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Division II
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NO. 51897-0-II

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

STATE OF WASHINGTON,

Respondent,

v.

SOPHEAP CHITH,

Appellant.

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

The Honorable Timothy L. Ashcraft, Judge

OPENING BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The trial court abused its discretion by failing to recognize that it had discretion to reimpose concurrent firearm enhancements following the Supreme Court's decision in *State v. McFarland*,¹ in which the Court held that a trial court has discretion to impose concurrent sentences for firearm related offenses in the form of an exceptional sentence downward, notwithstanding RCW 9.94A.589(1)(c).

2. Mr. Chith received ineffective assistance of counsel at sentencing.

3. Mr. Chith's right to be present was violated when the trial court entered a Motion and Order Correcting Judgment and Sentence (amending the April 15, 2016 Judgment and Sentence) on February 14, 2018 without the defendant's presence.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. The failure to exercise discretion constitutes an abuse of discretion. At Mr. Chith's resentencing hearing, the trial court erred in failing to properly consider its discretion to impose concurrent sentences for appellant's three firearm enhancements following the ruling in *State v. McFarland*? Should the case be remanded for

¹189 Wn.2d 47, 399 P.3d 1106 (2017).

resentencing, so the trial court may exercise its discretion in imposing a term of incarceration? Assignment of Error 1.

2. A criminal defendant's right to counsel includes the right to effective assistance of counsel at sentencing. Representation is constitutionally ineffective if it falls below an objective standard of reasonableness and results in prejudice to the defendant. After initially discussing whether the recent ruling in *State v. McFarland* authorized a sentencing court to order concurrent firearm enhancements and receiving permission to provide briefing, defense counsel did not brief or present argument in support of concurrent firearm enhancements. Did defense counsel's failure to argue for concurrent enhancements amount to deficient performance? Assignment of Error 2.

3. Did the entry of a Motion and Order Correcting Judgment and Sentence in Mr. Chith's absence, in which the overall sentence was modified, constitute a violation of Mr. Chith's right to be present? Assignment of Error 3.

C. STATEMENT OF THE CASE

1. Statement of facts and prior proceedings:

The State charged Sopheap Chith by amended information with 10 charges: (I) second degree assault with a firearm enhancement; (II) drive-by shooting; (III) unlawful possession of a stolen vehicle

with a firearm enhancement; (IV) second degree unlawful possession of a firearm; (V) reckless driving; (VI) hit and run; (VII) third degree driving with a suspended license; (VIII) violation of a court order with a firearm enhancement; (IX) first degree taking of a motor vehicle without permission with a firearm enhancement; and (X) witness intimidation with a firearm enhancement. A jury convicted Mr. Chith on all counts and the trial court subsequently dismissed the conviction for unlawful possession of a stolen vehicle, ruling it merged with taking a motor vehicle as charged in count IX. *State v. Chith*, No. 33002-8-III, 2015 WL 4164803, unpublished opinion dated July 9, 2015. Clerk's Papers 1-12.

On January 10, 2014, Mr. Chith was sentenced to 228 months of confinement with the sentence enhancements to run consecutive to each other and consecutive to the concurrently run underlying convictions. *Chith*, No. 33002-8-III (Slip. Op. at *2).

Mr. Chith appealed his witness intimidation and drive-by shooting convictions. *Chith*, No. 33002-8-III (Slip. Op. at *1). In an unpublished opinion, Division Three of this Court reversed Mr. Chith's witness intimidation conviction for insufficient evidence, held that a community custody condition imposing a substance abuse condition was improper, and remanded to the trial court for resentencing. *Chith*,

No. 33002–8–III (Slip. Op. at *5).

On remand, the trial court imposed the following sentences:

Count I	Second degree assault	84 months	36-month firearm enhancement
Count II	Drive by shooting	116 months	
Count VIII	Violation of a court order	60 months	18-month firearm enhancement
Count IX	First degree taking motor vehicle	96 months	36-month firearm enhancement

CP 26-27.

