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(Court of Appeals No. 79465-5-I)

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON,

Respondent,

v.

MICHAEL BERGMAN,

Appellant.

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ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR SNOHOMISH COUNTY

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# PETITION FOR REVIEW

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## A. IDENTITY OF PETITIONER AND DECISION BELOW

Michael Bergman, Appellant, asks this Court to review the opinion of the Court of Appeals in *State v. Bergman*, No. 79465-5-I (filed June 8, 2020). A copy of the opinion is attached as an Appendix.

## B. ISSUES PRESENTED FOR REVIEW

1. A sentencing court errs when it operates under a mistaken belief that it does not have the discretion to impose an exceptional mitigated sentence for which a defendant may be eligible. Under *State v. McFarland*, a court may impose concurrent sentences for firearm-related convictions as an exceptional mitigated sentence, despite statutory language directing consecutive sentences. Is review warranted where the trial court in Mr. Bergman's case mistakenly believed it was required to impose consecutive sentences for the firearm-related convictions, while imposing concurrent sentences for all other counts?

2. Mr. Bergman has a Sixth Amendment right to effective assistance of counsel at sentencing, including representation by counsel who is appraised of the relevant law. Is review warranted where defense counsel failed to seek an exceptional mitigated sentence under *State v. McFarland* based upon the mistaken belief that the trial court was required to impose consecutive sentences for the firearm-related convictions?

## C. STATEMENT OF THE CASE

### 1. Mr. Bergman was convicted of two firearm-related offenses.

In July 2016, officers pulled over a white pickup truck during a traffic stop. RP 296. Although the truck was registered to Mr. Bergman, Jorge Sanabria was driving, and Mr. Bergman was in the passenger seat. RP 314. An officer observed a dirt bike motorcycle, which he believed to be stolen, in the bed of the truck. RP 296-98. A subsequent search of the truck revealed Bose speakers and a gas can; a shotgun was also located inside a large toolbox. RP 302, 307. All the items were previously reported stolen from a nearby residence and shed. RP 256, 259, 301-02.

At trial, Mr. Bergman testified that he lent Mr. Sanabria his car on the night of the burglary and, when the two reunited, the toolbox was in the truck bed. RP 474-75, 478-79. Mr. Bergman stated that he was unware that the gun was in the truck. RP 484. His fingerprints were not on the gun. RP 424. No one observed the burglary and no forensic evidence placed Mr. Bergman at the scene of the burglary. RP 254, 285-86.

Although he made contradictory statements to law enforcement, Mr. Bergman denied committing the burglary. RP 402, 475-76. He maintained that he purchased the motorcycle from an acquaintance, but admitted that he suspected it was stolen. RP 467-68, 472.

The State charged Mr. Bergman with possession of a stolen motorcycle, unlawful possession of a firearm in the first degree, possession of a stolen firearm, residential burglary, and second-degree burglary. CP 64-65. The jury found him guilty on all counts. CP 158-62.

**2. Mr. Bergman pled guilty in other cause numbers.**

In addition to the instant case, Mr. Bergman faced charges in six unrelated cause numbers for incidents occurring between July 2016 and July 2018. *See* CP 46-48. He informed the State that he was willing to plead guilty as charged in each case. RP 544. Even knowing this, the State decided to amend the charges in those cases to include four additional counts and to heighten the seriousness level of several counts. RP 544.

In November 2018, Mr. Bergman pled guilty to the amended charges. RP 544. None of the offenses were "violent offenses" under RCW 9.94A.030(56). CP 46-48. The highest seriousness level for any of the convictions was three. RCW 9.94A.515; RCW 9.94A.518. All cases were set for a single sentencing hearing. *See* RP 564-68.

