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COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

ANTHONY T. CLARK, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Elizabeth Martin

No. 11-1-03699-7

Brief of Respondent

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A. INTRODUCTION

Anthony Clark shot a sixteen-year-old boy in the back of the head, dumped his body in a trash can, and stole his cocaine. He was twenty years old at the time. At sentencing, Clark requested a low-end standard range sentence, consistent with the State's recommendation. Clark did not request a mitigated exceptional sentence on any basis, including youth. The trial court followed the joint recommendation of the parties and imposed a low-end standard range sentence.

The trial court did not abuse its discretion by sentencing Clark within the standard range. There is no basis to remand this case for resentencing because a standard range sentence is not subject to appellate review. Clark did not request a mitigated exceptional sentence based on youth, and the trial court did not indicate that it lacked the authority to impose such a sentence. Further, Clark fails to show that his attorney was ineffective for failing to advise the trial court of its authority to impose an exceptional sentence that Clark was not requesting. Clark's attorney researched possible mitigating factors and did not believe any applied to Clark's case.

The trial court also did not abuse its discretion in recognizing that the firearm enhancements should run consecutive. The sentence imposed

by the court is consistent with the law, and there is no basis to remand for resentencing. Finally, the trial court properly imposed collection costs and costs of supervision in this case. But this Court should remand for the trial court to amend the interest accrual provision in the judgment and sentence to reflect the recent change in the law.

B. RESTATEMENT OF THE ISSUES

1. IS CLARK PRECLUDED FROM APPEALING A STANDARD RANGE SENTENCE IMPOSED BY THE TRIAL COURT AT THE JOINT RECOMMENDATION OF THE PARTIES?
2. SHOULD THIS CASE BE REMANDED FOR RESENTENCING WHERE CLARK DID NOT REQUEST A MITIGATED EXCEPTIONAL SENTENCE BASED ON YOUTH AND WHERE THE TRIAL COURT GAVE NO INDICATION THAT IT LACKED THE DISCRETION TO IMPOSE A MITIGATED EXCEPTIONAL SENTENCE?
3. HAS CLARK MET HIS BURDEN TO SHOW THAT HIS ATTORNEY WAS INEFFECTIVE FOR FAILING TO ADVISE THE COURT THAT IT HAD THE DISCRETION TO IMPOSE AN EXCEPTIONAL SENTENCE DOWNWARD BASED ON YOUTH WHERE CLARK WAS NOT REQUESTING SUCH A MITIGATED SENTENCE?
4. DID THE TRIAL COURT ABUSE ITS DISCRETION BY RECOGNIZING THAT FIREARM ENHANCEMENTS SHOULD RUN CONSECUTIVELY FOR ADULT OFFENDERS?

5. SHOULD THIS COURT REMAND FOR THE TRIAL COURT TO STRIKE COLLECTION COSTS AND COSTS OF SUPERVISION IN THE JUDGMENT AND SENTENCE WHERE CLARK DID NOT OBJECT TO THESE COSTS BELOW AND WHERE THESE COSTS ARE NOT DISCRETIONARY?
6. SHOULD THIS COURT REMAND FOR THE TRIAL COURT TO AMEND THE INTEREST ACCRUAL LANGUAGE IN THE JUDGMENT AND SENTENCE TO REFLECT A RECENT CHANGE IN THE LAW?

C. STATEMENT OF THE CASE

1. INITIAL TRIAL AND APPEAL

In 2011, Anthony Clark killed 16-year-old D.D.¹ with a single shot to the back of his head and dumped his body in a garbage can. CP at 86-88; *State v. Clark*, No. 45103-4-II, 2015 WL 388513 at *1 (Wash. Ct. App. June 23, 2015),² *affirmed* 187 Wn.2d 641, 389 P.3d 462 (2017). Clark then asked his neighbors to help sell the cocaine he had stolen from D.D. and to hide his body. CP at 87-89. Clark was 20 years old at the time of these crimes. CP at 10. A jury found Clark guilty of murder in the first degree, robbery in the first degree, unlawful possession of a controlled substance with intent to deliver, and unlawful possession of a firearm in

¹ D.D. was a minor at the time of the murder; initials are used to protect his privacy.

² The decision of the Court of Appeals is unpublished and has no precedential value. The opinion is cited only for the factual and procedural history of Clark's case. *See* GR 14.1(a).

the second degree. CP at 10-11. The jury returned a special verdict form finding firearm sentencing enhancements for three counts. CP at 10-11.

