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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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SUPPLEMENTAL BRIEF OF RESPONDENT

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I. SUPPLEMENTAL STATEMENT OF ISSUES.

- A. DID THE SENTENCING COURT MISINTERPRET EXISTING LAW TO THE EXTENT IT MAY HAVE BELIEVED IT LACKED THE DISCRETION TO IMPOSE AN EXCEPTIONAL SENTENCE WHEN Ms. MCFARLAND FAILED TO REQUEST AN EXCEPTIONAL SENTENCE AND NOTHING IN THE RECORD SUPPORTS A DOWNWARD DEPARTURE? (ASSIGNMENT OF ERROR No. 1)
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II. SUPPLEMENTAL STATEMENT OF THE CASE. <sup>1</sup>

The State incorporates facts from the parties' briefs filed in the Court of Appeals, RAP 10.3(b), and presents supplemental facts within the State's argument where relevant.

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<sup>1</sup> The verbatim transcript of proceedings consists of three volumes of consecutively paginated trial record, cited here as IRP \_\_ and a separately paginated transcript including the October 27, 2014 sentencing hearing, cited as 2RP \_\_.

### III. ARGUMENT

- A. THE SENTENCING COURT DID NOT MISINTERPRET EXISTING LAW TO THE EXTENT IT MAY HAVE BELIEVED IT LACKED THE DISCRETION TO IMPOSE AN EXCEPTIONAL SENTENCE WHEN MS. MCFARLAND FAILED TO REQUEST AN EXCEPTIONAL SENTENCE AND NOTHING IN THE RECORD SUPPORTS A DOWNWARD DEPARTURE.

No Washington appellate court has yet decided whether the exceptional sentence provisions of RCW 9.94A.535 apply to RCW 9.94A.589(1)(c), the subsection commanding consecutive sentences for specific armed crimes. Ms. McFarland argued for its application in the Court of Appeals and reargues that position here. Br. of Appellant at 10; Pet. For Review at 7–8. Below, the State elected not to address the question and focused instead on Ms. McFarland’s failure to request an exceptional sentence and her failure on appeal to identify anything in the record supporting mitigation. Br. of Respondent at 10–11.

The Court of Appeals took the same approach, finding it need not resolve whether the rationale of *In re Pers. Restraint of Mulholland*, 161 Wn.2d 322, 166 P.3d 677 (2007), would authorize an exceptional sentence because, unlike Mr. Mulholland, Ms. McFarland never requested one. *State v. Mc Farland*, No. 32873-2-III at 21 (Ct. App. Mar. 8, 2016). Rejecting Ms. McFarland’s assertion that the trial court had misapprehended its sentencing authority, the Court of Appeals observed

neither party suggested the possibility at sentencing and correctly concluded the question of an exceptional sentence “simply was not before the court. Accordingly, the judge cannot have erred for failing to do something he was never asked to do.” *Id.* at 18. Because the judge had no authority to impose an exceptional sentence absent sufficient evidence of mitigating circumstances, RCW 9.9A.535, his sentencing decision was consistent with decisions of this Court and other appellate courts.

B. IF WARRANTED UNDER RCW 9.94A.535, NOTHING PROHIBITS EXCEPTIONAL DEPARTURES FROM THE STANDARD SENTENCE RANGE FOR CRIMES ENUMERATED IN .589(1)(C), BUT THE INTERPLAY BETWEEN THAT SUBSECTION AND THE UNAMBIGUOUS LANGUAGE OF RCW 9.41.040(6) PRECLUDES APPLICATION OF *MULHOLLAND*'S RATIONALE TO AUTHORIZE CONCURRENT EXCEPTIONAL SENTENCES.

The Court of Appeals rightly assessed the effect of the interplay between RCW 9.94A.589(1)(c), requiring consecutive sentences for certain gun crimes, and its correlative statute, RCW 9.41.040(6), mandating consecutive sentences for these crimes “notwithstanding any other law.” *McFarland*, No. 32873-2-III at 20-21.

On its face, [RCW 9.41.040(6)] appears to prohibit any exceptional sentence that would alter the consecutive ordering of the sentences, but does not otherwise prohibit use of the exceptional sentence power in these cases. Thus, it would not prohibit the reduction of each of the consecutive terms in the event an exceptional sentence is appropriate.

*Id.* at 21.

