced Graham to a total of 1,225.5 months (102.1 years) in prison. Of that sentence, 33 years consisted of mandatory consecutive firearm enhancements.

Graham appealed, and the Court of Appeals initially affirmed the judgment. *State v. Jones,* 2006 WL 3479055 (2006). This Court then granted review and remanded the case for reconsideration in light of *State v. Williams-Walker*, 167 Wash.2d 889, 225 P.3d 913 (2010). *State v. Graham*, 169 Wash.2d 1005 (2010). Thereafter, the Court of Appeals remanded to the Spokane County Superior Court for re-sentencing. *State v. Graham*, 2011 WL 3570120 (2011). Graham's subsequent petition for review (pertaining to other sentencing issues) was denied. *State v.*

Graham, 173 Wash.2d 1011 (2012). This concluded Graham's first appeal.

On June 22, 2012, the trial court re-sentenced Graham to a total of 985.5 months (82.1 years) in prison. CP 67-81. Of this sentence, 13 years consists of mandatory consecutive deadly weapon enhancements.

Graham again appealed. CP 181-99. After Graham filed his opening brief, the State filed a six page response brief which failed to address any of the substantive issues and assignments of error raised by Graham. On October 14, 2013, the Court of Appeals issued a ruling stating that the appeal would be decided without oral argument. On December 26th, the court issued the attached published opinion.

Overview of the Evidence at Trial

In Graham's first appeal, the Court of Appeals summarized the facts of the case as follows:

> On January 7, 2002, at approximately 1 a.m., Spokane Police Officer Christopher Lewis pulled over a speeding Toyota 4Runner at Scott Street and First Avenue. Officer Lewis stopped his patrol car behind the 4Runner. As he emerged from the patrol car gunfire erupted from inside the 4Runner, shattering the rear window. Officer Lewis dove to the ground and the 4Runner sped away. Officer Lewis chased the 4Runner to a parking area at First Avenue and Division Street, where the 4Runner rolled and came to rest on the driver's side. The passenger door opened and Jeremiah Jones jumped out and fled down some railroad tracks. He soon surrendered to police. Jason Graham then emerged, holding a gun. He paused, looked at Officer Lewis and ran down the railroad tracks.

> Officer Aaron Ames responded to the area. He saw Mr. Graham armed with an AK-47 assault rifle. He drew his gun and ordered Mr. Graham to drop his weapon. Mr. Graham continued to hold the AK-47 with both hands, pointed down, and responded that "I am really fucked up" or "I really fucked up" and that he just wanted to leave. When Mr. Graham took off, Officer Ames followed while attempting to maintain protective cover. At one point, Mr. Graham turned and raised his weapon slightly as if to point it at Officer Ames. As Mr. Graham fired, Officer Ames retreated for cover while Mr. Graham fled toward the Intermodal Center, a commercial bus and train terminal.
>
> Officer John Stanley of the canine unit arrived to assist. As Officer Stanley drove his patrol car up the entrance ramp and through the covered bus passenger loading area, Mr. Graham stepped out from between two parked vehicles and started shooting at Officer Stanley's car. Officer Stanley accelerated through the passageway and down the exit ramp and joined other officers taking position on that side of the building.
>
> Officer Alan Edwards arrived at the scene and loaded Sergeant Daniel Torok, Officer Kevin Vaughn, and Officer Jason Uberuaga into his patrol car. As Officer Edwards approached the Intermodal Center, gunfire erupted. Sergeant Torok saw Mr. Graham on the ramp, approximately 15 feet above street level, shooting at the patrol car. Officer Edwards and Sergeant Torok each understood that they were in a vulnerable position. Sergeant Torok, Officer Vaughn, and Officer Uberuaga got out of the vehicle and took cover. Sergeant Torok fired a shot at Mr. Graham. Officer Ames also caught up with Mr. Graham and fired. Mr. Graham was hit and taken into custody. Police found Mr. Jones' 9-mm Daewoo pistol in the 4Runner.

State v. Jones, 2006 WL 3479055 (2006) (citations to trial record omitted).

No one other than Graham was injured during these events.

Graham's 2012 Resentencing

At the 2012 resentencing hearing, Graham asked the trial court to impose an exceptional sentence downward of 25 years confinement. Graham argued that an exceptional sentence was legally authorized by the "multiple offense policy" mitigating factor set forth in RCW 9.94A.535(1)(g). Graham also presented voluminous evidence demonstrating his extraordinary rehabilitation during his first 10+ years of incarceration. *See* CP 82-162 (*Defense Sentencing Memorandum and Appendices*); RP 6-11; 15-16; 17-24 (defense presentation at resentencing).