At sentencing, the State requested a standard range sentence. CP at 158-67; 6/14/13 RP at 5-9, 16-17. Clark requested an exceptional sentence downward, arguing that his low IQ and developmental disability impaired his capacity to appreciate the wrongfulness of his conduct and to conform his conduct to the law. CP at 152-57; 6/14/13 RP at 17-19.³ The trial court denied Clark's request for an exceptional sentence downward, ruling that Clark had not met the standard to mitigate the sentence. 6/14/13 RP at 22. The trial court sentenced Clark to the minimum of the standard range — a total of 447 months with the three consecutive firearm enhancements. CP at 11-15; 6/14/13 RP at 22-23.

Clark raised several issues on appeal. *See Clark*, 2015 WL 388513 at *2. The Court of Appeals affirmed all convictions except for the robbery conviction, which it reversed and remanded based on an instructional error. *Id.* at *2-9. The Supreme Court affirmed. *Clark*, 187 Wn.2d 641.

³ For the Court's convenience, citations to the Verbatim Report of Proceedings (RP) are consistent with Clark's citation system: 1RP refers to the seven consecutively paginated volumes from the 2018 trial; 2RP refers to the August 24, 2018 sentencing transcript; and all other RPs from the prior appeal reference the date of the hearing and/or trial. *See* Brief Of Appellant, at 3 n.2, at 5 n.3.

2. ROBBERY RETRIAL AND RESENTENCING

On remand, Clark waived his right to a jury trial, and the court held a bench trial on the robbery charge. CP at 86; 1RP at 441. The trial court found Clark guilty of robbery in the first degree and determined that he was armed with a firearm during the robbery. CP at 91; 1RP at 442-43.

In August 2018, the trial court resentenced Clark on all counts. 2RP 4-6; CP at 95-106. The State requested that the court impose the same minimum standard range sentence that it imposed after the first trial. 2RP at 6-10. The State noted that Clark was only 20 years old when he committed the crimes, but explained that the court was not required to consider “the juvenile factors” because he was not a juvenile. 2RP at 9. Clark’s attorney explained that he researched the mitigating factors and did not find “anything that was even remotely applicable here, mainly because my client was, at the time, 20 years old.” 2RP at 11. He agreed that “the juvenile factors do not come into play.” 2RP at 11. Clark concurred with the State’s recommendation of a low end standard range sentence on all counts and that this is an “appropriate” sentence. 2RP at 13.

The trial court followed the joint recommendation of the parties and sentenced Clark to the low end of the standard range on all counts plus the firearm sentencing enhancements. 2RP at 14-15; CP at 96-100. The

trial court referenced the sentence previously imposed prior to appellate review and noted that “there were a lot of factors that went into that including the relative youth of Mr. Clark which is also balanced against the extreme youth of the victim.” 2RP at 14. The court noted other factors, including Clark’s cognitive abilities, that were before the prior sentencing court. 2RP at 14. The court concluded that it believed the low end of the standard range is an “appropriate sentence” based on all of the circumstances, including the fact that there were multiple firearm sentencing enhancements. 2RP at 14-15.

The court imposed a sentence of 447 months, which included the firearm sentencing enhancements. CP at 99-100. The trial court ordered restitution and the mandatory victim penalty assessment, but waived “all other fees in this case.” 2RP at 15-16; CP at 97-98. Based on the defendant’s indigency, the court ordered that payment of nonmandatory legal financial obligations is inappropriate. CP at 97. Clark timely appealed. *See* CP at 109.

D. ARGUMENT

1. CLARK IS PRECLUDED FROM APPEALING
THE STANDARD RANGE SENTENCE
IMPOSED BY THE COURT AT THE JOINT
RECOMMENDATION OF THE PARTIES

Clark is precluded from appealing the standard range sentence imposed by the trial court at the joint recommendation of the parties. The trial court properly exercised its discretion to impose a sentence at the low-end of the standard range, and Clark is not entitled to appeal that ruling.

A trial court does not abuse its discretion as a matter of law by sentencing a defendant within the sentencing range set by the Legislature. *State v. Williams*, 149 Wn.2d 143, 146, 65 P.3d 1214 (2003). Generally, a sentence within the standard range is not subject to appellate review. RCW 9.94A.585(1); *Williams*, 149 Wn.2d at 146. A defendant may appeal a standard range sentence only if the trial court violated the constitution or failed to comply with the procedural requirements of the Sentencing Reform Act (SRA). *State v. Osman*, 157 Wn.2d 474, 481-82, 139 P.3d 334 (2006).