Notwithstanding the plain language of RCW 9.94A.589(1)(b) requiring consecutive sentences for serious violent felonies, this Court has held “a sentencing court may order that multiple sentences for serious violent offenses run concurrently as an exceptional sentence<sup>2</sup> if it finds there are mitigating factors justifying such a sentence.” *In re Pers. Restraint of Mulholland*, 161 Wn.2d 322, 327–28, 166 P.3d 677 (2007). In *Mulholland*, this Court reasoned RCW 9.94A.535, authorizing departures from the standard sentence range, does not differentiate between subsections (1)(a) and (1)(b), “lead[ing] inescapably to a conclusion that exceptional sentences may be imposed under either subsection of RCW 9.94A.589(1).” *Id.* at 330.

The question here is whether this reasoning may properly extend to subsection .589(1)(c),<sup>3</sup> providing that where

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 offender shall serve consecutive sentences for each conviction of the felony

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<sup>2</sup> “A departure from the standards in RCW 9.94A.589(1) and (2) governing whether sentences are to be served consecutively or concurrently is an exceptional sentence[.]” RCW 9.94A.535.

<sup>3</sup> “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.” RCW 9.94A.589(1)(c).

crimes listed in this subsection (1)(c), and for each firearm unlawfully possessed.

RCW 9.94A.589(1)(c). This provision was added to the Sentencing Reform Act of 1981 (SRA)<sup>4</sup> under the Hard Time for Armed Crime Act (HTACA), LAWS OF 1995, ch. 129, the same legislation that enacted RCW 9.41.040, concerning unlawful possession of firearms.

The legislative title of the HTACA is “An Act Relating to increasing penalties for armed crimes . . . .” *State v. Broadaway*, 133 Wn.2d 118, 124, 942 P.2d 798 (1997). Its clear purpose was to increase sentences for armed crime. *Id.* at 128. The HTACA increased penalties for carrying and using deadly weapons and intended, among other goals, to “[r]educe the number of armed offenders by making the carrying and use of the deadly weapon not worth the sentence received upon conviction.” HTACA, ch. 129, § 1(2)(b), 1995 Wash. Sess. Laws 443, 444 (findings and intent). It was crafted to “[d]istinguish between the gun predators and criminals carrying other deadly weapons and provide greatly increased penalties for gun predators *and for those offenders committing crimes to acquire firearms.*” *Id.* at § 1(2)(c) (emphasis added). To this end, and directly contrary to the SRA’s general rule that convictions for two or

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<sup>4</sup> LAWS OF 1981, ch. 137.

more current offenses shall be served concurrently,<sup>5</sup> RCW 9.41.040(6)<sup>6</sup>

provides:

*Notwithstanding any other law*, if the offender is convicted under this section 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, then the offender shall serve consecutive sentences for each of the felony crimes of conviction listed in this subsection.

RCW 9.41.040(6) (emphasis added). This provision, included in the HTACA from its inception, LAWS OF 1995, ch. 129, § 16(6), “deals more specifically with the sentencing of firearm theft and unlawful possession offenses than does the more general SRA, which covers all types of offenses.” *State v. Murphy*, 98 Wn. App. 42, 48, 988 P.2d 1018 (1999), *review denied*, 140 Wn.2d 1018 (2000). “Where one statutory provision deals with a subject in a general way and another deals with the same subject in a specific manner, the specific prevails.” *Id.* (citing *State v. Lessley*, 118 Wn.2d 773, 781, 827 P.2d 996 (1992)). RCW 9.41.040(6) “clearly and unambiguously prohibits concurrent sentences for the listed

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<sup>5</sup> RCW 9.94A.589(1)(a), formerly 9.94A.400(1)(a).

<sup>6</sup> “Nothing in chapter 129, LAWS OF 1995 shall ever be construed or interpreted as preventing an offender from being charged and subsequently convicted for the separate felony crimes of theft of a firearm or possession of a stolen firearm, or both, in addition to being charged and subsequently convicted under this section for unlawful possession of a firearm in the first or second degree. Notwithstanding any other law, if the offender is convicted under this section 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, then the offender shall serve consecutive sentences for each of the felony crimes of conviction listed in this subsection.” RCW 9.41.040(6).