**3. The court believed it was required to impose consecutive sentences for the firearm-related convictions.**

The parties' recommendations at sentencing diverged greatly. The State recommended the court impose the high end of the standard range for every count in every cause number. CP 59-65. The State's

amendments to the charges paved the way for its argument that an exceptional aggravated sentence was warranted because Mr. Bergman's offender score would result in some offenses going unpunished. CP 59. Additionally, the State recommended the court run the sentences for the firearm convictions in this case consecutively with the high range of the most serious offense in an unrelated cause number (possession of a controlled substance with intent to deliver). CP 58-59. This would result in a 332-month sentence: 116 months for the unlawful possession of a firearm, 96 months for possession of a stolen firearm, and 120 months for the controlled substances conviction. RP 534. The nearly 30-year sentence would be the equivalent of the standard range for someone with Mr. Bergman's offender score who had been convicted of second-degree murder. CP 59.

Meanwhile, defense counsel requested a prison-based DOSA, which was cautiously recommended by the Department of Corrections. RP 546, 549-50. Alternatively, defense counsel requested that the court impose the low end of the standard range and – but for the firearm-related convictions, which required consecutive sentences – run all sentences concurrently. RP 542. Under Defense counsel's proposal, the court would sentence Mr. Bergman to 159-months in prison: 87 months for the

unlawful possession of a firearm and 72 months for possession of a stolen firearm. RP 542-43.

The one thing both parties agreed upon was that the court did not have the discretion to impose concurrent sentences for the firearm-related convictions. The State's sentencing memorandum stated that the firearm-related sentences "must run consecutive" pursuant to RCW 9.94A.589(c)(1).[1] CP 58. Defense counsel agreed that, "there is no doubt" that the court was required to run the firearm sentences consecutively. RP 542. While recommending the low end of the standard range for both sentences, counsel reiterated that the sentences "have to run back to back." RP 542.

The court denied defense counsel's request for a DOSA. RP 562. Although sympathetic to Mr. Bergman's struggles with addiction, the court determined that a DOSA was not in the best interest of the community given his criminal history and previous attempts at chemical

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[1] 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 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.

dependency treatment. RP 557-62. The court did, however, grant defense counsel's request to impose concurrent sentences for all counts in all cases "that are eligible for that[.]" RP 562-63. Although not sentencing Mr. Bergman to the low end of the standard range for the firearm convictions, the court concluded that it would not otherwise "impose consecutive sentences beyond that which I am required to impose." RP 563.

The court thereafter sentenced Mr. Bergman to consecutive sentences of 100 months of confinement for unlawful possession of a firearm and 80 months of confinement for possession of a stolen firearm. CP 32, 34. The Court of Appeals affirmed the sentence. Opinion at 10.

## D. ARGUMENT WHY REVIEW SHOULD BE GRANTED

### 1. The sentencing court erred in concluding that it lacked discretion to impose concurrent sentences for unlawful possession of a firearm and possession of a stolen firearm.

A sentencing court errs when it "operates under the 'mistaken belief that it did not have the discretion to impose a mitigated exceptional sentence for which [a defendant] may have been eligible.'" *State v. McFarland*, 189 Wn.2d 47, 56, 399 P.3d 1106 (2017) (quoting *In re Pers. Restraint of Mulholland*, 161 Wn.2d 322, 333, 166 P.3d 677 (2007) (alteration in original)). A court must recognize its ability to impose an exceptional sentence regardless of arguments made by counsel. *See*

*McFarland*, 189 Wn.2d at 56-57. "While no defendant is entitled to an exceptional sentence below the standard range, every defendant is entitled to ask the trial court to consider such a sentence and to have the alternative actually considered." *State v. Grayson*, 154 Wn.2d 333, 342, 111 P.3d 1183 (2005). A sentencing court's failure to consider an exceptional sentence for which the defendant may be qualified is reversible error. *Id*. at 342.

*State v. McFarland* is controlling. In *McFarland*, our Supreme Court held that, notwithstanding the language in RCW 9.94A.589(1)(c) which requires consecutive sentences for certain firearm-related convictions, a sentencing court retains the discretion to run the sentences concurrently as part of an exceptional mitigated sentence.[2] 189 Wn.2d at 55. In *McFarland*, defense counsel did not seek an exceptional sentence and agreed the sentences were required to run consecutively. *Id*. at 50-51. The court, too, believed the sentences must be consecutive, and expressed some concern in ultimately imposing the nearly 20-year sentence. *Id*. at 51.

