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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION III

No. 35703-1-III

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STATE OF WASHINGTON, Respondent,

v.

CECILY McFARLAND, Appellant.

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**APPELLANT'S REPLY BRIEF**

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## **I. ARGUMENT**

**A. The State's argument that the sentencing court properly exercised its discretion is unfounded in the record, as there is no indication the court applied the standard set forth in RCW 9.94A.535(1)(g) and *McFarland*.**

The State attempts to convert the sentencing court's conclusion that it lacked statutory authority to deviate from the standard sentencing range resulting from the State's charging decision into a factual determination that McFarland should not receive an exceptional sentence. *Respondent's Brief*, at 24. However, the State undermines its own argument by pointing to the court's conclusions that McFarland's circumstances could not legally support a mitigated sentence under RCW 9.94A.535(1)(g). *Respondents' Brief*, at 16-17, 23, 24. These conclusions ignore that evaluating whether multiple convictions render a sentence excessive under RCW 9.94A.535(1)(g) requires the trial court to consider the purposes of the SRA and the defendant's history, even though such considerations cannot independently support an exceptional sentence where the "multiple offense" policy does not apply.

Indeed, the State simply repeats the sentencing court's fundamental error by confusing the basis for an exceptional sentence with

the analysis to determine whether one is appropriate under the multiple offense mitigator, RCW 9.94A.535(1)(g). *Respondent's Brief*, at 14, 17-18 (arguing McFarland did not present statutorily permissible grounds for an exceptional sentence). Contrary to the assertions of the sentencing court that McFarland presented no legal basis for mitigation, McFarland repeatedly pointed to the multiple offense mitigator as the basis for the exceptional sentence, as the Washington Supreme Court had allowed her to do. RP 23, 34-35, 48, 54; *State v. McFarland*, 189 Wn.2d 47, 56, 399 P.3d 1106 (2017).

Indeed, the sentencing court's written ruling demonstrates that the refusal to impose an exceptional sentence was based upon its interpretation of the law, not the facts. *See, e.g.*, CP 127 ("[T]he reasons suggested are insufficient as a matter of law."), CP 128 ("The defendant has not supplied any authority for the proposition that this Court may somehow 'overrule' the prosecutor's decision to charge the multiple thefts as individual crimes, or to file all available counts."). Indeed, the sentencing court conceded that in its view, McFarland's sentence was unwise and did not advance the goals of the SRA. CP 128; *see also* CP 129 ("[T]his Court does feel a sentence of almost twenty years in prison in Ms. McFarland's case is excessive.") Factually, these express findings that the sentence is clearly excessive in light of the purposes of the SRA

are sufficient to support the application of the multiple offense mitigator, RCW 9.94A.535(1)(g).

As the sentencing court's memorandum ruling makes evident, the problem was not that the sentencing court believed that the standard range sentence resulting from the multiple convictions was appropriate under the facts of the case. The problem was that the sentencing court did not understand that RCW 9.94A.535(1)(g) allows it to mitigate the unfair and excessive consequences of the prosecutor's charging decision and the legislature's enactment of mandatory consecutive sentences. Its written ruling expressly acknowledged the factors that would enable it to apply RCW 9.94A.535(1)(g). But despite its findings, it still concluded it could not lawfully mitigate the sentence because to do so would interfere with prosecutorial charging discretion and the legislative sentencing decision. This was legal error and expressly contrary to *McFarland*.

B. The sentencing court's conclusion that prior decisions not involving RCW 9.94A.535(1)(g) precluded it from imposing an exceptional sentence downward is inconsistent with *McFarland* and the plain language of the SRA.

The State also repeats the sentencing court's error conflating consideration of the purposes of the SRA as directed by RCW

9.94A.535(1)(g), with considering the purposes of the SRA as independent justification for a mitigated sentence. *Respondent's Brief*, at 20-21. But while the court cannot rely upon the purposes of the SRA themselves as grounds for a mitigated sentence, the court is *required* to consider the purposes of the SRA in evaluating whether the sentence is clearly excessive under RCW 9.94A.535(1)(g). This consideration necessarily requires some attention to the personal circumstances of the defendant because the court must consider, among other things, whether imposing the standard range would protect the public, would afford needed opportunities for personal improvement, would reduce the risk of reoffense, and would be just and proportionate in light of the crime, the punishment meted out to others for similar offenses, and the defendant's history. *See* RCW 9.94A.010.

