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NO. 92947-5

Court of Appeals No. 32873-2-III

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SUPREME COURT OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON, RESPONDENT

v.

CECILY ZORADA MCFARLAND, PETITIONER

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STATE'S ANSWER TO PETITION FOR DISCRETIONARY REVIEW

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 ORIGINAL

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**I. IDENTITY OF RESPONDING PARTY.**

The responding party is the State of Washington, by and through the Grant County Prosecuting Attorney's Office.

**II. STATEMENT OF RELIEF SOUGHT**

The State asks this Court to find there are no grounds for discretionary review and deny this Petition for discretionary review pursuant to RAP 13.4(b).

**III. FACTS RELEVANT TO THE PETITION.**

**A. *Facts from the superior court proceedings***

**1. *The crimes***

Cecily McFarland had been dating Chad Faircloth (Chad)<sup>1</sup> about a week when the two of them moved in with Chad's father, Jeffrey Faircloth, and step-mother, Bobbi Jean Palma. 1RP 110.<sup>2</sup> Ms. McFarland's previous relationship with Derik Sterling had ended approximately six months earlier. 1RP 286. During that relationship, Ms. McFarland had lived for a while with Mr. Sterling and his parents, the Legaults. 1RP 222. At the time of the burglary, she had not lived with the Legaults, nor had

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<sup>1</sup> The senior Mr. Faircloth is referred to as Mr. Faircloth, while his son is referred to as Chad. The State means no disrespect.

<sup>2</sup> The verbatim transcript of proceedings consists of three volumes of consecutively paginated trial record, cited here as 1RP and a separately paginated volume of transcripts from hearings on August 13, August 18, and October 27, 2014. This is cited as 2RP.

they seen her, for approximately nine months. *Id.*

Somewhere between 10:30 and 11:00 o'clock on June 21, 2014, Mr. Sterling received a text from Ms. McFarland, telling him she was inside his mother's house. 1RP 287. When Fred Legault awoke the next morning, he noticed his big-screen television was missing. 1 RP 223. He was also missing eighteen firearms, approximately 2,000 rounds of ammunition, a Blu-ray player and other electronics including one or two DVD players, an iPod, hand tools, an electric sander, several bottles of liquor, four checkbooks, a wallet, and credit cards. 1RP 223–24. Only ten of the firearms were recovered. RP 237. Eight remained unaccounted for at time of trial. *Id.*

Chad and Ms. McFarland left the Palma-Faircloth residence around 7:00 o'clock the evening of June 21. Ms. Palma went to bed around 9:00. 1RP 129. When Ms. Palma let them back into the house around 3:00 o'clock the next morning, Ms. McFarland carried "a whole bunch of guns" into the living room. *Id.* Ms. McFarland told Ms. Palma that the guns belonged to her. 1RP 132. Ms. Palma testified that at some point that night, while she was still lying down, "this tall Mexican dude" in his 20s came into the house, had a gun, and left. RP 133–34.

Around 6:00 o'clock, Chad woke Mr. Faircloth and asked him to help move more of Ms. McFarland's property. 1RP 111. Ms. McFarland

drove. 1RP 118. Before leaving his home, Mr. Faircloth saw “about” eleven guns in the bedroom shared by McFarland and Chad. 1RP 121, 124. Because Chad’s three younger brothers also lived at the house, Mr. Faircloth locked the guns outside in a carport storage unit for safety. *Id.*

Ms. McFarland did not testify at trial. She argued in closing that she was a mere bystander. 1RP 337.

## 2. *The video*

Ms. McFarland’s custodial statements were ruled admissible before trial. CP 37–38. During trial, the State sought to introduce a body-camera video of Ms. McFarland’s custodial statement to Grant County Sheriff’s Deputy Corey Linscott in which she denied being involved in the burglary and denied she had left the Fairchild house the previous night.<sup>3</sup> 1RP 186–87, 192.

