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STATE OF WASHINGTON

**THE SUPREME COURT
STATE OF WASHINGTON**

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STATE OF WASHINGTON, PETITIONER,

v.

DANIEL C. MULHOLLAND, RESPONDENT

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STATE OF WASHINGTON

Court of Appeals Cause No. 34484-0
Appeal from the Superior Court of Pierce County
The Honorable Karen Strombom

No. 01-1-06114-5

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER.

The State of Washington, Respondent below, asks this court to accept review of the Court of Appeals's decision terminating review designated in Part B.

B. COURT OF APPEALS'S DECISION.

The State seeks review of the unpublished order, filed on July 24, 2006, in In re the Personal Restraint Petition of Daniel C. Mulholland, COA No. 34484-0-II. See Appendix A. The State respectfully requests the Supreme Court review the Court of Appeals's decision granting Mr. Mulholland's personal restraint petition and remanding for a new sentencing hearing when there was no error in the calculation of petitioner's offender score and he received a standard range sentence.

C. ISSUE PRESENTED FOR REVIEW.

1. Whether the Court of Appeals erred in failing to apply the heightened standards applicable to personal restraint petitions and to hold petitioner to his burden of showing actual and substantial prejudice in order to obtain relief.

2. Did the Court of Appeals err in finding the imposition of a standard range sentence under a properly computed offender score constituted a “complete miscarriage of justice,” a finding necessary to grant relief for non-constitutional error?

3. When neither the prosecution nor defense requested the court to consider imposing an exceptional sentence, did the Court of Appeals err in interpreting comments made by the sentencing court with respect to its decision on the contested issue of whether the offenses were the same criminal conduct as being evidence that the court thought it lacked discretion to impose an exceptional sentence?

4. Did the Court of Appeals err in not dismissing the petition under In re PRP of Grisby, when the best possible sentence the petitioner could hope for on remand is a sentence of 50 years, which is unlikely to afford him any actual relief?

5. Should this court take review to construe whether differences in the wording of RCW 9.94A.589(1)(a) and (1)(b) demonstrate that the legislature intended to allow presumptively concurrent sentences to be run consecutively via imposition of an exceptional sentence but did not intend to allow presumptively consecutive sentences to be run concurrently via an exceptional sentence?

D. STATEMENT OF THE CASE.

Daniel C. Mulholland was found guilty by a jury of six counts of first degree assault and one count of drive by shooting. Each count of assault carried a firearm enhancement. The victims of these assaults were six members of the Tullar family who were eating dinner in the living room of their home when the defendant drove by and fired multiple gunshots through their living room window. This was apparently over a dispute about a television set. See Unpublished Opinion, Appendix B to the petition.

At the sentencing hearing, defendant asked the court to treat his convictions as the same criminal conduct. This issue was briefed and argued by both parties. See Appendices E, F, G, and H to the petition. There was no request by either party for the court to consider the imposition of an exceptional sentence. *Id.* The court found that as each of the assault counts pertained to a separate victim, as a matter of law, it must treat the counts as separate and distinct. The court held that it had no discretion to classify the crimes as the same criminal conduct and run the counts concurrently. Transcript of sentencing, Appendix H to the petition, at RP 581-582. Prior to announcing the sentence, the court heard from one of the victims who talked about the lasting impact the crimes had had

on her family. In particular, she talked about the effect it has had on her husband, a war veteran who is suffering from post-traumatic stress syndrome. Since the shooting, she described him as suffering blackouts for three to seven hours a day; these blackouts had been controlled by medication prior to the shooting. Appendix H to the petition at RP 585-586. Given the chance to address the court, Mulholland indicated that he was not guilty and that he thought mistakes had been made in the trial. Appendix H to the petition, at RP 582. The court imposed a standard range sentence at the low end of the range according to the prosecutor's recommendation. In doing so, the court noted that "this incident has impacted the victims tremendously" and that it looked "at the counts and what the jury decided." Appendix H to the petition, at RP 587-588. The court stated, "I don't have the discretion to do anything but follow the law. I don't have the discretion to have the sentences in my view run at the same time. As I read the law, it requires them to run consecutively." Appendix H to the petition, at RP 588. Mulholland was sentenced to low end standard range sentences in accordance with the prosecutor's recommendation. With the time for the enhancements, Mulholland received a total sentence of 927 months.