The trial court was "very impressed" with Graham's rehabilitation, and stated that "there's really no doubt in my mind that you've become a changed person since you've been in prison." RP 24-25. Nevertheless, the court concluded that it did not have a legal basis to impose and exceptional sentence:

> Your lawyer has argued one, basically one [mitigating factor] to me, and that is the application of the multiple offense policy. I spent some time with this, because, as your lawyer says, it's not really well defined. It's defined, but in practice it's hard to really—really apply. What I discovered in some—frankly some unpublished opinions out of Division III, at least from what I can tell—and I haven't found anything out of any other divisions—is that ***the application of the multiple offense policy to justify a downward departure really doesn't apply to the concurrent/consecutive, the consecutive sentencing provisions for serious violent offenses. [RCW] 9.94A.589(1)(a) talks about***

> ***when you're scoring an offense and you have other current offenses, if there are too many other current offenses, it might be appropriate to impose an exceptional sentence. But if you look at Subpart B, the multiple offense policy doesn't really apply to Subpart B, because with serious violents you aren't scoring, you aren't taking into consideration the other current offenses.***

RP 26-27 (emphasis supplied).

The trial court then imposed the 82 year sentence described above. In doing so, the court lamented:

> I don't mind saying, Mr. Graham, that ***I don't agree with this sentence. I don't agree with it.*** I'm not suggesting that you don't deserve a punishment. I'm not suggesting that you should be forgiven, that everything you've done since then makes up for your crimes. But without some other mitigating circumstance, ***my hands are tied.*** Again, I don't write the laws; the legislature writes the laws. And this type of a scenario was something that was anticipated by the law-writers when they wrote the law. So ***I don't believe that I have a choice but to sentence you within the standard sentence range.***

RP 29 (emphasis supplied).

V. ARGUMENT

This Court Should Accept Review and Hold that the "Multiple Offense Policy" Mitigating Factor Set Forth in RCW 9.94A.535(1)(g) Applies to Multiple Serious Violent Offenses Which Would Otherwise Be Subject to RCW 9.94A.589(1)(b).

RCW 9.94A.589 governs the calculation of standard ranges and the imposition of concurrent and consecutive sentences in cases where there are multiple current offenses. It provides in relevant part:

> (1)(a) Except as provided in (b) or (c) of this subsection, whenever a person is to be sentenced for two or more current offenses, the

> sentence range for each current offense shall be determined by using all other current and prior convictions as if they were prior convictions for the purpose of the offender score: PROVIDED, That if the court enters a finding that some or all of the current offenses encompass the same criminal conduct then those current offenses shall be counted as one crime. Sentences imposed under this subsection shall be served concurrently. Consecutive sentences may only be imposed under the exceptional sentence provisions of RCW 9.94A.535. "Same criminal conduct," as used in this subsection, means two or more crimes that require the same criminal intent, are committed at the same time and place, and involve the same victim. This definition applies in cases involving vehicular assault or vehicular homicide even if the victims occupied the same vehicle.
>
> (b) Whenever a person is convicted of two or more serious violent offenses arising from separate and distinct criminal conduct, the standard sentence range for the offense with the highest seriousness level under RCW 9.94A.515 shall be determined using the offender's prior convictions and other current convictions that are not serious violent offenses in the offender score and the standard sentence range for other serious violent offenses shall be determined by using an offender score of zero. The standard sentence range for any offenses that are not serious violent offenses shall be determined according to (a) of this subsection. All sentences imposed under (b) of this subsection shall be served consecutively to each other and concurrently with sentences imposed under (a) of this subsection.

A court has the discretion to 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." RCW 9.94A.535(1)(g). At Graham's re-sentencing, the trial

court concluded that this mitigating factor applies only to RCW 9.94A.589(1)(a), but not to RCW 9.94A.589(1)(b):

> [T]he application of the multiple offense policy to justify a downward departure really doesn't apply to the concurrent/consecutive, the consecutive sentencing provisions for serious violent offenses. . . [T]he multiple offense policy doesn't really apply to Subpart B. . .

RP 27.

The Court of Appeals agreed with the trial court, holding that "the multiple offense policy refers to sentencing proceedings under RCW 9.94A.589(1)(a); it does not apply to sentencing under subsection (1)(b) that involves multiple violent [*sic*] felonies." *Slip Opinion*, at 10. In becoming the first Washington court to reach this holding in a published decision, the Court of Appeals relied exclusively on a single quote taken out of context from *State v. Batista*, 116 Wash.2d 777, 808 P.2d 1141 (1991). *Slip Opinion*, at 9. The full quote as it appears in *Batista* is as follows:

> It is important to remember what is meant by the "multiple offense policy" of [former] RCW 9.94A.400 [now RCW 9.94A.589]: The statute sets out a precise, detailed scheme to follow where multiple offenses are involved. Where multiple current offenses are concerned, except in specified instances involving multiple violent felonies, presumptive sentences for multiple current offenses consist of concurrent sentences, each computed with the others treated as criminal history utilized in calculating the offender score. Where such a presumptive sentence is "clearly too lenient," it is clearly possible under the statutory scheme to depart from the presumptive sentence by either imposing consecutive sentences or

> by further lengthening the otherwise standard concurrent sentences which have already been calculated according to the multiple offense policy of [former] RCW 9.94A.400 [now RCW 9.94A.589].

