

NO. 48042-5-II

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

STATE OF WASHINGTON,

Respondent,

v.

JOHN MICHAEL BALE,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF
KITSAP COUNTY, STATE OF WASHINGTON
Superior Court No. 12-1-00762-2

BRIEF OF RESPONDENT

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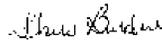
<p>SERVICE</p> <p>Kathryn Russell Selk 1037 N.E. 65th St., #176 Seattle, WA 98115 Email: KARSdroit@aol.com</p> <p>John M. Bale, #845543, CH-10 WCC P.O. Box 900 Shelton, WA 98584</p>	<p style="text-align: center;">1</p> <p>This brief was served, as stated below, via U.S. Mail or the recognized system of interoffice communications, <i>or, if an email address appears to the left, electronically</i>. I certify (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.</p> <p>DATED July 21, 2016, Port Orchard, WA </p> <p>Original e-filed at the Court of Appeals; Copy to counsel listed at left. Office ID #91103 kcpa@co.kitsap.wa.us</p>
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**I. COUNTERSTATEMENT OF THE ISSUES
DIRECT APPEAL**

1. Whether the second sentencing judge properly refused Bale's request for an exceptional sentence?
2. Whether defense counsel was ineffective at resentencing?
3. Whether appellate cost should be imposed should the state substantially prevail?

PERSONAL RESTRAINT PETITION

1. Whether Bale's Personal Restraint Petition is procedurally barred?
2. Whether Bale, who was represented by counsel throughout, was prejudiced by his inability to conduct legal research?
3. Whether Bale's rights to speedy arraignment and timely charging were violated?
4. Whether the first sentencing judge erred in failing to order an exceptional sentence?
5. Whether trial counsel was ineffective or was operating under a conflict of interest?
6. Whether the prosecutor committed misconduct or elicited false testimony from police witnesses or elicited improper opinion

evidence?

7. Whether on direct appeal the Court of Appeals committed legal error and appellate counsel was ineffective?

II. STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

Bale was convicted of two counts of first degree assault (with firearm enhancement on each) and one count of possession of a stolen firearm. Bale timely appealed and by unpublished opinion the Court of Appeals affirmed the two assault convictions and reversed the possession of stolen firearm conviction, ordering that count dismissed on remand. *State v. John Michael Bale*, no. 44172-1-II. at 14. The Supreme Court denied review by order entered on April 1, 2015. The Court of Appeals issued mandate on April 1, 2015.

Bale was resentenced on August 21, 2015. RP (8/21/15). The possession of stolen firearm count was dismissed as ordered. At resentencing Bale received on count one 277 months plus a 60 month firearm enhancement for a total of 337 months and on count two 93 months plus 60 month firearm enhancement for a total of 153 months. CP 74. All were run consecutively for a total sentence of 490 months. *Id.*

At resentencing, the trial court appropriately noted that the two firearm enhancements are to run consecutive to each other for a total of

ten years. RP (8/21/15) 3. Then, the state asserted, correctly, that the two first degree assault convictions are to be consecutive under RCW 9.94A.589(1). RP (8/21/15) 4. Bale objected to that assertion, claimed he wanted “go hybrid” and treat his attorney as standby. Id. Bale argued that under *State v. Graham* the trial court had the option of running the two sentences concurrently. Id. The state noted that no motion had been filed that properly cited authority for Bale’s argument. Id.

The trial court inquired and Bale cited *Graham* as 337 P.3d 319. RP (8/21/15) 5. For reasons not clear in the record, this citation led the trial court to an Ohio case which did not discuss the consecutive/concurrent issue being decided. Id. at 6. The trial court then read RCW 9.94A.589 to Bale. Id. at 8. He then raised the issue of same criminal conduct but the state correctly explained that that sentencing rule does not apply because there were two separate victims of the two first degree assaults. The trial court agreed with the state’s same criminal conduct argument. Id. at 9.

Ultimately, the defense agreed with the standard range calculation. RP (8/21/15) 14-15. Defense counsel argued for a sentence at the bottom of the standard range. Id. at 15. Defense counsel then deferred to Bale who argued that the reversal of the stolen firearm count showed prejudice in his trial, that he proceeded with hybrid representation, and he was not

allowed access to the law library, and that he was not given a timely arraignment on the charges. *Id.* at 17. He also argued that conviction for assault with a firearm requires that the victim either be shot or hit with the gun. *Id.* at 19. The trial court declined to grant relief on these issues. Although no written motion for a downward departure was filed, Bale asked the trial court to consider an “exceptional sentence downward.” RP (8/21/15) 28.

The trial court answered this request by noting

[t]here aren't any statutory mitigating factors, and for me to do an exceptional down would require me to make certain findings that statutory mitigating factors exist. It's not simply within the Court's discretion. There has to be reasons that are set out in the statute, and this isn't one of them.

RP(8/21/15) 28-29. The trial court also noted its deference to the previous sentencing judge's determinations because that judge had heard the case. *Id.* at 30. In fact the trial court reduced its initial pronouncement on count II from 98 to 93 months because that is what the prior judge had done. *Id.* at 32-33.

B. FACTS

The following statement of substantive facts is lifted from the state's Response to Bale's first appeal under number 46745-3-II. References to the record are from the transcription filed in that matter.

Port Orchard Patrol Officer Charles Schandel was dispatched to

Powers Park regarding the possibility of narcotics activity. 2RP 145. When Schandel arrived, Bale and two other men were walking out of the adjacent mobile home park. 2RP 145. They matched the description given him by the dispatcher. 2RP 145.

Schandel got out of his car and approached them. 2RP 145. He asked them for identification. 2RP 147. Two of them complied, but Bale, after fumbling with his wallet, asserted that he did not have any ID on him. 2RP 147.

Officer Stephen Morrison was in the park on an unrelated call at the time. 1RP 61. When he heard the dispatch call, he left the person he was speaking with and went to assist Schandel. 1RP 61.

