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NO. 54341-9-II

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**COURT OF APPEALS, DIVISION II  
STATE OF WASHINGTON**

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STATE OF WASHINGTON,

Respondent,

v.

Darrell Parnel Berrian,

Appellant.

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Appeal from the Superior Court of Pierce County  
The Honorable Jerry T. Costello

No. 13-1-03133-9

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**BRIEF OF RESPONDENT**

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## I. INTRODUCTION

Darrell Parnel Berrian committed assault in the first degree when he ran behind Tavaris Morriel and stabbed him in the chest after an altercation at a nearby gas station parking lot. Berrian went unidentified for several months until he was arrested for an unrelated attempted robbery. Berrian was charged with attempted robbery and unlawful possession of a firearm. While incarcerated for the attempted robbery, Berrian bragged to another inmate that he had gotten away with a stabbing during the prior fall. Unbeknownst to Berrian, that inmate later reported him to law enforcement. Berrian was ultimately identified by an emotional Mr. Morriel as his assailant. Berrian went to trial on the unrelated attempted robbery charge and was found guilty on both the attempted robbery charge and its accompanying firearm sentence enhancement.

Following the attempted robbery trial, Berrian went to trial for the present incident and was found guilty of assault in the first degree and the attached deadly weapon sentence enhancement. He was sentenced to 150 months for the assault charge and an additional 48 months for the deadly weapon enhancement.

After a successful personal restraint petition, this Court determined that the trial court incorrectly calculated his offender score and remanded the matter for resentencing on both the attempted robbery case and this

assault case. During resentencing, the trial court incorrectly presumed that Berrian's sentence for this assault should run consecutive to his robbery case and reaffirmed his sentence of 150 months with the 48-month enhancement. Berrian filed a direct appeal to this sentence as well as a personal restraint petition. Berrian's personal restraint petition was denied, and his direct appeal was remanded for resentencing for the trial court to correct its presumption that the cases should run consecutively.

During the most recent resentencing hearing, the court reduced Berrian's sentence from 150 to 138 months based on prior defense counsel's advocacy regarding Berrian's various showings of self-improvement while incarcerated. Berrian appeals the most recent resentencing and is alleging that he received ineffective assistance of counsel because prior defense counsel failed to make an argument that the deadly weapon enhancement in this case should run concurrent to the firearm enhancement in the attempted robbery case based on *State v. McFarland*. This claim is without merit. The case that Berrian relies upon does not support his argument and instead relates only to firearm related *convictions* and does not extend to firearm or deadly weapon sentence *enhancements*. Accordingly, this Court should affirm Berrian's sentences.

## I. RESTATEMENT OF THE ISSUES

- A. Did prior defense counsel provide ineffective assistance of counsel by failing to bring a novel argument extending *McFarland's* narrow holding to allow a deadly weapon enhancement sentence to run concurrently to a firearm enhancement sentence in an unrelated case?

## II. STATEMENT OF THE CASE

### A. Facts established at trial

In the early hours of November 12, 2013, Tavaris Morriel witnessed Darrell Parnel Berrian and another individual arguing with a gas station store employee in the parking lot of the store and decided to intervene. (*State v. Berrian*, No. 46687-2-II, 2015 WL 9039155 at \*2 (Wash. Ct. App. December 15, 2015) (Unpublished)).<sup>1</sup> After Morriel intervened, Berrian and Mr. Morriel fought for several minutes and were eventually separated. *Id.* at \*2. Mr. Morriel left the scene and began to walk away when he was informed by a friend that someone was running toward them. *Id.* When Mr. Morriel turned around, he was stabbed by Berrian in his torso with a small knife that had a two-inch blade. *Id.*

Mr. Morriel was transported to the emergency room and treated by a trauma surgeon. *Id.* Mr. Morriel experienced “bleeding around the lung”

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<sup>1</sup> GR 14.1 allows for citation to unpublished opinions of the Court of Appeals filed on or after March 1, 2013. The unpublished decision cited above is the Defendant’s \_\_\_ appeal in the matter and has no precedential value, is not binding on any court, and is cited only for reference to the history of this case for the purpose of this appeal.

meaning that the knife penetrated Mr. Morriel's chest deep enough to cause muscular bleeding in the chest cavity. *Id.* After Mr. Morriel was released from the hospital, he continued to have difficulty breathing. *Id.* He sought subsequent medical treatment and the doctors discovered blood accumulation around his lung. *Id.* Mr. Morriel had to undergo surgery to remove a clot that had formed in his wound which would have been life threatening had he not sought treatment when he did. *Id.* at \*3.

