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CLERK OF COURT
COURT OF APPEALS
DIVISION III
1000 WEST WALTON AVENUE
YAKIMA, WA 98901

NO: 30279-2-III

COURT OF APPEALS DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON
Plaintiff/Respondent

v.

JOEL RODRIGUEZ RAMOS
Appellant/Defendant

BRIEF OF RESPONDENT

KENNETH L. RAMM
WSBA 16500
Deputy Prosecuting Attorney
Room 211 Yakima County Courthouse
Yakima WA 98901

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I. ISSUES PRESENTED BY REVIEW.

1. Whether the appellant's request for a resentencing to a term of confinement that is different than was originally set forth violates the earlier plea agreement? And if so, what is the State's remedy?
2. Whether the Supreme Court's remand order was limited to correct the length of community placement and conditions of community placement?
3. Whether the lower court on remand exercised discretion in its decision not to consider the appellant's request to address the portion of the sentence that dealt with the length of total confinement?
4. Whether *Mulholland* created a "new rule" for retroactivity analysis when the court interprets the meaning of a statute?
5. Whether the lower court erred in denying the appellant's CrR 7.8 motion for the reasons stated by the appellant?
6. Whether the trial court abused its discretion when it decided not to consider the personal facts related to the appellant?

II. ANSWERS TO ASSIGNMENTS OF ERROR.

1. The appellant's attempt to modify the length of total confinement that was the centerpiece of the original plea agreement violates that agreement and the State demands specific performance.
2. The remand order from the Supreme Court merely instructs the lower court to specify the community placement and the conditions, and affording the appellant the opportunity to be present and heard.
3. The lower court properly exercised its discretion in its decision not to consider the appellant's request to address the portion of the sentence that dealt with the length of total confinement.
4. Mulholland did not create a "new rule" for retroactivity analysis when it interpreted the meaning of the statute.
5. The lower court did not err in denying the appellant's CrR 7.8 motion or RAP 2.5.
6. The lower court did not abuse its discretion when it decided not to consider the personal facts related to the appellant in deciding not to modify the total term of confinement.

III. STATEMENT OF THE CASE

The facts regarding the murders can be found in the unpublished case involving the codefendant. *State v. Gaitan*, 1996 Wash. App. LEXIS 1159.

The appellant was initially charged in Yakima County Juvenile court. CP 40. On August 23, 1993, prior to the commencement of a declination hearing, the appellant agreed to have the juvenile court transfer his case to the adult court division of the Yakima County Superior Court. During the hearing to transfer his case, the record shows that the judge engaged in a colloquy with the appellant concerning his waiver of his right to a declination hearing. [8-23-1993 RP 2-8].

The appellant was then arraigned on four counts of first degree murder. [8-23-1993 RP 8-11]. Defense counsel then advised the court that the appellant was prepared to enter guilty pleas to the charges. Defense counsel then advised the court what work they had done in order to prepare the case for trial, and the declination and plea hearing. [8-23-1993 RP 12-14]. The trial court then had a colloquy with the defendant to ascertain whether his plea was knowingly, intelligently and voluntarily decision. [8-23-1993 RP 15-23].

The prosecutor then presented exhibits as a factual basis for the plea. [8-23-1993 RP 23-25]. The court made a finding that the pleas to

the charges were knowingly, intelligently and voluntarily made. [8-23-1993 RP 25]. The prosecutor then handed the proposed judgment and sentence to the court, stating that “the State, pursuant to our plea agreement, is recommending that Mr. Ramos be sentenced at the low end of the standard range, which is 80 years in prison.” [8-23-1993 RP 26].

The prosecutor stated that the “State is recommending this sentence because we believe that the interests of society would be protected. The crime that Mr. Ramos committed obviously is the most heinous in terms of the number of people killed that I have ever been involved with in almost 20 years of prosecution. It was brutal. It was a terrible thing that happened to the family. But in terms of looking at what is fair and what is just, we believe that a sentence of 80 years protects society. [8-23-1993 RP 26-27].

The defense counsel then spoke, stating “we urge the court to follow the recommendation of the prosecutor, that recommendation being one that has been accepted by Mr. Ramos.” [8-23-1993 RP 26]. The defense presented a packet of information regarding the appellant to the court for its consideration. [8-23-1993 RP 29-30]. The defendant was also given his right to allocution. Following that the court stated: “It is my duty and obligation to sentence you today for these four crimes of first degree murder, which I am sure everyone here in the courtroom would

agree have no parallel in Yakima County history for violence, the number of victims, and in fact, the entire destruction of one family. In making my decision as to how to sentence you, Mr. Ramos, I believe I have to consider a number of things. First of all, I do, in fact, consider the fact that you are 14. I know now about your family and where you have come from, about your mother, your brothers, and what has happened in your life.” [8-23-1993 RP 31-32].