Here, the court agreed that the length of the sentence was disproportionate to the seriousness of the offense and more proportionate with serious violent offenses like murder. McFarland also showed that the excessively long sentence was not necessary to protect the public or to help her rehabilitate herself. CP 127-29. Indeed, the logical reason to enact the multiple offense mitigator at all is to address the circumstance where a defendant accrues a large offender score or a mandatory consecutive sentence as the consequence of a single criminal episode, but

the defendant does not pose the same kinds of risks to the community as an experienced criminal who has acquired the same high score through repeated and unreformed criminal behavior. McFarland's showing was consistent with this rationale and highlighted the harshness of the punishment as well as the waste of state resources resulting from a standard range sentence in her case.

The critical distinction, apparently not recognized by the sentencing court or the State, is that had McFarland been convicted of only a single count of theft of a firearm, the sentencing court would be correct that it lacked a legal basis for mitigating her sentence based upon a belief that the sentence was inconsistent with the purposes of the SRA. Nor, as the court observed, could it then consider McFarland's individual circumstances as independent grounds for a mitigated sentence. CP 129. But because McFarland's standard range sentence arose because of the multiplicity of charges required to run consecutive under RCW 9.94A.589 – the condition triggering consideration of the SRA purposes under RCW 9.94A.535(1)(g) – the sentencing court was not only allowed, but required, to consider those factors.

In sum, the sentencing court concluded that because it could not consider the purposes of the SRA or McFarland's individual

circumstances in a different context, it could not do so in this context. This conclusion was erroneous and contrary to RCW 9.94A.535(1)(g) and *McFarland*. Because the cases holding that personal circumstances may not independently establish grounds for an exceptional sentence do not operate to bar a mitigated sentence under RCW 9.94A.535(1)(g), the trial court erred in concluding that those holdings precluded an exceptional sentence downward in this case.

C. McFarland's showing was legally and factually adequate to support a mitigated sentence under RCW 9.94A.535(1)(g).

The State concedes that “the trial court would have imposed a mitigated exceptional sentence had McFarland identified any legally-cognizable justification for doing so.” *Respondent's Brief*, at 24. Accordingly, if RCW 9.94A.535(1)(g) provided a legally cognizable justification for the mitigated sentence, then the trial court erred in concluding it could not lawfully impose one.

As argued above and in the Appellant's Brief, it did. Contrary to the sentencing court's conclusion that the sentence it believed to be unreasonable and inconsistent with the purposes of the SRA was required by the State's charging decision and the legislatively-mandated standard range, RCW 9.94A.535(1)(g) applies when the sentence resulting from

consecutive terms for multiple firearm convictions imposed under RCW 9.94A.589(1)(c) is excessive. *McFarland*, 189 Wn.2d at 55. The sentence is excessive when the disparity it creates between the sentences for the single offense and the aggregate offenses does not further the goals and purposes of the SRA. See *State v. Kinneman*, 120 Wn. App. 327, 343, 84 P.3d 882 (2003), *review denied*, 152 Wn.2d 1022 (2004); *State v. Sanchez*, 69 Wn. App. 255, 261, 848 P.2d 208, *review denied*, 122 Wn.2d 1007 (1993). To make this determination, the sentencing court evaluates the factors set forth in RCW 9.94A.010 and decides whether the consecutive term is proportionate to the seriousness of the offense and the offender's criminal history, is just, is commensurate with sentences imposed on others committing similar offenses, protects the public, provides the defendant with opportunities for self-improvement, makes frugal use of public resources, and reduces the risk of reoffense.

The sentencing court clearly found the standard range sentence resulting from application of RCW 9.94A.589(1)(c) excessive in this case. CP 129 (“[T]his Court does feel a sentence of almost twenty years in prison in Ms. McFarland’s case is excessive . . . it is so because of the charging decision the prosecution made in this case”). Accordingly, the RCW 9.94A.535(1)(g) factors applied and warranted an exceptional sentence.

## II. CONCLUSION

For the foregoing reasons, McFarland respectfully requests that the court REVERSE the sentence imposed herein and REMAND the case for resentencing.

RESPECTFULLY SUBMITTED this 12 day of September,  
2018.

A handwritten signature in blue ink, appearing to read "Andrea Burkhart", written over a horizontal line.

ANDREA BURKHART, WSBA #38519  
Attorney for Appellant

**CERTIFICATE OF SERVICE**

I, the undersigned, hereby declare that on this date, I caused to be served a true and correct copy of the foregoing Appellant's Brief upon the following parties in interest by depositing them in the U.S. Mail, first-class postage pre-paid, addressed as follows:

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I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Signed this 12 day of September, 2018 at Walla Walla, Washington.

  
\_\_\_\_\_  
Andrea Burkhart

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