Here, as in *McFarland*, the sentencing court was operating under the mistaken belief that RCW 9.94A.589(1)(c) required consecutive

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[2] Specifically, a court may impose concurrent firearm-related sentences where consecutive sentences "result[] in a presumptive sentence that is clearly excessive in light of the purpose of [the SRA]" under RCW 9.94A.535(1)(g). *McFarland*, 189 Wn.2d at 55.

sentences for the firearm-related convictions. Both the prosecution and defense counsel informed the court that the sentences must run consecutively. CP 58; RP 542. Although not directly addressing the question of whether it was able to impose concurrent sentences, the trial court repeatedly distinguished counts eligible for concurrent sentences from those in which the court "was required to impose" consecutive sentences. RP 562-63. The Judgment and Sentence is explicit that all counts are to run concurrently, except for the firearm-related counts, "which must be consecutive." CP 33.

And here, as in *McFarland*, remand is necessary for the sentencing court to consider the imposition of concurrent sentences. "Remand for resentencing is often necessary where a sentence is based on a trial court's erroneous interpretation of or belief about the governing law." *State v. McGill*, 112 Wn. App. 95, 100, 47 P.3d 173 (2002). The record need only establish "at least the possibility" that the court would have imposed a different sentence. *McFarland*, 189 Wn.2d at 58.

Contrary to the Court of Appeal's conclusion, this possibility exists in Mr. Bergman's case. Opinion at 9. In rejecting the State's request for consecutive sentencing relating to other cause numbers, the trial court was unequivocal that "I am not going to impose consecutive sentence[s] beyond that which I am required to impose[.]" RP 563. Although the court

did not impose the lowest sentence authorized, the sentences imposed for the firearm offenses were below the middle of the standard range. RCW 9.94A.510.

The court recounted Mr. Bergman's criminal history and treatment attempts in denying defense counsel's request for a DOSA, but did not further explain its decision when granting the request for concurrent sentences. RP 563. The court's belief that Mr. Bergman's history warranted a longer prison sentence than that afforded by a DOSA is not the equivalent of an out-of-hand rejection of concurrent sentences for the firearm convictions. RP 570.

Notably, when the court imposed 120 months for possession with intent to deliver under another cause number, defense counsel interjected, asking whether it was the court's intention that Mr. Bergman serve 120 months when the court imposed a100-month sentence for the unlawful possession of a firearm in the instant case. RP 564-65. The prosecution argued that, given the consecutive firearm-related sentences, Mr. Bergman was actually sentenced to 180 months and imposing 120 months in another case would not add to the total confinement. RP 565. The court revised the sentence for the possession with intent to deliver conviction to 100 months, "just to avoid [defense counsel's] concern." RP 565.

Once a court has imposed an exceptional sentence, it has "all but unbridled discretion" in fashioning the structure and length of that sentence. *State v. France*, 176 Wn. App. 463, 470, 308 P.3d 812 (2013). Here, Mr. Bergman had the support of his family, sponsor, and others involved with his recovery. RP 537. In his statement to the court, Mr. Bergman took responsibility for the offenses, and expressed remorse to the victims and a commitment to turning his life around. RP 554-56. Although the court was not swayed to impose an alternative to prison, it is plainly possible that the court would have considered fashioning a sentence that ran at least part, if not all, of the firearm-related sentences concurrently.

The trial court's misunderstanding of the law at sentencing warrants review under RAP 13.4.

**2. Alternatively, Mr. Bergman's trial attorney rendered constitutionally deficient representation when he informed the court that it lacked discretion to impose concurrent sentences for the firearm-related convictions.**

Mr. Bergman was denied effective assistance of counsel at sentencing when his attorney failed to apprise the trial court of the decision in *McFarland* and to seek an exceptional sentence in the form of concurrent sentences for the firearm-related convictions. Defendants in criminal proceedings have a constitutional right to effective assistance of counsel. *See* U.S. Const. amend. VI; Const. art. I, § 22. "The right to

counsel plays a crucial role in the adversarial system embodied in the Sixth Amendment, since access to counsel's skill and knowledge is necessary to accord defendants the 'ample opportunity to meet the case of the prosecution' to which they are entitled." *Strickland v. Washington*, 466 U.S. 668, 685, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984) (quoting *Adams v. United States ex rel. McCann*, 317 U.S. 269, 275-76, 63 S. Ct. 236, 87 L. Ed. 268 (1942)). That right is denied where (1) counsel's performance is deficient and (2) the deficient performance prejudiced the defense. *Strickland*, 466 U.S. at 687; *State v. Thomas,* 109 Wn.2d 222, 229, 743 P.2d 816 (1987). Mr. Bergman's case satisfies both prongs.