The court sentenced Mr. Chith to a total of 206 months and entered Judgment and Sentence As To Count I, II, IV, VIII, and IX Only on April 15, 2016. CP 24-44. Mr. Chith appealed and this Court found the sentences for the second degree assault, drive-by shooting, violation of a court order, and first degree taking a motor vehicle without permission exceeded their statutory maximums, and reversed the sentences and remanded to (1) resentence Mr. Chith on those counts, (2) to vacate the possession of a stolen vehicle conviction (Count III), and (3) to correct several scrivener's errors in the judgment and sentence. *State v. Chith*, 48913–9–II, 2017 WL 4251815,

unpublished opinion dated September 26, 2017.

2. Second resentencing hearing:

The case again came on for resentencing on January 12, 2018, the Honorable Timothy L. Ashcraft presiding. Report of Proceedings (RP) at 2-10, 2RP at 12-27.²

Defense counsel stated that he had met with Mr. Chith the previous day and requested a continuance in order to research the holdings in *State v. McFarland, supra*, and *In re Pers. Restraint of Mulholland*, 161 Wash.2d 322, 166 P.3d 677 (2007), copies of which counsel provided to the court. 1RP at 2. Judge Ashcraft established a briefing schedule to permit counsel time to file written materials and also engaged in a long colloquy with counsel regarding the Supreme Court cases. 1RP at 4. During the discussion Judge Ashcraft quoted the following portion of *McFarland*:

Building on the logic of *Mulholland*, we hold that in a case in which standard range consecutive sentencing for multiple firearm-related convictions “results in a presumptive sentence that is clearly excessive in light of the purpose of [the SRA],” a sentencing court has discretion to impose an exceptional, mitigated sentence by imposing concurrent firearm-related sentences. RCW 9.94A.535(1)(g).

1RP at 4, (quoting *McFarland*, 189 Wn.2d at 55).

Judge Ashcraft stated that in light of *Mulholland* and

²This brief refers to the verbatim reports of proceedings as follows: 1RP -January 12, 2018; and 2RP – February 9, 2018 (sentencing).

McFarland,

the question in my mind is, does the Court first--so the end result is discretion. But that sentence at least could imply that the Court first has to come to the conclusion that the sentence, the presumptive sentence, is clearly excessive in light of the purposes of the SRA before it even enters the realm of discretion. So that's my question is do you believe that, at least as far as what was held in *McFarland*, the prerequisite to the Court even considering discretion or having discretion is coming to the conclusion that the presumptive sentence is excessive?

1RP at 4-5.

After further discussion of the two Supreme Court decisions, Judge Ashcraft invited either party to address the issue in briefing. 1RP at 9.

The court reconvened for sentencing on February 9, 2018. 2RP at 12-27. Defense counsel told the court that after reading *Mulholland* and *McFarland*, "the two cases differentiates between a gun charge and a deadly weapon enhancement or a gun enhancement," and that he had not briefed the issue regarding sentencing court discretion to order firearm enhancements to be served concurrently. 2RP at 13. Defense counsel stated that Mr. Chith wanted to address the court regarding imposition of consecutive firearm enhancements. 2RP at 13-14. Mr. Chith argued that the court has discretion to order an exceptional sentence downward and also to impose a concurrent sentence. 2RP at 23-24.

Judge Ashcraft reduced the base sentence for drive-by shooting (count II) from 116 months to 114 months, followed by six months of community custody. 2RP at 26. The court did not address *McFarland* and instead ruled:

I'm looking at this as far as, on the community custody, it would be four months if I gave the 116 [months], which is very short. But on the other hand, I'm not willing to reduce the sentence in a great deal. So I'm going to sentence to 114 months, and six months of community custody on the drive-by shooting change. All the firearms are to run consecutively as per statute. And any non-mandatory fees are waived.
2RP at 25-26.

The court entered a Motion and Order Correcting Judgment and Sentence on February 9, 2018, in which numerous corrections were made to the April 15, 2016 Judgment and Sentence. CP 91-93; 2RP at 25-26.