The court further stated “[t]he sentence which is proposed to me is that of 80 years, which, under today’s standards, works out, by my rough calculations, to be an actual sentence of approximately 68 years, although, don’t trust my multiplication. . . . Because this is an extraordinary, harsh sentence either way, and because I believe this sentence which I will impose incarcerates you for your life and until you cannot ever, I believe, be a danger to anyone outside of prison, I am going to accept the recommendations of the prosecutor and defense counsel, noting for the record that, under ordinary circumstances, it would be my inclination and belief that you should be punished more harshly for what you did as described in Count I. There is no question that you should receive a greater sentence for the death of that young man than what your degree of responsibility is as to the other three counts. But taken together, because the way the law works, the total sentence, I believe, reflects your acts,

your admissions and not, before this court, that you plead guilty and accept responsibility for your acts.” [8-23-1993 RP 33-34].

The court further stated “I will signed the financial order, Mr. Ramos, and Counsel, although, practically speaking, we all understand that the collections of these sums more than likely will not occur because of the extraordinary length of Mr. Ramos’s sentence, which he so richly deserves, in any event.” [8-23-1993 RP 34-35].

Pursuant to the order of the Supreme Court and mandate thereof dated February 10, 2011 and March 2, 2011, the Yakima County Superior Court held a hearing regarding on September 16, 2011, regarding the “resentencing” of the appellant. The court first considered the scope of the hearing, considering the order of the Supreme Court. [9-16-2011 RP 4].

After argument from both counsel, the court first took up the issue of whether it should grant a full rehearing. The court first looked to the decision of the Supreme Court. The court quoted the order in that “[t]he matter is remanded to the trial court to specify the community placement. Upon remand, Ramos shall be afforded the opportunity to be present and heard.” [9-16-2011 RP 34].

The judge at the “resentencing” hearing held that many of the “arguments here this morning as to why the Court should exercise its

discretion and the issues which he and his counsel feel should be considered at the time of any resentencing, if there is resentencing There's certain issues that are argued that should have been raised at the time, but there have never been, that I'm aware of, an issue of ineffective assistance of counsel raised in all these years." [9-16-2011 RP 36].

The court continued, stating "the other issue is the issue related to is – there a plea bargain here? Well, obviously there was a plea bargain. He came in and he pled guilty and the judge sentenced him to the twenty – four 20-year sentences based upon minimum mandatory requirements at the time. So I can see how that information was never presented to the judge because – and I – and it's my belief that it was a joint recommendation. In fact, it was agreed to. Now, as pointed out by counsel, the plea form doesn't say that. It says the State will recommend – I'm informed that the State will recommend. But you have to go beyond that. You have to go to what was the agreement and what was done at the time of the sentencing hearing." [9-16-2011 RP 36-37]. The judge specifically stated that "I've invoked by discretion here to not grant the motion under both of those." [9-16-2011 RP 41-42].

The appellant now appeals from that order.

IV. ARGUMENT

A. THE APPELLANT'S ATTEMPT TO SEEK AN EXCEPTIONAL SENTENCE VIOLATES THE PLEA AGREEMENT PREVIOUSLY ENTERED INTO, AND TO WHICH THE STATE SEEKS SPECIFIC PERFORMANCE OF SAID PLEA AGREEMENT.

The appellant entered a plea of guilty to the four counts of first degree murder pursuant to a plea agreement which saved him from the possibility of spending the rest of his life behind bars on the charge of aggravated first degree murder. The length of total confinement, 80 years, was central to the plea agreement. This fact recognized by the sentencing judge, when he accepted the plea stating “[b]ecause this is an extraordinary, harsh sentence either way, and because I believe this sentence which I will impose incarcerates you for your life and until you cannot ever, I believe, be a danger to anyone outside of prison, I am going to accept the recommendations of the prosecutor and defense counsel, noting for the record that, under ordinary circumstances, it would be my inclination and belief that you should be punished more harshly for what you did as described in Count I. There is no question that you should receive a greater sentence for the death of that young man than what your degree of responsibility is as to the other three counts. But taken together, because of the way the law works, the total sentence, I believe, reflects your acts, your admissions and now, before this court, that you plead guilty and accept responsibility for your acts.” [8-23-1993 RP 33-34].

