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Court of Appeals  
Division II  
State of Washington  
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No. 51172-0-II

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

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STATE OF WASHINGTON,

Respondent,

v.

KENNETH WUCO,

Appellant.

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ON APPEAL FROM THE SUPERIOR COURT OF  
THE STATE OF WASHINGTON FOR PIERCE COUNTY

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REPLY BRIEF OF APPELLANT

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A. ARGUMENT

**Under the decision in *McFarland*, Mr. Wuco is entitled to remand for resentencing.**

Mr. Wuco was convicted of unlawful possession of a firearm and theft of the same firearm. As a consequence, under *State v. McFarland*, 189 Wn.2d 47, 399 P.3d 1106 (2017), the trial court had discretion to run the sentences concurrent. Nothing in this case distinguishes it from *McFarland*.

Nevertheless, in its response, the State contends the record does not show the trial court misunderstood that it possessed the discretion to impose an exceptional sentence below the standard range. Brief of Respondent at 5-8. Contrary to the State's contention, nothing in the record, even that portion quoted by the State, shows the trial court understood it possessed the discretion. The trial court expressed its opinion, supported by the parties, that the sentences were required to run consecutive. RP 555-56. The facts here are identical to those in *McFarland*. 189 Wn.2d at 50-51.

The State also argues imposition of an exceptional sentence and a DOSA sentence would be a hybrid sentence, which Division Three of this Court indicated the trial court was not authorized to impose. Brief of Respondent at 5, citing *State v. Murray*, 128 Wn.App. 718, 726, 116

P.3d 1072 (2005). But, that portion of the decision in *Murray* is *dicta* and has no legally binding significance. See *State v. Burch*, 197 Wn.App. 382, 403, 389 P.3d 685 (2016), *review denied*, 188 Wn.2d 1006 (2017) (“A statement is *dicta* when it is not necessary to the court’s decision in a case.”). In *Murray*, the Court reversed and remanded an exceptional sentence where the findings did not support the sentence. *Murray*, 128 Wn.App. at 725 (“[w]e vacate the sentence and remand for resentencing, allowing the trial court to exercise its discretion again in a manner consistent with this court’s opinion.”). Thus, what would happen on remand was not before the Court and should be ignored.

One fact the State neglects to address in its brief is that, offered a choice between a DOSA and a standard range sentence where the sentences run concurrent rather than consecutive, Mr. Wuco may have chosen the standard range sentence. However laudable the goals of a DOSA, the sentence does come with extensive and rather onerous requirements. See RCW 9.94A.662. The DOSA sentence Mr. Wuco received required 95.5 months of incarceration. CP 68. A standard range sentence where the sentences were concurrent would have a range of 87-116 months. CP 64. Thus, Mr. Wuco could have received

the same sentence without the onerous conditions imposed for a DOSA. Further, should Mr. Wuco fail to complete his DOSA, he could be required to do the entire sentence of 191 months. RCW 9.94A.660(7)(c); RCW 9.94A.662(3). Thus, Mr. Wuco very well may have chosen the standard range sentence over the DOSA. This fact shows why reversal and remand is necessary under *McFarland* and, alternatively, shows why counsel was ineffective for failing to argue for concurrent sentences.<sup>1</sup>

This Court should follow *McFarland* and remand for resentencing for the trial court to consider concurrent sentences.

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<sup>1</sup> While not moving to strike, counsel finds the State's demeaning and denigrating comments in the Conclusion section of its brief extremely objectionable, unprofessional, and personally offensive. Brief of Respondent at 14-15. The comments indicate a fundamental misunderstanding of the role of the parties. Under the Rules of Professional Conduct, counsel has an ethical duty to provide "competent representation," to "abide by a client's decisions concerning the objectives of representation, and to *zealously advocate*. RPC 1.1–1.3. *See also Strickland v. Washington*, 466 U.S. 668, 688, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)(counsel has an "overarching duty to advocate the client's cause.").

B. CONCLUSION

For the reasons stated in this Brief as well as the previously filed Brief of Appellant, Mr. Wuco asks this Court to remand his matter for resentencing.

DATED this 10<sup>th</sup> day of August 2018.

Respectfully submitted,

*s/Thomas M. Kummerow*

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# WASHINGTON APPELLATE PROJECT

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