

NO. 79150-3

RECEIVED  
SUPREME COURT  
STATE OF WASHINGTON

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SUPREME COURT OF THE  
STATE OF WASHINGTON

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STATE OF WASHINGTON, PETITIONER

v.

DANIEL CHARLES MULHOLLAND, RESPONDENT

Court of Appeals Cause No. 34484-0  
Appeal from the Superior Court of Pierce County  
The Honorable Karen Strombom

No. 01-1-06114-5

**SUPPLEMENTAL BRIEF OF PETITIONER**

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A. ISSUES PERTAINING TO REVIEW.

1. When the heightened standards applicable to personal restraint petitions are applied to Mulholland's claims, is it clear that the petition should have been dismissed?
2. Did the Court of Appeals err in not dismissing the petition under In re PRP of Grisby, when the best possible sentence the petitioner could hope for on remand is a sentence of 60 years, which is unlikely to afford him any actual relief?
3. Should the petition be dismissed when defendant can show neither deficient performance nor resulting prejudice necessary to succeed on his claim of ineffective assistance of counsel?
4. Do the differences in the wording of RCW 9.94A.589(1)(a) and (1)(b) demonstrate that the legislature intended to allow presumptively concurrent sentences to be run consecutively via imposition of an exceptional sentence, but did not intend to allow presumptively consecutive sentences to be run concurrently via an exceptional sentence?

B. STATEMENT OF THE CASE.

A jury found Daniel C. Mulholland guilty of six counts of first degree assault and one count of drive by shooting. The jury found that each count of assault was firearm enhanced. The victims of these assaults were six members of the Tullar family who were eating dinner in the living room of their home; the room was lit and there were no curtains or blinds across the windows. Mulholland drove by and fired multiple gunshots through their living room window- an act apparently motivated by a dispute about a television set. See, Unpublished Opinion, Appendix B to the petition.

At the sentencing hearing, Mulholland asked the court to treat his convictions as the same criminal conduct. This issue was briefed and argued by both parties. See Appendices E, F, G, and H to the petition. Neither the prosecutor nor Mulholland asked the court to consider the imposition of an exceptional sentence upward or downward. Id. The court found that as each of the assault counts pertained to a separate victim, as a matter of law, it must treat the counts as separate and distinct. The court held that it had no discretion to classify the crimes as the same criminal conduct and run the counts concurrently. Transcript of sentencing, Appendix H to the petition, at RP 581-582. Prior to announcing the sentence, the court heard from one of the victims who talked about the lasting impact the crimes had had on her family. In particular, she talked about the effect it has had on her husband, a war veteran who is suffering from post-traumatic stress syndrome. Since the shooting, she described him as suffering blackouts for three to seven hours a day; these blackouts had been controlled by medication prior to the shooting. Appendix H to the petition at RP 585-586. Given the chance to address the court, Mulholland indicated that he was not guilty, and that he thought mistakes had been made in the trial. Appendix H to the petition, at RP 582. The court imposed a standard range sentence at the low end of the range according to the prosecutor's recommendation. In doing so, the court noted that "this incident has impacted the victims tremendously" and that it looked "at the counts and what the jury decided." Appendix H to

the petition, at RP 587-588. The court stated, “I don’t have the discretion to do anything but follow the law. I don’t have the discretion to have the sentences in my view run at the same time. As I read the law, it requires them to run consecutively.” Appendix H to the petition, at RP 588.

Mulholland was sentenced to low end standard range sentences in accordance with the prosecutor’s recommendation. With the time for the enhancements, Mulholland received a total sentence of 927 months.

Mulholland appealed alleging instructional error, insufficient evidence, and ineffective assistance of counsel. His convictions were affirmed in an unpublished opinion and, after review was denied, the mandate issued March 8, 2005.

In a timely filed personal restraint petition, Mulholland alleged that he received ineffective assistance of counsel because his attorney failed to ask for an exceptional sentence downward. He further claimed that equal protection was violated by the court’s failure to recognize that it had sentencing options available other than the 927 month sentence.