Mulholland appealed alleging instructional error, insufficient evidence and ineffective assistance of counsel. His convictions were affirmed in an unpublished opinion and, after review was denied, the mandate issued March 8, 2005.

In a timely filed personal restraint petition, Mulholland alleged that he received ineffective assistance of counsel because his attorney failed to ask for an exceptional sentence downward. He further claimed that equal protection was violated by the court's failure to recognize that it had sentencing options available other than the 927 month sentence.

In an unpublished order signed by three judges of the Court of Appeals, Division II, the court granted the petition. Appendix A. Although the court granted relief, it expressly did not reach the issues raised by Mulholland. See Appendix A at p.5, fn.5. The State now seeks discretionary review of this order granting relief.

E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED.

1. THE COURT OF APPEALS ERRONEOUSLY USED STANDARDS APPROPRIATE FOR DIRECT REVIEW RATHER THAN THE STANDARDS SET FORTH FOR DETERMINING THE MERITS OF A PERSONAL RESTRAINT PETITION.

It is well established under Washington law that a criminal defendant has an increased burden of proof in a collateral attack on his judgment

than he would in a direct appeal. In this collateral action, the petitioner has the duty of showing constitutional error, and that such error was actually prejudicial. Once a criminal defendant shows a constitutional error in a direct appeal, the burden is then shifted to the prosecution to show that the error is harmless beyond a reasonable doubt. State v. Brown, 147 Wn.2d 330, 338-40, 58 P.3d 889 (2002). This presumption of prejudice has no application in the context of personal restraint petitions. In re Mercer, 108 Wn.2d 714, 718, 721, 741 P.2d 559 (1987); In re Personal Restraint of Benn, 134 Wn.2d 868, 940, 952 P.2d 116 (1998). On collateral review, the burden shifts to the petitioner to establish that the error was not harmless; in other words, petitioner must establish that the error was prejudicial. A petitioner "must show the error worked to his actual and substantial prejudice in order to prevail." In re Personal Restraint Petition of St. Pierre, 118 Wn.2d 321, 329, 823 P.2d 492 (1992).

To obtain collateral relief from an alleged non-constitutional error, a petitioner must show "a fundamental defect which inherently results in a complete miscarriage of justice." In re Cook, 114 Wn.2d 802, 812, 792 P.2d 506 (1990). This is a higher standard than the constitutional standard of actual prejudice. Id. at 810.

To obtain relief with respect to either constitutional or nonconstitutional claims, the petitioner must show that he was actually and substantially prejudiced by the error. In re Cook, supra at 810; In re

St. Pierre, 118 Wn.2d 321, 329, 823 P.2d 492 (1992); In re Pers. Restraint of Lord, 123 Wn.2d 296, 303 P.2d (1994).

Although these principles are well established by numerous decisions of this court, there is nothing in the Court of Appeals order granting the petition to show that these heightened standards were employed by that court. Other than mentioning the fact that Mr. Mulholland's request for relief was by personal restraint petition in the first and last sentence of the order, the order is devoid of any relevant authority or analysis of the law applicable to collateral attacks on a judgment. The order reads as if the court was determining the case on direct appeal.

The Court of Appeals below found that the sentencing court had erred in concluding that it had no discretion to impose an exceptional sentence.¹ There is no discussion of constitutional principles in the order granting the petition. The court relied upon the statutory provisions of the Sentencing Reform Act, and State v. McGill, 112 Wn. App. 95, 47 P.3d 173 (2002). The relevant portion of the decision in McGill² does not cite

¹ The State contends that the Court of Appeals characterization of the record below was unreasonable. See Infra, p. 9.

² In McGill, Division I of the Court of Appeals granted a new sentencing hearing where the sentencing court erred in failing to recognize its authority to consider an exceptional sentence. At the hearing, the court stated "I have no option but to sentence you within the range on these of 87 to 116 months." McGill, 112 Wn. App. at 99. As there was legal authority that provided a basis for an exceptional sentence, the appellate court found that the sentencing court had an erroneous interpretation about the governing law.

or discuss any constitutional principles. Thus, the decision below granted relief upon a non-constitutional issue. As mentioned above, on non-constitutional claims, a petitioner has the very difficult burden of showing a “fundamental defect” resulting in a “complete miscarriage of justice.” The Court of Appeals offered no explanation of how an imposition of standard range sentence is equivalent to a “complete miscarriage of justice.” The Court of Appeals reasoned that because it can perceive a legal theory upon which an exceptional sentence might be based, and because the sentencing court did not expressly reject the imposition of an exceptional sentence, that relief is warranted. Order granting Petition at pp.4-5. The Court’s grant of relief on non-constitutional error is even more surprising as the order seems to acknowledge that petitioner might receive exactly the same sentence upon remand. The Court of Appeals granted relief only upon a showing of possible prejudice, well below the required standard of actual and substantial prejudice required by this court under In re Cook, In re St Pierre, and In re Lord.