Batista, 116 Wash.2d at 786-87.

Batista dealt exclusively with the circumstances under which a trial court may impose an exceptional *aggravated* sentence in a multiple count case, either by going above the high end of the standard range and running the counts concurrently, or by imposing standard range sentences and running them consecutively. *Batista* does not stand for the proposition—either explicitly or by any inferential leap of faith—that the "multiple offense policy" mitigating factor cannot support an exceptional sentence downward in a case involving multiple convictions for serious violent offenses. In short, *Batista* does not purport to address an issue even remotely similar to that raised in Graham's case. The Court of Appeals' reliance on *Batista* to the exclusion of any other authority is gravely flawed.

In its rush to uphold Jason Graham's 82 year sentence, the Court of Appeals simply ignored this Court's jurisprudence regarding the most basic principles of statutory construction. Indeed, even though any analysis of Graham's appeal must begin with proper interpretations of

RCW 9.94A.535(1)(g) and RCW 9.94A.589, the Court of Appeals failed to cite even a single statutory construction case in its decision.

Statutory construction "begin[s] with the plain language of the statute. If the plain language is unambiguous, [the Court] need go no further." *State v. Cooper*, 176 Wash.2d 678, 683, 294 P.3d 704 (2013). *See also State v. Delgado*, 148 Wash.2d 723, 727, 63 P.3d 792 (2003):

> When statutory language is unambiguous, we look only to that language to determine the legislative intent without considering outside sources. Plain language does not require construction. When we interpret a criminal statute, we give it a literal and strict interpretation. ***We cannot add words or clauses to an unambiguous statute when the legislature has chosen not to include that language.*** We assume the legislature means exactly what it says.

(quotations and citations omitted) (emphasis supplied).

By its plain language, RCW 9.94A.535(1)(g) authorizes an exceptional sentence when the "presumptive sentence" generated by RCW 9.94A.589 for multiple current offenses is "clearly excessive in light of the purpose of [the SRA], as expressed in RCW 9.94A.010." Subsections (1)(a) and (1)(b) of RCW 9.94A.589 both deal with calculating the presumptive sentence when there are multiple current offenses. RCW 9.94A.535(1)(g) does not distinguish between RCW 9.94A.589(1)(a) and RCW 9.94A.589(1)(b). If the legislature had intended to limit the application of RCW 9.94A.535(1)(g) to subsection (1)(a) of RCW

9.94A.589, it would have stated as much. Because the statute is unambiguous, the Court of Appeals was manifestly incorrect to limit its application by adding qualifying language to the statute.

Controlling reasoning is found in this Court's decision in *In Re PRP of Mulholland*, 161 Wash.2d 322, 166 P.3d 677 (2007). In a situation closely analogous to the one presented here, the issue in *Mulholland* was whether the exceptional sentence provisions of RCW 9.94A.535 apply to both subsection (1)(a) and (1)(b) of RCW 9.94A.589. The specific language in RCW 9.94A.535 which the Court examined is as follows:

> A departure from the standards in RCW 9.94A.589(1) and (2) governing whether sentences are to be served consecutively or concurrently is an exceptional sentence subject to the limitations of this section. . .

The State argued that this language applies only to RCW 9.94A.589(1)(a). The Supreme Court rejected this argument based on the plain language of RCW 9.94A.535:

> In our judgment, the State's argument fails because it pays too little heed to the plain language of RCW 9.94A.535. As we have observed above, it provides that exceptional sentences may be imposed when sentencing takes place under RCW 9.94A.589(1). ***Because it does not differentiate between subsections (1)(a) and (1)(b), it can be said that a plain reading of the statute leads inescapably to a conclusion that exceptional sentences may be imposed under either subsection of RCW 9.94A.589(1).***

Mulholland, 161 Wash.2d at 329-30 (emphasis supplied).

The identical principle applies here—because RCW 9.94A.535(1)(g) does not differentiate between RCW 9.94A.589(1)(a) and 9.94A.589(1)(b), the inescapable conclusion is that the "multiple offense policy" mitigating factor applies to both subsections (1)(a) and (1)(b) of RCW 9.94A.589.

Even if 9.94A.535(1)(g) were somehow deemed to be ambiguous or "susceptible to more than one reasonable interpretation, the rule of lenity [would] require[] this Court to adopt the interpretation most favorable to the defendant." *State v. Flores*, 164 Wash.2d 1, 17, 186 P.3d 1038 (2008). *See also In Re PRP of Sietz,* 124 Wash.2d 645, 652, 880 P.2d 34 (1990) ("[T]he rule of lenity applies to the SRA and operates to resolve statutory ambiguities, absent legislative intent to the contrary, in favor of a criminal defendant."); *State v. Breaux*, 167 Wash. App. 166, 273 P.3d 447 (2012) (applying the rule of lenity to resolve ambiguity in RCW 9.94A.589(1)(b) regarding the scoring of multiple serious violent offenses).