Initially, Berrian's involvement was unknown as Mr. Morriel was unable to give more than a general description of his assailant. *Id.* While the police were investigating the assault, Berrian was arrested and charged with attempted robbery in the first degree and unlawful possession of a firearm on a separate incident. *See* 12/20/19 RP 8-9. However, in August 2013, an inmate at Pierce County Jail sent information to the Lakewood Police Department after Berrian told him he had gotten away with a stabbing in fall of the year prior. *Berrian*, No. 46687-2-II at \*3. Detective Jeff Martin investigated the tip which eventually led to an emotional Mr. Morriel identifying Berrian in a photo montage as his assailant. *Id.* at \*3, \*5.

**B. Sentencing following trial**

The State charged Berrian with assault in the first degree with a deadly weapon enhancement. CP 1-2. The jury found Berrian guilty as charged. CP 925. Berrian was sentenced to 150 months and an addition 48-

months due to the deadly weapon sentencing enhancement. *See* 12/20/19 RP 7; CP 894.

**C. Appellate history in this case and an unrelated case**

Prior to the present case going to trial, Berrian went to trial for attempted robbery and unlawful possession of a firearm charges, the case for which he was in jail when he told his inmate that he had gotten away with a stabbing. He was convicted and sentenced to 39 months with an additional 36-month firearm sentencing enhancement. 12/20/19 RP 9. Berrian appealed that case and this Court affirmed his convictions in *State v. Berrian*, No. 45922-1-II, 2015 WL 4922302 (Wash. Ct. App. August 18, 2015) (unpublished) (Citing pursuant to GR 14.1, not for precedential value, rather to establish the history of this case and earlier appeals related to this case and defendant Berrian).

Berrian then filed a personal restraint petition seeking relief on multiple grounds, and this court remanded this case, along with his other case for attempted robbery and unlawful possession of a firearm, for resentencing after accepting the State's concession and holding that the trial court miscalculated his offender score to be a five rather than a four. *See In re Personal Restraint Petition of Berrian*, No. 48069-7-II, Consolidated with No. 49119-2-II and No. 49139-7-II, 2017 WL 3602078 at \*2-3. (Wash.

Ct. App. August 22, 2017) (unpublished) (cited pursuant to GR 14.1 not for precedential value but to establish procedural history of this case).

On remand from this Court from the above personal restraint petition, the trial court imposed the same sentence of 150 months for the assault in the first-degree charge and an additional 48 months pursuant to that charge for the deadly weapon sentence enhancement resulting in a total of 198 months confinement. CP 738. The trial court ordered this sentence to run consecutive to his attempted robbery case with the unlawful possession of a firearm enhancement. *See* CP 738; *see also* 12/20/19 RP 3.

Berrian filed a subsequent personal restraint petition alleging that *State v. Brown*,<sup>2</sup> which held that deadly weapon sentencing enhancements are mandatorily consecutive to a defendant's base sentence, is incorrect, and that *State v. McFarland*<sup>3</sup> undermines *Brown*. This Court denied that personal restraint petition and concluded that Berrian's claims would overrule *Brown*, which the Court is unable to do not only because it is a Washington Supreme Court case, but because *McFarland* did not overrule *Brown*. *In Re Personal Restraint Petition of Berrian*, No. 53044-9-II, 2019 WL 3430834 at \*2 (Wash. Ct. App. July 30, 2019) (unpublished) (cited

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<sup>2</sup> *State v. Brown*, 139 Wn.2d 20, 29, 983 P.2d 608 (1999) (overruled in part as applied to sentencing of juveniles by *State v. Houston-Sconiers*, 188 Wn.2d 1, 21, n.5, 391 P.3d 409 (2017)).