firearms crimes.” *State v. McReynolds*, 117 Wn. App. 309, 343, 71 P.3d 663 (2003) (citing *Murphy*, 98 Wn. App. at 48–49). “Interpreting RCW 9.94A.589(1)(c) consistently with RCW 9.41.040(6) results in a harmonious, unified statutory scheme.” *State v. Haggin*, 195 Wn. App. 315, 321, \_\_\_ P.3d \_\_\_ (2016). There is no need to apply various rules of statutory construction because the statute is unambiguous. *McReynolds*, 117 Wn. App. at 343 (citing *State v. Smith*, 117 Wn.2d 263, 814 P.2d 652 (1991)). “Where the plain language of the statute is unambiguous, the legislature’s intent is evident, and the statute may not be construed otherwise.” *State v. Thomas*, 150 Wn.2d 666, 670, 80 P.3d 168 (2003).

The Legislature subsequently and unambiguously confirmed it intended the harsh sentencing provisions of the HTACA. After this Court, in *In re Post Sentencing Review of Charles*, 135 Wn.2d 239, 942 P.2d 363 (1997), held ambiguity in the interplay between the firearm enhancement provisions of the HTACA and RCW 9.94A.310(3)<sup>7</sup> concerning whether weapon enhancements were required to run consecutively to one another, the Legislature amended the HTACA, enacting former RCW 9.94A.400(1)(c).<sup>8</sup> “The stated purpose of the amendments was to

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<sup>7</sup> RCW 9.94A.310(3) provided: “Notwithstanding any other provision of law, any and all firearm enhancements under this section are mandatory, shall be served in total confinement, and shall not run concurrently with any other sentencing provisions.”

<sup>8</sup> LAWS OF 1998, ch. 235, § 2(1)(c).

amend[ ] the Sentencing Reform Act [of 1981, chapter 9.94A RCW,] to provide that sentences *must* be served consecutively for the multiple offenses of unlawful possession of a firearm in the first or second degree and possession of a stolen firearm or theft of a firearm, but that current weapon-related offenses may not be considered in criminal history when calculating the offender score to determine the sentence range.

*State v. Haggin*, 195 Wn. App. at 323 (emphasis added) (quoting Final B. Rep. on H.B. 1544, at 3, 56th Leg., Reg. Sess. (Wash. 1999)). Division II of the Court of Appeals “view[ed] this amendment, not as a change to the effect of the statute as previously worded, but rather as an underscore that the Legislature meant what it said originally in the plain language of [RCW 9.41.040(6)], as prefaced by ‘Notwithstanding any other law.’” *Murphy*, 98 Wn. App. at 48 n. 7. “It is the province of the Legislature, if it so chooses, not the appellate courts, to ameliorate any undue harshness arising from consecutive sentences for multiple firearm counts.” *Id.* at 49 n. 8. The Court of Appeals in *McFarland* cited *Murphy* when it succinctly noted: “Sentencing for this type of offense is harsh by legislative design.” *McFarland*, No. 32873-2-III at 22 n. 11 (citing *Murphy*, 98 Wn. App. at 49 n. 8).

Despite the unavailability of concurrent sentences for firearms violations specified in RCW 9.41.040(6), nothing in the plain language of the HTACA prohibits a trial court from imposing a mitigated exceptional

sentence below the standard sentence range when justified by the considerations of RCW 9.94A.535. As the Court of Appeals noted, in the case of consecutive sentences imposed under subsection .589(1)(c), a court could impose shorter periods of incarceration on each count.

The trial court's comments at Ms. McFarland's sentencing, uttered without a request for an exceptional sentence or reference to any mitigating factors, appear to reflect general discomfort over the intended effect of the HTACA—to make armed crime not worth the harsh sentence guaranteed upon conviction. The Court of Appeals correctly observed “[m]ere disagreement with a standard sentence range is not a basis for an exceptional sentence.” *Id.* (citing *State v. Freitag*, 127 Wn.2d 141, 144–145, 896 P.2d 1254 (1995), 905 P.2d 355)).