The U.S. Supreme Court recognized the value of plea bargains in *Blackledge v. Allison*, 431 U.S. 63, 71-72, 97 S. Ct. 1621, 52 L. Ed. 2d 136 (1977),

stating that:

Whatever might be the situation in an ideal world, the fact is that the guilty plea and the often concomitant plea bargain are important components of this country's criminal justice system. Properly administered, they can benefit all concerned. The defendant avoids extended pretrial incarceration and the anxieties and uncertainties of a trial; he gains a speedy disposition of his case, the chance to acknowledge his guilt, and a prompt start in realizing whatever potential there may be for rehabilitation. Judges and prosecutors conserve vital and scarce resources. The public is protected from the risks posed by those charged with criminal offenses who are at large on bail while awaiting completion of criminal proceedings.

These advantages can be secured, however, only if dispositions by guilty plea are accorded a great measure of finality. To allow indiscriminate hearings in federal postconviction proceedings, whether for federal prisoners under 28 U.S.C. § 2255 or state prisoners under 28 U.S.C. §§ 2241-2254, would eliminate the chief virtues of the plea system - speed, economy, and finality. And there is reason for concern about that prospect. More often than not a prisoner has everything to gain and nothing to lose from filing a collateral attack upon his guilty plea. If he succeeds in vacating the judgment of conviction, retrial may be difficult. If he convinces a court that his plea was induced by an advantageous plea agreement that was violated, he may obtain the benefit of its terms. A collateral attack may also be inspired by "a mere desire to be freed temporarily from the confines of the prison." *Price v. Johnston*, 334 U.S. 266, 284-285; accord, *Machibroda v. United States*, 368 U.S. 487, 497 (Clark, J., dissenting).

The defendant's attempt to seek an exceptional sentence at this point in time violates the plea agreement previously entered into, thereby damaging the interest of the State in the finality of the judgment and sentence. (08/23/1993 RP 26). In *State v. Armstrong*, 109 Wn. App. 458, 461-462, 35 P.3d 397 (2001), the court held that

Plea agreements are favored by the courts. See *Brady v. United States*, 397 U.S. 742, 751-53, 90 S. Ct. 1463, 25 L. Ed. 2d 747 (1970). When "[p]roperly administered, they can benefit all concerned." *Blackledge v. Allison*, 431 U.S. 63, 71, 97 S. Ct. 1621, 52 L. Ed. 2d 136 (1977).

"A plea bargain is analogous to a contract right" n2 and its terms are read as a contract. n3 But plea agreements "are more than simple common law

contracts" because due process requires that the State adhere to the agreement's terms. State v. Sledge, 133 Wn.2d 828, 839, 947 P.2d 1199 (1997). In addition, fairness is required to "ensure public confidence in the administration of our justice system." Sledge, 133 Wn.2d at 839.

After a party breaches the plea agreement, the nonbreaching party may either rescind n4 or specifically enforce it. Thomas, 79 Wn. App. at 37. The nonbreaching party's choice of remedies, however, might be limited.

"For example, a defendant's choice of specific performance . . . may be unfair if the violation was caused by misinformation provided by the defendant. Similarly, the choice of plea withdrawal [rescission] may be unfair if the prosecutor has detrimentally relied on the bargain and has lost essential witnesses or evidence." State v. Miller, 110 Wn.2d 528, 535, 756 P.2d 122 (1988); see also United States v. Tilley, 964 F.2d 66, 73 (1st Cir. 1992) (when determining whether to permit a defendant to withdraw his guilty plea, the trial court should give consideration to whether the government "will suffer undue prejudice as a result of the withdrawal").

The State specifically requests to enforce the plea agreement which consisted of a joint recommendation of 80 years, 20 years consecutive to one another for each murder. This agreement was clearly within the court's discretion to accept and was a lawful sentence under the charges of first degree murder which required a minimum mandatory sentence of 20 years pursuant to former RCW 9.94A.120(4) [1993], and could not be modified by an exceptional sentence under former RCW 9.94A.120(20) [1993]. This court must be mindful that "[o]ne of society's most basic tasks is that of protecting the lives of its citizens and one of the most basic ways in which it achieves the task is through criminal laws against murder." Gregg v. Georgia, 428 U.S. 153, 226 (1976) (WHITE, J., concurring).

B. THE SUPREME COURT'S REMAND ORDER WAS MERELY DIRECTS THE SUPERIOR COURT TO CORRECT THE LENGTH OF COMMUNITY PLACEMENT AND THE CONDITIONS THERETO.

All that is required to comport with the court's order on remand is to add the language that the defendant will be on 24 months of community placement. Whether it's called a clarification or an amendment, there is no need for a complete resentencing. The appellant argued that the Supreme Court's order on remand for the sentence correction regarding the length of the community placement and conditions thereto, should be a resentencing.