As discussed above, the decision of the Court of Appeals is in conflict with numerous decisions of this court regarding the standards for reviewing personal restraint petitions. This provides a grounds for review under RAP 13.4(b)(1).

Perhaps more important is the harm the decision below does to the public’s trust in the court system in upholding the finality of convictions. The increased burdens placed upon a criminal defendant to obtain relief by

personal restraint petition are there for sound policy reasons. “These threshold requirements are justified by the court's interest in finality, economy, and integrity of the trial process and by the fact that the petitioner has already had an opportunity for judicial review.” In re Pers. Restraint of Isadore, 151 Wn.2d 294, 298, 88 P.3d 390 (2004); In re Pers. Restraint of Cashaw, 123 Wn.2d 138, 148-49, 866 P.2d 8 (1994). Here, Mr. Mulholland was convicted by a jury of six counts of assault and those convictions were affirmed on appeal. The public has an expectation of finality in the judgment which the Court of Appeals has ignored by not employing the heightened threshold requirements. This also provides a basis for review under RAP 13.4(b)(4).

This petition for review also calls in to question the Court of Appeals’ characterization of the statements made by the sentencing court. The Court of Appeals noted that the sentencing court referred to its lack of discretion in sentencing Mulholland several times as proof that the trial court did not believe that it had the power to impose an exceptional sentence downward. Appendix A at p. 3. However, the court removes these comments from the context in which they were made. First, the court was faced with a contested issue regarding whether the assaults could be treated as the same criminal conduct. The court correctly concluded that because there were separate victims involved, it had no discretion to treat the convictions as the same criminal conduct. See Appendix H to the petition, at RP 581-582. The comments in this portion

of the record cannot be fairly characterized as a statement by the court that it had no authority to impose an exceptional sentence. The court made similar comments at the time it was imposing sentence.

But when I'm looking at the counts and what the jury decided, I don't have discretion to do anything but follow the law. I don't have the discretion to have the sentences in my view run at the same time. As I read the law, it requires them to run consecutively.

Appendix H to the petition, at RP587-588. The most reasonable explanation for these comments was that the court was harkening back to its lack of discretion to treat the assaults as the same criminal conduct, rather than it expressing a general statement about its lack of discretion to impose an exceptional sentence. The Court of Appeals interprets these comments most favorably to the defendant when, in a collateral attack, it should be viewing the record in a manner to uphold the conviction. These comments are just as consistent with the court expressing its view that an exceptional sentence was not warranted under its understanding of the law. As argued in the State's response to the petition, the application of the multiple offense policy as a mitigating factor for an exceptional sentence downward has primarily been employed in cases involving multiple drug transactions. The standard to be employed is to examine the effects of the first crime against the cumulative effects of the subsequent crimes to assess whether the difference is nonexistent, trivial or trifling. It is not reasonable to conclude that the difference in causing trauma to six

persons is trivial or trifling, as compared to the impact of a crime causing trauma to only one person.

2. UNDER THE PRINCIPLES SET FORTH IN IN RE PERS RESTRAINT OF GRISBY, THE COURT BELOW ERRED IN NOT DISMISSING THE PETITION.

In In re Personal Restraint of Grisby, 121 Wn.2d 419, 853 P.2d 901 (1993), this court was faced with a petition from a defendant, sentenced to life imprisonment without the possibility of parole on three murder convictions, who claimed that he was constitutionally entitled to be sentenced to life with the possibility of parole, and to have a minimum term set by the Indeterminate Sentence Review Board. Grisby was also convicted of two additional counts of murder in the first degree, and one count of assault in the first degree, for which he received sentences of life with the possibility of parole. The sentencing court had ordered that all sentences should run consecutively. 121 Wn.2d at 423. His convictions were affirmed on appeal. Id. This court dismissed his petition because Grisby had failed to meet his burden of showing “actual and substantial prejudice” because he had made no showing of any prejudice stemming from his life without parole sentences. The court concluded that unless Grisby could show that there was a possibility he would ever be released on parole, he could not satisfy this threshold burden. 121 Wn. 2d at 424.