The trial court may impose a sentence outside the standard sentence range if it finds “substantial and compelling reasons justifying an exceptional sentence.” RCW 9.94A.535. Mitigating circumstances justifying a sentence below the standard range must be established by a

preponderance of the evidence. RCW 9.94A.535(1). Although every defendant is entitled to ask the court for an exceptional sentence downward and to have the court consider the request, no defendant is entitled to such a sentence. *State v. Grayson*, 154 Wn.2d 333, 342, 111 P.3d 1183 (2005); see *State v. McFarland*, 189 Wn.2d 47, 56, 399 P.3d 1106 (2017) (when a court is called on to make a discretionary sentencing decision, it must meaningfully consider the request in accordance with the applicable law).

A trial court abuses its discretion when “it refuses categorically to impose an exceptional sentence below the standard range under any circumstances.” *Grayson*, 154 Wn.2d at 342. A trial court also abuses its discretion if it fails to exercise its discretion because it incorrectly believes it is not authorized to do so. *State v. O’Dell*, 183 Wn.2d 680, 696-97, 358 P.3d 359 (2015). But a trial court that has considered the facts and concluded that there is no factual or legal basis for an exceptional sentence has exercised its discretion, and the defendant cannot appeal that ruling. *State v. Garcia-Martinez*, 88 Wn. App. 322, 330-31, 944 P.2d 1104 (1997).

This Court's unpublished decision in *State v. George*, No. 46705-4-II, 2017 WL 700786 (Wash. Ct. App. Feb. 22, 2017) is instructive.⁴ In *George*, this Court held that the defendant waived any challenge to his standard range sentence by failing to request an exceptional sentence downward based on youth at sentencing. *George*, 46705-4-II, slip op. at *10-11. This Court held that the defendant failed to show that his standard range sentence is appealable. *Id.* at *11. Similar to the defendant in *George*, Clark fails to show that his standard range sentence is appealable. Clark did not request an exceptional sentence based on youth. 2RP at 13. Rather, he requested that the court follow the State's recommendation of a low-end standard range sentence and argued that this is an appropriate sentence. 2RP at 13. The trial court followed the joint recommendation of the parties and imposed a low-end standard range sentence, agreeing that this is an appropriate sentence based on all of the circumstances. 2RP at 13-15; CP at 96-100.

Further, the trial court neither refused to consider a mitigated sentence nor indicated a lack of discretion to impose such a sentence had one been requested. The trial court did not abuse its discretion by

⁴ Unpublished cases have no precedential value and are not binding on any court. An unpublished case filed after March 1, 2013 may be cited as non-binding authority and may be accorded such persuasive value as this Court deems appropriate. GR 14.1(a).

sentencing Clark within the standard range, and this standard range sentence is not subject to appellate review.

2. THERE IS NO BASIS TO REMAND THIS CASE FOR RESENTENCING BECAUSE CLARK DID NOT REQUEST A MITIGATED SENTENCE BASED ON YOUTH AND THE TRIAL COURT DID NOT INDICATE THAT IT LACKED DISCRETION TO IMPOSE SUCH A SENTENCE

In certain cases, an adult defendant's youth may amount to a substantial and compelling reason to mitigate a sentence if it significantly impairs his capacity to appreciate the wrongfulness of his conduct or conform his conduct to the law. *O'Dell*, 183 Wn.2d at 696. But age is not a per se mitigating factor automatically entitling every youthful defendant to a mitigated exceptional sentence. *Id.* at 695. And nothing in the law requires an adult defendant to raise youth as a mitigating factor if the facts do not support such mitigation. Here, Clark did not request a mitigated sentence based on youth, and the trial court did not indicate that it lacked discretion to impose such a sentence. Thus, there is no basis to remand the case for resentencing.

Relying on several United States Supreme Court decisions citing studies establishing a link between youth and decreased criminal

culpability,⁵ the Washington Supreme Court noted that “age may well mitigate a defendant’s culpability, even if that defendant is over the age of 18.” *O’Dell*, 183 Wn.2d at 695. In *Miller*, *Graham*, and *Roper*, the Court recognized that the neurological differences between adolescent and mature brains make young offenders, in general, less culpable for their crimes. *O’Dell*, 183 Wn.2d at 692. *O’Dell* explained that these differences *might* justify a trial court’s finding that youth diminished a defendant’s culpability. *Id.* at 693.