When Morrison approached, Bale was standing at the back of Schandel's vehicle with Schandel. 1RP 64. Schandel was holding two ID cards. 1RP 64. Bale had his wallet in his hands and was looking extremely nervous. 1RP 64. He was rocking back and forth and looking around. 1RP 64. Schandel told Morrison that Bale said he did not have ID, and asked Morrison to talk to Bale. 1RP 64. While Morrison was doing that, Schandel ran the ID's of the other two men through dispatch. 2RP 149.

Morrison asked Bale if he had ID, and Bale said he did not have it or could not find it. 1RP 64. Under the circumstances Morrison's next

step would normally have been to ask Bale his name. 1RP 65. Morrison did not get that far, however, because of the way Bale was acting. 1RP 65. Morrison became concerned for the officers' safety. 1RP 66.

Morrison therefore decided to put Bale in cuffs and frisk him for weapons. 1RP 66. Morrison placed his hand on Bale's wrist and asked him to turn around and put his hands behind his back. 1RP 66-67. As soon as Morrison touched him, Bale started pulling away. 1RP 67. Bale broke free and ran. 1RP 67. Morrison yelled that he was running. 2RP 149.

Bale took off toward the trailer park. 1RP 67. Morrison and Schandel pursued him and yelled for him to stop running because he was under arrest. 1RP 68, 2RP 149. Bale did not stop. 1RP 68. The officers caught up with Bale and tackled him. 1RP 70.

As Morrison tackled Bale, he heard a metallic noise. 1RP 71. Afterwards, Morrison realized that it was the sound of a pistol being racked. 1RP 72. Schandel saw that Bale had a semiautomatic handgun in his hand and was holding the gun in the firing position and was trying to point it at Morrison. 2RP 151. Schandel was immediately afraid that Bale was going to shoot Morrison. 2RP 152. Schandel yelled that Bale had gun. 1RP 72.

Morrison then saw that Bale had a semiautomatic pistol in his right

hand. 1RP 72. Bale was holding the gun as a person would to shoot it. 1RP 74. He was rotating the gun toward Morrison. 1RP 75. Morrison saw that the gun was cocked; the hammer was back. 1RP 74. That meant the gun was ready to fire. 2RP 151. With the hammer cocked, it would take much less trigger pressure to fire. 2RP 152. The only reason to cock a gun is to shoot it. 1RP 74. That made Morrison think Bale was trying to shoot them. 1RP 74. He was pointing it at Morrison's chest. 1RP 75.

Schandel contemplated shooting Bale, but was afraid if he let go of Bale's hands, Bale would shoot Morrison. 2RP 153. Schandel noted that the fact that Bale had the hammer cocked would have allowed Schandel to use lethal force under departmental protocols. 2RP 166. The protocol required him to believe that someone's life was in jeopardy. 2RP 166.

Bale had a "death grip" on the gun with his finger on or close to the trigger. 2RP 153. Bale was trying to point the gun at Morrison. 2RP 154. Schandel feared that if Bale shot Morrison, he would then try to shoot Schandel. 2RP 154, 168. If he had shot Morrison, he could have easily shot Schandel as well. 2RP 170. All he would have had to do was bring his arms up. 2RP 170.

They were struggling with the gun and Bale kept trying to point it back toward Morrison. 2RP 155. At no time did Bale make any attempt to get rid of the gun. 2RP 158. He had thrown away the holster 15 feet

from where they tackled him. 2RP 158. He could have also ditched the gun then. 2RP 158.

Morrison grabbed the top of the barrel with both hands. 1RP 73, 2RP153. He yelled at Bale to drop the gun. 1RP 75. Morrison leaned back to try to get out of the gun's trajectory. 1RP 76. This put Morrison, who was on his knees, off-balance. 1RP 76. Bale had the muzzle within inches of Morrison's body. 1RP 77. Morrison wrested the gun from Bale by pulling it up and over his head and behind his back. 1RP 78, 2RP 158. Morrison was very concerned and afraid for his life. 1RP 78.

After getting the gun away from him, Morrison continued to try and hold Bale with his other hand. 2RP 90, 159. Bale continued to struggle. 2RP 90. Schandel let go of Bale with one hand to call for backup. 2RP 90-92, 159.

Bale stood up and broke their grip and began running. 2RP 92, 190. Bale ran through the trailer park and back toward Powers Park. 2RP 93. Morrison and Schandel pursued him. 2RP 94. Schandel tripped over a root and fell hard enough to crack a couple of ribs. 2RP 94, 160.

Morrison caught up to Schandel at a car. 2RP 97. He ordered Bale to get down to the ground, multiple times, but he refused. 2RP 96. The car was associated with the original call. 2RP 99. There was a woman in the driver's seat. 2RP 100.

Morrison was on one side of the car and Bale was on the other. 2RP 102. Bale was yelling at the driver to start the car. 2RP 102. He was starting to get in the car. 2RP 102. Morrison tried to edge around the car, but Bale kept moving. 2RP 104. Morrison holstered his gun and drew his taser. 2RP 104.

Morrison told Bale to get on the ground or he would tase him. 2RP 106. Bale was trying to catch his breath and looked like he was about to run again. 2RP 106. Morrison pulled the trigger on the taser, and its probes struck Bale's torso and knocked him to the ground. 2RP 106. Because he was still holding Bale's gun, Morrison was unable to cuff him. 2RP 106. Morrison kept the taser on him and told him not to move. 2RP 106. When the first shock ended, Bale attempted to sit up. 2RP 107. Morrison again told him to lay down and not move. 2RP 107. Morrison had to tase Bale two more times before he finally submitted and lay on his stomach. 2RP 107.

Meanwhile, Schandel got up and continued after them. 2RP 161. When he caught up, the other two suspects were still standing with their hands on the trunk of the patrol car. 2RP 161. Schandel patted them down quickly and put them in the back of his car. 2RP 161. Then he went to assist Morrison. 2RP 161.