The trial court believed that it was prohibited from imposing an exceptional sentence downward. This belief was based on an erroneous interpretation of the application of RCW 9.94A.535(1)(g) to RCW 9.94A.589(1)(b). At the same time, the trial court made it clear that it wanted to impose a lower sentence on Graham:

> I don't mind saying, Mr. Graham, that ***I don't agree with this sentence. I don't agree with it.*** I'm not suggesting that you don't deserve a punishment. I'm not suggesting that you should be forgiven, that everything you've done since then makes up for your crimes. But without some other mitigating circumstance, ***my hands are tied.*** Again, I don't write the laws; the legislature writes the laws. And this type of a scenario was something that was anticipated by the law-writers when they wrote the law. So ***I don't believe that I have a choice but to sentence you within the standard sentence range.***

RP 29 (emphasis supplied).

> The record does not show that it was a certainty that the trial court would have imposed a mitigated exceptional sentence if it had been aware that such a sentence was an option. Nonetheless, the trial court's remarks indicate that it was a possibility. In our view, this is sufficient to conclude that a different sentence might have been imposed had the trial court applied the law correctly. Where the appellate court cannot say that the sentencing court would have imposed the same sentence had it known an exceptional sentence was an option, remand is proper.

Mulholland, 161 Wash.2d at 334 (quotations omitted).

This Court should accept review, reverse the Court of Appeals, and remand for resentencing.

This Court Should Accept Review and Articulate the Appropriate Legal Standard Governing Application of the "Multiple Offense Policy" Mitigating Factor set forth in RCW 9.94A.535(1)(g).

As noted above, RCW 9.94A.535(1)(g) authorizes a downward departure from the presumptive sentence when "[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." RCW 9.94A.535(1)(g) (emphasis supplied).

Meanwhile, RCW 9.94A.010 describes the purposes of the SRA:

> The purpose of this chapter is to make the criminal justice system accountable to the public by developing a system for the sentencing of felony offenders which structures, but does not eliminate, discretionary decisions affecting sentences, and to:
>
> (1) Ensure that the punishment for a criminal offense is proportionate to the seriousness of the offense and the offender's criminal history;
> (2) Promote respect for the law by providing punishment which is just;
> (3) Be commensurate with the punishment imposed on others committing similar offenses;
> (4) Protect the public;
> (5) Offer the offender an opportunity to improve himself or herself;
> (6) Make frugal use of the state's and local governments' resources; and
> (7) Reduce the risk of reoffending by offenders in the community.

This Court has never interpreted the precise meaning of the phrase "clearly excessive" in RCW 9.94A.535(1)(g). It should take this opportunity to do so.

In the absence of guidance from this Court, the Courts of Appeals have generally agreed that this mitigating factor will apply if the incremental harm created by the additional offenses is "nonexistent, trivial or trifling." *See, e.g., State v. Sanchez*, 69 Wash. App. 255, 261-62, 848 P.2d 208, *rev. denied*, 122 Wash.2d 1007 (1993) (upholding application of "multiple offense policy" mitigating factor to three counts of delivery of cocaine); *State v. Moore*, 73 Wash. App. 789, 799-800, 871 P.2d 642

(1994) (upholding application of "multiple offense policy" mitigating factor to 14 felony counts of drug trafficking and trafficking in stolen property); *State v. Fitch*, 78 Wash. App. 546, 897 P.2d 424 (1995) (applying *Sanchez* to uphold imposition of exceptional sentence based on "multiple offense policy" mitigating factor); *State v. Calvert*, 79 Wash. App. 569, 583, 903 P.2d 1003 (1995), *rev. denied*, 129 Wash.2d 1005 (1996) (upholding application of "multiple offense policy" mitigating factor to multiple counts of forgery given "the close relationship in time, intent and scheme of the various" crimes); *State v. Smith*, 124 Wash. App. 417, 437, 102 P.3d 158 (2004), *aff'd*, 159 Wash.2d 778, 154 P.3d 873 (2007) (upholding one day sentence for three counts of second degree assault where standard range called for 15-20 months in prison; "The trial court reserves broad discretion to decrease a sentence" pursuant to RCW 9.94A.535(1)(g).).

At Graham's re-sentencing, after concluding that the "multiple offense policy" mitigating factor does not apply to RCW 9.94A.589(1)(b), the trial court did go on to make passing reference to those cases that have actually sought to articulate a legal standard for application of RCW 9.94A.535(1)(g):

> There is a discussion within these [Court of Appeals] opinions regarding an analysis of whether they are—***the additional current charges are nonexistent, trivial, or trifling.*** Certainly in a

> situation where we have someone firing a weapon at an officer, firing on another officer who's driving a motor vehicle, firing on a patrol vehicle containing three other officers, I hate to even use the words "nonexistent, trivial, or trifling."

RP 29 (emphasis supplied).