In *O’Dell*, the defendant asked the trial court to impose an exceptional sentence downward because his youth significantly impaired his capacity to appreciate the wrongfulness of his conduct or conform his conduct to the law. *Id.* at 685. The trial court acknowledged this argument, but believed it was prohibited from considering youth as a mitigating factor based on *State v. Ha’mim*, 82 Wn. App. 139, 916 P.2d 971 (1996), *aff’d*, 132 Wn.2d 834, 940 P.2d 633 (1997). *O’Dell*, 183 Wn.2d at 685-86. The Court held that youth can be a mitigating factor that diminishes a defendant’s culpability and supports an exceptional sentence downward.

⁵ *Miller v. Alabama*, 567 U.S. 460, 132 S. Ct. 2455, 183 L. Ed. 2d 407 (2012) (holding that the constitution forbids a sentencing scheme mandating life without parole for juveniles); *Graham v. Florida*, 560 U.S. 48, 130 S. Ct. 2011, 176 L. Ed. 2d 825 (2010) (holding that the constitution prohibits a life sentence without parole for juvenile nonhomicide offenders); *Roper v. Simmons*, 543 U.S. 551, 125 S. Ct. 1183, 161 L. Ed. 2d 1 (2005) (holding that the constitution forbids capital punishment for juvenile offenders).

O'Dell, 183 Wn.2d at 696-99. Because the trial court believed it was prohibited from considering youth as a mitigating factor, the Court remanded for the trial court to meaningfully consider whether youth diminished the defendant's culpability. *Id.* at 696-97.

O'Dell clarified that *Ha'mim* did not bar courts from considering a defendant's youth at sentencing, but instead held only that there must be evidence that youth, in fact, diminished the defendant's culpability. *Id.* at 689. As recognized by our Supreme Court, the statutory provision involving the defendant's capacity to appreciate the wrongfulness of his conduct or conform his conduct to the law has always provided the opportunity to raise youth as the basis for a mitigated sentence. *In re Pers. Restraint of Light-Roth*, 191 Wn.2d 328, 336, 422 P.3d 444 (2018).

Clark argues that his case should be remanded for resentencing for the trial court to meaningfully consider a mitigated sentence based on youth. But the cases he relies on for this assertion involve defendants who *requested* the trial court impose a mitigated exceptional sentence based on youth and the court mistakenly believed it did not have the discretion to do so. *See O'Dell*, 183 Wn.2d at 685; *see also Solis-Diaz*, 194 Wn. App. 129, 132-33, 376 P.3d 458 (2016), *reversed on other grounds*, 187 Wn.2d 535, 387 P.3d 703 (2017).

In *O'Dell*, the Court remanded for resentencing because the trial court misinterpreted the law and erroneously believed it could not impose a mitigated sentence based on youth. *O'Dell*, 183 Wn.2d at 696-97. Similarly, in *Solis-Diaz*, the case was remanded because the trial court believed it was prohibited from considering the defendant's request for a mitigated sentence based on youth. *Solis-Diaz*, 194 Wn. App. at 133-35. Here, Clark never requested an exceptional sentence based on youth, and the trial court did not misinterpret the law. *O'Dell* and *Solis-Diaz* are distinguishable because they involved appealable errors, whereas Clark's case does not.

Clark's reliance on *McFarland* and *State v. McGill*, 112 Wn. App. 95, 47 P.3d 173 (2002) is also misplaced. In *McGill*, the trial court erroneously believed that it could not depart from a standard range sentence even though it expressed a desire to do so. *McGill*, 112 Wn. App. at 98-100. The Court noted that "the trial court's comments indicate it would have considered an exceptional sentence had it known it could." *Id.* at 100. Similarly, in *McFarland*, the trial court erroneously believed it lacked discretion to impose a mitigated exceptional sentence and the record suggests it might have done so had it recognized such discretion. *McFarland*, 189 Wn.2d at 56-59. Here, unlike *McGill* and *McFarland*, the trial court neither erroneously interpreted the law nor expressed a

desire to impose a mitigated exceptional sentence. *See* 2RP at 14-16.

Rather, the trial court indicated that a low-end standard range sentence is appropriate based on all of the circumstances. 2RP at 15. Nothing in the trial court's ruling suggested that it lacked discretion to consider or impose a mitigated sentence or that it would have imposed such a sentence. *See* 2RP at 14-16.