Schandel found Morrison and Bale near a car in the park. 2RP

162. Bale was on his hands and knees and Morrison had his taser out. 2RP 162. Schandel handcuffed Bale. 2RP 109, 162.

After Bale was secured, Morrison inspected Bale's gun. 2RP 110. It was a 9mm semiautomatic. 2RP 117. He ejected the magazine, which was loaded with 14 rounds. 2RP 110, 117. Morrison ran the serial number on Bale's gun and determined that it had been stolen. 2RP 130.

A subsequent search of the area found Bale's ankle holster, hat and wallet, which contained his ID. 2RP 163, 167.

John Hagenon was the registered owner of the gun Bale used. 2RP 175. He noticed that the gun was missing about a week before the incident. 2RP 177. He filed a police report. 2RP 176.

It had been about three months since Hagenon had last looked at the gun before he noticed it was missing. 2RP 178. There was no forced entry into the gun safe. 2RP 178. They questioned the stepson about it, and he said he could get it back. 2RP 178.

Hagenon had known Bale's family for years. 2RP 176. Bale and his stepson had been friends for years. 2RP 176. The stepson was not permitted to possess firearms. 2RP 176. Bale was with Hagenon's stepson around the date of the incident. 2RP 177.

Bale could not have bought it from the stepson believing it was

lawfully the stepson's because "they knew each other's pasts." 2RP 180. Bale and Hagenson's stepson were fairly close. 2RP 180. Bale would have known that the stepson should not have had the gun. 2RP 180.

III. ARGUMENT DIRECT APPEAL

A. THE TRIAL COURT AT RESENTENCING UNDERSTOOD ITS DISCRETION TO IMPOSE A DOWNWARD EXCEPTIONAL SENTENCE AND DECLINED TO DO SO.

Bale argues that the trial court erred in failing to give him an exceptional sentence downward by ordering the sentences on his serious violent convictions run concurrently. This claim is without merit because nothing in the record proves that the sentencing court was not aware of its discretion to impose an exceptional sentence downward and the court expressly ruled that there were no mitigating factors that would justify such a departure.

First, it simply is the case that RCW 9.94A.589(1)(b) commands that such serious violent convictions as Bale's "shall be served consecutively to each other." Neither *State v. Mulholland*, 161 Wn.2d 322, 166 P.3d 677 nor *State v. Graham*, or any other appellate case, changes the command of the statute. The cases simply hold that the RCW 9.94A.535 also applies to such sentences and allows the sentencing court to depart from the consecutive sentence requirement as "an exceptional

sentence subject to the limitations of this section.” Thus the *Mulholland* Court held that “the plain language of RCW 9.94A.589(1) and RCW 9.94A.535 support the Court of Appeals' determination that the trial court had the discretion to impose an exceptional sentence.”

The matter was remanded for resentencing because

the trial court sentenced Mulholland while possessed of a mistaken belief that it did not have the discretion to impose a mitigated exceptional sentence for which he may have been eligible. This error is particularly significant because the trial court made statements on the record which indicated some openness toward an exceptional sentence, expressing sympathy toward Mulholland because of his former military service.

161 Wn.2d at 333. The reason for the decision, then, is that in *Mulholland* the sentencing court expressly got it wrong in believing that RCW 9.94A.535 does not apply. That court should have known that “*if mitigating circumstances are present, concurrent sentences may be imposed by the sentencing court as an exceptional sentence.*” *Id.* at 328 (emphasis added).

Again, in *State v. Graham*, 181 Wn.2d 878, 337 P.3d 319, our Supreme Court considered the availability of a downward departure when convictions for multiple serious violent offenses are sentenced. The Court again noted that RCW 9.94A.535 applies to this as it does to all sentencings. *Id.* at 882. In particular, the *Graham* Court focused on subsection (1)(g), which provides that a mitigated exceptional sentence

may be had if “[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.” *Id.* But it was observed that this provision is limited to situations that include a finding of a “clearly excessive” sentence “*and where the exceptional sentence is supported by substantial and compelling reasons.*” *Id.* at 885 (emphasis added; internal quotation omitted). In *Graham*, as in *Muholland*, the matter was remanded for resentencing because the sentencing judge had expressly doubted his discretion to depart from the command of RCW 9.94A.535 and, just as expressly, had noted displeasure with that requirement.

Thus, neither *Mulholland* nor *Graham* supports Bale’s argument. Here, the resentencing judge clearly stated that she could not go below the standard range, or avoid the consecutive sentence command of the statute, “because there aren’t any statutory mitigating factors, and for me to do an exceptional down would require me to make certain findings that statutory mitigating factors exist.” RP (8/21/15) 28-29. This ruling shows both that the sentencing court was aware of the law, its authority thereunder, and that it knew what was required of Bale on his request for a downward departure. Nowhere in this record did Bale assert availing mitigating factors; let alone prove them so that findings on the issue would have

satisfied Bale's burden to prove mitigation by a preponderance.

The cases certainly do not mandate a downward departure from Bale's substantial sentence. And those cases do not require sentencing courts to ignore the command RCW 9.94A.535. The judge is required to be aware that a mitigated sentence is possible and to be aware that such a departure requires substantial and compelling reasons. The trial court knew its power and knew that no reasons supported a downward departure. The sentence was lawful and Bale's claim fails.

B. COUNSEL WAS NOT INEFFECTIVE AT THE RESENTENCING HEARING.

Bale next claims that his counsel was ineffective at his resentencing hearing. This claim is without merit because defense counsel successfully argued for a low-end standard range sentence and because, given the trial court's ruling that no mitigating factors obtained, a request for an exceptional sentence would have been unavailing. Moreover, Bale prevailed on the issue wherein counsel's performance is assailed and thus Bale can show no prejudice.