Mr. Chith filed notice of appeal on February 9, 2018. 2RP at 26; CP 90; Following entry of the order and after Mr. Chith had been returned to the Department of Corrections, the parties entered a second Motion and Order Correcting Judgment and Sentence on February 14, 2018. CP 99-101. The corrected order stated in relevant part that the prior number of months in confinement of 206 is corrected to reflect that the “[a]ctual number of months in total confinement order is: 202 months.” CP 99.

This appeal follows.

D. ARGUMENT

1. REMAND FOR RESENTENCING IS REQUIRED BECAUSE THE COURT DID NOT RECOGNIZE ITS DISCRETIONARY AUTHORITY TO ORDER CONCURRENT ENHANCEMENTS BASED ON *McFARLAND*.

- a. The trial court abused its discretion by failing to recognize its authority to exercise discretion under *McFarland*.

This Court should again reverse the sentence and remand for resentencing. The jury found firearm enhancements in count I (second degree assault), count VIII (violation of a protection order), and count IX (first degree taking a motor vehicle). CP 26-27. The case came on for resentencing on January 12, 2018. 1RP at 2-10. Defense counsel requested a continuance in order to brief the court's ability to impose concurrent enhancements in light of the Supreme Court decisions in *McFarland* and *Mulholland*. 1RP at 2. When the court reconvened on February 9, however, defense counsel had not briefed the issue and did not advance argument on the issue. 2RP at 12-14.

The trial court ordered the sentences for the firearm enhancements in counts I, VIII and IX be served consecutively to each other pursuant to RCW 9.94A.533. 2RP at 26; CP 84-87, 99-101. This resulted in a remarkably lengthy sentence totaling 202 months,

or almost 17 years in prison, almost half of which consists of firearm enhancements. CP 99.

A defendant generally cannot appeal a standard range sentence. RCW 9.94A.585(1); *State v. Williams*, 149 Wn.2d 143, 146, 65 P.3d 1214 (2003). But a 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). The “[f]ailure to exercise discretion is an abuse of discretion.” *In re Detention of Mines*, 165 Wn. App. 112, 125, 266 P.3d 242 (2011) (quoting *Bowcutt v. Delta N. Star Corp.*, 95 Wn. App. 311, 320, 976 P.2d 643 (1999)). Thus, appellate courts reverse and remand for resentencing when trial courts either refuse to exercise the discretion conferred upon them by statute or wrongly believe statutes prohibit the exercise of discretion. *E.g. State v. Grayson*, 154 Wn.2d 333, 342, 111 P.3d 1183 (2005) (reversing where trial court categorically refused to consider Drug Offender Sentencing Alternative because it believed the program was underfunded).

“When a trial court is called on to make a discretionary sentencing decision, the court must meaningfully consider the request in accordance with the applicable law.” *McFarland*, 189 Wn.2d at 56 (citing *Grayson*, 154 Wn.2d at 342). “A trial court errs when it

operates under the ‘mistaken belief that it did not have the discretion to impose a mitigated exceptional sentence for which [a defendant] may have been eligible.’” *McFarland*, 189 Wn.2d at 56 (quoting *State v. Garcia-Martinez*, 88 Wn. App. 322, 330, 944 P.2d 1104 (1997), review denied, 136 Wn.2d 1002, 966 P.2d 902 (1998)). Based on the defense counsel's failure to advance the issue, the trial court did not evaluate whether *McFarland* permits firearm enhancements to be served concurrently.