<sup>3</sup> *State v. McFarland*, 189 Wn.2d 47, 52, 399 P.3d 1106 (2017).

pursuant to GR 14.1 to establish procedural history rather than establish precedential value). Instead, *McFarland* allows “as an exceptional sentence for standard range sentences for multiple firearm-related crimes to be served concurrently in certain circumstances.” *Id.* at \*2-3. This Court additionally distinguished Berrian’s personal restraint petition from *Mulholland*,<sup>4</sup> stating, “there is no evidence that the trial court was inclined to impose an exceptional sentence but refrained because it thought it was prohibited from doing so.” *Id.* at \*3.

In addition to his subsequent personal restraint petition, Berrian filed a direct appeal of his sentence in the present case. CP 732. Berrian alleged that the trial court abused its discretion when it applied a presumption that his sentence should run *consecutive* with another sentence. *State v. Berrian*, No. 36652-9-III, 2019 WL 3064061, at \*1 (Wash. Ct. App. July 11, 2019) (unpublished). This Court accepted the State’s concession to that claim and remanded to the trial court, directing the trial court to instead, “apply a presumption that Berrian’s sentence should run *concurrent* to the other sentence,” as well as striking discretionary LFOs. *Id.* at \*1 (emphasis added)

#### **D. Present Appeal**

During resentencing, the trial court followed this Court’s mandate and applied the presumption that Berrian’s sentence should run concurrent

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<sup>4</sup> *In Re Personal Restraint Petition of Mulholland*, 161 Wn.2d 322, 166 P.3d 677 (2007).

to his other sentence. 12/20/19 RP 3. In doing so, the trial court also acknowledged their complete discretion in sentencing notwithstanding the mandated presumption. 12/20/19 RP 3. Prior defense counsel advocated for the above presumption and asserted a statutory interpretation that allows for a trial judge to overcome the presumption for concurrent sentencing only if there is a basis for an exceptional sentence. 12/20/19 RP 11-12.

In addition to the proposed statutory interpretation, prior defense counsel presented numerous mitigating factors to the trial court in support of Berrian, such as Berrian having earned his high school equivalency certificate, and numerous financial literacy certificates. 12/20/19 RP 4. Prior defense counsel asked the court to take Berrian's efforts into consideration, asserting that Berrian has used his time during incarceration "to his benefit and to the benefit of society." 12/20/19 RP 13.

The trial court applied the presumption and acknowledged prior defense counsel's argument but declined the statutory interpretation and asserted their complete discretion in sentencing based on *State v. Linderman*, imposing an exceptional sentence for the two cases to run consecutively. 54 Wn. App. 137, 772 P.2d 1025 (1989)<sup>5</sup>; 12/20/19 RP 15-16. Pursuant to prior defense counsel's effective advocacy, the trial court

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<sup>5</sup> "The trial court is granted total discretion to choose whether to impose a consecutive sentence. It requires *only* that the judge 'expressly orders that they be served consecutively.'" *Linderman*, 54 Wn. App. at 139 (citations omitted).

reduced Berrian's sentence from 150 months to 135 months, in addition to the mandatory 48-month deadly weapon sentence enhancement. 12/20/19 RP 16-17. The court substantiated this reduction, stating "I'm reducing [the sentence] because I'm impressed by your self-improvement efforts that you've made while you've been incarcerated." 12/20/19 RP 16-17. Berrian appeals this most recent sentence.

### III. ARGUMENT

#### A. Berrian received effective assistance of counsel

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, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)). 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).

To establish deficient performance so egregious as to necessitate reversal of a conviction, the defendant must show "that counsel made errors

so serious that counsel was not functioning as the ‘counsel’ guaranteed the defendant by the Sixth Amendment.” *Strickland*, 466 U.S. at 687. In order to establish that the deficient performance prejudiced the defendant, the defendant must show that counsel’s errors were so serious that it could not have produced a just result. *Id.* at 686-87.

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 proper measure of attorney performance remains simply reasonableness under prevailing professional norms.” *Strickland*, 466 U.S. at 688. There is a “strong presumption that counsel’s performance was reasonable.” *State v. Grier*, 171 Wn.2d 17, 33, 246 P.3d 1260 (2011) (quoting *Kylo*, 166 Wn.2d at 862). Judicial scrutiny of a defense attorney’s performance must be “highly deferential” and a “fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time.” *Strickland*, 466 U.S. at 689.