In an unpublished order signed by three judges of the Court of Appeals, Division II, the court granted the petition. Appendix A. Although the court granted relief, it expressly did not reach the issues raised by Mulholland. See Appendix A at p.5, fn.6. The State successfully sought discretionary review of this order granting relief.

C. ARGUMENT.

1. UNDER PROPERLY APPLIED STANDARDS FOR REVIEW OF COLLATERAL ATTACKS, THE PETITION SHOULD BE DISMISSED.

It is well established under Washington law that a criminal defendant has an increased burden of proof in a collateral attack on his judgment than he would in a direct appeal. In a collateral action, the petitioner has the duty of showing error, and that such error was actually prejudicial. In contrast, once a criminal defendant shows a constitutional error in a direct appeal, the burden is then shifted to the prosecution to show that the error is harmless beyond a reasonable doubt. State v. Brown, 147 Wn.2d 330, 338-40, 58 P.3d 889 (2002). This presumption of prejudice has no application in the context of personal restraint petitions. In re Mercer, 108 Wn.2d 714, 718, 721, 741 P.2d 559 (1987); In re Personal Restraint of Benn, 134 Wn.2d 868, 940, 952 P.2d 116 (1998). On collateral review, the burden shifts to the petitioner to establish that the error was not harmless; in other words, petitioner must establish that the error was prejudicial. To obtain collateral relief from an alleged non-constitutional error, a petitioner must show "a fundamental defect which inherently results in a complete miscarriage of justice." In re Cook, 114 Wn.2d 802, 812, 792 P.2d 506 (1990). This is a higher standard than the constitutional standard of actual prejudice. Id. at 810.

To obtain relief with respect to either constitutional or nonconstitutional claims, the petitioner *must* show that he was actually and substantially prejudiced by the error. In re Cook, *supra* at 810; In re St. Pierre, 118 Wn.2d 321, 329, 823 P.2d 492 (1992); In re Pers. Restraint of Lord, 123 Wn.2d 296, 303 P.2d (1994).

Although these principles are well established by numerous decisions of this court, there is nothing in the Court of Appeals's order under review to show that these heightened standards were employed below. Other than twice mentioning the fact that Mulholland's request for relief was by personal restraint petition, the order granting relief is devoid of any relevant authority or analysis of the law applicable to collateral attacks on a judgment. The Court of Appeals granted relief on a non-constitutional sentencing claim, but offered no explanation of how the trial court's imposition of standard range sentence based upon a properly calculated offender score constituted a "complete miscarriage of justice." When the standard of review applicable to collateral attacks are properly applied, it is clear that the petition should have been dismissed.

The increased burdens placed upon a criminal defendant to obtain relief by personal restraint petition are there for sound policy reasons. "These threshold requirements are justified by the court's interest in finality, economy, and integrity of the trial process and by the fact that the petitioner has already had an opportunity for judicial review." In re Pers. Restraint of Isadore, 151 Wn.2d 294, 298, 88 P.3d 390 (2004); In re Pers.

Restraint of Cashaw, 123 Wn.2d 138, 148-49, 866 P.2d 8 (1994). Here, Mulholland was convicted by a jury of six counts of assault, and those convictions were affirmed on appeal. The public, and the victims in this case, have an expectation of finality in the judgment which the Court of Appeals has ignored by not employing the heightened threshold requirements. Such action erodes the public's confidence in the criminal justice system. The order granting relief should be vacated.

a. The Petition Should Be Dismissed As Petitioner Reiterates A Claim That Was Rejected On Direct Appeal And Makes No Showing Why The Interests Of Justice Require Its Re-Examination

A petitioner in a personal restraint petition may not raise an issue which "was raised and rejected on direct appeal unless the interests of justice require relitigation of that issue." In re Personal Restraint of Lord, 123 Wn.2d 296, 303, 868 P.2d 835 (1994). "Simply 'revising' a previously rejected legal argument . . . neither creates a 'new' claim nor constitutes good cause to reconsider the original claim." In re Jeffries, 114 Wn.2d 485, 488, 789 P.2d 731 (1990).