The Supreme Court’s opinion in *Mulholland* is instructive. See *In re the Personal Restraint of Mulholland*, 161 Wn.2d 322, 166 P.3d 677 (2007). In *Mulholland*, the Court recognized that “notwithstanding the language of [RCW 9.94A.589(1)(b)], a sentencing court may order that multiple sentences for serious violent offenses run concurrently as an exceptional sentence if it finds there are mitigating factors justifying such a sentence.” *Mulholland*, 161 Wash.2d at 327-28. The trial court concluded that it lacked discretion to impose concurrent sentences for multiple serious violent offenses. *Id.* at 324. This Court granted the defendant’s PRP, holding that the trial court erred because the statute permitted concurrent sentences under the exceptional sentence provision. *Id.* The Supreme Court affirmed. *Id.*

As to the statutory question, the Court held, “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." *Mulholland*, 161 Wn.2d at 331. The trial court erred by failing to recognize that it had such discretion. *Id.* at 332. Furthermore, even though the trial court did not state with certainty that it would have imposed concurrent sentences had it realized the statutes afforded it discretion to do so, remand was required 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." *Id.* at 333.

Six months before Mr. Chith's resentencing on February 9, 2018, the Washington Supreme Court issued its opinion in *State v. McFarland*, 189 Wn.2d 47, 399 P.3d 1106 (2017). In that case, the Court held a trial court does have discretion to impose concurrent sentences for firearm related offenses in the form of an exceptional sentence downward, notwithstanding RCW 9.94A.589(1)(c). *McFarland*, 189 Wn.2d at 55. Mr. Chith submits that the reasoning in *McFarland* supports a similar interpretation of RCW 9.94A.533 and that he must be resentenced in light of the Court's ruling in *McFarland*.

In that case, McFarland was convicted of over a dozen counts

of unlawful possession and theft of firearms, which were sentenced consecutively pursuant to statute, for a total term of 237 months confinement. *McFarland*, 189 Wn.2d at 49. McFarland did not seek an exceptional sentence, believing the law did not permit one. *Id.* McFarland requested the low end of the standard range, which the trial court imposed. *Id.* Division Three affirmed the sentence in an unpublished opinion. *Id.*

The Supreme Court ordered a new sentencing hearing, holding that a defendant convicted of multiple firearm offenses could get an exceptional sentence when the multiple offense policy resulted in “clearly excessive” punishment. *Id.* at 53-55. The Court stated:

[b]uilding on the logic of *Mulholland*, in a case in which standard range consecutive sentencing for multiple firearm-related convictions “results in a presumptive sentence that is clearly excessive in light of the purpose of [the SRA],” a sentencing court has discretion to impose an exceptional, mitigated sentence by imposing concurrent firearm-related sentences. RCW 9.94A.535(1)(g).

McFarland, 189 Wn.2d at 55.

The Court excused McFarland's failure to request an exceptional sentence due to her and the trial court's erroneous belief that one was unavailable. *Id.* at 55-56. The Court reasoned that since McFarland had agreed that a consecutive sentence was required, the trial court had never been advised of its potential use of discretion. *Id.* at 57-58.

In this case, the sentencing court apparently believed it had no discretion under RCW 9.94A.533 to impose concurrent sentences. 2RP at 26. This was compounded by defense counsel's failure to argue to the court that Mr. Chith's sentence was excessive and that the firearm enhancements should be served concurrently under *McFarland*, despite the sentencing court's extensive discussion of that precise potential argument on January 12, 2018 and the court's invitation for the parties to submit briefing on the issue. 1RP at 4, 7, 9.

Mr. Chith was sentenced to three consecutive firearm enhancements under RCW 9.94A.533(3)(e). The statute provides:

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

RCW 9.94A.589, the statute addressed in *McFarland*, contains similarly restrictive language. The statute provides in relevant part:

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

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

A discretionary sentence within the standard range is

reviewable where the sentencing court refused to exercise its discretion or where it relied on an impermissible basis for refusing to impose an exceptional sentence below the standard range. *McFarland*, 189 Wn.2d at 56. A court errs when it refuses categorically to impose an exceptional mitigated sentence, or when it operates under the mistaken belief it had no discretion to impose a mitigated sentence for which the defendant may have been eligible. *Id.* Under *McFarland*, a defendant must be resentenced where the record indicates “that it was a possibility” the court would have imposed a mitigated exceptional sentence had it recognized its discretion to do so. *Id.* at 58. If the reviewing court is “unsure” whether the sentencing court would have imposed the same sentence had it known an exceptional sentence was available, the court must remand for resentencing. *Id.*

Here, Mr. Chith must be resentenced. The sentencing court never considered, nor was it asked to consider, whether concurrent sentences for the firearm enhancements were appropriate because (1) the court apparently erroneously believed it had no discretion to impose concurrent firearm enhancements, and (2) because the argument for concurrent sentences was not made by defense counsel.