The State argued the jury could interpret Ms. McFarland’s evasiveness “as going to her guilt[.]” 1RP 188. In response, the trial court noted most of the material objected to occurred after McFarland’s statement about just having gotten out of jail and ordered a redacted copy that ended just before that statement. 1RP 194. The court responded the video would give the jury a chance to observe Ms. McFarland’s demeanor

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<sup>3</sup> Defense counsel had told the court during the limine hearing there was no objection to admission of the video but apparently reconsidered and objected when it was offered during trial on the basis of relevance, and, eventually, prejudice. 1RP 55, 187, 191.

while she was making the statement and that courts “characteristically like juries to be able to do that when assessing statements, whether out of court or in court.” 1RP 199. Concerning the officer’s definition of the elements of burglary, the court stated the jury would be given the instruction to follow the law as the court gave it to them. 1RP 201. The court went on:

“I’m afraid that if we try somehow to extract that out, it’s going to – it’s going to be much more difficult for the jury to follow what’s on there. And I just don’t think given the instructions we’re giving them, I don’t think there’s any danger that the jury is going to take [the officer’s statement] as an instruction on the law. It does help the jury understand Ms. McFarland’s responses and the things that she was saying.”

1RP 201. The court offered a limiting instruction. *Id.* The record is silent as to why this instruction was not given. The jury was given standard definitional and “to-convict” burglary instructions. CP 144–45.

Ms. McFarland objected to the newly-redacted video, again asking that the video be turned off and only the audio be played for the jury, because McFarland was shown in handcuffs at the very beginning and again later in a portion of the video that could not be redacted. *Id.* at 212–13. The court responded that while there was prejudicial impact in showing McFarland in handcuffs, playing only the audio would deprive the jury of the full benefit of observing her demeanor. *Id.* at 213. The court reviewed the video one final time before announcing: “obviously, it’s

going to be impossible to sanitize this completely.” *Id.* at 213–14. The court offered a limiting instruction concerning the handcuffs. *Id.* at 214. The instruction was not given and here, too, the record is silent.

### 3. *Sentencing*

Ms. McFarland was convicted of first degree burglary, ten counts of theft of a firearm and three counts of unlawful possession of a firearm. CP 211. At sentencing, the State argued for high-end consecutive sentences on the firearms charges. CP 189–90. The court asked, “And – these – these counts all essentially have to run consecutively?” 2RP 22. After the State clarified that the thirteen gun counts ran consecutively to one another but concurrently with the burglary, the court asked: “Total range is 237 to 306 months in prison?” 2RP 23. Defense counsel responded: “Yes, your Honor.” *Id.* Counsel then stated: “unfortunately the burglary in the first degree conviction makes her legally ineligible for [a prison-DOSA], but based on the lack of sophistication of the crime, we believe – a sentence at the low end of the standard range is appropriate.” *Id.* The court imposed the low-end standard range sentence. 2RP at 24.

### **B. *Decision of Court of Appeals***

#### *1. Exceptional Sentence / Deficient Performance*

Division Three of the Court of Appeals affirmed Ms. McFarland’s convictions for first degree burglary, ten counts of theft of a firearm, and

three counts of unlawful possession of a firearm in an unpublished opinion filed March 8, 2016. The issues on appeal subject to this Petition for Review were (a) whether resentencing is appropriate when McFarland failed to request an exceptional downward departure and failed to identify any evidence in the record of substantial and compelling circumstances justifying such a sentence; and (b) whether the trial court abused its discretion by admitting and publishing a redacted video showing Ms. McFarland in handcuffs, argumentative, sarcastic, and apparently impaired as she denied involvement in the burglary when the probative value of the video outweighed its potential for unfair prejudice and any possible error was harmless.

The Court of Appeals held sentencing within the standard range was appropriate because Ms. McFarland did not request an exceptional downward sentence nor was there any writing from either side discussing the possibility. *State v. Mc Farland*, No. 32873-2-III, 2016 Wash. App. LEXIS 423, at \*18 (2016). The trial court could not have erred for failing to do something it was not asked to do. *Id.*

Division Three further held trial counsel's failure to request an exceptional downward sentence was not deficient performance because Ms. McFarland failed to show the existence of a basis for such a sentence that her counsel failed to pursue and cited no published authority for its

imposition under RCW 9.94A.589(1)(c)<sup>4</sup>. *Id.* at 20–21. The Court distinguished Ms. McFarland’s case from *In re Mulholland*, 161 Wn.2d 322, 166 P.3d 677 (2007), on two factual differences. *McFarland*, *supra* at 21. The first critical difference was that Ms. McFarland, unlike Mr. Mulholland, did not ask for an exceptional sentence. *Id.* She therefore had to attack her attorney’s performance as deficient. *Id.* This she could not do because of the second critical difference.