Counsel's performance is considered deficient where the quality of representation fell "below an objective standard of reasonableness based on consideration of all of the circumstances." *Strickland, 466 U.S.* at 688. Although there is a strong presumption of competence, "[w]here an attorney unreasonably fails to research or apply relevant statutes without any tactical purpose, that attorney's performance is constitutionally deficient." *State v. Kyllo,* 166 Wn.2d 856, 862-83, 215 P.3d 177 (2009); *see also Hinton v. Alabama,* 571 U.S. 263, 274, 134 S. Ct. 1081, 188 L. Ed. 2d 1 (2014) ("[a]n attorney's ignorance of a point of law that is fundamental to his case combined with his failure to perform basic

research on that point is a quintessential example of [deficient] performance under *Strickland.*").

At sentencing, counsel's failure to cite or argue relevant caselaw supporting an exceptional sentence downward constitutes ineffective assistance of counsel. *McGill*, 112 Wn. App. at 102. Where counsel fails to apprise the court of the relevant case law and use it to argue for an exceptional mitigated sentence, the trial court cannot make an informed decision. *Id.* at 101-02.

Here, Mr. Bergman's attorney not only failed to cite or argue *McFarland* in favor of an exceptional sentence, but also expressly informed the trial court that it lacked discretion to run the firearm sentences concurrently. RP 542. Had counsel been appraised of the relevant law, he likely would have requested an exceptional mitigated sentence given his advocacy for a DOSA and concurrent sentences. Counsel's omission cannot be deemed a reasonable tactical decision.

The Court of Appeals did not address whether defense counsel's performance was deficient, but concluded Mr. Bergman did not establish the prejudice prong. Opinion at 9-10. However, where counsel is ineffective for failing to argue for an exceptional downward sentence, remand is proper if the record indicates the sentencing court would have considered the sentence had it known it could. *McGill*, 112 Wn. App. at

100. As argued above, the trial court's imposition of other concurrent sentences to fashion Mr. Bergman's punishment establishes that it is at least reasonably possible the court would have considered such sentences for the firearm-related convictions.

The violation of Mr. Bergman's constitutional right to effective assistance of counsel warrants review pursuant to RAP 13.4.

## E. CONCLUSION

For the reasons set forth above, Michael Bergman respectfully requests that this Court grant review.

DATED this 8th day of July, 2020.

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# IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

| STATE OF WASHINGTON,<br>Appellant,<br>v.<br>MICHAEL LEE WAYNE BERGMAN,<br>Respondent. | No. 79465-5-I<br>DIVISION ONE<br>UNPUBLISHED OPINION |
|---|---|

APPELWICK, J. — Bergman appeals his sentence following convictions for 5 felony counts. He argues that remand for resentencing is required because the trial court mistakenly believed that it lacked discretion to impose concurrent sentences for his firearm-related convictions. He also contends that his trial counsel was ineffective for failing to inform the court of its authority to impose concurrent sentences for his firearm-related convictions. We affirm.

## FACTS

In the present case, the State charged Michael Bergman with five felony counts, including possession of a stolen vehicle, first degree unlawful possession of a firearm, possession of a stolen firearm, residential burglary, and second degree burglary. The charges were based on the State's allegation that Bergman burglarized a home and tool shed in July 2016. The State alleged that Bergman stole a firearm from the home and a motorcycle from the shed. In August 2018, a jury found Bergman guilty as charged.