2RP at 13-14. It is possible the court would have imposed an exceptional sentence had it recognized its discretion to do so.

A mitigated exceptional sentence was appropriate in light of the “central” values of the SRA of proportionality and consistency in sentencing. *McFarland*, 189 Wn.2d at 57. Similarly, in this case Mr. Chith received a very high sentence of almost 17 years, which consisted of 90 months for the three firearm enhancements. CP 31. Mr. Chith’s sentence was particularly high given that Counts VIII and IX, for which a total of 54 months were imposed for firearm enhancements alone, are a Class C felony and a Class B felony, respectively.

In sum, the court erred in failing to consider imposition of concurrent sentences for the three enhancements in light of disproportionately high sentence of 202 months. Based on the discussion of *McFarland* and *Mulholland* on January 12, 2018, the sentencing court indicated that it would have been at least receptive to hearing argument that under the reasoning of *McFarland* and *Mulholland* should be extended to cases involving firearm enhancements. Given the court’s statements and invitation for further briefing, it is possible the court would have imposed concurrent

firearm enhancements had the argument been propounded by defense counsel. Therefore, Mr. Chith must be resentenced. See *McFarland*, 189 Wn.2d at 58.

2. **DEFENSE COUNSEL'S FAILURE TO ARGUE THAT MCFARLAND MAY PROVIDE A SENTENCING COURT DISCRETION TO ORDER CONCURRENT SENTENCES FOR FIREARM ENHANCMENTS VIOLATED MR. CHITH'S RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL.**

The federal and state constitutions provide the accused with the right to representation of counsel and to due process of law. U.S. Const, amends. 6, 14; Wash. Const., art. I, § 3, 22. Sentencing is a critical stage of the proceeding where the defendant is entitled to counsel. *State v. Saunders*, 120 Wn.App. 800, 825, 86 P.3d 323 (2004); *In re Morris*, 34 Wn.App. 23, 658 P.2d 1279 (1983). See *State v. Ford*, 137 Wn.2d 472, 484, 973 P.2d 452 (1999) ("Sentencing is a critical step in our criminal justice system. The fact that guilt has already been established should not result in indifference to the integrity of the sentencing process.").

The right to counsel necessarily includes the right to the effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *In re Pers. Restraint of*

Brett, 142 Wn.2d 868, 873, 16 P.3d 601 (2001). A defendant's sentencing may be reversed due to ineffective assistance of counsel if he can demonstrate, based upon the entire record, (1) counsel's performance was deficient, and (2) there is a reasonable probability that, but for counsel's unprofessional errors, the outcome would have been different. *Strickland*, 466 U.S. at 693-94. At a minimum, competent counsel is expected to be familiar with the facts of the case and to research the applicable law. See *Brett*, 142 Wn.2d at 873 (at a minimum counsel must conduct a reasonable investigation in order to determine how best to represent the client).

Ineffective assistance of counsel is an issue of constitutional magnitude that can be raised for the first time on appeal. *State v. Kylo*, 166 Wn.2d 856, 862, 215 P.3d 177 (2009); RAP 2.5(a).

Counsel's performance is deficient if it falls below an objective standard of reasonableness. *Kylo*, 166 Wn.2d at 862. Deficient performance prejudices the accused when there is a reasonable probability that it affected the outcome of the proceeding. *Id.* An attorney has "the duty to research the relevant law." *Kylo*, 166 Wn.2d at 862. An unreasonable failure to do so constitutes deficient performance. *Id.*, at 868.