Even if this Court were to adopt the reasoning of the Courts of Appeals regarding the standard for applying RCW 9.94A.535(1)(g), the trial court misconstrued this line of cases to require a showing that the "additional current charges" themselves are nonexistent, trivial, or trifling. RP 29. But the cases focus on the *incremental harm* which flows from the additional charges, not on whether the crimes themselves are "trivial." This is an important distinction. Graham has never contended that the serious crimes of which he was convicted are trivial or trifling. What he argued in the trial court was that the minimal incremental harm which flowed from each additional shot he fired justified application of RCW 9.94A.535(1)(g) to impose an exceptional sentence downward.

All ten of the convictions in this case arose from a single incident which lasted no more than a few minutes. The shots fired by Graham during those several minutes resulted in multiple convictions for attempted first degree murder and for first degree assault. But because no one was actually hit (apart from Graham himself), the incremental harm caused by

each additional shot fired by Graham was in fact non-existent.[1] Given the lack of incremental harm engendered by each additional shot, robotic application of RCW 9.94A.589(1)(b) on the specific facts of this case resulted in a sentence which is clearly excessive in light of the stated purposes of the SRA—proportionate and just punishment which sufficiently protects the public while making frugal use of the state's scarce resources. As in *Calvert*, "the close relationship in time, intent and scheme of the various" crimes warranted the exercise of the trial court's broad discretion in applying the "multiple offense policy" mitigating factor. But because the trial court misapprehended the law, it mistakenly believed it lacked the discretion to impose the lesser sentence it clearly thought was appropriate.

The trial court's misunderstanding of the prevailing legal standard governing application of RCW 9.94A.535(1)(g)—should this Court choose to adopt that standard without modification—coupled with its

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[1] Moreover, Jury Instruction No. 27 allowed the jury to convict Jason of multiple counts of first degree assault based upon a single intent to inflict great bodily harm. Instruction No. 27 reads:

> Under the crime of first degree assault, a person's intent to inflict great bodily harm upon another person transfers to an unintended person. ***An intent against one person is intent against all persons.***

CP 34 (emphasis supplied).

stated desire to impose a lower sentence, necessitates reversal and remand for resentencing. *See Mulholland*, 161 Wash.2d at 334; *State v. McGill*, 112 Wash. App. 95, 100, 47 P.3d 173 (2002) ("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.").

Meanwhile, the Court of Appeals did not even mention, let alone attempt to articulate, the legal standard for application of RCW 9.94A.535(1)(g). Instead, the Court of Appeals seized on the trial court's cursory comments regarding that standard, and concluded that "the [trial] court exercised its discretion and decided a standard-range sentence was appropriate." *Slip Opinion*, at 11. This characterization of the trial court's decision is at best a gross distortion of the record at the re-sentencing hearing.

This Court should accept review and announce a clear standard for application of the "multiple offense policy" mitigating factor. Trial courts and the Courts of Appeals will certainly benefit from such guidance.

VI. CONCLUSION

For the foregoing reasons, this Court should accept review, reverse the Court of Appeals, and remand for resentencing.

DATED this 5th day of February, 2014.

Respectfully Submitted:

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CERTIFICATE OF SERVICE

I, Steven Witchley, hereby certify that on February 5, 2014, I served a copy of the attached petition on counsel for the State of Washington by causing the same to be mailed, first-class postage prepaid, to:

Andrew Metts
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Spokane, WA 99260-0270

And by emailing the petition to:

ametts@spokanecounty.org; kowens@spokanecounty.org

s/ Steven Witchley
Steven Witchley

FILED
DEC. 26, 2013
In the Office of the Clerk of Court
WA State Court of Appeals, Division III

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

STATE OF WASHINGTON,	)	No. 31020-5-III
	)	
Respondent,	)	
	)	
v.	)	
	)	
JASON ALLEN GRAHAM,	)	PUBLISHED OPINION
	)	
Appellant.	)	

BROWN, J. — In 2006, this court affirmed Jason A. Graham's attempted first degree murder, first degree assault, second degree assault, and first degree possession of stolen property convictions. *See State v. Jones*, noted at 136 Wn. App. 1009, 2006 WL 3479055 at *12 (*Graham* I). Mr. Graham's sentence was partly based on several firearm enhancements even though the jury found deadly weapon enhancements. *Id.* Our Supreme Court accepted review solely regarding the imposition of the firearm enhancements. *State v. Graham*, 169 Wn.2d 1005, 234 P.3d 210 (2010) (*Graham* II). The Supreme Court remanded the matter to this court for reconsideration in light of a later decided case, *State v. Williams-Walker,* 167 Wn.2d 889, 225 P.3d 913 (2010). Under *Williams-Walker*, a sentencing court must impose a deadly weapon

enhancement when the jury finds the defendant was armed with a deadly weapon even if the weapon was a firearm.