[I]dential grounds may often be proved by different factual allegations. So also, identical grounds may be supported by different legal arguments, . . . or be couched in different language, . . . or vary in immaterial respects. Thus, for example, "a claim of involuntary confession predicated on alleged psychological coercion does not raise a different 'ground' than does one predicated on physical coercion."

Jeffries, 114 Wn.2d at 488 (citations omitted). A petitioner may not create a different ground for relief merely by alleging different facts, asserting different legal theories, or couching his argument in different language. Lord, 123 Wn.2d at 329.

In his petition, Mulholland claimed that he received ineffective assistance of counsel. The opinion from his direct appeal clearly shows that he raised a claim of ineffective assistance of counsel on direct review. Appendix B to the petition. The court considered the merits of this claim and rejected it. Id. While it does not appear that Mulholland raised the same factual allegation in his direct appeal – failure to request an exceptional sentence- as a basis for finding deficient performance, the “ground” for relief is identical. Appendix B to the petition. Consequently, Mulholland had to demonstrate that the interests of justice require relitigation of this issue before this claim could be properly before the court in a collateral attack. RAP 16.4(d); Lord, 123 Wn.2d at 303. Mulholland made no argument regarding the “interest of justice” standard, and his petition should have been summarily dismissed.

b. The Petition Should Be Dismissed Under the Principles Set Forth in In Re Grisby.

In In re Personal Restraint of Grisby, 121 Wn.2d 419, 853 P.2d 901 (1993), this court was faced with a petition from a defendant, sentenced to life imprisonment without the possibility of parole on three murder convictions, who claimed that he was constitutionally entitled to

be sentenced to life with the possibility of parole, and to have a minimum term set by the Indeterminate Sentence Review Board. Grisby was also convicted of two additional counts of murder in the first degree, and one count of assault in the first degree, for which he received sentences of life with the possibility of parole. The sentencing court had ordered that all sentences should run consecutively and his convictions were affirmed on appeal. 121 Wn.2d at 423.

This court dismissed his petition because Grisby had failed to meet his burden of showing “actual and substantial prejudice” because he had made no showing of any prejudice stemming from his life without parole sentences. The court concluded that unless Grisby could show that there was a possibility he would ever be released on parole, he could not satisfy this threshold burden. 121 Wn. 2d at 424. The court looked at the minimum terms that Grisby would have to serve, the fact that the standard range on any one of the murders was 411 to 548 months, and that his minimum terms would run consecutively and concluded that “[w]hatever this court’s decision, Grisby will undoubtedly be in prison until he dies.” 121 Wn.2d at 424-425.

The decision in Grisby demonstrates that collateral relief is not given simply because a defendant articulates a legal theory that could provide a possible basis for lowering a sentence “on paper.” Such a showing is insufficient to demonstrate that there is “actual and substantial prejudice” flowing from the current sentence. In order to prevent a

petition from being dismissed, a petitioner challenging his sentence must show the likelihood that he will obtain material, or actual, relief in the sentence ultimately served. As Grisby could not show that resentencing him to life with the possibility of parole on three of his murder convictions would actually result in his parole from prison, the court dismissed the petition.

In the case now before the court, Mulholland was convicted of six counts of assault in the first degree upon six separate victims, each with a firearm enhancement. Mulholland recognizes that the court has no authority to reduce the time imposed on the firearm enhancements. State v. Brown, 139 Wn.2d 20, 983 P.2d 608 (1999). Thus, Mulholland acknowledges that 360 months of the 947 months of total confinement imposed by the court is beyond the reach of a downward exceptional sentence. Petition at p. 9.