An attorney owes a responsibility to their client to research relevant law. *State v. Brown*, 159 Wn. App. 366, 372, 243 P.3d 776 (2011). While

counsel has a duty to investigate all reasonable lines of defense, they have no duty to pursue a strategy which is unlikely to succeed. *Id.* at 371. Counsel is not required to pursue every possible strategy regardless of likelihood of success. A decision not to raise a novel legal argument does not constitute deficient performance. *Brown*, 159 Wn. App. at 371.

RCW 9.94A.533 provides that both firearm enhancements and deadly weapon enhancements must run consecutively to their accompanying sentences. RCW 9.94A.533(3)(e) provides guidance for sentencing 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(4)(e) provides virtually identical guidance for sentencing in regard to deadly weapon enhancements:

Notwithstanding any other provision of law, all deadly weapon 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.

**1. Berrian has not established either of the *Strickland* prongs**

Berrian has not satisfied either prong of the *Strickland* test. He did not prove that prior defense counsel's representation was deficient or fell

below an objective standard of reasonableness; he similarly did not prove that any deficient performance prejudiced him. *See Strickland*, 466 U.S. at 687. Berrian merely cites to *McFarland* for both prongs and alleges that the court in that case provides for a reasonable probability that resentencing would have been different. *See* Br. of App. at 9. Because *McFarland* is related to the courts ability to run concurrent sentences related to firearm convictions only, it is inapplicable to the present case which involves deadly weapon sentence enhancements. Consequently, this Court should affirm Berrian's sentences.

- a. Berrian has not proved that prior defense counsel's representation was not reasonable

Berrian claims that because our Supreme Court of Washington in *McFarland* allowed for a sentencing court to order concurrent instead of consecutive sentences as an exceptional sentence for firearm and serious violent offenses, the same logic applies to deadly weapon enhancements and further would have allowed the trial court to run the deadly weapon enhancement in the present case to the firearm enhancement in an unrelated case. 189 Wn.2d at 53; *see* Br. of App. at 7. This is an erroneous interpretation that inappropriately extends the narrow holding of *McFarland*.

In *McFarland*, the Court addressed the issue of running firearm related offenses concurrently. In that case, the trial court assumed they did

not have the discretion to run 13 firearm offenses concurrently and instead chose to run the sentences consecutively, for a 237-month sentence. *Id.* at 51. *McFarland* involves firearm related offenses and does not address deadly weapon enhancements. 189 Wn.2d at 50. In fact, the Court in *McFarland* expressly distinguished firearm sentencing enhancements from sentences for firearm-related convictions, noting that the primary purpose of RCW 9.94A.533 was to ensure that enhancements were served consecutively. *McFarland*, 189 Wn.2d at 55 (citing *State v. Conover*, 183 Wn.2d 706, 714, 355 P.3d 1093 (2015)). Because of this distinction, an argument to run a deadly weapon enhancement concurrent with an unrelated case's firearm enhancement sentence cannot possibly prevail. This is contrary to *McFarland* and the underlying statutes for both types of sentence enhancements. *See* RCW 9.94A.533(3)(e); 9.94A.533(4)(e).

This Court has recently addressed a similar claim in the unpublished opinion *State v. Chith*, finding that *McFarland* does not apply to firearm sentence enhancements. *See State v. Chith*, No. 51897-0-II, 2019 WL 6131228 (Wash. Ct. App. November 19, 2019) (unpublished).<sup>6</sup> In *Chith*, the Defendant challenged his second resentencing on the grounds that

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<sup>6</sup> GR 14.1 allows citation to unpublished opinions of the Court of Appeals filed on or after March 1, 2013. The unpublished decision cited above has no precedential value, is not binding on any court, and is cited only for persuasive value.

