№. 42899-7-II
IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,
Appellant,

v.

SPENCER MILLER,
Respondent.

RESPONSE BRIEF OF RESPONDENT

Appeal from the Superior Court of Pierce County,
Cause No. 01-1-05476-9
The Honorable Frank E. Cuthbertson, Presiding Judge

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A. INTRODUCTION

Spencer Miller hereby responds to Brief of Appellant, State of Washington.

B. COUNTER-STATEMENT OF THE CASE

On April 8, 2002, a jury convicted Mr. Spencer Miller of two counts of attempted murder in the first degree. CP 16, 21. Judge Frank Cuthbertson sentenced Mr. Miller to 200 months confinement on each count with the sentences to be served consecutively pursuant to RCW 9.94A.589(b). CP 28-44. Mr. Miller appealed his sentence to the Court of Appeals and the Court of Appeals affirmed Mr. Miller's conviction and sentence. CP 45-70.

On September 22, 2008, Mr. Miller filed in Pierce County Superior Court a Motion for Reconsideration and New Trial pursuant to CrR 7.8 and a brief in support of the motion. CP 71-75.

On November 3, 2008, Mr. Miller filed a personal restraint petition (PRP) in the Washington Supreme Court, which transferred the petition to the Court of Appeals. CP 78-79.

On November 14, 2008, the Pierce County Superior Court transferred the motion to the Court of Appeals for consideration as a PRP. CP 76-77.

On June 3, 2009, the Court of Appeals entered an order dismissing

Mr. Miller's November 3, 2008 petition for review as time barred under RW 10.73.090. CP 78-79.

On October 15, 2010, Mr. Miller filed a Motion to Vacate his Judgment and Sentence in the trial court. CP 83-101. Mr. Miller argued that he was entitled to vacation of his sentence under CrR 7.8(b)(1), (4), and (5) and under *In re Mulholland*, 161 Wn.2d 322, 166 P.3d 677 (2007). CP 83-101.

On November 9, 2010, Mr. Miller filed a second Motion to Modify or Correct Judgment and Sentence. CP 102-103. In this motion Mr. Miller argued that the trial court ordered his sentences to run consecutively based on a misunderstanding of the law regarding consecutive sentences under RCW 9.94A.589. CP 102-103. Mr. Miller argued that the law in Washington was unclear or ambiguous at the time of his sentencing and that the decision in *In re Mulholland*, 161 WN.2d 322, 166 P.3d 677 (2007) clarified the law. CP 102-103.

On November 19, 2010, the State filed a response to Mr. Miller's motions, arguing that the trial court should transfer the motion to the Court of Appeals as a PRP under CrR 7.8. CP 104-105.

On November 30, 2010, Mr. Miller filed a reply to the State's response. CP 106-112.

On December 10, 2010, the trial court transferred Mr. Miller's

motion to the Court of Appeals for consideration as a PRP. CP 113.

On February 16, 2011, the Court of Appeals rejected the transfer of Mr. Miller's motion, finding that the trial court failed to include the findings required by CrR 7.8(c)(2) in its order transferring the motion. CP 114. The Court of Appeals rejected the transfer of Mr. Miller's motion and remanded the case back to the trial court for further appropriate action under CrR 7.8(c). CP 114.

On June 7, 2011, Mr. Miller filed a motion to clarify the status of his motion to vacate judgment and sentence. CP 119-125.

On June 22, 2011, the State filed a response to Mr. Miller's motion and asked the court to retransfer the motion to the Court of Appeals as a PRP and argued that Mr. Miller's motion was a collateral attack and was, therefore, time barred. CP 126-130.

On July 18, 2011, Mr. Miller filed a reply to the State's response to his motion to clarify. CP 137-144.