C. NOTHING IN THIS RECORD DEMONSTRATES SUBSTANTIAL AND COMPELLING CIRCUMSTANCES JUSTIFYING AN EXCEPTIONAL SENTENCE.

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,’ and where the exceptional sentence is supported by ‘substantial and compelling reasons.’” *Id.* (citing RCW 9.94A.535(1)(g)). 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 complains the court imposed her 20-year sentence “after she took boxes of [her] personal property and additional property that belonged to her ex-boyfriend’s parents from a home where she used to live.” Pet. for Review at 11. Ms. McFarland had not lived at the Legault residence for nine months. 1RP 222. The “additional property” included 18 firearms, 2,000 rounds of ammunition, a Blu-ray player and other electronics including one or two DVD players and an iPod, hand tools, an electric sander, several bottles of liquor, four checkbooks, a wallet, and credit cards. 1RP 223–24. Mr. Legault was home, alone and asleep, as Ms. McFarland and Mr. Faircloth ransacked his house. 1RP 222. He was still asleep when they returned with the senior Mr. Faircloth several hours later. 1RP 222.

For some unfathomable reason, Ms. McFarland texted her ex-boyfriend sometime between 10:30 and 11:00 P.M. to tell him she was inside his mother’s house. 1RP 287. The two burglars did not return to the

Palma-Faircloth residence until 3:00 A.M. 1RP 130. Ms. McFarland carried ten guns into the house.<sup>9</sup> 1RP 121, 124; 127. Around 6:00 A.M., the senior Mr. Faircloth went back to the Legault residence with his son and Ms. McFarland, ostensibly to retrieve more of Ms. McFarland's "stuff." 1RP 115. He did not see any guns removed from the Legault house during that trip. 1RP 118. He heard Ms. McFarland tell his son all the guns were hers and "Chad wasn't gonna get nothing of it." 1RP 124.

The Court of Appeals commented that evidence of Ms. McFarland's drug use around the time of the burglary might have rendered her unable to appreciate the wrongfulness of her actions, citing RCW 9.94A.535(1)(e). *McFarland*, No. 32873-2-III at 19-20. That provision specifically excludes the voluntary use of drugs or alcohol.<sup>10</sup>

Ms. McFarland proposes other bases for downward departure, Pet. for Review at 12, none of which support an exceptional sentence.

1. *Lack of proportionality between Ms. McFarland's sentence and that of her co-defendant*

Ms. McFarland argues her sentence was disproportionate to that of

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<sup>9</sup> Mr. Faircloth testified he saw "about" eleven guns and locked them in a storage area. 1RP 121, 124. Law enforcement recovered ten guns from the storage area later that afternoon. 1RP 127.

<sup>10</sup> RCW 9.94A.535(1)(e) provides: "The defendant's capacity to appreciate the wrongfulness of his or her conduct, or to conform his or her conduct to the requirements of the law, was significantly impaired. *Voluntary use of drugs or alcohol is excluded.*" (Emphasis added).

her co-defendant, Chad Faircloth, who “participated in the events with Ms. McFarland and thereafter received only a three-year prison-based DOSA.” Pet. for Review at 11. This Court should decline to consider proportionality related to the sentence imposed on Ms. McFarland’s co-defendant. There is no competent evidence of Chad Faircloth’s sentence in the record. The record contains only defense counsel’s representations at Ms. McFarland’s sentencing. Counsel told the court the co-defendant did not have the same criminal history as his client but did not elaborate. 2RP 23. Ms. McFarland’s criminal history included a 2014 conviction for possession of methamphetamine and convictions in 2007 for possession of stolen property, forgery, and bail jumping. CP 214. Counsel also told the court Chad Faircloth was not convicted of burglary in the first degree as Ms. McFarland was. 2RP 23. The record is silent on the details of Chad Faircloth’s plea agreement, the crimes to which he pleaded guilty, his criminal history, and the length and terms of his DOSA sentence.<sup>11</sup> 2RP 21–28. Without such information, it is impossible to determine whether the sentence at issue here is “commensurate with the punishment imposed on others committing similar offenses[.]” RCW 9.94A.010.

2. *Lack of proportionality to the seriousness of the offense and the offender’s criminal history; application of the “multiple offense policy”*

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<sup>11</sup> The State has been unable to locate anything in the record supporting Ms. McFarland’s assertion Chad Faircloth’s DOSA sentence was three years.