Here, defense counsel provided ineffective assistance by failing to prepare briefing and present argument in support of

concurrent firearm enhancements in counts I, VIII, and IX. As argued above, the sentencing court anticipated argument from counsel regarding extension of *McFarland* to cases involving firearm enhancements, established a briefing schedule for counsel, and continued the sentencing hearing. By the time of hearing on February 9, defense counsel had entirely abandoned the argument, leaving Mr. Chith to argue pro se as best he could for concurrent sentencing enhancements. 2RP at 23-24.

Rather than utterly abandoning the argument, counsel should have drawn the sentencing court's attention to the facts of *McFarland* the similarities between the firearm offense statutes and firearm enhancement statutes. Counsel should also have pointed out the disproportionate length of Mr. Chith's sentence in support of an argument that the sentence with enhancements was excessive.

Counsel provided deficient performance by failing to argue that the relatively new *McFarland* case provides grounds for extension of the ruling to firearm enhancements. Defense counsel had no valid strategic reason for failing to present Mr. Chith's position in the best possible light and to analogize the facts of his case to that of *McFarland*.

Mr. Chith was prejudiced by his attorney's deficient performance. *Kyllo*, 166 Wn.2d at 862. The sentencing judge gave

every indication of being receptive to the argument that *McFarland* authorizes a sentencing court to order concurrent enhancements under some circumstances.

Mr. Chith's enhancements totaled 90 months, 44.5 percent of his total sentence of 202 months. If two or more enhancements had been ordered to be served concurrent, his overall sentence would have been significantly reduced.

Mr. Chith's attorney provided ineffective assistance of counsel by failing to brief and argue for extension of the reasoning of *McFarland*. Mr. Chith's case must be remanded for resentencing.

3. ENTRY OF THE ORDER CORRECTING THE JUDGMENT AND SENTENCE ON FEBRUARY 14, 2018 DENIED MR. CHITH HIS CONSTITUTIONAL RIGHT TO BE PRESENT

Pursuant to the Sixth Amendment's confrontation clause and the due process clauses of the Fifth and Fourteenth Amendments, the state and federal constitutions guarantee a defendant the right to be present at all critical stages of a criminal proceeding, including sentencing. U.S. Const. amends. 6, 14; Const. art. 1, §§ 3, 22. *State v. Irby*, 170 Wash.2d 874, 880, 246 P.3d 796 (2011); *State v. Duvall*, 86 Wn. App. 871, 874 n.3, 940 P.2d 671 (1997) (citing *United States v. Gagnon*, 470 U.S. 522, 105 S. Ct. 1482, 84 L. Ed. 2d 486 (1985),

and *State v. Walker*, 13 Wn.App. 545, 556, 536 P.2d 657 (1975)); and *State v. Pruitt*, 145 Wn. App. 784, 798, 187 P.3d 326 (2008). Although the right to be present originated in the confrontation clause of the Sixth Amendment, the United States Supreme Court has applied the due process clause of the Fourteenth Amendment in situations where defendants are not actually confronting witnesses or evidence against them. See *Gagnon*, 470 U.S. at 526; *Rushen v. Spain*, 464 U.S. 114, 117, 104 S.Ct. 453, 78 L.Ed.2d 267 (1983).

The defendant's presence is constitutionally required "whenever his presence has a relation, reasonably substantial, to the fullness of his opportunity to defend against the charge." *Snyder v. Massachusetts*, 291 U.S. 97, 105–06, 54 S.Ct. 330, 78 L.Ed. 674 (1934), overruled in part on other grounds sub nom. *Malloy v. Hogan*, 378 U.S. 1, 84 S.Ct. 1489, 12 L.Ed.2d 653 (1964); see also *Gagnon*, 470 U.S. at 526, 105 S.Ct. 1482. A defendant, however, has no right to be present at proceedings involving " 'legal' " or " 'ministerial' " matters. *Irby*, 170 Wash.2d at 881–82, 246 P.3d 796 (quoting *In re Pers. Restraint of Pirtle*, 136 Wash.2d 467, 484, 965 P.2d 593 (1998)).

