

Jacob, but without a pinpoint citation). The State fails to acknowledge, as the Jacob Court did, that this limitation is not without exception. See Jacob, 154 Wn.2d at 602 ("Although sentencing courts generally enjoy discretion in tailoring sentences, for the most part that discretion does not extend to deciding whether to apply sentences concurrently or consecutively (emphasis added)."

As discussed in the petition, RCW 9.94A.535(1)(g) constitutes one of the exceptions to RCW 9.94A.589(1)(b). Petition at 9-11. Under this provision, a sentencing court has authority to override the presumption for consecutive sentences for serious violent offenses if it determines that "operation of the multiple offense policy of RCW 9.94A.589 results in a presumptive sentence that is clearly excessive in light of the purpose of [the SRA], as expressed in RCW 9.94A.010."² Nowhere in the SRA has

² RCW 9.94A.010 provides:

The purpose of this chapter is to make the criminal justice system accountable to the public by developing a system for the sentencing of felony offenders which structures, but does not eliminate, discretionary decisions affecting sentences, and to:

- (1) Ensure that the punishment for a criminal offense is proportionate to the seriousness of the offense and the offender's criminal history;
- (2) Promote respect for the law by providing punishment which is just;
- (3) Be commensurate with the punishment imposed on others committing similar offenses;
- (4) Protect the public;
- (5) Offer the offender an opportunity to improve him or herself;
- (6) Make frugal use of the state's and local governments' resources; and

the Legislature expressed an intent that RCW 9.94A.535(1)(g) should not apply to that portion of the multiple offense policy under RCW 9.94A.589 pertaining to consecutive sentences for serious violent offenses. To the contrary, a review of RCW 9.94A.589 reveals that the only mitigation that can arise from application of RCW 9.94A.535(1)(g) is ordering concurrent those sentences that would otherwise be served consecutively (subsections (1)(b) & (c)), or reducing a sentence for which the standard range is made excessive by counting each of several current offenses against each other for scoring purposes (subsection (1)(a)). See State v. Hortman, 76 Wn. App. 454, 463-64, 886 P.2d 234 (1994), review denied, 126 Wn.2d 1025, 896 P.2d 64 (1995); State v. Sanchez, 69 Wn. App. 255, 260-62, 848 P.2d 208, review denied, 122 Wn.2d 1007, 859 P.2d 604 (1993).

Thus, as recognized in Jacob, in some instances trial courts have discretion to determine whether presumptively consecutive sentences should be served concurrently. Mulholland's case presents one of those instances.

2. MULHOLLAND HAS SHOWN THAT THE CIRCUMSTANCE WARRANTING IMPOSITION OF A MITIGATED EXCEPTIONAL SENTENCE EXISTS IN HIS CASE.

The State correctly identifies the rule for determining whether RCW 9.94A.535(1)(g) is applicable in a given case. Response at 11. The State fails, however, to meaningfully or correctly apply the rule to the facts

(7) Reduce the risk of reoffending by offenders in the community.

here, instead summarily concluding that "Petitioner cannot argue that the effects of his crime on any of the six victims was nonexistent, trivial or trifling." Id. When the rule is thoughtfully and correctly applied, it is apparent the trial court had ample grounds to impose a mitigated exceptional sentence.

In both Hortman and Sanchez, the offender scores were calculated using all current offenses. The trial courts imposed mitigated exceptional sentences because the standard ranges were excessive in light of the purposes of the SRA. The State appealed. This Court affirmed the sentences, holding the mitigated exceptional sentences were justified based on findings that the cumulative effect of the various crimes was "trivial or trifling." Hortman, 76 Wn. App. at 461; Sanchez, 69 Wn. App. at 261-62.

The Sanchez Court derived the "trivial or trifling" rule from State v. Batista, 116 Wn.2d 777, 808 P.2d 1141 (1991), which addressed the opposite circumstance, *i.e.*, imposition of an *aggravated* exceptional sentence on the basis that the multiple offense policy resulted in a standard range sentence that was clearly too lenient. Sanchez, 69 Wn. App. at 260-61. The Batista court stated that the analysis for determining whether an *aggravated* sentence may be imposed involves assessing the "(1) 'egregious effects' of the defendant's multiple offenses and (2) the level of defendant's culpability resulting from the multiple offenses." 116 Wn.2d at 787-88 (quoting State v. Fisher, 108 Wn.2d 419, 428, 739 P.2d 683

(1987)). If the multiple offenses caused "extraordinarily serious harm or culpability" not otherwise accounted for in determining the standard range, then an aggravated sentence is justified. Both findings are not necessary. Id. (emphasis added).

The Sanchez Court recognized that the inverse of the Batista rule applies when the consideration is for a *mitigated* exceptional sentence. 69 Wn. App. at 261. In other words, if the harm or culpability arising from the commission of subsequent "criminal acts" is trivial or trifling in comparison to the initial offense, then a mitigated exceptional sentence may be imposed.³ See Hortman, 76 Wn. App. at 463-64 ("Sanchez holds that a presumptive sentence calculated in accord with the multiple offense policy is clearly excessive if the difference between the effects of the first *criminal act* and the cumulative effect of the subsequent *criminal acts* is nonexistent, trivial or trifling" (emphasis added)).

Despite the State's contrary claim, the "trivial or trifling" finding is warranted here. As discussed in the petition, Mulholland's offenses do not meet the legal definition of "same criminal conduct." Petition at 20. They did, however, all arise from a single criminal act - shooting from his car at the Tular's home. There is no indication Mulholland knew anyone was in the home, and if so, how many. Mulholland was convicted of six counts of assault, in addition to drive-by shooting, only because the State proved there were six people in the home. Had the State been able to prove there

were more people home, the State's charging theory could have resulted in more convictions, all for the same criminal act.