*resulting in a standard range "clearly excessive" in light of the purposes of the SRA*

At sentencing, defense counsel argued:

[I]f Ms. McFarland had been found guilty of stealing toasters instead of firearms she'd be looking at a range of nine to twelve months confinement, versus 237 months to 306 months confinement. So, - - there's a certain degree of - - lack of proportionality in the - in the punishment based on the consecutive sentences that are required by the legislature - -

2RP 23-24. But Ms. McFarland did not steal 18 toasters. Ms. McFarland did not dispose of eight toasters between the time of her text to Mr. Legault's step-son and her return to the Faircloth residence about four hours later. Eight toasters let loose into the community are hardly cause for alarm. Although the State was unable to prove Ms. McFarland trafficked in stolen firearms, CP 211, the inescapable fact is that eight firearms were somehow disposed of in just a few hours. It was after these eight firearms went missing Ms. McFarland told Chad Faircloth all the guns were hers and "Chad wasn't gonna get nothing of it." 1RP 124. These facts lead to a reasonable inference the missing guns had been converted into an asset Ms. McFarland wanted to keep for herself. They refute her trial defense that she was a helpless bystander.

Ms. McFarland is precisely the criminal the Legislature had in mind when it enacted the HTACA. Her sentence was disproportional by

design—its structure was carefully crafted to convince like-minded felons that theft of firearms was not worth the harsh sentence received upon conviction. HTACA, ch. 129, § 1(2)(b), 1995 Wash. Sess. Laws 443, 444 (findings and intent).

3. *Expressions of remorse and hope for rehabilitation, college, and a brighter future*

Remorse is not a valid mitigating factor. *State v. Kinneman*, 120 Wn. App. 327, 347, 84 P.3d 882 (2003) (citing *State v. McClarney*, 107 Wn. App. 256, 263, 26 P.3d 1013 (2001) (“using remorse as a mitigating factor would undermine the SRA’s focus on meting out the appropriate punishment for a particular crime”), *review denied*, 146 Wn.2d 1002 (2002)). Further, there is no compelling evidence of remorse. Ms. McFarland did nothing to assist law enforcement in locating the eight missing firearms, one of which was an irreplaceable 1873 Winchester lever action 44-40 caliber buffalo gun that had belonged to Mr. Legault’s great-great-great-grandfather. CP 192. Nothing in the record supports Ms. McFarland’s claim that her remorse was anything other than regret at having been caught.

Under that same rationale, hope for a brighter future through rehabilitation and a college education cannot be considered grounds for an exceptional sentence. It is an unexceptional sentiment.

4. *Lack of predisposition to commit violent crime; lack of violent criminal history*

A defendant's lack of criminal history does not justify an exceptional sentence because criminal history "is one of the components used to compute the presumptive range for an offense under the sentencing reform act." *Freitag*, 127 Wn.2d at 144. While Ms. McFarland had no violent criminal history, the evidence of eight missing firearms, her apparent drug impairment after the burglary, and her prior convictions for possession of methamphetamine, possession of stolen property, and forgery support the reasonable inference she stole to support a drug habit. Her willingness to burgle an occupied house while the owner was present demonstrates extreme lack of judgment and could have had tragic consequences in light of the number of firearms available. Mr. Legault recognized, "Had I awoke during this, the outcome for me could have been much worse." CP 192. Somebody easily could have been killed.

As noted above, one of the Legislature's stated purposes in enacting the HTACA was to "provide greatly increased penalties for gun predators and for those offenders committing crimes to acquire firearms." HTACA, ch. 129, § 1(2)(c). Nothing in the HTACA carves out a "nonviolent priors" exception for felons stealing and possessing stolen firearms.

5. *No attempt to conceal weapons from the senior Mr. Faircloth and his wife*

Mr. Faircloth and Ms. Palma were not victims here. Ms.

McFarland led her new boyfriend's exceptionally trusting father and stepmother to believe the firearms and other stolen property she hauled into their house in the middle of the night belonged to her. She did not hide the guns but she lied to hide the fact she stole them. The factors illustrating grounds for a mitigated downward sentence in RCW 9.94A.535(1) do not include anything analogous to falsely claiming ownership of stolen property to cover up another crime. Further, Ms. McFarland made one of her claims of ownership in the context of telling Chad Faircloth she was not going to share "nothing of it" with him. IRP 124. Status as a selfish thief is not a mitigating circumstance.

There may exist other circumstances suggesting downward departure, but that possibility is outside this record.

D. MS. MCFARLAND'S STATEMENTS ON THE REDACTED VIDEO WERE RELEVANT FALSE EXCULPATORY STATEMENTS, NOT IRRELEVANT GENERAL DENIALS OF GUILT.