The second critical difference was that the sentencing issue in *Mulholland* was application of RCW 9.94A.535(1)(g), the “multiple offense policy” authorizing a downward exceptional sentence when the operation of that policy results in a clearly excessive sentence, to serious violent offenses under RCW 9.94A.589(1)(b). *Id.* at 20. Ms. McFarland’s case concerns application of that policy to .589(1)(c). Ms. McFarland had failed to cite any published opinion indicating any court had extended the multiple offense policy to the provision under which she was sentenced. *Id.* “In light of the lack of any history of other counsel successfully making a similar argument [concerning application to .589(1)(c)], we

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<sup>4</sup> RCW 9.94A.589(1)(c) provides: “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 the 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.”

cannot conclude as a matter of law that counsel failed to meet professional standards.” *Id.* at 21–22.

The Court of Appeals concluded Ms. McFarland could prevail on the sentencing issue in a personal restraint petition if she could marshal evidence showing an exceptional sentence was, in fact, available to her and that counsel failed to pursue it. *Id.* at 20–22. Such evidence, however, is absent from this record. *Id.* at 22.

## 2. *Redacted video*

The Court of Appeals found the redacted video relevant “because it included Ms. McFarland’s denial of involvement in the crime, a facet of the recording that she agreed was relevant.” *Mc Farland, supra.* at 12. The Court also found the statement limited Ms. McFarland’s defense to “statements consistent with her alleged non-involvement with the incident.” *Id.* The Court agreed discussion of the elements of burglary was improper but found it was “part and parcel of the defendant’s discussion and denial of involvement in the crime.” *Id.* It was Ms. McFarland’s statements that “prompted the deputy to correct her understanding of what constituted a burglary.” *Id.* Division Three agreed with the trial court that it was not possible to completely sanitize the video and that any prejudice from the discussion of the elements of burglary was minimal. *Id.* at 13. Finally, the Court assessed the prejudice to Ms. McFarland of being

shown in handcuffs and “her demeanor over several minutes while she was not being questioned or making any statements relevant to the proceedings. *Id.* at 13–14. The Court acknowledged the question of whether the evidence was more prejudicial than probative “was the trial court’s decision to make.” *Id.* at 14. Further, the Court noted, “In large part, the demeanor evidence was cumulative to that shown in the admittedly relevant portions of the video.” *Id.*

#### **IV. ARGUMENT**

A petition for review will be accepted by this Court only if (1) the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or (2) the decision of the Court of Appeals is in conflict with another decision of the Court of Appeals, or (3) a significant question of law under the Constitution of the State of Washington or of the United States is involved; or (4) the petition involves an issue of substantial public interest that should be determined by the Supreme Court. RAP 13.4(b).

Ms. McFarland asserts the decision of the Court of Appeals conflicts with decisions of this Court and with other decisions of the Court of Appeals. It does not. Ms. McFarland also asks this Court to revisit the appellate court’s decision and findings affirming that admission of the redacted video was not an abuse of the trial court’s discretion.

**A. The decision of the Court of Appeals affirming a sentence within the standard range is not in conflict with any decision of the Supreme Court or with another decision of the Court of Appeals.**

An exceptional sentence below the standard range may be imposed if the court finds mitigating circumstances are established by a preponderance of the evidence. RCW 9.94A.535(1). Ms. McFarland challenges the procedure under which she was sentenced to the low end of the standard range, asserting the trial court misapprehended its sentencing authority. The Court of Appeals correctly rejected this argument because Ms. McFarland never asked the trial court to consider an exceptional downward departure, noting the trial court could not have erred for failing to do something it was not asked to do. *McFarland, supra.* at 18.