The sentencing hearing ended with Bale receiving 41 months less on resentencing. Defense counsel was obviously aware of the 93 month number on count II because in discussing the numbers counsel correctly arrived at the 41 month less number. RP (8/21/15) 14. Counsel knew that

the range on count II was 93 to 123 months. *Id.* Counsel then argued for the bottom of the range on count I in an attempt to save Bale more months in comparison with the initial sentence. RP (8/21/15) 15. But as the trial court announced the sentence, the judge gave, on count II, 123 months. *Id.* at 30. Bale spoke up, as he had done throughout the hearing, and mentioned that the previous judge had made that number 98 months, and after brief discussion, that the first sentence was in fact 93 months on count II. *Id.* at 31. This discussion followed from the trial court's remark that it would do what the previous judge, who had heard the evidence, had done. *Id.* at 30. Defense counsel had reviewed the initial judgment and sentence on the same day and, as noted, was aware that 93 months was the low end of the standard range. *Id.* at 32.

So, the assertion here is that counsel was ineffective because Bale spoke up before counsel did. The record does not establish that defense counsel would not have made the same observation had Bale not spoken first. And Bale, at that point in the proceeding, was as active a speaking participant as was his counsel. Then the issue was discussed and Bale got the low end number that he and his counsel had asked for. Deficient performance does not appear on this record—unless counsel's performance is deficient simply because Bale spoke first. And since Bale got the low-end sentence, he prevailed on this issue regardless of who first

brought it up. He therefore can show no prejudice. This claim of ineffective assistance fails.

B. THE STATE WILL NOT SEEK APPELLATE COSTS.

Bale next claims that he should not have appellate costs imposed should the state prevail on this review. The state does not concede the law or the statutory authority to seek appellate costs. However, the state does not intend to further seek appellate costs in this matter and therefore takes no position on the issue.

On Bale's first appeal, a cost bill was filed. CP 50. Bale objected and this court ordered that the costs are owing if the trial court makes a finding of his present or future ability to pay. CP 52. The trial court made no such finding at the resentencing hearing. Thus, by this Court's order, the costs should not be imposed. As indicated, the state will not again seek costs.

IV. PRP RESPONSE

V. AUTHORITY FOR PETITIONER'S RESTRAINT

The authority for the restraint of John Michael Bale lies within the amended judgment and sentence entered by the Superior Court of the State of Washington for Kitsap County, on August 21, 2015, in cause number 12-1-00762-2, upon Bale's conviction of two counts of Assault First

Degree (with firearm enhancement on each). CP 72-82.

VI. ARGUMENT PRP¹

A. THE PETITION IS NOT TIME BARRED BUT BALE MUST PROVE BY PREPONDERANCE THAT HE WAS PREJUDICED BY ERRORS THAT WERE NOT ADJUDICATED ON DIRECT APPEAL AND THAT HIS SUBMISSION IS NOT A MIXED PETITION.

Bale begins by arguing procedure, asserting that because the Court has subject matter jurisdiction the matter is not time-barred. Pet. at 2. Although his reference to subject matter jurisdiction is superfluous, he is correct that the matter is not time-barred under RCW 10.73.090 because this petition has been filed within one year of this Court's mandate of the first direct appeal. His claim under #3 (at p. 4) refers to manifest constitutional error. Bale's claim denominated #12 (at p. 25) addresses Bale's right for review.

To obtain relief in a personal restraint petition, a petitioner must show by a preponderance of the evidence, actual and substantial prejudice resulting from alleged constitutional errors, or for alleged nonconstitutional errors, a fundamental defect that inherently results in a miscarriage of justice. *In re Cook*, 114 Wn.2d 802, 813, 792 P.2d 506 (1990). These two types of error, constitutional and nonconstitutional, are

¹ Reference to Clerk's Papers as "CP" refer to those ordered in the present consolidated case. Reference to Clerk's Papers as "ICP" refer to those ordered in direct appeal

treated differently on collateral review:

Two types of challenges, constitutional or nonconstitutional errors, may be raised in a collateral attack on a conviction or sentence. To actually obtain relief on collateral review based on a constitutional error the petitioner must demonstrate by a preponderance of the evidence that petitioner was actually and substantially prejudiced by the error. Under limited circumstances “[t]he petitioner’s burden to establish actual and substantial prejudice may be waived where the error gives rise to a conclusive presumption of prejudice.” Although some errors that are per se prejudicial on direct appeal will also be per se prejudicial on collateral attack the interests of finality of litigation demand that a higher standard be satisfied in a collateral proceeding. The standard of review on a nonconstitutional issue is different. Nonconstitutional error requires more than a mere showing of prejudice. We will consider nonconstitutional error only when the claimed error constitutes a fundamental defect which inherently results in a complete miscarriage of justice.

In re Davis, 152 Wn.2d 647, 671-72, 101 P.3d 1 (2004) (internal citation and quotation omitted). Thus Bale must show by a preponderance that he was actually prejudiced by constitutional error or that nonconstitutional error, if any, resulted in a complete miscarriage of justice.

Further, this forum is not for the purpose of reiterating issues already decided on direct review

As a general rule, collateral attack by [personal restraint petition] on a criminal conviction and sentence should not simply be a reiteration of issues finally resolved at trial and direct review, but rather should raise new points of fact and law that were not or could not have been raised in the principal action, to the prejudice of the defendant. The petitioner in a personal restraint petition is prohibited from renewing an issue that was raised and rejected on

direct appeal unless the interests of justice require relitigation of that issue.

In re Davis, 152 Wn.2d at 670-71; accord *In re Gentry*, 137 Wn.2d 378, 388, 972 P.2d 1250 (1999)(“Personal restraint petitioner must raise new points of fact and law that were not or could not have been raised in the principal action.”). Bale raises numerous issues that were decided on direct review.