The Court of Appeals held the redacted body camera video of Ms. McFarland's arrest "was relevant because it included Ms. McFarland's denial of involvement in the crime, a facet of the recording she agreed was relevant [of consciousness of guilt.]" *Mc Farland*, No. 32873-2-III at 12.

In his concurring opinion, Judge Fearing questioned whether one's denial of guilt tends to establish one's guilt. *Id.* at \_\_\_\_.

Judge Fearing is correct to question the relevance of a suspect's general denial of involvement in a crime. "A denial of guilt can never be evidence of guilt." *United States v. Bear Killer*, 534 F.2d 1253, 1260 (8th Cir. 1976) (citing *United States v. Sutherland*, 428 F.2d 1152, 1157 (5th Cir. 1970)). However, a statement going beyond a declaration of innocence and asserting an affirmative alibi to the crime charged is relevant evidence of consciousness of guilt. *Id.* (citing *United States v. Merrill*, 484 F.2d 168, 170 (8th Cir.), *cert. denied*, 414 U.S. 1077, 38 L. Ed. 2d 484, 94 S. Ct. 594 (1973); *Rizzo v. United States*, 304 F.2d 810, 830 (8th Cir.), *cert. denied*, 371 U.S. 890, 83 S. Ct. 188, 9 L. Ed. 2d 123 (1962)). Exculpatory statements contradicted by trial evidence are evidence of consciousness of guilt. *United States v. McDougald*, 650 F.2d 532, 533 (4th Cir. 1981).

The statements made by Ms. McFarland on the redacted video were not general denials of guilt. She specifically denied having left the Faircloth residence the night of the burglary. Her first such denial was: "I was here the whole time except when I went out to get my clothes." Ex. 44 at 3:12-3:21. When the deputy asked where she had been the previous night, she repeated: "I was here." *Id.* at 3:41-3:48. Her final statement,

after which the video ended, was: "What the hell, I was here the whole fucking all last night." *Id.* at 5:35. These were false exculpatory statements. False exculpatory statements provide circumstantial evidence of consciousness of guilt. *United States v. Perkins*, 937 F.2d 1397, 1401-02 (9th Cir. 1991); *Nelson v. United States*, 601 A.2d 582, 595-96 (D.C. 1991) (false statement made in explanation of conduct which is the subject of criminal charges is admissible as tending to show consciousness of guilt). *See also Wilson v. United States*, 162 U.S. 613, 620-21, 40 L. Ed. 1090, 16 S. Ct. 895 (1896) (there could be no "question that, if the jury were satisfied, from the evidence, that false statements in the case were made by defendant, or on his behalf, at his instigation, they had the right, not only to take such statements into consideration, in connection with all the other circumstances of the case, in determining whether or not defendant's conduct had been satisfactorily explained by him upon the theory of his innocence, but also to regard false statements in explanation or defense, made or procured to be made, as in themselves tending to show guilt.").

The Court of Appeals correctly held Ms. McFarland's post-arrest statements were relevant both to her consciousness of guilt and to the credibility of her trial defense that she was a reluctant, innocent bystander.

#### IV. CONCLUSION

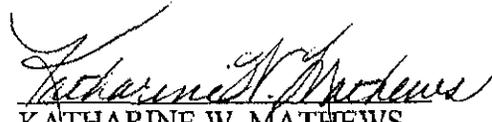
This Court should conclude the plain language of the HTACA contained in RCW 9A.040(6) precludes imposition of concurrent sentences for crimes imposed under subsection .589(1)(c) but does not prohibit sentences whose duration is below the standard range when justified by substantial and compelling reasons.

This Court should further conclude there is no evidence in this record justifying a downward departure.

Finally, this Court should affirm the conclusion of the Court of Appeals that the redacted video contained relevant, admissible evidence of Ms. McFarland's consciousness of guilt and her credibility, and was not unduly prejudicial in light of the overwhelming evidence of Ms. McFarland's willing participation in a home-invasion burglary and theft of multiple firearms.

Respectfully submitted this 24th day of October 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.	)	
<hr/>		

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 Supplemental Brief of Respondent 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: October 24, 2016.

  
\_\_\_\_\_  
Kaye Burns

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Attached for filing is the Supplemental Brief of Respondent in the above matter. Thank you.

### ***Kaye Burns***

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