Further, the fact that the trial court referenced Clark's youth in its ruling indicates that it was aware of its discretion to take youth into consideration at sentencing. *See* RP2 at 14. The trial court referenced the "relative youth" of Clark as well as the "extreme youth of the victim." 2RP at 14. Although the record does not indicate that the initial sentencing court explicitly considered Clark's age as the court suggested, the court's reference to youth indicates its awareness that this is a proper consideration for sentencing. And the court repeatedly stated that it believed its imposition of a standard range sentence is an appropriate sentence. *See* 2RP at 15.

Finally, contrary to Clark's assertions, the State did not dismiss the notion that Clark's youth could be considered a mitigating factor. Rather, the State recognized Clark's age, noting that he "is only 20" but explained that because he was not a juvenile at the time of the crimes, the trial court need not consider "the juvenile factors" at sentencing. 2RP at 9. Clark's

attorney agreed that “the juvenile factors” were not applicable. 2RP at 11. This is an accurate statement of the law. At a disposition hearing for juvenile offenders, the court is required to consider specific mitigating and aggravating factors outlined in the statute before entering a dispositional order. RCW 13.40.150(3). Neither the State nor Clark’s attorney misled the trial court as to the law or its discretionary authority as to sentencing.

3. CLARK HAS FAILED TO MEET HIS BURDEN TO SHOW THAT HIS ATTORNEY WAS INEFFECTIVE FOR NOT ADVISING THE COURT OF ITS DISCRETIONARY AUTHORITY TO IMPOSE AN EXCEPTIONAL SENTENCE

Clark has not met his burden to show that his attorney was ineffective for failing to advise the court of its authority to impose an exceptional sentence downward based on youth. A claim of ineffective assistance of counsel is a mixed question of fact and law that is reviewed de novo. *State v. Sutherby*, 165 Wn.2d 870, 883, 204 P.3d 916 (2009). To prevail on an ineffective assistance of counsel claim, the defendant must show: (1) that counsel’s representation was deficient and fell below an objective standard of reasonableness; and (2) that the deficient performance prejudiced the defendant. *Id.* (applying two-prong test of *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)).

Courts assume counsel is effective, and the defendant must show there was no legitimate strategic or tactical reason for counsel's actions. *Sutherby*, 165 Wn.2d at 883. Counsel's performance is not deficient if it can be characterized as a legitimate trial strategy or tactic. *State v. Kylo*, 166 Wn.2d 856, 863, 215 P.3d 177 (2009). The defendant must overcome the strong presumption that counsel's performance was reasonable. *State v. Grier*, 171 Wn.2d 17, 33, 246 P.3d 1260 (2011). Reasonable conduct includes "carrying out the duty to research the relevant law." *Kylo*, 166 Wn.2d at 862.

To establish prejudice, a defendant must show that there is a reasonable probability that, but for counsel's deficient performance, the result of the proceeding would have been different. *Grier*, 171 Wn.2d at 34. A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Id.* The failure to satisfy either prong is fatal to an ineffective assistance of counsel claim. *State v. Emery*, 174 Wn.2d 741, 755, 278 P.3d 653 (2012).

Clark fails to meet either prong of the ineffective assistance of counsel test. First, he fails to show that his attorney's representation was deficient. His attorney informed the court that he researched the mitigating factors and did not find anything remotely applicable to Clark's case. 2RP at 11. His conduct was reasonable because he carried out his duty to

research the relevant law. *See Kylo*, 166 Wn.2d at 862. Clark's argument that his attorney "failed to find and apply" relevant legal authority is based on pure speculation. In fact, the record shows that he did research the mitigating factors, but determined that nothing was applicable to Clark's case.

Moreover, Clark cites no authority indicating that a defendant is required to request a mitigated sentence based on youth. Counsel may determine that the individual circumstances of the case do not support such a sentence. Here, Clark's theory of the case was that he accidentally shot the victim. 1RP at 423-33. His attorney repeatedly argued that this was a "terrible accident." 1RP at 425, 433. In light of this, it is a reasonable, legitimate decision for counsel to decide that Clark's youth did not significantly impair his capacity to appreciate the wrongfulness of his conduct or conform his conduct to the law. *See O'Dell*, 183 Wn.2d at 696. Clark's attorney was not deficient for failing to advise the court of exceptional sentence possibilities that he was not requesting or did not believe were appropriate. Clark has not shown that there is no legitimate reason for his attorney's conduct. Nor has he overcome the strong presumption that his attorney's performance was reasonable.