In addition to the firearm enhancements, Mulholland faces mandatory minimums on his six convictions for assault in the first degree. Under RCW 9.94A.540(1)(b)<sup>1</sup> the crime of assault in the first degree is subject to a mandatory minimum term of five years under that “shall not be varied or modified under RCW 9.94A.535<sup>2</sup>,” the statute authorizing exceptional sentences. RCW 9.94A.540(1)(b). One division of the Court

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<sup>1</sup> See Appendix B  
<sup>2</sup> See Appendix C.

of Appeals has held that this language precludes the mandatory minimums on multiple assault convictions from being run concurrently via an exceptional sentence. State v. Flett, 98 Wn. App. 799, 806, 992 P.2d 1028 (2000), review denied, 149 Wn.2d 1034, 75 P.3d 969 (2003).

Flett was convicted of four counts of assault in the first degree; the jury found a firearm enhancement applicable to each of these counts. The trial court sentenced Flett to total confinement of 459 months. The court sentenced Flett to four consecutive base standard range sentences totaling 399 months. The court then imposed an exceptional sentence to run the four 60-month firearm enhancements concurrently with each other, but consecutively to the base sentence. Flett, 98 Wn. App. at 802. Flett unsuccessfully asked the court to reconsider how it imposed the 459 month sentence, arguing that the base sentences should be decreased via an exceptional sentence, and the firearm enhancements should run consecutively to the base sentences, to result in the same 459-month sentence. Id. at 802-803. On appeal, the court vacated this sentence holding that the four firearm enhancements had to be imposed so that they ran consecutively to each other and to the base sentences. The court also rejected Flett's contention that the court could lawfully achieve a 459 month sentence by imposing an exceptional sentence on the base sentences so that they totaled 219 months, and running the 240 months for the enhancements consecutively. The court noted that the mandatory minimums applicable to first degree assault precluded any base sentence

less than 240 months – four consecutive 60 month mandatory minimum sentences. The court concluded that because of the mandatory minimums, and the mandatory enhancements applicable to Flett’s convictions, “a mitigated exceptional sentence under these circumstances cannot go below 480 months.” Flett, 98 Wn. App. at 808.

The court below noted the existence of Flett, but provided no explanation as to why it was not following its holding. The court relied upon State v. Hale, 65 Wn. App. 752, 829 P.2d 802 (1992), for the proposition that a court may impose an exceptional sentence to impose concurrent sentences where consecutive sentences are standard. See, Appendix A, Order Granting petition at p. 4. Reliance on Hale was misplaced.

First, this language from Hale was dicta. Hale was found guilty of four counts of attempted first degree murder; the court imposed a sentence of 720 months -- 180 months for each count, to run consecutively. The trial court believed that it was precluded from imposing an exceptional sentence downward because Hale’s conviction was subject to mandatory minimums applicable to first degree murder that could not be mitigated via an exceptional sentence. The appellate court held that the mandatory minimums were *not* applicable to attempt crimes, and remanded for a new sentencing hearing. The court’s decision rested on its determination that the mandatory minimums for first degree murder were not applicable to the crime of attempted first degree murder. It was not necessary to the

decision to address whether concurrent sentences could or could not be imposed lawfully upon remand.

Secondly, Hale does not address the impact of the language in RCW 9.94A.540(1) exempting mandatory minimum sentences from the provisions governing exceptional sentences, because Hale was not convicted of crimes subject to a mandatory minimum. Hale is inapposite to the situation presented here. Flett is on point

Finally, Hale cites to State v. Bautista, 116 Wn. 2d 777, 808 P.2d 1141 (1991), and State v. Oxborrow, 106 Wn.2d 525, 723 P.2d 1123 (1986), to support its claim that a court may use an exceptional sentence to impose *concurrent* sentences where *consecutive* sentences are standard. Neither of these cases stand for this proposition. Both cases stand for the proposition that a court may use an exceptional sentence to impose *consecutive* sentences where *concurrent* sentences are standard. Neither Mulholland or the court below provides any authority where an appellate court in Washington has upheld an exceptional sentence imposing concurrent sentences on multiple current serious violent offenses, much less a case where the multiple current offenses were subject to mandatory minimums under RCW 9.94A.540(1). The State can find no such authority.