*McFarland* and *Mulholland*<sup>7</sup> allowed the sentencing court the discretion to run his firearm sentencing enhancements concurrently, and counsel was ineffective for failing to make such an argument. *Id.* at \*1. This Court concluded that because *McFarland* and *Mulholland* do not undermine *Brown*<sup>8</sup> and because of *McFarland*'s distinctions of firearm enhancements from firearm convictions, *McFarland* and *Mulholland* do not apply to firearm sentencing enhancements and therefore the court did not have the discretion to run the enhancement concurrently and counsel was not ineffective for failing to make such an argument. *Id.* at \*4-5 (citing *McFarland*, 189 Wn.2d at 55; *Mulholland*, 161 Wn.2d at 329-30.)

This Court should apply the finding in *Chith* to the present case. The sentencing court did not have the discretion to deviate from the statutory requirements that the deadly weapon enhancement run consecutive to the accompanying sentence. *See* RCW 9.94A.533(4)(e). In the same vein, because the court did not have the discretion to do so, it was entirely reasonable for prior defense counsel to not make such a claim because doing so would result in a novel argument doomed to fail. *See Brown*, 159 Wn.

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<sup>7</sup>In *Mulholland*, the trial court imposed consecutive sentences under the belief that they did not have the discretion to run the sentences concurrently and expressed great sympathy toward the defendant for their inability to do so. *Mulholland*, 161 Wn.2d 322.

<sup>8</sup>(The "absolute language" of the statutes providing concurrent sentences for firearm and deadly weapon enhancements deprived the sentencing court the discretion to impose an exceptional sentence regarding such enhancements). *Brown*, 139 Wn.2d at 29.

App. at 371. Because it was reasonable for prior defense counsel not to make such an argument, Berrian has not established the first prong of *Strickland*, and cannot prevail on his claim for ineffective assistance of counsel. *See Strickland*, 466 U.S. at 686-87. Accordingly, this Court should affirm Berrian's sentences.

b. Berrian has not established that he was prejudiced by prior defense counsel's representation

Berrian erroneously asserts that because the Court in *McFarland* reversed and remanded the defendant's sentence, a similar outcome would occur here. *See Br. of App. at 9*. This is not so, and because of this unlikelihood, Berrian has not proved that he was prejudiced by prior defense counsel's representation, resulting in a failure to satisfy the second prong of *Strickland*.

In addition to the distinction between firearm convictions running concurrently and firearm enhancements needing to be run consecutively, the Court in *McFarland* reversed and remanded to the sentencing court in light of *Mulholland*,<sup>9</sup> reasoning that "the record suggests at least the possibility that the sentencing court would have considered imposing

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<sup>9</sup> In *Mulholland*, the trial court imposed consecutive sentences under the belief that they did not have the discretion to run the sentences concurrently and expressed great sympathy toward the defendant for their inability to do so. *In re Pers. Restraint of Mulholland*, 161 Wn.2d 322, 166 P.3d 677 (2007).

concurrent firearm-related sentences had it properly understood its discretion to do so.” *McFarland*, 189 Wn.2d at 59.

Based on the trial court’s decision not to run the separate cases concurrently, despite having the discretion to do so, it is unlikely that had prior defense attorney argued for the exceptional sentence downward to run the deadly weapon enhancement concurrent to his other sentences, that the trial court would have done so. Consequently, Berrian has not proved that but for counsel’s deficient performance, the outcome would have been different and thus has not established the second Strickland prong. Accordingly, Berrian has not established ineffective assistance of counsel and this Court should affirm Berrian’s sentences.

#### IV. CONCLUSION

Berrian received effective assistance of counsel. Prior defense counsel was not required to make a novel argument that would have failed had he made it anyway. Because *McFarland* relates only to firearm convictions and not firearm or deadly weapon enhancements, this Court should find that prior defense counsel provided reasonable representation by not arguing for the court to run the unrelated mandatory enhancements concurrent to one another. Because counsel’s assistance was reasonable, this Court should further find that Berrian was not prejudiced by prior

defense counsel's representation. For the above stated reasons, the State asks that this Court affirm the Defendant's sentences.

RESPECTFULLY SUBMITTED this 13th day of August, 2020.

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Malena Boome  
s/ Malena Boome  
Rule 9  
ID #9880321

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The undersigned certifies that on this day she delivered by E-file to the attorney of record for the appellant 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.

08/13/20      s/Aeriele Johnson  
Date                      Signature

**PIERCE COUNTY PROSECUTING ATTORNEY**

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**Transmittal Information**

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