B. BALE WAS REPRESENTED BY COUNSEL THROUGHOUT THE CASE AND CANNOT HAVE RELIEF THAT IS ACCORDED TO PRO SE LITIGANTS.

Bale next claims that his case was “frustrated and impeded” by jail staff not allowing access to the law library. Pet. at 3. An identical claim was asserted and rejected on direct appeal. There, the Court of Appeals noted that the access-to-materials cases that Bale cited are case that are intended to “ensure a meaningful pro se defense.” At 14, citing *State v. Bebb*, 108 Wn.2d 515, 524, 740P.2d 829 (1987). But Bale was represented by counsel. Nothing has changed in the present iteration of the claim.

Defense counsel sought and received an order from the court allowing Bale access to the county law library. (Petitioner’s appendix C) That order recites that it is entered to allow Bale the opportunity to assist in the preparation of his defense. *Id.* However, neither in that order nor in

the record of the hearing during which the order was signed, was defense counsel removed or ordered to act in a standby capacity. 1RP (10/4/12) 5. Bale was not pro se and Bale was not engaged in hybrid representation with his attorney. He was at all times represented by counsel and thus the access to court policy underlying the rule requiring access to legal materials for pro se defendants does not apply.

Since Bale was represented, he must show how the jail staff prejudiced his trial by not allowing law library access. It should be noted that the order allowing access was signed on October 4, 2012. (Petitioner's appendix C). Trial began on October 30, 2012. RP (10/30/12) 3. But even if this relatively short time period would have allowed some access, Bale makes no argument explaining how his failure to do legal research prejudiced his case. If he had been pro se in fact, he may have had such an argument. And, finally, the order was conditioned on jail policy and jail safety procedures. Bale addresses neither of these requirements in his argument.²

The Court on direct review noted that no evidence supports Bale's assertion that the jail staff failed to honor the trial court's order allowing him law library access. No additional proof is asserted in the present

² In his SAG on the present appeal, at appendix C, Bale includes an excerpt from a jail policy manual that clearly advises him that his attorney is his access to court and that he can have access to the law library if his attorney requires his help or, later in the same section, if he is pro se.

proceeding. But even if his access was in fact denied, he fails to show how this administrative failure prejudiced his trial. This claim is barred as successive to the same claim in his direct appeal. This claim also fails for want of proof of prejudice.

C. SPEEDY ARRAIGNMENT AND CHARGING DELAY.

Bale next claims that his due process rights were violated by delayed filing of charges. Pet. at 6. In a related claim, he asserts a failure to accord him a speedy arraignment. Pet. at 22. He alleges that some unspecified charges were filed at some unspecified time because the prosecution was vindictive. Id. He cites to cases that discuss pre-accusatorial delay but asserts no fact about such a delay in his case. Id. Bale baldly asserts that whatever it was that delayed charging raises an issue of prosecutorial misconduct under CrR 8.3(b). Id. at 6-7. He then asserts that he “will show” governmental misconduct and how he was prejudiced thereby but never in fact asserts any fact or procedure in his case that can or would arguably make such a showing.

Similarly, in his eleventh claim (Pet. at 22) Bale claims he was denied speedy arraignment. He claims error because charges were originally filed in the district court. Id. at 23. Conspicuously missing from this argument is any date or document to support the claim. It cannot be determined what particular spans of time constituted the delay in

procedures of which Bale complains.

Both these claims, then, fail for want of proof. Bale fails to carry his burden because he fails to identify any charging delay or speedy arraignment violation in the record. His argument, at pp. 6-7, shows a failure to grasp the difference between a late charge and an amended information. Herein, Bale was timely charged initially (CP 1) and the information was later amended without objection. 1CP 10. Bale completely fails to tie any possible procedural delay to either prosecutorial vindictiveness or misconduct. And, he does not demonstrate that he was prejudiced by pre-accusatorial delay if any there was in the case.

As to filing in district court, again, no fact or document is asserted. Moreover, no document establishing this procedure can be found in the Superior Court's file in this case. However, on the supposition that such procedure underlies Bale's complaint, it should be noted that the initial filing of a felony complaint in district court is a lawful procedure pursuant to CrRLJ 3.2.1(g). That rule nowhere restricts such filing to situations of court congestion in the superior court. Once the felony complaint is filed in the district court, the State has 30 days to either file an information in superior court, hold a "preliminary hearing," or dismiss the case. CrRLJ 3.2.1(g)(2).

Thus if there was proof in the record that Bale was in fact first charged by felony complaint in district court, such proof would not

establish error. The procedure is lawful. *See State v. Shapiro*, 28 Wn. App. 860, 626 P.2d 546 (1981). Insofar as this is Bale's argument, then, it fails.

Finally, this issue is procedurally barred because the very same argument was asserted and rejected on direct appeal. Further, Bale fails to articulate a constitutional basis for this claim; the number of days between arraignment and trial are court rule rights, not constitutional commands. The speedy trial claim has been decided on appeal, is argued as a nonconstitutional issue, and other delay here complained of cannot be found in the record. Bale's claims fail.

D. BALE DID NOT RECEIVE AN EXCEPTIONAL SENTENCE EITHER UP OR DOWN AND THE SENTENCING JUDGES UNDERSTOOD THEIR DISCRETION TO SO SENTENCE.

Bale next claims that he was given an exceptional sentence. Pet. at 7-9. Once again Bale provides no facts to support this claim. Although one might fairly surmise that he is assailing the consecutive sentences he received on the two counts of assault first degree, Bale does not say so. Further, he then, without any reference to the record of the present case, argues that juries must find aggravators, that this Court should interpret unidentified statutes in a certain manner, and that his sentence is "clearly excessive." Moreover, failure of the trial court to depart from the standard

range or to impose a sentence following the statutory command does not raise an issue of constitutional magnitude.