The appellant has been sentenced and he received the mandatory minimum of 20 years for each of the four deaths, to run consecutive pursuant to statute for a total term of 80 years. (CP 6-9). There is nothing to reargue. The original sentencing judge has since retired. The prosecutor who handled the case is no longer with the office. A new sentencing hearing would open old wounds for the victim's family. The appellant is not entitled to reargue the length of his sentence and he should not be allowed to by requiring a "resentencing." *State v. Shove*, 113 Wn.2d 83, 776 P.2d 132 (1989) (Absent statutory authority, trial court lacks authority to reduce or modify *sentence*).

In *State v. Kilgore*, 167 Wn.2d 28, 42, 216 P.3d 393 (2009). There, the Supreme Court held that "[t]he trial court's discretion to resentence on remand is limited by the scope of the appellate court's mandate. *State v. Collicott*, 118 Wn.2d 649, 660, 827 P.2d 263 (1992)."

In this case, like *Kilgore*, the only thing that a court would have to do is to insert the minimum amount of community placement, which is 24 months.

The statute in effect at the time, RCW 9.94A.150(8)(b) held that:

(b) When a court sentences a person to a term of total confinement to the custody of the department of corrections for an offense categorized as a sex offense or serious violent offense committed on or after July 1, 1990, the court shall in addition to other terms of the sentence, sentence the offender *to community placement for two years or up to the period of earned early release awarded pursuant to RCW 9.94A.150 (1) and (2), whichever is longer.*

In order to make the sentence definite, the court has to sentence the petitioner to a specific term of community placement under RCW 9.94A.150(8)(b). The only specific term is the two years. Therefore the court has no discretion to set a period of time otherwise. Is it that the defendant wants to argue for a longer term of community placement? Will he somehow know what the length of earned early release will be? The answer to both questions is no.

Furthermore, in *State v. Toney*, 149 Wn. App. 787, 792 (2009) the court stated:

We revisited *Kilgore* in *State v. McNeal*, 142 Wn. App. 777, 175 P.3d 1139 (2008), where we permitted the defendant to appeal after the court had vacated his original sentence. *McNeal*, 142 Wn. App. at 787 n.13. We recognized that a conviction is final when both the conviction and the sentence are final. *McNeal*, 142 Wn. App. at 786 (citing *In re Pers. Restraint of Skylstad*, 160 Wn.2d 944, 949-50, 162 P.3d 413 (2007)). We explained that the sentence was not final because “the resentencing on remand was an

entirely new sentencing proceeding” and noted that had this court merely remanded for amendment of the judgment, the analysis would be different. *McNeal*, 142 Wn. App. at 787 n.13.

Thus, under *Kilgore* and *McNeal*, the defendant may raise sentencing issues on a second appeal if, on the first appeal, the appellate court vacates the original sentence or remands for an entirely new sentencing proceeding, but not when the appellate court remands for the trial court to enter only a ministerial correction of the original sentence. Here, Toney's sentence was not final because our remand did not limit the trial court to making a ministerial correction. Rather, we unequivocally “remand[ed] for resentencing.” *Toney*, 1999 WL 294615, at * 1, 1999 Wash. App. LEXIS 822, at *12.

The petitioner should be prohibited from raising any additional issues since he has had numerous occasions to do so in the past, and has not so. A further collateral attack is prohibited by the one-year time limit under RCW 10.73.090(1). See also RCW 10.73.140, restricting number of successive personal restraint petitions. This case should be final by an amendment to the Judgment and Sentence which would clarify the length of time of community placement. Not a new opportunity for a new round of appeals.

C. MANDATORY MINIMUM SENTENCES FOR MULTIPLE COUNTS OF FIRST DEGREE MURDER STILL APPLIES TO THE DEFENDANT SINCE THE AMENDMENT TO RCW 9.94A.540 IS NOT RETROACTIVE.

The appellant asserts that because of the amendment to RCW 9.94A.540, he should be allowed to argue for a sentence below the standard range. This

argument, however, disregards the statutory language which made the statute effective for crimes committed after the effective date of the statute, which was July 24, 2005. RCW 9.94A.540(3) ((3) (a) Subsection (1) of this section shall not be applied in sentencing of juveniles tried as adults pursuant to RCW 13.04.030(1)(e)(i). (b) This subsection (3) applies only to crimes committed on or after July 24, 2005).