On August 15, 2011, a hearing was held on Mr. Miller's motion. RP 1-8, 8-15-11.[1] The trial court found that Mr. Miller's motion was not time barred by RCW 10.73.090 because *Mulholland* represented a significant change in the law which was material to Mr. Miller's sentence,

[1] The report of proceedings in this matter are not numbered continuously. Reference to the record will be made by giving the page number followed by the date of the hearing being referenced.

and, therefore, found that Mr. Miller's motion was allowed under RCW 10.73.100(6). RP 4, 8-15-11. The trial court ordered a hearing to further discuss the issue. RP 4-7, 8-15-11.

On October 7, 2011, a hearing was held to discuss Mr. Miller's motion. RP 1-12, 10-7-11. The trial court held that *Mulholland* was "significant" and ordered a further hearing be held regarding Mr. Miller's motion. RP 8-12, 10-7-11.

On November 18, 2011, a third and final hearing was held regarding Mr. Miller's motion. RP 1-11, 11-18-11. The trial court granted Mr. Miller's motion to vacate his judgment and sentence. RP 7, 11-18-11. The trial court held that when it originally sentenced Mr. Miller it did not know that it had the discretion to impose an exception mitigated sentence of running Mr. Miller's sentences concurrently. RP 7, 11-18-11. The trial court held that this was a fundamental defect which yielded a miscarriage of justice and ordered Mr. Miller have a new sentencing hearing to determine whether or not there were grounds for any type of mitigated exceptional sentence. RP 7, 11-18-11. The hearing was tentatively scheduled for January 20, 2011. RP 9-10, 11-18-11.

The trial court entered an order vacating Mr. Miller's judgment and sentence and setting a new sentencing hearing. CP 267-269. In this order the trial court held that Mr. Miler's case was like the case in

Mulholland in that the trial court believed that it did not have the discretion to impose a concurrent sentence due to the language of RCW 9.94A.589(1)(b). CP 267-269. The trial court found that the error in this case, specifically that the trial court failed to recognize that it had the discretion to impose a mitigated exceptional sentence, constituted a fundamental defect which inherently resulted in a miscarriage of justice under *Mulholland*. CP 267-269.

On December 14, 2011, the State filed its notice of appeal from the trial court's order vacating Mr. Miller's sentence and ordering a new sentencing hearing. CP 270-275.

C. IDENTIFICATION OF RELEVANT ISSUES

In it's opening brief, the State makes numerous arguments, some of which are superficially meritorious, others of which are wholly frivolous and irrelevant. The following arguments are the arguments that are not wholly frivolous:

(1) the trial court erred in finding that *Mulholland* represented a significant change in the law (State's opening Brief, p. 12, 24, 27, 28);

(2) the trial court's erroneous conclusion that *Mullholland* represented a significant change in the law led to the trial court erroneously finding that Mr. Miller's November 9, 2011 motion to modify his judgment and sentence was not time barred (State's opening Brief, p. 12, 22, 28);

(3) the trial court's erroneous conclusion that *Mullholland* represented a significant change in the law led to the trial court erroneously failing to transfer Mr. Miller's November 9, 2011 motion to modify his judgment and sentence to this court as a PRP (State's opening Brief, p. 12);

(4) despite this case coming before this court as an appeal from the trial court's granting of Mr. Miller's November 9 motion, this court should ignore the actions of the trial court and address Mr. Miller's motion de novo as a PRP (State's Opening Brief, p. 9-11, 28)

(5) the trial court erred in finding that it believed it did not have discretion to impose a concurrent sentence because it imposed an exceptional consecutive sentences below the standard range for Mr. Miller's codefendant (State's Opening Brief, p. 29-31)

(6) Mr. Miller waived his ability to argue the trial court erred in imposing consecutive sentences because Mr. Miller's trial counsel failed to request the court impose concurrent sentences (State's Opening Brief, p. 30)

The first four arguments are actually the same argument rephrased in four different ways; specifically that the trial court erred in finding that *Mulholland* represented a significant change in the law. It is true that the trial court's decision that *Mulholland* represented a significant change in the law had numerous ramifications with regards to how Mr. Miller's motion was handled by the trial court, i.e. the trial court found it wasn't time barred and did not transfer it to this court as a PRP. However, the impacts of the trial court's determination are really manifestations of the trial court's underlying determination that *Mulholland* represented a

significant change in the law, not separate errors committed by the trial court. Thus, the State's appeal actually presents only three non-frivoulous issues:

(1) whether or not the trial court erred when it found that *Mulholland* presented a significant change in the law;

(2) whether or not the trial judge erred in finding that he believed he did not have discretion to impose concurrent sentences when he sentenced Mr. Miller originally; and

(3) whether or not Mr. Miller waived his ability to argue that the trial court erred in imposing consecutive sentences because his initial trial counsel failed to request concurrent sentences be imposed.