The claim is without merit because his sentence was lawful. (see also response to second appeal, *supra* at section III., A.) Bale's two convictions for assault in the first degree are defined as "serious violent offenses." RCW 9.94A.030(46)(a)(v). Sentences for such offenses "shall be served consecutively to each other." RCW 9.94A.589(1)(b). Following these statutory provisions, the trial court sentenced Bale to a standard range sentence. The jury was not required to find an aggravating factor in order for the statute to apply. (Pet. at 7) And, although the sentencing court has discretion to find sufficient mitigating factors to warrant an exceptional sentence, on a failure to find that necessary mitigation the consecutive sentence requirement of the statute is in fact mandatory ("shall") and the sentenced is not clearly excessive. (Pet. at 7)

Bale cites to *State v. Mulholland*, 161 Wn.2d 322, 166 P.3d 677 (2007) to support his claim. But *Mulholland* does not disapprove of the serious violent sentencing scheme. Rather, that case addressed and endorsed the power of the court to depart from the consecutive sentence provision as a downward exceptional sentence. 161Wn.2d at 331. The Court granted relief because the trial court had ruled that it was without authority to consider such a departure and because the trial court had expressed some solicitude toward the defendant on the record. *Id.* at 333-

334.

The trial court in the initial sentencing in the present case exhibited neither a misunderstanding of its discretion nor solicitude toward Bale. 10-App. (RP 11/9/12 at 11). Similarly, as addressed above, the trial court in resentencing understood its discretion as well. The first sentencing court noted that

we can't have people running around with guns strapped to their ankles and pulling them out during routine arrests, and I am not going to have a person who would do that running around in Kitsap County while I've got officers out there risking their lives.

App (RP id.). Thus Bale's first request for a downward departure was denied. On resentencing, the trial court clearly announced that there is an absence of mitigating factors that would justify a downward departure. Both judges recognized the power to depart from the standard range but neither judge found sufficient mitigation to do so.

Bale's serious violent acts exposed him to serious punishment under the law. And that has not changed in his resentencing without the stolen firearm conviction. His original sentence was lawful in all respects. His second sentence, as argued above, is similarly without error and this claim fails.

E. COUNSEL WAS NOT INEFFECTIVE AND HAD NO CONFLICT OF INTEREST.

Bale next claims that he received ineffective assistance of trial counsel. Pet. at 9. Again he argues that he “will show” deficient performance and “will show” actual prejudice. He claims that he was entitled to a lesser included offense instruction, that counsel failed to object on numerous occasions, and that counsel had a “conflict of interest.” Pet. at 15. Moreover he alleges that counsel’s errors should expose counsel to professional conduct sanctions under the Rules of Professional Conduct.

Bale’s sixteenth claim (Pet. at 31) alleges that counsel was ineffective at trial because this Court later reversed his unlawful possession of firearm conviction.

Bale claimed ineffective assistance on direct appeal where he focused on alleged failure to use compulsory process to obtain witnesses. But on that claim there was insufficient factual basis in the record and the issue was not considered. *Id.*

To establish ineffective assistance of counsel, a defendant must show both deficient performance and resulting prejudice. Defense counsel's conduct is deficient if it falls below an objective standard of reasonableness. *See generally Strickland v. Washington infra.* Such claims are addressed as follows:

A convicted defendant making a claim of ineffective assistance must identify the acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment. The court must then determine whether, in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance. In making that determination, the court should keep in mind that counsel's function, as elaborated in prevailing professional norms, is to make the adversarial testing process work in the particular case. At the same time, the court should recognize that counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. *Strickland v. Washington*, 466 U.S. 668, 690, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). "The reasonableness of counsel's performance is to be evaluated from counsel's perspective at the time of the alleged error and in light of all the circumstances." *Kimmelman*, 477 U.S. at 384, 106 S.Ct. 2574.

In re Nichols, 151 Wn. App. 262, 272-73, 211 P.3d 462 (2009). And, additionally, Bale "must show in the record the absence of legitimate strategic or tactical reasons supporting the challenged conduct of counsel." *In re Elmore*, 162 Wn.2d 236, 252, 172 P.3d 335 (2007).

First, the State can find no "conflict of interest" of defense counsel in this record. If there are facts outside the record that so prove, Bale has failed to assert those facts. It is Bale's burden to show an actual conflict that adversely affected his lawyer's performance. *State v. Dhaliwal*, 150 Wn.2d 559, 573, 79 P.3d 432 (2003). He has not met his burden here.

Second, Bale similarly fails to adequately articulate his claim that defense counsel failed to object. To be sure, Bale lists a series of 19 occasions where he believes objections were appropriate. Pet. at 12-15.

To show deficient performance on such a claim, Bale has the burden of establishing that had counsel objected, the objection would likely be successful. *State v. Gerdtz*, 136 Wn. App. 720, 727, 150 P.3d 627 (2007).

Further, with regard to factual testimony

The decision of when or whether to object is a classic example of trial tactics. Only in egregious circumstances, on testimony central to the State's case, will the failure to object constitute incompetence of counsel justifying reversal.

State v. Madison, 53 Wn. App. 754, 763, 770 P.2d 662 (1989). Bale's argument completely fails to reach his burden.

Bale provides no evidence rule, case, or other authority from which it can be determined that counsel should have objected on any of the 19 occasions he alleges. Bale completely fails to show that his alleged failures to object were not strategic or that an objection was proper and would have been successful if asserted. As to the particular instances

1. Regarding speedy arraignment: as noted above there are not sufficient facts in the record to warrant a sustained objection to lack of speedy arraignment;
2. Regarding the filing of an amended information: no authority is advanced establishing untimely filing, without notice, of an amended information so there was no issue to object to;
3. Regarding the prohibition of speaking objections: no speaking objections is simply a correct rule of court procedure which is not

objectionable;

4. Regarding testimony that the weapon was cocked: testimony that the witness heard the gun being cocked is not an inadmissible opinion and not objectionable;

5. Regarding prosecutor's "ill-intentioned" statement: his assertion is unintelligible and not supported by the transcript excerpt submitted, wherein the prosecutor's questioning appears to be unobjectionable;