Ms. McFarland also asks this Court to revisit the decision distinguishing the facts in *Mulholland* from the facts in her case. *Mulholland* held mandatory consecutive sentences for violent offenses under RCW 9.94A.589(1)(b) could be run concurrently as an exceptional sentence downward if the sentencing court finds mitigating factors justifying such a sentence. *Mulholland*, 161 Wn.2d at 327–28. But, as Division Three pointed out, *Mulholland* does not address whether the multiple offense policy extends to the consecutive sentence requirements of .589(1)(c), nor has Ms. McFarland cited any published case extending

*Mulholland* to mandatory consecutive sentences for gun crimes. Counsel's performance could not have been deficient for failing to ask for such an extension without any guidance from established precedent.

Regardless of whether the multiple offense policy should be extended to consecutive gun crime sentences, exceptional downward sentences are designed to be just that—exceptional. *State v. Graham*, 181 Wn.2d 878, 885, 337 P.3d 219 (2014). The legislature intended such sentences to be rare. *Id.* “This is accomplished . . . by limiting them for presumptive range sentences that are ‘clearly excessive,’ RCW 9.94A.535(1)(g), and where the exceptional sentence is supported by ‘substantial and compelling reasons.’” *Id.* The asserted mitigating factor, like an aggravating factor, “must be sufficiently substantial and compelling to distinguish the crime in question from others in the same category.” *State v. Alexander*, 125 Wn.2d 717, 725, 888 P.2d 1169, 1173 (1995) (citing *State v. Smith*, 123 Wn.2d 51, 57, 864 P.2d 1371 (1993)). “The trial court may not base an exceptional sentence on factors necessarily considered by the Legislature in establishing the standard sentence range.” *Id.*

Ms. McFarland fails to identify why her sentence is clearly excessive or argue any substantial and compelling reasons her circumstances should be differentiated from those of any other felon later

convicted of multiple counts of theft of a firearm or possession of stolen firearms. She was a willing participant in the burglary and theft. The victim was not. She did nothing to assist law enforcement or the victim in the recovery of almost half of the guns stolen. This is not the type of situation in which a confidential informant, having made one successful drug purchase from a target, continues to make additional purchases from the same target over a relatively short period of time, rendering the effects of subsequent purchases trivial or trifling. *See, e.g., State v. Sanchez*, 69 Wn. App. 255, 260 – 61, 848 P.2d 208 (1993). Here, there is some evidence that Ms. McFarland managed to dispose of eight firearms less than 24 hours after stealing them. Eight guns on the loose is not “trivial or trifling.” This Court should deny review of the exceptional sentence.

***B. The Court of Appeals properly held admission of the redacted video was well within the trial court’s discretion and any prejudice was harmless, and this decision does not conflict with decisions of other appellate courts.***

*1. The decision of the Court of Appeals does not conflict with the holding in another case.*

The Court of Appeals held Ms. McFarland’s affirmative denial of involvement in the Legault burglary was relevant to show consciousness of guilt, noting Ms. McFarland had agreed her denial was relevant. *McFarland, supra*, at 12. Ms. McFarland now argues that holding conflicts with *State v. Fuller*, 169 Wn. App. 797, 282 P.3d 126 (2012).

*Fuller* does not mean what Ms. McFarland thinks it means. In *Fuller*, Division Two of the Court of Appeals found prosecutorial misconduct when the State used Mr. Fuller's post-arrest partial silence solely as substantive evidence of guilt. 169 Wn. App. at 814. Mr. Fuller, like Ms. McFarland, had made a knowing, voluntary, and intelligent waiver of his right to remain silent but had neither admitted nor denied committing the crime. *Id.* at 805. Throughout trial, the State referenced Mr. Fuller's silence as failure to deny culpability, indicating consciousness of guilt. *Id.* at 806.

Ms. McFarland did not remain silent. On the video, she actively denied any involvement in the Legault burglary. Her constitutional right to remain silent is not implicated. This Court has held "the range of circumstances which may be shown as evidence of flight is broad." *State v. Bruton*, 66 Wn.2d 111, 112, 401 P.2d 340 (1965). The inquiry is focused on whether the circumstances were substantial and sufficient to create a reasonable and substantive inference that the defendant's departure was "an instinctive or impulsive reaction to a consciousness of guilt or was a deliberate effort to evade arrest and prosecution." *Id.* at 113. Consciousness of guilt may be inferred from a variety of circumstances, including voluntarily providing false information to law enforcement. *See, e.g., State v. Clark*, 143 Wn.2d 731, 24 P.3d 1006 (2001). That is what

precisely Ms. McFarland did. She instinctively and impulsively reacted in a deliberate effort to evade arrest and prosecution. Her denial was relevant, admissible evidence of her consciousness of guilt.