The saving statute, RCW 10.01.040, states as follows:

No offense committed and no penalty or forfeiture incurred previous to the time when any statutory provision shall be repealed, whether such repeal be express or implied, shall be affected by such repeal, unless a contrary intention is expressly declared in the repealing act, and no prosecution for any offense, or for the recovery of any penalty or forfeiture, pending at the time any statutory provision shall be repealed, whether such repeal be express or implied, shall be affected by such repeal, but the same shall proceed in all respects, as if such provision had not been repealed, unless a contrary intention is expressly declared in the repealing act. Whenever any criminal or penal statute shall be amended or repealed, all offenses committed or penalties or forfeitures incurred while it was in force shall be punished or enforced as if it were in force, notwithstanding such amendment or repeal, unless a contrary intention is expressly declared in the amendatory or repealing act, and every such amendatory or repealing statute shall be so construed as to save all criminal and penal proceedings, and proceedings to recover forfeitures, pending at the time of its enactment, unless a contrary intention is expressly declared therein.

RCW 10.01.040 presumptively saves offenses already committed, and penalties already incurred, from being affected by amendments to criminal statutes. *State v. Kane*, 101 Wn. App. 607, 610, 5 P.3d 741 (2000). As a derogation of the common law, the saving statute is strictly construed, whereas its exception for acts that expressly declare a contrary intention is interpreted broadly. *Id.* at 612. Where the saving statute applies, if the amendment is

silent as to intent for retroactive application, it will be given prospective application only, and this court need not determine whether it is remedial or curative. *Id.* at 613. "When a new statute repeals or amends a statute governed by the saving statute, it will be given prospective application even if it is patently remedial, unless it contains words that fairly convey a different intention." *Id.* at 615.

The court in *In Re Hegney*, 138 Wn. App. 511, 541-42, 158 P.3d 1193 (2007), was faced with the same argument as presented here. The *Hegney* court held that:

In 2005, the legislature amended RCW 9.94A.540, stating: (1) The legislature finds that emerging research on brain development indicates that adolescent brains, and thus adolescent intellectual and emotional capabilities, differ significantly from those of mature adults. It is appropriate to take these differences into consideration when sentencing juveniles tried as adults. The legislature further finds that applying mandatory minimum sentences for juveniles tried as adults prevents trial court judges from taking these differences into consideration in appropriate circumstances. (2) The legislature intends to eliminate the application of mandatory minimum sentences under RCW 9.94A.540 to juveniles tried as adults, and to continue to apply all other adult sentencing provisions to juveniles tried as adults. Laws of 2005, ch. 437, § 1. Thus, the legislature ensured that the mandatory minimum terms of RCW 9.94A.540(1) "shall not be applied in sentencing of juveniles tried as adults pursuant to RCW 13.04.030(1)(e)(i)." Laws of 2005, ch. 437, § 2. The legislature also provided that this prohibition against mandatory minimum sentences for juveniles tried as adults "applies only to crimes committed on or after the effective date of this act." Laws of 2005, ch. 437, § 2.

Absent language indicating a contrary intent, we must apply an amendment to a penal statute—even a patently remedial one—prospectively under RCW 10.01.040. *State v. McCarthy*, 112 Wn. App. 231, 237, 48 P.3d 1014 (2002), review denied, 148 Wn.2d 1011 (2003). RCW 10.01.040, also known as the savings clause, in relevant part provides: Whenever any criminal or penal statute shall be amended or repealed, all offenses committed or penalties or forfeitures

incurred while it was in force shall be punished or enforced as if it were in force, notwithstanding such amendment or repeal, unless a contrary intention is expressly declared in the amendatory or repealing act. This savings clause is deemed a part of every amending or repealing statute as if the legislature had expressly inserted it therein. State v. Ross, 152 Wn.2d 220, 237, 95 P.3d 1225 (2004). Nevertheless, to avoid application of the savings clause, the legislature simply needs to express its intent in words that fairly convey its intention. Ross, 152 Wn.2d at 238.

Here, the legislature has failed to express any intent that the 2005 amendments to RCW 9.94A.540 apply retroactively. In fact, the legislature has expressed the opposite intent by explicitly providing that the 2005 amendments to RCW 9.94A.540 apply on or after the effective date of the act: July 24, 2005. Laws of 2005, ch. 437, § 2. Accordingly, we hold that the amendments apply prospectively only.

Finally, the 2005 amendments to RCW 9.94A.540 do not violate equal protection of the laws. See Ross, 152 Wn.2d at 240-41; In re Pers. Restraint of Stanphill, 134 Wn.2d 165, 175, 949 P.2d 365 (1998).