6. Regarding questions about fingerprinting the weapon: the officer had training in fingerprint taking and there were no finger prints found on the item; this testimony is not objectionable;

7. Regarding the officer's surprise with respect to fingerprints and gloves: this assertion refers to the same passage as #6 and is still not objectionable, in fact the purpose of the question is completely unclear taken as it is out of context;

8. Regarding admission of a BB gun: a BB gun was admitted; there is no argument why it should not have been or what prejudice it caused or as to what counsel's objection should have been or why it would have been sustained;

9. Regarding the holster: petitioner recites facts received at trial but advances no argument as to why it is objectionable or why such objection would have been sustained;

10. Regarding ownership of the holster: again, the basis for objection is

completely unclear let alone whether or not the same would have been sustained;

11. Regarding prosecutor's questions: here, the questioned served to differentiate Bale's firearm from a BB gun that was also recovered, there is no leading and no reference to a holster and what "holster issue" there is completely unclear; there is no basis for objection;

12. Regarding the prosecutor's argument: this is argument that correctly states the law, no objection to this argument would have been sustained;

13. Regarding the prosecutor's argument: this the same passage of the state's closing referred to in #12; the prosecutor did not testify, the prosecutor was arguing essential elements, and the jury and the Court of Appeals disagreed that there was no evidence showing intent;

14. Regarding the prosecutor's argument: the prosecutor did not testify, the prosecutor was arguing a reasonable inference from the evidence, no objection was warranted and one would not have been sustained;

15. Regarding the prosecutor's argument: this, again, is argument and a reasonable inference from the evidence, no objection was warranted and one would not have been sustained;

16. Regarding the prosecutor's argument: the prosecutor did not testify and this was proper argument (the jury and this Court agreed that assault one was proven);

17. Regarding the prosecutor's argument: this restatement of #12 above

with the same answer, the argument was not objectionable;

18. Regarding the prosecutor's argument: this is argument wherein the prosecutor argues from the facts that Bale could have shot both officers; neither improper nor objectionable;

19. Regarding the state's sentencing argument: the prosecutor made a corrected statement of the law at sentencing.

(Petition pp. 12-15). Thus none of occasions that Bale claims show deficient performance actually warranted objection that would have been sustained. In fact on many of these complaints Bale shows that he does not understand the difference between argument and testimony. Moreover, his argument in essence is that if he thinks the evidence worked against him, it should have been objected to. Bale's claim fails both factually and legally.

Third, Bale alleges that counsel was ineffective because the possession of stolen firearm count was dismissed on appeal. This novel argument is unsupported by any authority. Moreover, Bale completely fails to assert facts in the record regarding counsel's performance on this point. Moreover, since that count was in fact dismissed at resentencing, the issue is moot, being at this point merely an "abstract question which does not rest upon existing facts or rights." *Hansen v. West Coast Wholesale Drug Co.*, 47 Wn.2d 825, 827, 289 P.2d 718 (1955). This claim should be rejected as such.

Forth, lesser included offense instructions were in fact given. ICP 109 (instruction #23). (Pet at 20; claim #9). The jury was instructed on second degree assault as lesser to each count of first degree assault. Counsel cannot have been deficient in not seeking instructions that were in fact given. Moreover, in order to go lower (Bale says he wanted forth degree assault and/or resisting arrest (Pet. at 20)) there must have been some evidence indicating that those lower offenses were committed. Bale does not address this requirement, arguing instead that by his lights he believes that the lower level offenses are what he did. But the two first degree assaults occurred when Bale fought with the police while he had a loaded gun in his hand. It appears from the record that the conduct alleged was not forth degree assault and that resisting arrest could have been independently charged.

F. THERE IS NO PROOF OF PROSECUTORIAL MISCONDUCT, THAT THE TESTIFYING OFFICERS COMMITTED PERJURY, OR THAT THE OFFICERS GAVE INADMISSIBLE OPINION TESTIMONY.

Bale's seventh claim (Pet. at 17) is that the prosecution committed misconduct. He makes no separate factual argument in this regard instead arguing that such misconduct can be seen in the 19 instances of ineffective assistance discussed above. Bale also in his claim eight alleges that the police lied. Once again Bale assails evidence and testimony that he does

not like because it tended to prove his guilt. It has been seen that none of the state's arguments were incorrect statements of the law and, factually, those arguments proceeded on reasonable inferences from the evidence adduced.

He further claims in his tenth claim that testimony by the officers was improper opinion evidence. (Pet. at 21) But Bale fails to cite to any case or rule addressing opinion evidence. It does not appear that the complained of testimony was in fact mere opinion. And, the prosecuting attorney's arguments are in fact not opinion evidence or evidence at all. This claim is without merit; there is no legal argument explaining why the complained of evidence constitutes inadmissible opinion. Moreover, although these claims can be seen as sounding under the Due Process Clause, these evidentiary claims are nonconstitutional.

G. ALLEGED APPELLATE ERROR

Bale makes several claims of post-conviction error: (1) he claims the Court of Appeals erred by not conducting harmless error analysis in his appeal (Pet. at 25); (2) he claims that the trial court failed to provide him with a transcript of a hearing (Pet. at 27); (3) he claims that the Court of Appeals erroneously interpreted the meaning of assault with a firearm (Pet. at 29); and, (4) he claims appellate counsel was ineffective for failing

to file a motion to reconsider the opinion in his direct appeal (Pet. at 32).

1. Harmless Error

This claim is unintelligible. The Court of Appeals did in fact find error—insufficient evidence on the issue of knowledge that the firearm was stolen—and clearly did not find that error was harmless. The Court remanded that count with order that it be dismissed. Herein, the state has no argument that the error was in fact harmless. Moreover, the jury was properly instructed to consider each count separately. 1CP 92 (instruction #6). And, given that the allegedly stolen firearm was the instrument by which Bale committed two first degree assaults, the jury would have seen it in any event. This nonconstitutional claim has no merit. There simply is no issue here.