The court looked at the minimum terms that Grisby would have to serve, the fact that the standard range on any one of the murders was 411 to 548 months, and that his minimum terms would run consecutively and concluded that “[w]hatever this court’s decision, Grisby will undoubtedly be in prison until he dies.” 121 Wn.2d at 424-425.

This decision demonstrates that merely articulating a legal theory which provides a possible basis for lowering a sentence “on paper” is insufficient to demonstrate that there is “actual and substantial prejudice” flowing from the current sentence. In order to prevent a petition from being dismissed, a petitioner challenging his sentence must show the likelihood that he will obtain material, or actual, relief in the sentence ultimately served. As Grisby could not show that resentencing him to life with the possibility of parole on three of his murder convictions would actually result in his parole from prison, the court dismissed the petition.

In the case now before the court, Mr. Mulholland was convicted of six counts of assault in the first degree upon separate victims, each with a firearm enhancement. Mr. Mulholland recognizes that the court has no authority to reduce the time imposed on the firearm enhancements. State v. Brown, 139 Wn.2d 20, 983 P.2d 608 (1999). Thus, Mulholland acknowledges that 300 months of the 947 months of total confinement imposed by the court is beyond the reach of a downward exceptional sentence. Petition at p. 9. Additionally, as set forth in State v. Brown, 139 Wn.2d 20, 25, 983 P.2d 608 (1999), and State v. Flett, 98 Wn. App. 799,

806, 992 P.2d 1028 (2000), the crime of assault in the first degree is subject to a mandatory minimum term of five years under RCW 9.94A.540(1)(b) that is "excluded from exceptional sentence eligibility." Under these cases, the trial court could not impose a minimum base sentence of less than 300 months for the assault convictions. Adding this mandatory minimum amount to the mandatory enhancement time means that, even assuming that there was some legal basis for imposing an exceptional sentence, the trial court had no authority to impose a sentence of less than 600 months, or fifty years. Mulholland was fifty-five years old at the time of sentencing. Appendix H to the petition, at p. 584. Remanding for imposition of a sentence of an exceptional sentence of 600 months is unwarranted under Grisby, as the reduction of his sentence from 947 months to 600 months offers no realistic hope of benefiting Mr. Mulholland.

Because the decision of the Court of Appeals is in conflict with a decision of this court, this provides a grounds for review under RAP 13.4(b)(1).

3. THE COURT OF APPEALS' CONSTRUCTION OF RCW 9.94A.589(1)(a) and (b), AND RCW 9.94A.535(1)(g) VIOLATE STANDARD RULES OF STATUTORY CONSTRUCTION.

A well-settled principle of statutory construction is that "each word of a statute is to be accorded meaning." State ex rel. Schillberg v. Barnett,

79 Wn.2d 578, 584, 488 P.2d 255 (1971). "[T]he drafters of legislation . . . are presumed to have used no superfluous words and we must accord meaning, if possible, to every word in a statute." In re Recall of Pearsall-Stipek, 141 Wn.2d 756, 767, 10 P.3d 1034 (2000) (quoting Greenwood v. Dep't of Motor Vehicles, 13 Wn. App. 624, 628, 536 P.2d 644 (1975)). Statutes must be interpreted and construed so that all the language used is given effect, with no portion rendered meaningless or superfluous. State v. J.P., 149 Wn.2d 444, 450, 69 P.3d 318 (2003).

While sentencing courts enjoy some discretion in determining the length of sentences, that discretion does not extend to deciding whether to run sentences on current offenses concurrently or consecutively. State v. Jacobs, 154 Wn.2d 596, 115 P.3d 281 (2005). Where a person is sentenced for two or more current offenses that are not serious violent offenses or certain firearm offenses, the legislature has specified that the sentences for those offenses shall be served concurrently. RCW 9.94A.589(1)(a), see Appendix B. The statute expressly provides that consecutive sentences may be imposed only as an exceptional sentence under RCW 9.94A.535. RCW 9.94A.589(1)(a), see Appendix B. In contrast, the legislature specified that sentences for "two or more serious violent offenses arising from separate and distinct criminal conduct" must be served consecutively to each other. RCW 9.94A.589(1)(b), see Appendix B. The legislature did not include in subsection (1)(b) wording

similar to that found in subsection (1)(a) which would allow for concurrent sentences to be imposed as an exceptional sentence. RCW 9.94A.589(1)(b). The omission of the language authorizing an exceptional sentence to override presumptively consecutive sentences under subsection 1(b) reflects that the legislature did not intend to grant the sentencing court the same power that it had granted in subsection 1(a). The State submits that under the proper construction of RCW 9.94A.589, the sentencing court did not have any legal authority to run the base sentences on the assault convictions concurrently as part of an exceptional sentence.