In *State v. McCarthy*, 112 Wn. App. 231, 48 P.3d 1014 (2002), the court rejected a claim that a certain amendment to the SRA should be applied retroactively because the amendment expressly stated that it applied "to crimes committed on or after July 1, 2002," and nothing in the amendment suggested a legislative intent for retroactive application. 112 Wn. App. at 237. In *State v. Kane*, 101 Wn. App. 607, 610, 5 P.3d 741 (2000), the trial court sentenced Kane based on an amendment to the DOSA eligibility requirements that took effect after he committed his crime. *Kane* at 609. The appellate court reversed because the statute contained "no language even remotely suggest[ing] an intention to make the amended eligibility criteria available in cases arising before the effective date." *Id.* at 614. The court rejected Kane's attempt to demonstrate a contrary intent with legislative history because "the

issue is whether the new statute's express language shows that the Legislature intended to depart from the presumption created by the saving statute." *Id.*

By its very language, the amendment to RCW 9.94A.540 applies only to crimes committed on or after July 24, 2005. As the court in *State v. Kane*, *supra*, made clear, the question is whether the "new statute's express language" demonstrates a legislative intent to depart from the saving statute's presumption. 101 Wn. App. at 614. Although the exception to the saving statute is to be interpreted broadly, the words "expressly declared" must be given some meaning. RCW 10.01.040. As in *Kane*, the amendment contains no language that suggests an intention to apply the amendment to cases arising before the effective date. Because there is no language in the amendment that demonstrates a legislative intent to avoid the presumption of the saving statute, the trial court must apply the saving statute to this case.

D. THE COURT'S DECISION IN *IN RE MULHOLLAND* IS NOT A NEW PRINCIPLE OF LAW REQUIRING RETROACTIVE APPLICATION.

The defendant's reliance upon *In Re Mulholland*, 161 Wn.2d 322, 166 P.3d 677 (2007) is misplaced. *Mulholland* was a case in which the defendant went to trial and was found guilty by a jury of six counts of first degree assault and one count of drive-by shooting. The question presented to the court was whether the defendant was entitled to ask the trial court to consider an exceptional sentence below the standard range, and to have that request actually considered. There, the court said that it was a fundamental defect to not consider

a request for a sentence below the standard range. In this case there was a plea agreement that contemplated a consecutive sentence of 20 years per murder count, for a total of 80 years, in lieu of going to trial on charges of aggravated murder.

In *In Re Mulholland*, 161 Wn.2d 322, 166 P.3d 677 (2007), the court held that the appellant, who went to trial and was convicted by a jury, could request an exceptional sentence so that multiple counts of serious violent offenses and a trial court has discretion to order that they be served concurrently. *Id* at 331. However, *Mulholland* did not create a new rule. Retroactivity analysis does not apply where a petitioner basis his challenge on an intervening decision that construes the meaning of a statute. There is no “retroactive” effect of a court's construction of a statute; rather, once the court has determined the meaning, that is, what the statute has meant since its enactment. *In re Pers. Restraint of Vandervlugt*, 120 Wn.2d 427, 436, 842 P.2d 950 (1992); and see *State v. Evans*, 154 Wn.2d 438, 448, 114 P.3d 627 (2005) (identifying *Vandervlugt* as an example of a case in which retroactive application would be authorized or required as a matter of state law even where *Teague* would not support retroactive application).

E. THE ORIGINAL SENTENCING COURT WAS NOT MISTAKEN AS TO ITS AUTHORITY AND WAS NOT INCLINED TO IMPOSE AN EXCEPTIONAL SENTENCE BELOW THE STANDARD RANGE IN ANY EVENT.

The appellant asserts that the original sentencing court was under the misapprehension that it had no discretion in sentencing the appellant to consecutive mandatory minimum sentences of 20 years. [App. Br. at 28]. The original sentencing court was presented with a plea agreement with a joint recommendation of 80 years. [8-23-1993 RP 27]. The court's statement that "each count is required by law to be served consecutively" was not a misapprehension of the law since the standard range for serious violent offenses is that they run consecutive to one another. (Former) RCW 9.94A.400(1)(b).

The 1993 Sentencing Guidelines Manual states that "[i]f the court imposes a sentence outside a standard range, it must set forth the reasons for its decision in written Findings of Fact and Conclusions of Law (RCW 9.94A.120(3)). These procedures must also be followed if the court departs from the consecutive/concurrent policy in RCW 9.94A.400(1) and (2). Any departures can be appealed to the Court of Appeals by the defendant or the prosecutor." SGC Manual 1993, pg. I-34. The 1993 Sentencing Guidelines Manual also states that a mitigating circumstance for an exceptional sentence is "[t]he operation of the multiple offense police of RCW 9.94A.400 results in a presumptive sentence that is clearly

excessive in light of the purpose of this chapter, as expressed in RCW 9.94A.010.” SGC Manual 1993, pg. I-34-35.