Further, in *Fuller*, the State did not identify any defense theory on which comments on Mr. Fuller's constitutionally protected right to silence could have been proper impeachment. 169 Wn. App. at 818. Ms. McFarland, on the other hand, argued in closing she had been nothing more than a bystander at the Legault burglary. The Court of Appeals found her affirmative statement in the video "tied the defense down to theories consistent with her alleged non-involvement with the incident." *Id.* at 12.

2. *The portion of the video in which the deputy told Ms. McFarland a burglary occurred and explaining its elements was not "opinion testimony" and its admission was not an abuse of discretion.*

The Court of Appeals correctly concluded the trial court did not abuse its discretion in admitting the portion of the video in which the deputy told Ms. McFarland a burglary had occurred and corrected her obvious misunderstanding of the nature of the crime with his own definition of "burglary." *McFarland, supra*, at 12.

The discussion was not offered to the jury as a statement of law for their consideration. It simply put the denial of involvement in its proper context. Finally, the court's written instructions repeatedly reminded jurors that it must

accept the law as contained in the written instructions.  
Given all, we cannot say the court erred in its decision.

*Id.* “There was minimal prejudice from this discussion and it did relate to relevant statements made by the defendant.” *Id.*

3. *The jury convicted on the overwhelming evidence of Ms. McFarland's participation in the burglary, not on an improper emotional response to her behavior.*

While Ms. McFarland's demeanor on the redacted video was unpleasant and unflattering, the jury had ample evidence to convict her of charges related to the Legault burglary without resorting to collective, visceral distaste. Four people were involved in one way or another with the Legault burglary and theft. But it was Ms. McFarland who had a prior relationship with the Legaults and their son, including her temporary residence at the burglarized house. It was Ms. McFarland who drove Chad and Mr. Faircloth on one of their forays to the house. It was Ms. McFarland who texted from that house in the middle of the night, telling her former boyfriend she was inside. It was Ms. McFarland who carried the guns into the Faircloth/Palma residence told Ms. Palma all of the property hauled in that night belonged to her. Any prejudice arising from the jury seeing Ms. McFarland in handcuffs and behaving badly was minimal in light of the overwhelming evidence she was an active participant in the burglary, if not its mastermind.

V. CONCLUSION

Ms. McFarland fails to demonstrate either of her asserted grounds supporting discretionary review. This Court should deny her petition.

Respectfully submitted this 2nd day of May, 2016.

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SUPREME COURT OF THE STATE OF WASHINGTON

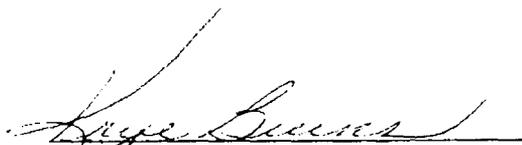
STATE OF WASHINGTON,	)	
	)	
Respondent,	)	No. 92947-5
	)	
vs.	)	
	)	
CECILY ZORADA McFARLAND,	)	DECLARATION OF SERVICE
	)	
Petitioner.	)	
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Under penalty of perjury of the laws of the State of Washington, the undersigned declares:

That on this day I served a copy of the State's Answer to Petition for Discretionary Review in this matter by e-mail on the following party, receipt confirmed, pursuant to the parties' agreement:

Kristina M. Nichols  
[Wa.Appeals@gmail.com](mailto:Wa.Appeals@gmail.com)

Dated: May 2, 2016.

  
Kaye Burns

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(This was sent yesterday, but due to a computer failure did not go through. Please let us know if you need a Motion to Extend Time.)

Attached for filing is the State's Answer to Petition for Discretionary Review in the above matter. A copy is by this e-mail being also served on Kristina M. Nichols, counsel for Petitioner. Thank you for your consideration.

### ***Kaye Burns***

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