Bergman also faced charges under 6 separate cause numbers for incidents that occurred between July 2016 and July 2018. The charges mainly involved drug and stolen property offenses, but also included 2 counts of attempting to elude a pursuing police vehicle. Bergman pleaded guilty to all of the charges in November 2018. Among the present case and 6 other cases, he was convicted of a total of 17 felony counts.

In January 2019, the trial court held a single sentencing hearing for Bergman's 17 felony convictions. He had previously been convicted of 5 felony and 14 misdemeanor counts. His offender score for each new felony conviction ranged from a low of 20 to a high of 31.

The State asked the trial court to impose an exceptional sentence of 332 months, or about 28 years, of confinement under RCW 9.94A.535(2)(c). It explained that in the present case, the controlling sentencing range was 87 to 116 months for the first degree unlawful possession of a firearm charge. It asked the court to impose 116 months for the unlawful possession of a firearm charge and 96 months for the possession of a stolen firearm charge, for a total of 212 months. It stated that the two firearm-related charges "must run consecutive" to one another. Further, instead of running the sentences in the other six cases concurrently, the State asked the court to run one of the sentences consecutively. Specifically, it asked the court to impose a high end sentence of 120 months for a possession of a controlled substance with intent to manufacture or deliver charge, and run it consecutive to the 212 month sentence. It explained that imposing a

total sentence of 332 months would ensure that Bergman's high offender score would not result in numerous felony convictions going unpunished:

> [W]hen Mr. Bergman was convicted on the five charges [in the present case], his offender score was maxed out and any additional felony charges at that point would not affect the standard sentencing range. If all of those run [con]current, essentially you are looking at 12 felony counts which are quite serious in nature going unpunished.

In contrast, Bergman sought a prison-based drug offender sentencing alternative (DOSA). The DOSA would have resulted in 92 months, or about 8 years, of confinement, with the second half of the 92 months served on community custody. Defense counsel explained that Bergman had a chemical dependency issue, and that all of his offenses were driven by that issue. He therefore argued that a DOSA was "the right solution or the right option for [Bergman] to take to build a foundation of sobriety that he can then rebuild his life on."

Alternatively, Bergman requested that the trial court impose a sentence on the low end of the standard sentencing range in the present case, for a total of 159 months, or about 13 years, of confinement. He asked that the sentences in the other 6 cases run concurrent to that sentence. In requesting a low end sentence, defense counsel agreed with the State that the sentences for Bergman's two firearm-related convictions must run consecutively:

> I spent a lot of time in my briefing talking about consecutive versus concurrent sentences, and just to reiterate our position, I don't think there is -- there is no doubt that RCW 9.94A.589 requires, subsection (1)(c), requires this Court to run the so-called [unlawful possession of a firearm], the gun charge, felon in possession of a firearm and possession of stolen firearm charges, those must be run consecutively.

He explained that the low ends of the standard ranges for the unlawful possession of a firearm and possession of a stolen firearm charges were 87 months and 72 months, respectively. If the sentences for the other 15 felony counts ran concurrent with those, Bergman would face a 159 month sentence.

The trial court denied Bergman's request for a DOSA. While recognizing his substance abuse disorder, it found that a DOSA was not in the community's best interest given his extensive criminal history. It explained,

> There are any number of opportunities that you have had to step off the terrible roller coaster ride that you have been on with addiction, to seek help, to reach out to your sponsor, to put your sobriety first, and throughout all of that, you always had the choice of not committing crimes. But you have committed a lot of them, and many of these crimes have victimized individuals and have put others at risk. Attempting to elude a police vehicle is a very risky crime, [it] all too often results in horrible motor vehicle collisions.

Further, the court declined the State's recommendation to impose an exceptional sentence of 332 months. It stated,

> In looking at the overall nature of your crimes and what the Court considers to be a just and equitable sentence given the matters in front of me and your criminal conviction history, I have concluded that I am not going to impose consecutive sentence[s] beyond that which I am required to impose, and I am also not going to impose an exceptional sentence.

The trial court imposed 100 months for the unlawful possession of a firearm charge and 80 months for the possession of a stolen firearm charge. It explained that both charges "must be run consecutive" to one another. It ran the sentences for the other 15 felony counts across all 7 cases concurrently. Thus, the court imposed a total of 180 months, or 15 years, of confinement.