This court then remanded the matter to the trial court for resentencing consistent with *Williams-Walker*. *State v. Graham*, noted at 163 Wn. App. 1011, 2011 WL 3570120 at *3 (*Graham* III). At resentencing the court corrected and reduced Mr. Graham's standard-range sentence from a total of 1,225.5 months to a total of 985.5 months after considering and reluctantly rejecting his multiple offense policy arguments under RCW 9.94A.589. Mr. Graham appealed his standard-range sentence, contending the court erred in denying his request for a mitigated exceptional sentence because it failed to apply multiple offense policy principles of RCW 9.94A.589(1)(a) to RCW 9.94A.589(1)(b).

We conclude the trial court correctly reasoned the multiple offense policy applies to RCW 9.94A.589(1)(a), but not to serious violent offenses sentenced under RCW 9.94A.589(1)(b). Additionally, in imposing Mr. Graham's standard-range sentence under RCW 9.94A.589(1)(b), the trial court properly exercised its discretion in rejecting his multiple offense arguments when reasoning the differences in his criminal behaviors were not nonexistent, trivial, or trifling. Accordingly, we affirm.

FACTS

In January 2002, a police officer stopped Mr. Graham in downtown Spokane for speeding. *Graham* III, at *1. Gunfire erupted, and Mr. Graham's car sped away. Eventually the car crashed, and Mr. Graham

engaged in a gun battle with several officers. He was shot and arrested.

The State charged Mr. Graham with six counts of attempted first degree murder, one count of first degree assault, one count of unlawful possession of a firearm, one count of first degree possession of stolen property, and one count of taking a motor vehicle without permission. The trial court instructed the jury on the procedure for deciding the special verdicts regarding deadly weapon enhancements. *Graham* III, 2011 WL 3570120 at *1. The jury found Mr. Graham guilty of two counts of attempted first degree murder, four counts of first degree assault, one count of second degree assault, one count of unlawful possession of a firearm, one count of possession of stolen property, and one count of taking a motor vehicle without permission. The jury also found by special verdicts that Mr. Graham was armed with a deadly weapon in the commission of the attempted murder and assault offenses. Despite the jury's findings that Mr. Graham was armed with a deadly weapon, the trial court imposed seven consecutive firearm enhancements, resulting in a sentence of 1,225.5 months. Of that sentence, 33 years consisted of mandatory consecutive firearm enhancements. *Graham* III, 2011 WL 3570120 at *2.

On appeal, this court affirmed Mr. Graham's convictions and sentence. *Graham* I, 2006 WL 3479055 at *1. Mr. Graham filed a petition for review with the Washington Supreme Court, which granted the petition solely on the enhancement issue and remanded for this court's reconsideration. *Graham* II, 169 Wn.2d 1005. Thereafter, this

court remanded "for resentencing consistent with the decision in *Williams-Walker*." *Graham* III, 2011 WL 3570120 at *3.

At the 2012 resentencing hearing, Mr. Graham asked the trial court to impose an exceptional sentence downward of 25 years' confinement. Mr. Graham argued an exceptional sentence was legally authorized by the "multiple offense policy" mitigating factor set forth in RCW 9.94A.535(1)(g). He argued the convictions arose from a single incident and that "[g]iven the lack of incremental harm engendered by each additional shot, application of the multiple offense policy on the specific facts of this case results in a sentence which is clearly excessive in light of the stated purposes of the SRA [Sentencing Reform Act of 1981, ch. 9.94A RCW]." Clerk's Papers (CP) at 89. Mr. Graham presented evidence demonstrating his rehabilitation during his over 10 years of incarceration.

The trial court was "very impressed" with Mr. Graham's rehabilitation, and stated, "[T]here's really no doubt in my mind that you've become a changed person since you've been in prison." Report of Proceedings (RP) at 24-25. Nevertheless, the court concluded that it did not have a legal basis to impose a mitigated exceptional sentence, stating:

> Your lawyer has argued one, basically one [mitigating factor] to me, and that is the application of the multiple offense policy. I spent some time with this . . . . [RCW] 9.94A.589(1)(a) talks about when you're scoring an offense and you have other current offenses, if there are too many other current offenses, it might be appropriate to impose an exceptional sentence. But if you look at Subpart B, the multiple offense policy doesn't really apply to Subpart B,

> because with serious violents you aren't scoring, you aren't taking into consideration the other current offenses.

RP at 26-27. The court went on to state, "[I]t's the very rare occasion when you should be utilizing the multiple offense policy to reduce a sentence. There is a discussion within these opinions regarding an analysis of whether they are—the additional current charges are nonexistent, trivial, or trifling." RP at 29. The court further stated, "Certainly in a situation where we have someone firing a weapon at an officer, firing on another officer who's driving a motor vehicle, firing on a patrol vehicle containing three other officers, I hate to even use the words 'nonexistent, trivial, or trifling.'" RP at 29.

The court then imposed a 985.5 month standard-range sentence (240 months less than the previous sentence). RP at 29. The reduced sentence reflected the court's imposition of six 24-month deadly weapon enhancements (down from six 60-month enhancements) and one 12-month deadly weapon enhancement (down from one 36-month enhancement).[1] CP at 172. The court ordered all sentences to be served consecutively. The court stated, "I don't agree with this sentence . . . . But without some other mitigating circumstance, my hands are tied." RP at 29. Mr. Graham appealed.