As noted in Section 2, *supra*, sentencing is a critical stage of a

criminal case. *State v. Bandura*, 85 Wn.App. 87, 97, 931 P.2d 174, rev. denied, 132 Wn.2d 1004 (1997). Washington also has a rule-based right to be present at sentencing. CrR 3.4(a);³ *State v. Hammond*, 121 Wn.2d 787, 792-93, 854 P.2d 637 (1993).

Whether a defendant's constitutional right to be present has been violated is a question of law, subject to de novo review. *Cf. State v. Strode*, 167 Wash.2d 222, 225, 217 P.3d 310 (2009).

At the sentencing hearing on February 9, 2018, the court entered a Motion and Order Correcting Judgment and Sentence, correcting multiple errors in the April 15, 2016 judgment and sentence. CP 84-87. On February 14, 2018, after Mr. Chith was returned to the Department of Corrections, the state and defense filed a Motion and Order Correcting Judgment and Sentence correcting *nunc pro tunc* the total of the base sentences and enhancements contained in the judgment and sentence. The February 14, 2018 order provides in part:

- 1) That Page 8 of the Judgment and Sentence, Section 4.5 reflects “Actual number of months of total confinement order is: 206 months” and should reflect “Actual number of months of total confinement order is: 202 months.”

³CrR(a) provides: The defendant shall be present at the arraignment, at every stage of the trial including the empaneling of the jury and the return of the verdict, and at the imposition of sentence, except as otherwise provided by these rules, or as excused or excluded by the court for good cause shown.

- 2) All other terms and conditions of the original Judgment and Sentence as well as the order correcting judgment and sentence shall remain in full force and effect as if set forth in full herein. IT IS FURTHER ORDERED that the Clerk of the Court shall attach a copy of this order to the judgment and sentence filed on April 15, 2016 so that any one obtaining a copy of the judgment and sentence will also obtain a copy of this order.

CP 99-100.

A defendant has a constitutional right to be present at sentencing, including resentencing. *State v. Rodriguez Ramos*, 171 Wn.2d 46, 48, 246 P.3d 811 (2011) (citing *State v. Rupe*, 108 Wn.2d 734, 743, 743 P.2d 210 (1987)); *United States v Villano*, 816 F.2d 1448, 1452 (10th Cir. 1987). Mr. Chith also had a right to be present when the the judgment and sentence is amended. *United States v. Johnson*, 315 F.2d 714, 716-17 (2nd Cir. 1963) (defendant entitled to be present at sentencing hearing even where court merely “affirmed” sentence imposed at earlier hearing). Here, the brief hearing on February 14 involved more than merely a ministerial correction—the amended order modified a key element of the Judgment and Sentence—the overall length of Mr. Chith’s sentence. Although the modification was ostensibly in Mr. Chith’s favor, he made clear on the record that he contested the overall length of the sentence imposed. 2RP at 13-14. Mr. Chith had a constitutional and statutory right to be present for entry of the amended order insofar as the order

pertained to the total number of months of DOC confinement.

The court violated Mr. Chith's right to be present on February 14 when it signed the order amending his sentence without Mr. Chith being present. The proper remedy is to vacate the February 14 order and remand for resentencing.

E. CONCLUSION

For the reasons discussed above, Mr. Chith respectfully requests this court remand his case for re-sentencing.

DATED: September 28, 2018.

Respectfully submitted,
THE TILLER LAW FIRM

A handwritten signature in black ink, appearing to read "Peter B. Tiller", is written over a horizontal line.

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CERTIFICATE OF SERVICE

The undersigned certifies that on September 28, 2018, that this Appellant's Opening Brief was sent by the JIS link to Mr. Derek M. Byrne Clerk of the Court, Court of Appeals, Division II, 950 Broadway, Ste. 300, Tacoma, WA 98402, and Ms. Michelle Hyer, Pierce County Prosecutor and copies were mailed by U.S. mail, postage prepaid, to the following Appellant:

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This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Centralia, Washington on September 28, 2018.



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