Bergman appeals.

## DISCUSSION

Bergman makes two arguments. First, he argues that remand for resentencing is required because the trial court mistakenly believed that it lacked discretion to impose concurrent sentences for his firearm-related convictions. Alternatively, he argues that he was denied effective assistance of counsel when defense counsel failed to (1) apprise the court of case law allowing it to impose concurrent sentences for his firearm-related convictions and (2) seek an exceptional sentence in the form of concurrent sentences.

### I. Concurrent Sentences for Firearm-Related Convictions

Bergman argues first that the trial court mistakenly believed that it lacked discretion to impose concurrent sentences for his firearm-related convictions. As a result, he contends that remand for resentencing is warranted.

A discretionary sentence within the standard range is reviewable where the trial court has refused to exercise its discretion at all or has relied on an impermissible basis for refusing to impose an exceptional sentence below the standard range. State v. McFarland, 189 Wn.2d 47, 56, 399 P.3d 1106 (2017). A trial court errs when (1) "it refuses categorically to impose an exceptional sentence below the standard range under any circumstances" or (2) when it operates under the "mistaken belief that it did not have the discretion to impose a mitigated exceptional sentence for which [the defendant] may have been eligible." State v. Garcia-Martinez, 88 Wn. App. 322, 330, 944 P.2d 1104 (1997); In re Pers. Restraint of Mulholland, 161 Wn.2d 322, 333, 166 P.3d 677 (2007).

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 range sentence 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. <u>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.</u>

(Emphasis added.) But, if a court finds that a presumptive sentence under RCW 9.94A.589 is "clearly excessive in light of the purpose of the [Sentencing Reform Act of 1981 (SRA), chapter 9.94A RCW]," it has discretion to impose an exceptional mitigated sentence. RCW 9.94A.535(1)(g). Among the purposes of the SRA is to "[e]nsure that the punishment for a criminal offense is proportionate to the seriousness of the offense and the offender's criminal history." RCW 9.94A.010(1).

Bergman relies primarily on <u>McFarland</u>. There, McFarland's trial counsel had agreed with the State as to running his firearm-related sentences consecutively, but had expressed concern about the overall sentence length. <u>McFarland</u>, 189 Wn.2d at 50-51. In responding to that concern, the trial court remarked that the almost 20 year sentence McFarland faced was typically the sentence people receive for second degree murder. <u>Id.</u> at 51. But, neither McFarland's counsel nor the trial court considered imposing an exceptional sentence downward by running the firearm-related sentences concurrently. <u>Id.</u> The trial court stated, "'I don't have—apparently [I] don't have much discretion

here. Given the fact that these charges are going to be stacked one on top of another, I don't think—I don't think [the] high end is called for, here.'" Id. (alterations in original).

On appeal, the Washington Supreme Court clarified that "nothing in the SRA preclud[es] concurrent exceptional sentences for firearm-related convictions."[1] Id. at 54. Specifically, it held, "[I]n a case in which standard range consecutive sentencing for multiple firearm-related convictions 'results in a presumptive sentence that is clearly excessive in light of the purpose of [the SRA],' a sentencing court has discretion to impose an exceptional, mitigated sentence by imposing concurrent firearm-related sentences." Id. at 55 (alterations in original) (quoting RCW 9.94A.535(1)(g)). It further held that remand for resentencing was warranted because the record suggested "at least the possibility that the sentencing court would have considered imposing concurrent firearm-related sentences had it properly understood its discretion to do so." Id. at 59. It cited the fact that the trial court indicated some discomfort with its apparent lack of discretion, and "commented that McFarland's standard range sentence was equivalent to that imposed for second degree murder." Id. at 58-59.