Despite the omission of any express authority in RCW 9.94A.589(1)(b) to run consecutive sentences concurrently via an exceptional sentence, the Court of Appeals concluded that the language of RCW 9.94A.535(1)(g), the mitigating factor relating to the operation of the multiple offense policy set forth in 9.94A.589, provides a legislative grant of authority for imposing concurrent sentences on serious violent offenses via an exceptional sentence. It does not. While RCW 9.94A.535(1)(g) provides authorization for imposing an exceptional sentence downward, it does not expressly mention that this is to be achieved by running consecutive sentences concurrently. If a court determines that the multiple offense policy on multiple serious violent

offenses results in a presumptive sentence that is clearly excessive, it may impose an exceptional sentence downward, but it must do so in the length of the base sentences imposed and not by running the sentences concurrently. The Court of Appeals construction of RCW 9.94A.589 renders the differences in wording between subsection (1)(a) and (1)(b) meaningless, and renders the language in subsection (1)(a) regarding exceptional sentences superfluous. Such a construction violates the rules of statutory construction.

F. CONCLUSION.

For the foregoing reasons the State asks this court to grant the petition for review, to vacate the order granting relief issued below, and to dismiss the petition.

DATED: August 23, 2006.

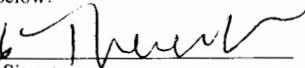
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Certificate of Service:

The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the 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.

8-23-06 
Date Signature

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APPENDIX "A"

Order Granting Petition

Whit

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

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In re the
 Personal Restraint Petition of

 DANIEL C. MULHOLLAND,

 Petitioner.

No. 34484-0-II

ORDER GRANTING PETITION

Daniel C. Mulholland seeks relief from personal restraint imposed following his conviction of six counts of first degree assault with a firearm and one count of drive-by shooting. Mulholland, who was 54 years old at the time of sentencing, received a standard range sentence of 927 months.¹ Mulholland argues that the trial court abused its discretion and violated his right to equal protection in failing to recognize that it could have imposed an exceptional sentence downward. He also contends that he received ineffective assistance of counsel when his attorneys at trial and on appeal failed to argue for such a sentence.

First degree assault is a serious violent offense. RCW 9.94A.030(37)(a)(v).² Whenever a person is convicted of two or more serious violent offenses arising from separate and distinct criminal conduct, the sentences imposed for those violent offenses are to be served consecutively to each other. RCW 9.94A.589(1)(b). This provision is part of the multiple offense policy outlined in RCW 9.94A.589.

¹ Mulholland had no criminal history that counted toward his sentence.

² For ease of reference, this order uses current statutory citations. The substance of the statutes cited has not changed since Mulholland committed his offenses in 2001.

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Although RCW 9.94A.589(1)(b) states that sentences for serious violent offenses “shall be served consecutively to each other,” this seemingly mandatory provision is subject to the exceptional sentence provisions of RCW 9.94A.535. This statute states at the outset that “[a] departure from the standards in RCW 9.94A.589(1) . . . governing whether sentences are to be served consecutively . . . is an exceptional sentence subject to the limitations in this section[.]”

RCW 9.94A.535(1) then provides a list of non-exclusive, illustrative factors that justify an exceptional sentence downward. One such factor is when “[t]he operation of the multiple offense policy of RCW 9.94A.589 results in a presumptive sentence that is clearly excessive in light of the purpose of this chapter, as expressed in RCW 9.94A.010.”³ RCW 9.94A.535(1)(g). Since RCW 9.94A.535(1)(g) references RCW 9.94A.589 in general, and does not exclude subsection (1)(b), this mitigating factor applies to sentences for serious violent offenses.