Second, even assuming that counsel was deficient, Clark fails to show that his counsel's failure to inform the court of its discretion to

impose an exceptional sentence downward prejudiced him such that there is a reasonable probability that the result of the proceeding would have been different. Clark's reliance on *McGill* is misplaced. The trial court in *McGill* erroneously believed it could not depart from the standard range even though it expressed a desire to do so. *McGill*, 112 Wn. App. at 98-100. Here, in contrast with *McGill*, the trial court did not express a desire to depart from the standard range or make comments that it would have considered an exceptional sentence had it known it could. *See* 2RP at 14-15. Rather, the trial court stated that, based on all of the circumstances, it believed a low-end standard range sentence as recommended by the parties is an "appropriate sentence". 2RP at 15. Clark fails to show that the outcome of the proceeding would have been different if his attorney had requested an exceptional sentence. Thus, his ineffective assistance claim fails.

4. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION BY RECOGNIZING THAT FIREARM ENHANCEMENTS MUST BE SERVED CONSECUTIVELY

The trial court did not abuse its discretion by recognizing that firearm enhancements must be served consecutively. The trial court properly sentenced Clark, an adult defendant, to mandatory consecutive firearm enhancements as required by law.

Firearm enhancements are mandatory and shall run consecutively to other sentencing provisions, including other firearm enhancements:

Notwithstanding 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.533(3)(e). This unambiguous statute applies to adult offenders. The plain language of the statute “clearly insists that all firearm and deadly weapon enhancements are ‘mandatory’ and must be served consecutively.” *State v. DeSantiago*, 149 Wn.2d 402, 418, 68 P.3d 1065 (2003). The Supreme Court has interpreted this statute to require that “all firearm and deadly weapon enhancements are mandatory and, where multiple enhancements are imposed, they must be served consecutively to base sentences and to any other enhancements.” *State v. Conover*, 183 Wn.2d 706, 714, 355 P.3d 1093 (2015) quoting *DeSantiago*, 149 Wn.2d at 416.⁶

Judicial discretion to impose an exceptional sentence for adults does not extend to deadly weapon or firearm enhancements. *See State v. Brown*, 139 Wn.2d 20, 29, 983 P.2d 608 (1999), *overruled on other*

⁶ *DeSantiago* interpreted RCW 9.94A.510(3)(e), which was the former version of the firearm enhancement statute that is now recodified as RCW 9.94A.533(3)(e). Both statutes contain the same statutory language. *See DeSantiago*, 149 Wn.2d at 415 n.3.

grounds, *State v. Houston-Sconiers*, 188 Wn.2d 1, 391 P.3d 409 (2017). In *Houston-Sconiers*, the Supreme Court held that trial courts must have discretion to depart from the sentencing guidelines and mandatory enhancements in sentencing juveniles. *Houston-Sconiers*, 188 Wn.2d at 21. *Houston-Sconiers* overruled *Brown* only with respect to *juvenile* offenders. The Court did not modify *Brown's* applicability to adult defendants. Here, Clark was an adult when he murdered D.D. CP at 10. Thus, the trial court lacked discretion to depart from the mandatory consecutive firearm enhancements.

Clark's reliance on *McFarland* and *In re Mulholland*, 161 Wn.2d 322, 166 P.3d 677 (2007) is misplaced. *Mulholland* held that a trial court may impose concurrent sentences for multiple serious violent *offenses* as an exceptional sentence if it finds mitigating circumstances. *Mulholland*, 161 Wn.2d at 327-31. *Mulholland* relied on the plain language of RCW 9.94A.535, which provides that exceptional sentences may be imposed for *offenses* when sentencing takes place under RCW 9.94A.589(1). *Mulholland*, 161 Wn.2d at 329-30. In *McFarland*, the Court concluded that the rationale of *Mulholland* applies equally to sentencing for multiple firearm-related *offenses* under of RCW 9.94A.589(1)(c). *McFarland*, 189 Wn.2d at 49-50, 53. *McFarland* held that if a standard range consecutive sentence for multiple firearm-related *convictions* results in a presumptive

sentence that is clearly excessive, the trial court may impose an exceptional, mitigated sentence by running the firearm-related sentences concurrently. *McFarland*, 189 Wn.2d at 55. The Court remanded for resentencing because the trial court erroneously believed it could not impose concurrent sentences, and the record suggests it might have done so had it recognized this discretion. *Id.* at 56-59.

Neither *Mulholland* nor *McFarland* address RCW 9.94A.533, the firearm enhancement statute at issue in Clark's case. Rather, these cases involve the imposition of a mitigated, exceptional sentence pursuant to RCW 9.94A.535 for *offenses* under RCW 9.94A.589. Clark does not challenge the trial court's sentence regarding his offenses; he only challenges the imposition of consecutive firearm *enhancements*.