2. Failure to provide transcript: Petitioner had no right to transcription at public expense.

Bale asserts error because the trial court refused to provide public funds for transcription of a hearing. He then leaps to the supposition that the same was not provided because the trial court does not have them. This, claims Bale, requires a reconstruction of the record on appeal. But Bale fails to provide any authority either here or below that requires the expenditure of public funds for such a request. Moreover, it is clear that Bale was represented by appointed appellate counsel at the time of his trial court motion.

In fact, Bale is not entitled to post-conviction discovery.

As the Ninth Circuit recently held, “there is simply no federal right, constitutional or otherwise, to discovery in habeas proceedings as a general matter.” *Campbell v. Blodgett*, 982 F.2d 1356, 1358 (9th Cir.1993) (upholding the denial of Campbell's request for discovery regarding Dodd's execution); see *Spencer v. Hopper*, 243 Ga. 532, 255 S.E.2d 1 (1979) (no right to appointment of experts or investigators in habeas corpus proceedings, even in death penalty cases).

In re Gentry 137 Wn.2d 378, 390-91, 972 P.2d 1250 (1999).

More specifically, with regard to transcription for appellate purposes, “the party [seeking transcription] should arrange for transcription of and payment for an original and one copy of the verbatim report of proceedings within 30 days after the notice of appeal.” RAP 9.2 Under subsection (d) of RAP 9.2, a party may be sanctioned for failing to arrange for payment. Bale asserted no such arrangements. Ultimately, there is no particular reason to prohibit Bale from receiving this transcript; Bale simply needs to correctly seek the document. The issue does not warrant reversal.

3. *The Court of Appeals committed no error in evaluating the crime of assault in the first degree.*

Without authority, Bale argues that one must either shoot a person or hit her with a gun in order to commit assault with a firearm. Pet. at 29. This claim is barred as successive because Bale argued and lost the same issue on direct appeal. The Court on direct appeal viewed the evidence in

a light most favorable to the State and concluded that sufficient evidence of assault attended both assault convictions.

Further, Bale's continual resort to this supposed issue evinces his fundamental misunderstanding of the law of assault. At trial, the jury was instructed that assault includes

an act done with intent to create in another apprehension and fear of bodily injury, and which in fact creates in another a reasonable apprehension and imminent fear of bodily injury even though the actor did not actually intend to inflict bodily injury.

ICP 101 (instruction #15). This accurate statement of the law is ignored by Bale in this and other arguments. The Court of Appeals made no error on direct review. Once again this is a nonconstitutional claim and has no merit.

4. *Appellate counsel was not ineffective for not filing a motion to reconsider in the Court of Appeals.*

Bale argues that appellate counsel was ineffective for failing to file a reconsideration motion on his first direct appeal. First, RAP 12.4 is discretionary in that a party "may" file for reconsideration. But such a motion must "state with particularity the points of law or fact which the moving party contends the court has overlooked or misapprehended." RAP 12.4(c).

In this context, Bale makes much of counsel's letter of October 22, 2014. (Petitioner's appendix GGG). The letter is ambiguous as to a

motion for reconsideration. It appears that counsel is agreeing to so move should Bale's request for a CD of the oral argument on his appeal be denied. She then clearly and correctly explains that petitions for further review will depend on "the presence of any issues that meet criteria for a petition for review" and that she will make that decision after receipt of the Court of Appeals decision. Thus, at that pre-opinion time, Bale clearly knew of counsel's intentions with respect to further review. We do not know, from this record, of the reasons that counsel decided not to file a petition for review.

We do know however that Bale himself filed with the Supreme Court and that by order dated April 1, 2015 the Supreme Court denied review. We are left to surmise that Bale's appellate counsel knew there were insufficient issues to warrant review.

A criminal defendant has a right to effective assistance of counsel on his first appeal of right. *In re Pers. Restraint of Dalluge*, 152 Wn.2d 772, 787, 100 P.3d 279 (2004), citing *Evitts v. Lucey*, 469 U.S. 387, 396, 105 S.Ct. 830, 83 L.Ed.2d 821 (1985). To prevail on a claim of ineffective assistance of appellate counsel, the petitioner must demonstrate the merit of any legal issue appellate counsel raised inadequately or failed to raise and also show how he or she was prejudiced. *In re Pers. Restraint of Netherton*, 177 Wn.2d 798, 801, 306 P.3d 918 (2013). In *Netherton*, a clearly defined and ongoing line of cases would likely have worked to

Netherton's benefit had appellate counsel not essentially dropped the ball in failing to stay Netherton's appeal while other courts resolved the issue. But failure to raise all possible non-frivolous issues on appeal is not ineffective assistance, and the exercise of independent judgment in deciding what issues may lead to success is the heart of the appellate attorney's role. *Dalluqe*, 152 Wn.2d at 787.

Bale's claim neither addresses nor meets these standards. He fails to argue what if any meritorious arguments that appellate counsel failed to raise. He fails to argue that appellate counsel inadequately argued any issue that she raised. He fails to argue why counsel's decision to forego further review was not a correct exercise of her independent judgment. Moreover, since Bale has completely failed to raise additional meritorious issues, he provides no evidence from which this Court might find that appellate counsel's performance in any way prejudiced his right to an effective appeal as of right. Bale merely seeks to substitute his judgment for that of his appellate lawyer. This does not comport with the strong presumption that counsel's performance was sufficient. *In re Nichols*, *supra*. Bale proves neither deficient performance nor prejudice and this claim fails.

VII. CONCLUSION

For the foregoing reasons, Bale's conviction and sentence should be affirmed.

DATED July 21, 2016.

Respectfully submitted,

TINA R. ROBINSON
Prosecuting Attorney

A handwritten signature in black ink, appearing to read "John L. Cross", written over the typed name below.

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KITSAP COUNTY PROSECUTOR

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