Mulholland was found guilty of firing shots from his car toward a home and its six residents. The State advised the court that consecutive sentencing on the resulting six assault convictions was mandatory under RCW 9.94A.589(1)(b). Defense counsel urged concurrent sentencing on the basis that the assaults could be found to be the same criminal conduct and thus count as one offense. *See* RCW 9.94A.589(1)(a) (offenses constitute the same criminal conduct if they require the same criminal intent, were committed at the same time and place, and involved the same victim). Because Mulholland’s assaults involved different victims, the trial court was left with only one

³ These purposes include ensuring punishments that are proportionate to the seriousness of the offense and the offender’s criminal history, promoting respect for the law by providing punishment which is just, encouraging commensurate punishments for offenders who commit similar offenses, protecting the public,

apparent option: to impose consecutive base sentences and consecutive firearm enhancements.⁴ The court referred several times to its lack of discretion in sentencing

Mulholland:

So I don't believe there is any discretion that this court has with regard to running the sentences concurrent. I think the law requires me to run them consecutive. I don't believe there's any discretion that this court has in that regard.

...

Mr. Mulholland, I know that this incident has impacted your family tremendously and it's impacted you, and I can't ignore what you gave to this country. It's a sacrifice to serve in the military and we--that's important and we recognize that. But when I'm looking at the counts and what the jury decided, I don't have discretion to do anything but follow the law. I don't have the discretion to have the sentences in my view run at the same time.

As I read the law, it requires them to run consecutively. I believe that's what I have to do. I'm going to be imposing the sentence as requested by the prosecutor. At this point I understand that's--that's a life sentence, as far as you are concerned, but there's nothing I can do about that.

RP 11-08-02 at 582, 588. The trial court imposed low-end standard range sentences on each count, ran the sentences for the assault counts consecutively, and then ran the six firearm enhancements on those counts consecutively, for a total of 927 months.

The trial court erred in concluding that it had no discretion to do otherwise. Under RCW 9.94A.535(1)(g), a sentencing court has the discretion to consider and impose an exceptional sentence downward if the multiple offense policy of RCW 9.94A.589 results in a clearly excessive sentence. *State v. McGill*, 112 Wn. App. 95, 99, 47 P.3d 173 (2002). The trial court either could have run the base sentences for the

offering the offender an opportunity for self-improvement and making frugal use of the State's resources. *State v. Hortman*, 76 Wn. App. 454, 463, 886 P.2d 234 (1994) (citing RCW 9.94A.010).

⁴ Consecutive firearm enhancements were required under RCW 9.94A.533(3)(e).

assault convictions concurrently or imposed lower sentences on each count. *State v. Hale*, 65 Wn. App. 752, 758, 829 P.2d 802 (1992).⁵ As the court stated in *Hale*,

Where a lesser sentence is supported by the factors set out in [RCW 9.94A.535(1)], an exceptional sentence for multiple current offenses may consist of either shortening the sentences or imposing concurrent sentences where consecutive sentences are standard. *See State v. Batista*, 116 Wn.2d 777, 787, 808 P.2d 1141 (1991). When more than one mitigating factor is present, an exceptional sentence may include both elements: i.e., shortening the sentences and making them run concurrently. *State v. Oxborrow*, 106 Wn.2d 525, 723 P.2d 1123 (1986).

65 Wn. App. at 758; *but see State v. Flett*, 98 Wn. App. 799, 806-07, 992 P.2d 1028 (2000) (mitigated exceptional sentence for multiple counts of first degree assault must include consecutive sentences on each assault).

The presumptive sentence imposed under RCW 9.94A.589 for multiple offenses is clearly excessive if the difference between the effects of the first offense and the subsequent offenses was nonexistent, trivial, or trifling. *State v. Calvert*, 79 Wn. App. 569, 583, 903 P.2d 1003 (1995); *State v. Sanchez*, 69 Wn. App. 255, 260-61, 848 P.2d 208 (1993). It is not for this court to make this determination regarding Mulholland's offenses in the first instance. Nor can this court determine whether other mitigating factors might apply. Because the trial court failed to realize that it had discretion to impose a mitigated sentence, and because its comments indicate that it would have considered an exceptional sentence downward had it known such a sentence was lawful, this matter must be remanded so that the trial court can determine whether a mitigated exceptional sentence is appropriate. *See McGill*, 112 Wn. App. at 100-01 (where appellate court cannot say that the sentencing court would have imposed the same

⁵ It does not appear, however, that those sentences could have gone below the five-year minimum set forth in RCW 9.94A.540(1)(b).

sentence had it known an exceptional sentence was an option, it must remand for the court to exercise its principled discretion).⁶ Accordingly, it is hereby

ORDERED that this petition is granted and this matter is remanded for resentencing.