It is well-established that these enhancements are mandatory and must run consecutively. It is error for a trial court to order firearm enhancements to be served concurrently. *State v. Flett*, 98 Wn. App. 799, 805-08, 992 P.2d 1028 (2000). Two recent unpublished cases are instructive regarding the trial court's lack of discretion involving firearm enhancements. *See State v. Patterson*, No. 77437-9-I, 2019 WL 450505

(Wash. Ct. App. Feb. 5, 2019); *State v. Johnson*, No. 77355-1-I, 2019 WL 1112380 (Wash. Ct. App. March 11, 2019).⁷

In *Patterson*, the Court cited *Brown* and held that the trial court had no authority to shorten the duration of the firearm enhancement for an adult defendant. *Patterson*, 2019 WL 450505 at *5. In *Johnson*, the Court held that the trial court did not err in adhering to *Brown* and concluding that it lacked discretion to depart from mandatory consecutive firearm enhancements. *Johnson*, 2019 WL 1112380 at *4-5. Further, the Court rejected the defendant's reliance on *Mulholland* and *McFarland* for his assertion that a trial court has discretion to depart from mandatory consecutive firearm sentences. *Id.* at *5. The Court explained that these cases do not undermine *Brown* as they do not address the firearm enhancement statute at issue in the case. *Id.*

Finally, this Court should disregard Clark's reliance on the unpublished decision in *State v. Holcomb*, No. 49730-1-II, 2018 WL 5977987 (Wash. Ct. App. Nov. 14, 2018). *Holcomb* inaccurately states that the holding in *McFarland* involves "multiple firearm *enhancements*" and allows a trial court to "run the firearm *enhancements* concurrently" as part of a mitigated sentence. *See id.* at *6 (emphasis added). But as

⁷ Unpublished cases have no precedential value and are not binding on any court. An unpublished case filed after March 1, 2013 may be cited as non-binding authority and may be accorded such persuasive value as this Court deems appropriate. GR 14.1(a).

previously discussed, the holding in *McFarland* is limited to firearm-related offenses, not enhancements. See *McFarland*, 189 Wn.2d at 49-59.

At sentencing, Clark requested that the trial court impose a low-end standard range sentence consistent with the State's recommendation. 2RP at 13. He did not request a mitigated exceptional sentence and did not request that the court run the firearm enhancements concurrent to each other. 2RP at 11-13. The trial court sentenced Clark to the low end of the standard range on all counts and imposed mandatory consecutive firearm enhancements. CP at 96-100; 2RP at 15. The trial court did not abuse its discretion in recognizing that firearm enhancements should run consecutive to each other. The trial court's sentence is consistent with the law, and there is no basis to remand for resentencing.

5. CLARK FAILED TO OBJECT TO THE IMPOSITION OF COLLECTION COSTS AND SUPERVISION COSTS AND HAS FAILED TO PRESERVE THIS ISSUE FOR REVIEW

For the first time on appeal, Clark raises an objection to the trial court's imposition of collection costs and supervision costs. Because he has not preserved this issue for review, this Court should decline to reach the merits of his claim.

An appellate court may refuse to review any claim of error that was not raised below. RAP 2.5(a). A defendant who makes no objection at sentencing to the imposition of discretionary legal financial obligations is

not automatically entitled to review. *State v. Blazina*, 182 Wn.2d 827, 832, 344 P.3d 680 (2015). Clark did not object below to the imposition of collection costs or supervision costs in his judgment and sentence. Thus, he has not preserved this issue for review, and this Court should decline to reach the merits of his claim. *See id.* at 830.

Although a defendant has the obligation to properly preserve a claim of error, an appellate court may use its discretion to reach unpreserved claims of error consistent with RAP 2.5. *Blazina*, 182 Wn.2d at 830. Should this Court exercise its discretion to reach the merits of Clark's unpreserved claims, it should deny his request to strike the provisions in the judgment and sentence involving collection costs and costs of supervision.

- a. The court properly ordered Clark to pay supervision costs as determined by the Department of Corrections

The State does not dispute that the law now prohibits the imposition of discretionary costs on indigent defendants. Effective June 7, 2018, the Legislature enacted House Bill 1783, which amends former RCW 10.01.160(3) to prohibit the imposition of any discretionary costs on indigent defendants. *State v. Ramirez*, 191 Wn.2d 732, 739, 426 P.3d 714 (2018). Based on Clark's indigency at the August 2018 sentencing, the trial court ruled that payment of nonmandatory legal financial obligations

is inappropriate. CP at 97. The trial court imposed restitution and the mandatory victim penalty assessment, but otherwise waived all other costs associated in the case. 2RP at 15-17; CP at 97-98.