The court is presumed to know the law, and the Sentencing Guidelines Manual is the normal reference point with regard to the law of sentencing in the State of Washington.

F. CRR 7.8 DOES NOT APPLY TO THE FACTS OF THIS CASE SINCE THE FACTORS CITED BY THE APPELLANT WERE KNOWN AT THE TIME OF THE ORIGINAL SENTENCING.

The appellant asserts that there were numerous mitigating factors in this case, namely: new evidence regarding adolescent brains; Supreme Court statements on lesser culpability of adolescents; appellant’s unstable homelife with little parental involvement; the trauma to the appellant with the death of his closest family member; the appellant’s deficient reading and comprehension abilities at the time of the crime; the appellant’s age at the time of the crime; immaturity for age and demonstrated rehabilitation. All of these factors were known to the sentencing court at the time of the original sentencing except for the first two and the last. The studies regarding adolescent brain development are hardly new information. Studies regarding development of the human brain of been taking place for decades. Studies carried out in the 1970s and 1980s demonstrated that the structure of the prefrontal cortex undergoes significant changes during

puberty and adolescence. *Journal of Child Psychology and Psychiatry* 47:3 (2006), pp 296–312.

The appellant cites both *Roper v. Simmons*, 543 U.S. 551, 125 S. Ct. 1183, 161 L.Ed2d 1 (2005) and *Graham v. Florida*, ___ S. Ct. ___, 130 S.Ct. 2011, 176 L.Ed. 825 (2010) in support of his CrR 7.8 motion. However, both cases are factual distinguishable from the present case. In *Roper*, the court held that a juvenile could not be sentence to death. This case was not a death penalty case. In *Graham*, the court held that a defendant could not be sentenced to life without parole in a non-homicide case. This case deals with four counts of first degree murder.

G. THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION IN DECIDING NOT TO EXERCISE ITS DISCRETION BY NOT CONSIDERING A MITIGATED, EXCEPTIONAL SENTENCE.

The appellant asserts that the trial court erred by ruling that it lacked authority to revisit prior sentencing rulings. [App. Br. at 44, 46]. This is not exactly how the court ruled, however. The court specifically denied the appellant’s CrR 7.8 motion, as well as the motion pursuant to RAP 2.5 by exercising discretion. [9-16-2011 RP 41]. The judge specifically stated that “I’ve invoked by discretion here to not grant the motion under both of those.” [9-16-2011 RP 41-42]. The judge at the “resentencing” hearing held that many of the “arguments here this

morning as to why the Court should exercise its discretion and the issues which he and his counsel felt should be considered at the time of any resentencing, if there is resentencing . . . should have been raised at the time, but there have never been, that I'm aware of, an issue of ineffective assistance of counsel raised in all these years." [9-16-2011 RP 36].

The court continued, stating "the other issue is the issue related to is – there a plea bargain here? Well, obviously there was a plea bargain. He came in and he pled guilty and the judge sentenced him to the twenty – four 20-year sentences based upon minimum mandatory requirements at the time. So I can see how that information was never presented to the judge because – and I – and it's my belief that it was a joint recommendation. In fact, it was agreed to. Now, as pointed out by counsel, the plea form doesn't say that. It says the State will recommend – I'm informed that the State will recommend. But you have to go beyond that. You have to go to what was the agreement and what was done at the time of the sentencing hearing." [9-16-2011 RP 36-37].

As pointed out by the appellant, a trial court does not abuse its discretion in declining to hold a full resentencing hearing beyond that to correct error. *State v. Kilgore*, 167 Wn.2d 28, 216 P.3d 393 (2009).

H. ASSUMING ARGUENDO THAT THE DEFENSE CAN ASK FOR A SENTENCE BELOW THE RANGE IN VIOLATION OF THE PLEA AGREEMENT, THE

DEFENSE SEEKS TO USE FACTORS PERSONAL AND UNIQUE TO THE DEFENDANT WHICH ARE NOT RELEVANT TO THE SRA.