These legitimate issues will be discussed further below.

Frivolous and irrelevant issues raised by the State

The State devotes inordinately large portions of its Opening Brief discussing issues which do not relate to the issues before this court and are a waste of this court's time to consider. In fact, several times in its Opening Brief the State even admits that an issue which it has devoted several pages to discussing is actually irrelevant to this appeal. In the interests of clarity and conciseness, these frivolous issues are identified as follows and are not relevant for the following identified reasons.

Facial validity of the judgment and sentence

At pages 13-20 of its Opening Brief the State discusses the law regarding attacking a judgment and sentence on the basis that the

judgment and sentence is facially invalid. However, as recognized by the State on page 20 of its Opening Brief, Mr. Miller's claim in this case is that the trial court failed to exercise its discretion in imposing his sentence, not that his judgment and sentence is facially invalid. The State's lengthy discussion of the law regarding facial validity of judgments and sentences is frivolous, a waste of this court's time to consider, and irrelevant to any issue before this court.

Mr. Miller's motion was barred under RCW 10.73.140 and RAP 16.4(d)

At pages 24-26 the State discusses the law regarding successive personal restraint petitions and argues that because Mr. Miller made no showing in his motion as to why he had not discussed *Mulholland* as representing a significant change in the law in his prior PRP, his November 9 motion is barred under RCW 10.73.140 and RAP 16.4(d). However, on page 26 of its Opening Brief the State acknowledges that "[t]his case does not fall under the provision [of RCW 10.73.140 or RAP 16.4(d)] for a successive petition where the issue raised in the motion before the court was not raised previously."

If the provisions of RCW 10.73.140 and RAP 16.4(d) were not relevant to this case, then the State should not have wasted this court's time discussing them. The portions of the State's brief discussing

RCW10.73.140 and RAP 16.4(d) and successive PRPs are frivolous, irrelevant, and a waste of this court's time to consider.

Mr. Miller received ineffective assistance of counsel/*In re Crace* was wrongly decided

As part of its argument that Mr. Miller's ability to challenge his sentence by relying on *Mulholland* was waived because his trial counsel failed to request concurrent sentences at Mr. Miller's initial sentencing, the State argues that the only way Mr. Miller may challenge his sentence is by arguing he received ineffective assistance of counsel. State's Opening Brief, p. 30-31. The State then spends pages 31-43 discussing why Mr. Miller did not receive ineffective assistance of counsel. On pages 32-42 of its Opening Brief the State attacks the majority opinion in *In re Crace*, 157 Wn.App.81, 236 P.3d 914 (2010), arguing that the Court of Appeals erred in finding that a defendant's burden to establish ineffective assistance of counsel was the same in a PRP as it was in a direct appeal. Ineffective assistance of counsel not an issue raised at any time in the trial court in regards to Mr. Miller's motion. The State uses discussion of ineffective assistance of counsel in this case as a straw man and excuse to claim that, in spite of the holding of *Crace*, "It is unclear if the same standard applies when a claim of ineffective assistance of

counsel is raised for the first time in a personal restraint petition." State's Opening Brief, p. 32.