DATED this 24th day of July, 2006.

Pengon, J.
Hart, J.
Moulton, P.J.

cc: Daniel C. Mulholland
Pierce County Clerk
County Cause No. 01-1-06114-5
Kathleen Proctor
Christopher H. Gibson

⁶ This resolution makes it unnecessary to reach Mulholland's equal protection and ineffective assistance of counsel claims.

APPENDIX “B”

RCW 9.94A.589

§ 9.94A.589. Consecutive or concurrent sentences

(1) (a) Except as provided in (b) or (c) of this subsection, whenever a person is to be sentenced for two or more current offenses, the sentence range for each current offense shall be determined by using all other current and prior convictions as if they were prior convictions for the purpose of the offender score: PROVIDED, That if the court enters a finding that some or all of the current offenses encompass the same criminal conduct then those current offenses shall be counted as one crime. Sentences imposed under this subsection shall be served concurrently. Consecutive sentences may only be imposed under the exceptional sentence provisions of RCW 9.94A.535. "Same criminal conduct," as used in this subsection, means two or more crimes that require the same criminal intent, are committed at the same time and place, and involve the same victim. This definition applies in cases involving vehicular assault or vehicular homicide even if the victims occupied the same vehicle.

(b) Whenever a person is convicted of two or more serious violent offenses arising from separate and distinct criminal conduct, the standard sentence range for the offense with the highest seriousness level under RCW 9.94A.515 shall be determined using the offender's prior convictions and other current convictions that are not serious violent offenses in the offender score and the standard sentence range for other serious violent offenses shall be determined by using an offender score of zero. The standard sentence range for any offenses that are not serious violent offenses shall be determined according to (a) of this subsection. All sentences imposed under (b) of this subsection shall be served consecutively to each other and concurrently with sentences imposed under (a) of this subsection.

(c) If an offender is convicted under RCW 9.41.040 for unlawful possession of a firearm in the first or second degree and for the felony crimes of theft of a firearm or possession of a stolen firearm, or both, the standard sentence range for each of these current offenses shall be determined by using all other current and prior convictions, except other current convictions for the felony crimes listed in this subsection (1)(c), as if they were prior convictions. 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.

(2) (a) Except as provided in (b) of this subsection, whenever a person while under sentence for conviction of a felony commits another felony and is sentenced to another term of confinement, the latter term shall not begin until expiration of all prior terms.

(b) Whenever a second or later felony conviction results in community supervision with conditions not currently in effect, under the prior sentence or sentences of community supervision the court may require that the conditions of community supervision contained in the second or later sentence begin during the immediate term of community supervision and continue throughout the duration of the consecutive term of community supervision.

(3) Subject to subsections (1) and (2) of this section, whenever a person is sentenced for a felony that was committed while the person was not under sentence for conviction of a felony, the sentence shall run concurrently with any felony sentence which has been imposed by any court in this or another state or by a

federal court subsequent to the commission of the crime being sentenced unless the court pronouncing the current sentence expressly orders that they be served consecutively.

(4) Whenever any person granted probation under RCW 9.95.210 or 9.92.060, or both, has the probationary sentence revoked and a prison sentence imposed, that sentence shall run consecutively to any sentence imposed pursuant to this chapter, unless the court pronouncing the subsequent sentence expressly orders that they be served concurrently.

(5) In the case of consecutive sentences, all periods of total confinement shall be served before any partial confinement, community restitution, community supervision, or any other requirement or conditions of any of the sentences. Except for exceptional sentences as authorized under RCW 9.94A.535, if two or more sentences that run consecutively include periods of community supervision, the aggregate of the community supervision period shall not exceed twenty-four months.

HISTORY: ♦ 2002 c 175 § 7; ♦ 2000 c 28 § 14; ♦ 1999 c 352 § 11; ♦ 1998 c 235 § 2; ♦ 1996 c 199 § 3; ♦ 1995 c 167 § 2; ♦ 1990 c 3 § 704. Prior: 1988 c 157 § 5; 1988 c 143 § 24; 1987 c 456 § 5; 1986 c 257 § 28; 1984 c 209 § 25; 1983 c 115 § 11. Formerly RCW 9.94A.400.