As part of the community custody conditions, the trial court entered the following order: “While on community placement or community custody, the defendant shall...pay supervision fees as determined by DOC[.]” CP at 101. Clark argues that the cost of community supervision is discretionary and must be stricken from the judgment and sentence. He relies on dicta contained in a footnote in *State v. Lundstrom*, 6 Wn. App. 2d 388, 396 n.3, 429 P.3d 1116 (2018) to support his claim that the costs of community custody are discretionary. This Court should deny Clark’s request to strike the supervision costs because it does not appear that they are discretionary.

RCW 9.94A.704(3)(d) provides, “If the offender is supervised by the department, the department shall at a minimum instruct the offender to...[p]ay the supervision fee assessment.” RCW 9.94A.703 includes a list of mandatory, waivable, and discretionary conditions for the court to impose at sentencing. The “mandatory conditions” provision provides, “As part of any term of community custody, the court shall...[r]equire the offender to comply with any conditions imposed by the department under RCW 9.94A.704[.]” RCW 9.94A.703(1)(b). The “waivable conditions”

provision provides, “Unless waived by the court, as part of any term of community custody, the court shall order an offender to...[p]ay supervision fees as determined by the department[.]” RCW 9.94A.703(2)(b). The section of the statute addressing “discretionary conditions” does not include any reference to costs or fees. *See* RCW 9.94A.703(3). Thus, it does not appear that supervision costs are discretionary costs, and the trial court did not err by ordering Clark to pay supervision fees as determined by the Department of Corrections.

b. The court properly ordered Clark to pay the costs to collect any unpaid legal financial obligations

The trial court properly ordered Clark to pay the costs of services to collect unpaid legal financial obligations pursuant to the statutes. *See* CP at 98. Trial courts may contract with collection agencies or use county collection services in order to collect unpaid court-ordered legal financial obligations. RCW 36.18.190; RCW 19.16.500. The county clerk may also impose an assessment for the cost of collections. RCW 9.94A.780(7).

The State agrees that the trial court is not required to use a collection agency to collect unpaid costs. The State also agrees that the county clerk is not required to impose a fee for the cost of collections. But this does not mean that including a provision in the judgment and sentence requiring the defendant to pay costs associated with collecting his unpaid

legal financial obligations is “discretionary” such that it should be stricken. This is not a “discretionary cost,” but rather a means for the court to collect unpaid costs and restitution that the defendant is required to pay. The trial court did not err by ordering Clark to pay the costs of services to collect unpaid legal financial obligations.

6. THE STATE CONCEDES THAT REMAND IS APPROPRIATE TO AMEND THE INTEREST ACCRUAL LANGUAGE IN THE JUDGMENT AND SENTENCE

The State concedes that the language in Clark’s judgment and sentence involving interest accrual should be amended to reflect a recent change in the law. Restitution imposed in a judgment and sentence shall bear interest from the date of judgment until payment. RCW 10.82.090(1). But as of June 7, 2018, “no interest shall accrue on nonrestitution legal financial obligations.” RCW 10.82.090(1). Although the trial court sentenced Clark after this effective date, his judgment and sentence includes boilerplate language indicating that the “financial obligations imposed in this judgment shall bear interest from the date of the judgment until payment in full.” CP at 98.

The State agrees that the recent change in law provides that interest shall not accrue for nonrestitution legal financial obligations. Thus, remand is appropriate for the trial court to amend the judgment and sentence to reflect the following: “The restitution obligations imposed in

this judgment shall bear interest from the date of the judgment until payment in full, at the rate applicable to civil judgments. No interest shall accrue on non-restitution obligations imposed in this judgment. RCW 10.82.090.”

E. CONCLUSION

For the foregoing reasons, this Court should affirm Clark’s sentence, but remand to amend the judgment and sentence regarding the interest accrual provision.

DATED: April 30, 2019

MARY E. ROBNETT
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WSB # 32764

Certificate of Service:

The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellee and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. 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, on the date below.

4-30-19 Kristie Barham
Date Signature

PIERCE COUNTY PROSECUTING ATTORNEY

April 30, 2019 - 3:02 PM

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