ANALYSIS

The issue is whether the trial court erred in rejecting Mr. Graham's mitigated exceptional sentencing request based on the multiple offense policy and imposing a

[1] The State erroneously asserts in its brief (Resp't's Br. at 4) that the sentencing court reduced the sentence beyond the enhancement corrections. Based on this

standard-range sentence under RCW 9.94A.589(1)(b). Mr. Graham contends the trial court improperly failed to consider the application of the multiple offense policy.

Initially, the State contends Mr. Graham's issues are not appealable because the trial court was limited to resentencing consistent with *Williams-Walker*. Any issue outside the enhancement issue, the State argues, is not properly before this court.

In *State v. Toney*, 149 Wn. App. 787, 205 P.3d 944 (2009), Division Two of this court addressed whether a defendant may raise and argue issues in a second appeal despite failing to raise those issues in the first appeal. Mr. Toney originally argued former RCW 9.94A.310 (1996) did not mandate firearm enhancements to run consecutively. The *Toney* court agreed and "remanded for resentencing under 'proceedings consistent with this opinion.'" *Toney*, 149 Wn. App. at 790. The trial court sentenced Mr. Toney, per the appellate court's direction, but conducted a new sentencing hearing prior to imposing the sentence. Mr. Toney again appealed, this time challenging community placement and raising double jeopardy concerns. The State responded that these issues could not be raised for the first time on a second appeal. The *Toney* court held a defendant "may raise sentencing issues on a second appeal if, on the first appeal, the appellate court vacates the original sentence or remands for an entirely new sentencing proceeding, but not when the appellate court remands for the trial court to enter only a ministerial correction of the original sentence." *Toney*, 149 Wn. App. at 792.

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incorrect assertion, the State requests affirmative relief. Even if the State were correct, RAP 5.1(d) requires the filing of a notice of cross review to request affirmative relief.

Here, this court remanded "for resentencing consistent with the decision in *Williams-Walker*." *Graham* III, 2011 WL 3570120 at *3. This language is distinct from *Toney* because this court specifically limited the resentencing to one case, but like the court in *Toney*, the court conducted a new sentencing hearing. While the court resentenced Mr. Graham to reflect the enhancement corrections, it considered Mr. Grahams argument for a mitigated sentence and decided against it. When a court exercises "independent judgment" and rules again, then that issue becomes an "appealable question." *State v. Barberio*, 121 Wn.2d 48, 50, 846 P.2d 519 (1993).

Turning to whether Mr. Graham may appeal his standard-range sentence, the law is well settled that generally a defendant cannot appeal a standard-range sentence. *See* RCW 9.94A.585(1); *State v. Williams*, 149 Wn.2d 143, 146, 65 P.3d 1214 (2003). Nevertheless, a criminal defendant "may appeal a standard range sentence if the sentencing court failed to comply with procedural requirements of the SRA or constitutional requirements." *State v. Osman*, 157 Wn.2d 474, 481-82, 139 P.3d 334 (2006). "[W]here a defendant has requested an exceptional sentence below the standard range[,] review is limited to circumstances where the court has refused to exercise discretion at all or has relied on an impermissible basis for refusing to impose an exceptional sentence below the standard range." *State v. Garcia-Martinez*, 88 Wn. App. 322, 330, 944 P.2d 1104 (1997). "A court refuses to exercise its discretion if it refuses categorically to impose an exceptional sentence below the standard range under any circumstances; i.e., it takes the position that it will never impose a sentence

below the standard range." *Id.* at 330. A court relies on an impermissible basis for declining to impose an exceptional sentence below the standard range if, for example, it takes the position that no drug dealer should get an exceptional sentence down or it refuses to consider the request because of the defendant's race, sex, or religion. *Id.*

In *State v. Cole*, 117 Wn. App. 870, 880, 73 P.3d 411 (2003), the defendant unsuccessfully requested a below-range sentence and then challenged the court's refusal to impose an exceptional sentence on appeal. The court held the defendant could not appeal from a standard-range sentence where the trial court considered the defendant's request for the application of a mitigating factor, heard extensive argument on the subject, and then exercised its discretion by denying the request. *Id.* at 881. Similarly, in *Garcia-Martinez*, involving an equal protection challenge to a standard-range sentence, the court held a trial court that has considered the facts and concluded no basis exists for an exceptional sentence has exercised its discretion and the defendant may not appeal that ruling. 88 Wn. App. at 330.

Here, the trial court found no legal support existed for a mitigated sentence based on the multiple offense policy "because with serious violents you aren't scoring, you aren't taking into consideration the other current offenses." RP at 27.