The issue of ineffective assistance of counsel is raised entirely by the State in its discussion of issues this court should consider when it considers Mr. Miller's motion de novo as a PRP. The entire discussion of ineffective assistance of counsel and *Crace* is utterly irrelevant to the State's appeal. As stated above, Mr. Miller never asserted that he received ineffective assistance of counsel at his sentencing hearing. Further, even if the discussion of *Crace* was somehow relevant to this case, the State's arguments about the validity of the *Crace* majority opinion fail because the Washington Supreme Court upheld Court of Appeals' ruling that a petitioner in a PRP did not have to show more prejudice on collateral attack than on appeal to demonstrate ineffective assistance of counsel. *In re Crace*, 174 Wn.2d 835, 846-847, 280 P.3d 1102 (2012) ("Crace need not show more prejudice on collateral attack than on direct appeal.")

The portions of the State's brief discussing ineffective assistance of counsel and *In re Crace* are frivolous, irrelevant, and a waste of this court's time to consider.

D. ARGUMENT

1. This court should deny the State's appeal where the State fails to cite any authority or present any

arguments as to why the trial court erred in finding *Mulholland* represented a significant change in the law.

At numerous points in its Opening Brief the State makes the conclusory statements that *Mulholland* did not represent a significant change in the law (State's Opening Brief, p. 12) and that the trial court erred in finding that *Mulholland* represented a significant change in the law (State's Opening Brief, p. 22, 24, 44). However, the State never discusses *why* the trial court's decision was erroneous. The closest the State comes to actually presenting argument as to why the trial court's decision was in error is the State's statement on page 24 of its brief that "The opinion in *Mulholland* did not constitute a significant change in the law where it did not reverse established precedent." However, the State engages in no discussion of what it believes the holding of *Mulholland* was, what it believed the law was prior to *Mulholland*, or what it believes the law is after *Mulholland*. Indeed, the State's brief is composed entirely of summaries of various legal standards, most of which are inapplicable to this case. The State has presented **no** actual argument to this court regarding why the trial court's decision that *Mulholland* represented a significant change in the law was erroneous.

Appellants must provide "argument in support of the issues presented for review, together with citations to legal authority and references to relevant parts of the record." RAP 10.3(a)(6).

> Where no authorities are cited in support of a proposition, the court is not required to search out authorities, but may assume that counsel, after diligent search, has found none. Courts ordinarily will not give consideration to such errors unless it is apparent without further research that the assignments of error presented are well taken.

State v. Young, 89 Wn.2d 613, 625, 574 P.2d 1171, *cert. denied* 439 U.S. 870, 99 S.Ct. 200, 58 L.Ed.2d 182 (1978).

The State's assignments of error 1 through 3 and 6 are all premised on the assertion that the trial court erring in finding that *Mulholland* represented a significant change in law. None of these assignments of error are well taken. Not only has the State failed to present any argument in support of these assignments of error, but, as will be discussed further below, the trial court's ruling that *Mulholland* represents a significant change in the law was correct.

Because the State has failed to cite any authority or present any argument as to why the trial court erred in finding that *Mulholland* represents a significant change in the law, this court should refuse to consider the portions of the State's appeal that rely on the unsupported conclusion that the trial court erred regarding *Mulholland*.

2. The trial court properly ruled that *Mulholland* represented a significant change in the law and therefore, that Mr. Miller's motion was not time barred, and that transfer of Mr. Miller's motion to the Court of Appeals for consideration as a PRP was unnecessary.

Under RCW 9.94A.589(1)(b), whenever an individual is sentenced for two or more serious violent offenses, those sentences "shall be served consecutively to each other."

RCW 9.94A.535 provides, in pertinent part,

> The court may impose a sentence outside the standard sentence range for an offense if it finds...that there are substantial and compelling reasons justifying an exceptional sentence.
>
> ***
>
> 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 in this section, and may be appealed by the offender or the state as set forth in RCW 9.94A.585 (2) through (6).

In *Mulholland*, the Washington Supreme Court held that "under the plain language of RCW 9.94A.589(1) and RCW 9.94A.535" sentencing courts have discretion to order multiple sentences for serious violent offenses to run concurrently as an exceptional sentence if it finds that there are mitigating factors justifying such a sentence. *Mulholland*, 161 Wn.2d at 327-331, 166 P.3d 677.