Under Flett, the trial court below could not sentence Mulholland to a base sentence of less than 360 months for the six assault convictions. Adding this mandatory minimum amount to the mandatory enhancement

time means that, even assuming that there was some legal basis for imposing an exceptional sentence, the trial court had no authority to impose a sentence of less than 720 months, or sixty years. Mulholland was fifty-five years old at the time of sentencing. Appendix H to the petition, at p. 584. Remanding for the “possible” imposition of an exceptional sentence of 720 months is unwarranted under Grisby, as the reduction of his sentence from 947 months to 720 months offers no realistic hope of benefiting Mulholland.

c. The Petition Should Be Dismissed As Petitioner Failed To Show Either Prong Of The Strickland Test Necessary To Succeed On His Claim Of Ineffective Assistance Of Counsel.

The right to effective assistance of counsel is the right "to require the prosecution's case to survive the crucible of meaningful adversarial testing." United States v. Cronin, 466 U.S. 648, 656, 104 S. Ct. 2045, 80 L.Ed.2d 657 (1984). When such a true adversarial proceeding has been conducted, even if defense counsel made demonstrable errors in judgment or tactics, the testing envisioned by the Sixth Amendment has occurred. Id. "The essence of an ineffective-assistance claim is that counsel's unprofessional errors so upset the adversarial balance between defense and prosecution that the trial was rendered unfair and the verdict rendered suspect." Kimmelman v. Morrison, 477 U.S. 365, 374, 106 S. Ct. 2574, 2582, 91 L.Ed.2d 305 (1986).

To demonstrate ineffective assistance of counsel, a defendant must satisfy the two-prong test laid out in Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L.Ed.2d 674 (1984); see also, State v. Thomas, 109 Wn.2d 222, 743 P.2d 816 (1987). First, a defendant must demonstrate that his attorney's representation fell below an objective standard of reasonableness. Second, a defendant must show that he or she was prejudiced by the deficient representation. Prejudice exists if "there is a reasonable probability that, except for counsel's unprofessional errors, the result of the proceeding would have been different." State v. McFarland, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995); see also Strickland, 466 U.S. at 695. There is a strong presumption that a defendant received effective representation. State v. Brett, 126 Wn.2d 136, 198, 892 P.2d 29 (1995), cert. denied, 516 U.S. 1121, 116 S. Ct. 931, 133 L.Ed.2d 858 (1996); Thomas, 109 Wn.2d at 226. A defendant carries the burden of demonstrating that there was no legitimate strategic or tactical rationale for the challenged attorney conduct. McFarland, 127 Wn.2d at 336. Judicial scrutiny of a defense attorney's performance must be "highly deferential in order to eliminate the distorting effects of hindsight." Strickland, 466 U.S. at 689; State v. Benn, 120 Wn.2d 631, 633, 845 P.2d 289 (1993).

In addition to proving his attorney's deficient performance, the defendant must affirmatively demonstrate prejudice, i.e. "that but for counsel's unprofessional errors, the result would have been different."

Strickland, 466 U.S. at 694. The reviewing court will defer to counsel's strategic decision to present, or to forego, a particular defense theory when the decision falls within the wide range of professionally competent assistance. Strickland, 466 U.S. at 489. When the ineffectiveness allegation is premised upon counsel's failure to litigate a motion or objection, defendant must demonstrate not only that the legal grounds for such a motion or objection were meritorious, but also that the verdict or outcome would have been different if the motion or objections had been granted. Kimmelman, 477 U.S. at 375; United States v. Molina, 934 F.2d 1440, 1447-48 (9th Cir. 1991). An attorney is not required to argue a meritless claim. Cuffle v. Goldsmith, 906 F.2d 385, 388 (9th Cir. 1990).