RCW 9.94A.535(1)(g) provides a nonexclusive list of mitigating factors for awarding exceptional sentences, one of which is a finding 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." RCW 9.94A.535(1)(g). RCW 9.94A.589 specifies the rules for sentencing defendants with multiple convictions. Generally, sentences for multiple offenses set at one sentencing hearing are served concurrently. But, where two or more serious violent offenses are presented, the multiple offense policy provides the defendant's offender score for the crime with the highest seriousness level shall be computed using other current convictions that are not serious violent offenses, and the sentence range for other serious violent offenses shall be determined by using an offender score of zero. RCW 9.94A.589(1)(b). The sentences are then imposed consecutively. *Id.*

Mr. Graham argues if the resulting sentence under RCW 9.94A.589(1)(b) is clearly excessive, then the court may impose a mitigated exceptional sentence under RCW 9.94A.535(1)(g). We have found no published Washington cases applying the mitigating factor of RCW 9.94A.535(1)(g) to serious violent offenses. Professor David Boerner sheds some light on why, "In particular, the addition by the Legislature of special provisions governing multiple 'serious violent' crimes is clear evidence of its belief that just punishment for such offenders required significant terms of confinement." David Boerner, *Sentencing in Washington*, 9-32 (1985).

The "multiple offense policy" refers to the trade-off recognized by the legislature in the first subsection of RCW 9.94A.589(1). *State v. Batista*, 116 Wn.2d 777, 786-87, 808 P.2d 1141 (1991). When dealing with most cases involving multiple crimes, the offenses are counted as if they were prior criminal history when calculating the offender

score for each offense. Sentences computed in such a manner are then served concurrently unless a basis for an exceptional sentence exists. RCW 9.94A.589(1)(a).

However, the trade-off in RCW 9.94A.589(1)(a) is nonexistent when sentencing serious violent offenses under RCW 9.94A.589(1)(b). Instead, multiple serious violent offenses do not count in the offender score for any other serious violent offenses. The most serious crime is sentenced considering the defendant's whole criminal history, excluding other current serious violent offenses and a standard range computed in the normal manner. For all other serious violent offenses, the crimes are scored with an offender score of zero and are directed to run consecutively to the most serious offense.

As clarified in *Batista*, "It is important to remember what is meant by the 'multiple offense policy' . . . . The statute sets out a precise, detailed scheme to follow where multiple offenses are involved. Where multiple current offenses are concerned, *except in specified instances involving multiple violent felonies*, presumptive sentences for multiple current offenses consist of concurrent sentences, each computed with the others treated as criminal history utilized in calculating the offender score." 116 Wn.2d at 786 (emphasis added). In other words, the multiple offense policy refers to sentencing proceedings under RCW 9.94A.589(1)(a); it does not apply to sentencing under subsection (1)(b) that involves multiple violent felonies. As Mr. Graham correctly points out, it is possible for a mitigated exceptional sentence involving concurrent terms under RCW 9.94A.589(1)(b). *See In re Pers. Restraint of Mulholland*, 161 Wn.2d 322, 166 P.3d 677 (2007) (holding a trial court's discretion to impose an exceptional

sentence includes discretion to impose concurrent sentences where consecutive sentences are presumptively called for). But, the multiple offense policy of subsection (1)(a) is not itself a basis for an exceptional sentence under subsection (1)(b) of RCW 9.94A.589. The trial court properly concluded likewise.

Moreover, even if the RCW 9.94A.589(1)(a) multiple offense policy did apply, the court considered this basis for a mitigated sentence and rejected it. Again, if a trial court considers the facts and rejects that basis for an exceptional sentence, then a defendant may not appeal that ruling. *Garcia-Martinez*, 88 Wn. App. at 330. Here, the trial court similarly considered the basis for a mitigated sentence suggested by Mr. Graham and rejected it. The court determined, "[I]t's the very rare occasion when you should be utilizing the multiple offense policy" and that there is "an analysis of whether they are—the additional current charges are nonexistent, trivial, or trifling." RP at 29. The court reasoned, "Certainly in a situation where we have someone firing a weapon at an officer, firing on another officer who's driving a motor vehicle, firing on a patrol vehicle containing three other officers, I hate to even use the words 'nonexistent, trivial, or trifling.'" RP at 29. Thus, the trial court considered the factual circumstances and determined the case was not one warranting a lowered sentence. Therefore, the court exercised its discretion and decided a standard-range sentence was appropriate. Accordingly, Mr. Graham cannot prevail on this challenge to his standard-range sentence.

In sum, the court did not wrongly refuse to exercise discretion; nor did the court rely on an impermissible basis in denying Mr. Graham's request.

Affirmed.

Brown, J.

WE CONCUR:

Kulik, J.

Fearing, J.

Renee S. Townsley
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CASE # 310205
State of Washington v. Jason Allen Graham
SPOKANE COUNTY SUPERIOR COURT No. 021002022

Dear 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 an original and two copies of the motion. 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 received (not mailed) on or before the dates they are due. RAP 18.5(c).

Sincerely,

Renee S. Townsley

Renee S. Townsley
Clerk/Administrator

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