Prior to *Mulholland*, consecutive sentences were believed to be mandatory for multiple serious violent offenses. *See e.g. State v. Flett*, 98 Wn.App. 799, 806, 992 P.2d 1028, *review denied*, 141 Wn.2d 1002 (2000) ("Here, the trial court ordered four consecutive sentences for the first degree assaults because they are serious violent offenses required to be consecutively sentenced...Consecutive sentencing is mandatory.")

The Supreme Court's ruling in *Mulholland* that sentencing courts had discretion to impose exceptional downward sentences of concurrent sentences when sentencing on multiple serious violent offenses was a significant change in the law.

a. The trial court did not err when it found that Mr. Miller's November 9, 2010 was not time barred under RCW 10.73.090.

Under CrR 7.8(b), motions for relief from judgment are subject to RCW 10.73.090 and RCW 10.73.100.

Under RCW 10.73.090, "No petition or motion for collateral attack on a judgment and sentence in a criminal case may be filed more than one year after the judgment becomes final if the judgment and sentence is valid on its face and was rendered by a court of competent jurisdiction."

However, under RCW 10.73.100(6), "The time limit specified in RCW 10.73.090 does not apply to a petition or motion that is based solely

on one or more of the following grounds:...There has been a significant change in the law."

In this case, the trial court properly determined that *Mulholland* represented a significant change in the law of Washington. Accordingly, the trial court found that Mr. Miller's motion was not time barred by RCW 10.73.090 because *Mulholland* represented a significant change in the law which was material to Mr. Miller's sentence, and, therefore, found that Mr. Miller's motion was allowed under RCW 10.73.100(6). The trial are court did not err in finding Mr. Miller's motion was not time barred.

b. The trial court did not err in considering Mr. Miller's November 9, 2010 motion and not transferring it to the Court of Appeals.

Under CrR 7.8(c)(2),

> The court shall transfer a motion filed by a defendant to the Court of Appeals for consideration as a personal restraint petition unless the court determines that the motion is not barred by RCW 10.73.090 and either (i) the defendant has made a substantial showing that he or she is entitled to relief or (ii) resolution of the motion will require a factual hearing.

As stated above, the trial court found that Mr. Miller's motion was not barred by RCW 10.73.090 and, on October 7, 2011, held that a further factual hearing was necessary "to determine whether at the 2001 sentencing there was error based on the recent Supreme Court holding from *State v. Mulholland*, [sic] because I think that we're at the point of

starting to introduce evidence at this point and we need to have a show cause hearing." RP 9, 10-17-11.

Thus, the trial court held that Mr. Miller's motion was not barred by RCW 10.73.090 and that resolution of the motion required a factual hearing. The trial court did not err in not transferring Mr. Miller's case to the Court of Appeals.

3. Judge Cuthbertson court did not err in finding that he believed he did not have discretion to impose concurrent sentences when he sentenced Mr. Miller originally.

The State's argument as to why Judge Cuthbertson erred in finding that he believed he did not have discretion to run Mr. Miller's sentences concurrently when he sentenced Mr. Miller in 2001 appears to be that Judge Cuthbertson gave Mr. Miller's codefendant, Ms. Tonya Wilson, an exceptional sentence below the standard range, therefore Judge Cuthbertson was aware that he had discretion to run Mr. Miller's sentences concurrently as an exceptional downward sentence. State's Opening Brief, p. 29-30.

Ms. Wilson was also convicted of two serious violent offense. CP 145-263 (*See* Exhibit C, p. 42, lines 6-7). Judge Cuthbertson did, in fact, impose exceptional downward sentences on each count. CP 145-263 (*See* Exhibit C, p. 63-65). However, Judge Cuthbertson ***did not*** run the

sentences concurrently. CP 145-263 (*See* Exhibit C, p. 63, lines 11-12, page 65, lines 13-16). In fact, Judge Cuthbertson specifically indicated that the sentences ran consecutively because they were serious violent offenses. CP 145-263 (*See* Exhibit C, p. 63, lines 11-15).