Like McFarland, Bergman argues that the record suggests the possibility that the trial court would have imposed a different sentence had it understood its

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[1] In contrast, judicial discretion to impose concurrent sentences as part of an exceptional sentence does not extend to firearm enhancements for adult offenders. State v. Brown, 139 Wn.2d 20, 29, 983 P.2d 608 (1999), overruled in part by State v. Houston-Sconiers, 188 Wn.2d 1, 21, 391 P.3d 409 (2017) (overruling Brown's holding that judicial discretion to impose an exceptional sentence does not extend to firearm enhancements with regard to juvenile offenders).

discretion to run his firearm-related sentences concurrently. He cites the court's statement that it was not going to impose consecutive sentences beyond that which it was "required to impose." This statement implies that the court may have misunderstood its authority to impose concurrent firearm-related sentences if it found that Bergman's presumptive sentence was clearly excessive in light of the SRA.

But, unlike McFarland, the trial court did not state that it lacked discretion to impose an exceptional sentence. Nor did it express discomfort in imposing consecutive sentences within the standard range for Bergman's firearm-related convictions. Rather, it denied Bergman's request for a DOSA in light of his extensive criminal history. It noted that Bergman had committed "a lot" of crimes, many of which had "victimized individuals" and "put others at risk." The DOSA would have resulted in 92 months of confinement, with the second half of that 92 months served on community custody. Further, the court denied Bergman's alternative request for consecutive sentences on the low end of the standard range for his firearm-related convictions. Low end sentences for each conviction would have resulted in a total sentence of 159 months of confinement. Instead, the court imposed an even greater sentence of 180 months of confinement. It explained to Bergman,

> [T]he bottom line is the sentence today separates you from society for an extended period of time. Given the frequency with which you were committing crimes, that's in the community's best interest I believe, and you certainly know what is in front of you if you get out of prison and continue in the same thing.

The record here does not suggest the possibility that the trial court would have imposed a different sentence had it understood its discretion to run his firearm-related sentences concurrently. As a result, remand for resentencing is not warranted.

II. Ineffective Assistance of Counsel

Bergman argues in the alternative that he was denied effective assistance of counsel when defense counsel failed to (1) apprise the court of the decision in McFarland and (2) seek an exceptional sentence in the form of concurrent sentences.

We review ineffective assistance of counsel claims de novo. State v. Sutherby, 165 Wn.2d 870, 883, 204 P.3d 916 (2009). To demonstrate that he received ineffective assistance of counsel, Bergman must show that (1) his counsel's performance fell below an objective standard of reasonableness based on consideration of all the circumstances and (2) the deficient performance resulted in prejudice. Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. Nichols, 161 Wn.2d 1, 8, 162 P.3d 1122 (2007). The reasonableness inquiry requires the defendant to show the absence of legitimate strategic or tactical reasons for the challenged conduct. State v. McFarland, 127 Wn.2d 322, 336, 899 P.2d 1251 (1995). Prejudice is present if there is a reasonable probability that, but for counsel's error, the result would have been different. Id. at 334-35. If one of the two prongs of the test is absent, we need not inquire further. Strickland, 466 U.S. at 697; State v. Foster, 140 Wn. App. 266, 273, 166 P.3d 726 (2007).

As established above, the record here does not suggest that the trial court would have imposed an exceptional sentence in the form of concurrent sentences for Bergman's firearm-related convictions had defense counsel made such a request. Thus, Bergman cannot establish that he was prejudiced by defense counsel's decision not to request concurrent sentences under McFarland. Accordingly, his ineffective assistance of counsel claim fails.

We affirm.

Appelwick, J.

WE CONCUR:

Chun, J.

Mann, C.J.

**DECLARATION OF FILING AND MAILING OR DELIVERY**

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original document **Petition for Review to the Supreme Court** to which this declaration is affixed/attached, was filed in the **Court of Appeals** under **Case No. 79465-5-I**, and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to the following attorney(s) or party/parties of record at their regular office or residence address as listed on ACORDS:

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☒ petitioner

☐ Attorney for other party

MARIA ANA ARRANZA RILEY, Legal Assistant Date: July 8, 2020
Washington Appellate Project

## WASHINGTON APPELLATE PROJECT

## July 08, 2020 - 4:09 PM

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| **Appellate Court Case Title:** | State of Washington, Respondent v. Michael Lee Wayne Bergman, Appellant |
| **Superior Court Case Number:** | 16-1-02613-8 |

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