Where a single criminal act results in convictions for multiple offenses, the resulting harm and culpability of subsequent criminal acts is nonexistent because there were no subsequent acts. Mulholland's one act gave rise to six assault convictions and one "drive-by shooting" conviction. Had the State proved there were 25 people in the Tular home, presumably it could have obtained 25 assault convictions. Conversely, if only one person had been in the home the result would have been only a single assault conviction. Mulholland's culpability is no greater or less depending on the number of people present because he only engaged in a single criminal act. Yet, his low-end presumptive sentence is 927 months instead of 162 months because six people instead of one happened to be in the house, thereby triggering application of the multiple offense policy.

An increase in the presumptive sentence of 765 months (63.75 years) resulting from factors unrelated to Mulholland's culpability or matters within his control, does a disservice to the goals of the SRA. Mulholland's 77-year presumptive sentence is disproportionate to the seriousness of his single criminal act and absence of a criminal past, fails to promote respect for the law because it is unjustly excessive, and is not commensurate with punishment imposed on others who have committed

³ The Sanchez Court went on to analyze only the harm alternative and not the culpability alternative. 69 Wn. App. at 261-62.

virtually identical acts but for which there was, fortuitously, only a single victim. RCW 9.94A.010(1)-(3) (text of statute in note 2, supra).

Because there was only a single criminal act, the cumulative harm and culpability arising from *multiple* criminal acts is necessarily nonexistent. Therefore, there was a factual and legal basis to impose a mitigated exceptional sentence. Had the sentencing court been aware of its authority under RCW 9.94A.535(1)(g), the sentencing court likely would have ordered concurrent base sentences for some or all of Mulholland's convictions, particularly in light of Mrs. Tular's comments at sentencing and the court's own apparent displeasure with its erroneous understanding that it had no choice but to impose consecutive sentence. See Petition at Appendix H at 586-88.

The sentencing court's failure to recognize the extent of its sentencing options constitutes an abuse of discretion that deprived Mulholland of his right to due process and equal protection. Trial counsel's decision to pursue a legally frivolous sentencing argument (same criminal conduct), instead of the legally meritorious request for a mitigated exceptional sentence under RCW 9.94A.535(1)(g), constitutes deficient performance that prejudiced Mulholland. Similarly, appellate counsel's failure to raise these issues on direct appeal constitutes deficient performance that prejudiced Mulholland. See Petition at 18-21. Therefore, this Court should grant Mulholland's petition and remand for resentencing.

3. MULHOLLAND'S INEFFECTIVE ASSISTANCE OF COUNSEL CLAIM IS PROPERLY BEFORE THIS COURT.

The State invites this Court to dismiss Mulholland's petition because an ineffective assistance of trial counsel claim was litigated in his direct appeal.⁴ Response at 2-3. This Court should reject the State's invitation and its myopic characterization of the petition. Rather than the single issue recognized by the State, Mulholland's petition presents several issues for consideration that have not been litigated, including: (1) whether Mulholland was denied his right to equal protection and due process when the sentencing court, as a matter of law, abused its discretion at sentencing; (2) whether Mulholland was denied his right to effective assistance of trial counsel when trial counsel failed to properly educate the court about its sentencing options and instead pursued a legally frivolous sentencing argument (same criminal conduct); and (3) whether Mulholland was denied his right to effective assistance of appellate counsel for failing to raise issues (1) & (2). None of these issues were litigated in Mulholland's direct appeal.

Moreover, this Court need not reach the ineffective assistance claims if it agrees Mulholland was prejudiced by the sentencing court's denial of his right to equal protection and due process or that the court's

⁴ Mulholland did raise an ineffective assistance of trial counsel argument in his direct appeal, albeit pro se in a statement of additional grounds for review. See Petition at Appendix B at 8-10 (this Court's unpublished decision in the direct appeal).

abuse of discretion constitutes a fundamental defect resulting in a complete miscarriage of justice.

Finally, assuming, arguendo, that the ineffective assistance of *trial* counsel claim is barred as the State suggests, the same cannot be concluded about the ineffective assistance of *appellate* counsel claim, even under the authority relied on by the State. See In re Personal Restraint of Lord, 123 Wn.2d 296, 313, 868 P.2d 835 (1994) (although Court rejected ineffective assistance of *trial* counsel claims already litigated on direct appeal, consideration of ineffective assistance of *appellate* counsel was still warranted).

B. CONCLUSION

The central issue in this matter is the sentencing court's express failure to recognize its proper sentencing authority. This failure constitutes an abuse of discretion and violated Mulholland's right to equal protection and due process. State v. Grayson, 154 Wn.2d 333, 341-42, 111 P.3d 1183 (2005); State v. Garcia-Martinez, 88 Wn. App. 322, 330, 944 P.2d 1104 (1997); see Petition at Appendix H at 582, 588 (sentencing court states it has no discretion to impose concurrent base sentences). For this reason alone, the petition should be granted and the matter remanded for resentencing. RAP 16.4(c)(2).

If this Court determines that the sentencing court is not at fault for failing to recognize its full sentencing authority, then it can only be because trial counsel's performance was deficient. In this circumstance,

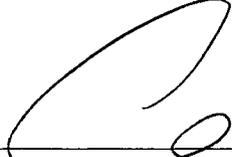
trial counsel was ineffective for failing to educate the court about its sentencing authority and appellate counsel was ineffective for failing to recognize and raise the issue of trial counsel's ineffectiveness on direct appeal. Having been deprived of his right to effective assistance of counsel at trial and on appeal, remand for resentencing is warranted. RAP 16.4(c)(2).

For reasons stated herein, and in previously filed petition, this Court should grant Mulholland's petition and remand for resentencing.

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Respectfully submitted,

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