The fact that Judge Cuthbertson imposed an exceptional downward sentence on Mr. Miller's codefendant that was *not* a sentence of concurrent sentences for serious violent offenses does not establish that Judge Cuthbertson was aware that he could run the sentences for serious violent offenses concurrently.

Nothing in the record contradicts Judge Cuthbertson's candid and honest finding that he did not believe when he sentenced Mr. Miller that he had the discretion to run Mr. Miller's sentences concurrently. The state's argument fails.

4. Mr. Miller did not waive his ability to argue that the trial court erred in imposing consecutive sentences because his initial trial counsel failed to request concurrent sentences be imposed.

The State argues that Mr. Miller waived his ability to challenge his sentence under *Mulholland* because his trial counsel did not request that his sentences be run concurrently. State's Opening Brief, p. 30-31. The State cites no authority in support of its proposition that the failure of Mr.

Miller's trial counsel to request Mr. Miller's sentences be run concurrently waived the issue.

Where a legal principle has not been established at the time of a defendant's trial, that defendant cannot be said to have waived the right to argue for the application of that principle by failing to argue that the principle be observed at trial. For example, in *State v. Robinson*, 171 Wn.2d 292, 253 P.3d 84 (2011), the court was dealing with whether or not an appellant court challenge the search of his or her vehicle incident to his or her arrest for the first time on appeal under *Arizona v. Gant, 556 U.S. ——, 129 S.Ct. 1710, 173 L.Ed.2d 485 (2009)* where the appellant did not challenge the search under *Gant* at trial and the trial occurred before *Gant* was decided. In discussing whether the principles of issue preclusion applied to bar review of the *Gant* issue for the first time on appeal, the *Robinson* court held that

> the rationale that failure to raise an issue in the trial court waives its consideration on appeal cannot withstand scrutiny in this context. Waiver of a constitutional right must be "knowing, intelligent, and voluntary." At the time of Millan's and Robinson's trials, the argument that the types of automobile searches at issue here were unconstitutional and that the evidence obtained was therefore suppressible was specifically foreclosed. In other words, there was no right to waive at that time. Only by virtue of *Gant* and *Patton*, and their retroactivity to Millan's and Robinson's cases, is such a right available. Millan's and Robinson's failure to invoke the right prior to its existence was not knowing, intelligent, and voluntary.

> Thus, there could be no waiver of the right to challenge the search.

Robinson, 171 Wn.2d AT 305-306, 253 P.3d 84.

The *Robinson* court's logic is applicable to this case. It was only by virtue of *Mulholland* that Mr. Miller and, in fact, all attorneys and judges in Washington became aware that sentencing judges had the discretion to run the sentences of serious violent offenses concurrently as exceptional downward sentences. Mr. Miller's failure to request his sentences be run concurrently did not constitute a waive of the ability to raise that issue because there was no issue regarding concurrent sentences to raise at the time of sentencing.

The failure of Mr. Miller's attorney to request Judge Cuthbertson run Mr. Miller's sentences concurrently, something that neither Judge Cuthbertson (CP 268, Finding 3) nor Mr. Miller's trial attorney (RP 5-910-7-11) were aware that Judge Cuthbertson could do, did not waive Mr. Miller's ability to argue *Mulholland* requires he receive a resentencing hearing.

E. CONCLUSION

For the reasons stated above, this court should deny the State's appeal and remand Mr. Miller's case for a new sentencing hearing where

Mr. Miller will be permitted to argue his sentence should be modified to permit the sentences to run concurrently.

DATED this 28th day of January, 2013.

Respectfully submitted,

/s/
Sheri Arnold, WSBA No. 18760
Attorney for Appellant

Certificate of Service:

The undersigned certifies that on January 28, 2013, she delivered by e-mail to the Pierce County Prosecutor's Office, pcpatcecf@pierce.wa.us, and by United States mailed to appellant, appellant, Spencer L. Miller, Pierce County Jail, 910 Tacoma Avenue South, Tacoma, Washington 98402, true and correct copies of this Brief. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, January 28, 2013.

/s/
Norma Kinter

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