Mulholland argues that his attorney was ineffective for not asking the court to impose an exceptional sentence downward. For this to constitute deficient performance, Mulholland must show that there is a valid legal basis for an exceptional sentence downward that a reasonably competent attorney would have argued to the court. The State does not dispute that Mulholland could have asked the court to impose an exceptional sentence in the length of the base sentence on each count of assault in the first degree as long as it did not go below the mandatory minimum term required by RCW 9.94A.540(1). As argued earlier, assuming the existence of mitigating factors, the lowest legally possible sentence in this case was 720 months, comprised of six exceptional base sentences of 60 months each (mandatory minimum) run consecutively to

each other, and consecutively to six consecutive firearm enhancements of 60 months each. His trial attorney was not deficient for failing to request an exceptional sentence of 720 months, when that length of sentence would offer no realistic hope of benefiting Mulholland.

Moreover, Mulholland did not articulate a legally justifiable basis for an exceptional sentence in his petition. While he claims that the multiple offense policy was a grounds for an exceptional sentence, that provision states that “the operation of the multiple offense policy in RCW 9.94A.589 results in a presumptive sentence that is clearly excessive in light of the purpose of this chapter, as expressed in RCW 9.94A.010.” RCW 9.94A.535(1)(g) (emphasis added). A review of Washington cases reveals that this mitigating factor has been applied almost exclusively in situations involving multiple charges stemming from multiple controlled buy drug transactions.<sup>3</sup> No case has applied this mitigating factor when the multiple offenses are violent crimes against different victims. “[A] presumptive sentence calculated in accord with the multiple offense policy is clearly excessive if the difference between the effects of the first

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<sup>3</sup> See e.g., State v. McGill, 112 Wn. App. 95, 47 P.3d 173 (2002); State v. Hernandez-Hernandez, 104 Wn. App. 263, 15 P.3d 719, review denied, 143 Wn.2d 1024, 25 P.3d 1020 (2001); State v. Bridges, 104 Wn. App. 98, 15 P.3d 1047, review denied, 144 Wn.2d 1005, 29 P.3d 717 (2001); State v. Fitch, 78 Wn. App. 546, 897 P.2d 424 (1995); State v. Powers, 78 Wn. App. 264, 896 P.2d 754 (1995); State v. Hortman, 76 Wn. App. 454, 463-64, 886 P.2d 234 (1994); State v. Sanchez, 69 Wn. App. 255, 848 P.2d 208, review denied, 122 Wn. 2d 1007, 859 P.2d 604 (1993); State v. Calvert, 79 Wn. App. 569, 903 P.2d 1003 (1995) (applying multiple offense policy analysis developed in Sanchez in context of multiple forgery case), review denied, 129 Wn.2d 1005, 914 P.2d 65 (1996).

criminal act and the cumulative effects of the subsequent criminal acts is nonexistent, trivial or trifling." State v. Hortman, 76 Wn. App. 454, 463-64, 886 P.2d 234 (1994). It is unlikely that the court would find that the effects of Mulholland's crime on any of his six victims was nonexistent, trivial or trifling. The court expressly commented that it knew "this incident has impacted the victims tremendously." Appendix H to the petition, at p. 587. The record of the sentencing hearing provides no indication that the court saw any basis for the imposition of an exceptional sentence on the basis of "trivial" impact on his six victims. Mulholland does not articulate how the standard range sentence he received is excessive in view of the purposes of the Sentencing Reform Act. Mulholland's trial counsel cannot be deemed deficient for failing to argue a theory unsupported by any case law. Also, he cannot show a reasonable likelihood that the court would have imposed an exceptional sentence if one had been asked for.

Mulholland recognizes that under the SRA, the sentences for the assault in the first degree convictions would run consecutive to one another as each is a serious violent offense. RCW 9.94A.589(1)(b). Mulholland contends that it is legally permissible for the court to impose concurrent sentences on these offenses by imposing an exceptional sentence under RCW 9.94A.535(1)(g). The State disagrees.