Assuming arguendo that even if the defendant could now ask for an exceptional sentence below the standard range, the factors that the defense wishes to present are not relevant under the SRA. In *State v. Law*, 154 Wn. 2d 85, 94-95, 110 P.3d 717 (2003), the court stated:

Generally, a trial court must impose a sentence within the standard range. See former RCW 9.94A.120(1) (2000), recodified as RCW 9.94A.505(2)(a)(i). The SRA permits departures from the standard range, instructing that "the court may impose a sentence outside the standard sentence range for that offense if it finds, considering the purpose of this chapter, that there are substantial and compelling reasons justifying an exceptional sentence." Former RCW 9.94A.120(2) (2000), recodified as RCW 9.94A.535. The SRA then sets forth nonexclusive "illustrative" factors which the court may consider in exercising its discretion to impose an exceptional sentence. n5 Former RCW 9.94A.390. While the statutory mitigating factors listed are "illustrative" only it should be noted that all the examples relate directly to the crime or the defendant's culpability for the crime committed. [Emphasis added].

.....

Our case law on this subject is well-established. We have held that the SRA establishes a two-part test to determine if a sentencing departure is justified as a matter of law. In determining whether a factor legally supports departure from the standard sentence range, this Court employs a two-part test: first, a trial court may not base an exceptional sentence on factors necessarily considered by the Legislature in establishing the standard sentence range; second, the asserted aggravating or mitigating factor must be sufficiently substantial and compelling to distinguish the crime in question from others in the same category. *Ha'mim*, 132 Wn.2d at 840 (citing *State v. Alexander*, 125 Wn.2d 717, 725, 888 P.2d 1169 (1995)).

In addressing the second prong of this analysis, the *Law* court stated:

The second prong of the Ha'mim test requires that the "mitigating factor must. . . distinguish the crime in question from others in the same category." Ha'mim, 132 Wn.2d at 840. This second prong encapsulates the SRA's explicit command that sentences be imposed "without discrimination as to any element that does not relate to the crime or the previous record of the defendant." RCW 9.94A.340. In adopting this sentencing requirement, the legislature provided the only basis on which discrimination is allowed: any element that relates to the crime or previous record.

Our cases have applied RCW 9.94A.340 to prohibit exceptional sentences based on factors personal in nature to a particular defendant. In Freitag, the trial court based the defendant's exceptional sentence, in part, on her "concern for others." 127 Wn.2d at 145. Citing RCW 9.94A.340, we reversed, holding such consideration was improper. *Id.* We concluded that "[w]hile we recognize the harshness of a rule that precludes the trial court from considering a defendant's altruistic past during the sentencing phase, the Sentencing Reform Act of 1981 requires this result." *Id.* at 144 (emphasis added) (citing RCW 9.94A.340).

We reached a similar conclusion in Ha'mim itself. There, the defendant was 18 years old with no previous police contacts when she took part in the armed robbery of a beauty salon. Ha'mim, 132 Wn.2d at 836-37. The trial court, relying on the defendant's "youth" and "lack of [any] prior contact[] with the police," imposed an exceptional [*98] sentence of 31 months, departing downward from the standard range of 55-65 months. *Id.* at 837-38. On review, this court rejected the use of age as a mitigating factor. *Id.* at 846. In doing so, this court relied on RCW 9.94A.340 in concluding that "[t]he age of the defendant does not relate to the crime or the previous record of the defendant." *Id.* at 847. Thus, we held that this personal factor was not a substantial and compelling reason to impose an exceptional sentence.

Law, supra at 97-98.

In holding that the sentencing courts' exercise of discretion is limited, the court stated:

In enacting RCW 9.94A.340 the legislature restricted sentencing courts' exercise of discretion in implementing the SRA; explicitly prohibiting reliance on "any element that does not relate to the crime or the previous record of the defendant." Our cases considering this statute's effect on the imposition of exceptional sentences hold that this nondiscrimination provision prohibits considerations of factors unrelated

to the crime and of factors personal in nature to a particular defendant. Ha'mim, 132 Wn.2d at 846-47; Freitag, 127 Wn.2d at 144-45. *It is undisputed that the trial court's stated justifications were unrelated to the crime and based on the personal circumstances of the defendant. Because such consideration is contrary to the will and intention of the legislature, the trial court's justifications were insufficient as a matter of law.* While amicus asserts general policy justifications for consideration of such personal factors, it fails to show how our prior interpretations of the SRA are in fact incorrect. Absent such a showing, the doctrine of stare decisis compels us to reaffirm our prior case law construing the SRA. [Emphasis added].

State v. Law, 154 Wn.2d 85, 103 (2005).

Applying the court's holding to the factors sought to be presented by the defense in this case, the appellant's post-crime behavior, learning and emotional development is irrelevant to this case. This court should not consider it for any purpose.

IV. CONCLUSION

Based upon the foregoing argument, this Court should deny the petition for review.

Respectfully submitted this 5th day of April, 2012.



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Certificate of Service

I certify that on April 5, 2012, I caused to be placed in the mails of the U.S., postage pre-paid, a copy of this document to:

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