While sentencing courts enjoy some discretion in determining the length of sentences, that discretion does not extend to deciding whether to

run sentences on current offenses concurrently or consecutively. State v. Jacobs, 154 Wn.2d 596, 115 P.3d 281 (2005). Where a person is sentenced for two or more current offenses that are not serious violent offenses or certain firearm offenses, the legislature has specified that the sentences for those offenses shall be served concurrently. RCW 9.94A.589(1)(a), see Appendix D. The statute expressly provides that consecutive sentences may be imposed only as an exceptional sentence<sup>4</sup> under RCW 9.94A.535. RCW 9.94A.589(1)(a), see Appendix D. In contrast, the legislature specified that sentences for "two or more serious violent offenses arising from separate and distinct criminal conduct" must be served consecutively to each other. RCW 9.94A.589(1)(b), see Appendix D. The legislature did not include in subsection (1)(b) wording similar to that found in subsection (1)(a) which would allow for concurrent sentences to be imposed as an exceptional sentence. RCW 9.94A.589(1)(b). The omission of the language authorizing an exceptional sentence to override presumptively consecutive sentences under subsection 1(b) reflects that the legislature did not intend to grant the sentencing court the same power that it had granted in subsection 1(a).

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<sup>4</sup> The language expressly authorizing an exceptional sentence to run sentences consecutively was added to subsection (a) of RCW 9.94A.400 (recodified as RCW 9.94A.589) in 1986. Laws of Washington 1986, Ch. 257, § 28. No similar wording was added to subsection (b).

A well-settled principle of statutory construction is that "each word of a statute is to be accorded meaning." State ex rel. Schillberg v. Barnett, 79 Wn.2d 578, 584, 488 P.2d 255 (1971). "[T]he drafters of legislation . . . are presumed to have used no superfluous words and we must accord meaning, if possible, to every word in a statute." In re Recall of Pearsall-Stipek, 141 Wn.2d 756, 767, 10 P.3d 1034 (2000) (quoting Greenwood v. Dep't of Motor Vehicles, 13 Wn. App. 624, 628, 536 P.2d 644 (1975)). Statutes must be interpreted and construed so that all the language used is given effect, with no portion rendered meaningless or superfluous. State v. J.P., 149 Wn.2d 444, 450, 69 P.3d 318 (2003).

The State submits that under the proper construction of RCW 9.94A.589(1)(b), the sentencing court did not have any legal authority to run the base sentences on the assault convictions concurrently as part of an exceptional sentence. Despite the omission of any express authority in RCW 9.94A.589(1)(b) to run consecutive sentences concurrently via an exceptional sentence, the Court of Appeals concluded that the language of RCW 9.94A.535(1)(g), the mitigating factor relating to the operation of the multiple offense policy set forth in 9.94A.589, provides a legislative grant of authority for imposing concurrent sentences on serious violent offenses via an exceptional sentence. It does not. While RCW 9.94A.535(1)(g) provides authorization for imposing an exceptional sentence downward, it does not expressly mention that this is to be achieved by running consecutive sentences concurrently. If a court

determines that the multiple offense policy on multiple serious violent offenses results in a presumptive sentence that is clearly excessive, it may impose an exceptional sentence downward, but it must do so in the length of the base sentences imposed and not by running the sentences concurrently. The Court of Appeals construction of RCW 9.94A.589 renders the differences in wording between subsection (1)(a) and (1)(b) meaningless, and renders the language in subsection (1)(a) regarding exceptional sentences superfluous. Such a construction violates the rules of statutory construction. Mulholland's attorney was not deficient for failing to suggest to the court that it impose an improper exceptional sentence by running the sentences on the assault convictions concurrently.

As Mulholland failed to demonstrate either prong of the Strickland test, his petition should have been dismissed.

D. CONCLUSION.

For the forgoing reasons, the State asks this court to vacate the Court of Appeals order granting Mulholland's petition and enter an order dismissing the petition.

DATED: January 5, 2007.

GERALD A. HORNE  
Pierce County  
Prosecuting Attorney

  
KATHLEEN PROCTOR  
Deputy Prosecuting Attorney  
WSB # 14811

Certificate of Service:

The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the ~~appellant and appellant~~ c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

4/5/09   
Date Signature

# **APPENDIX “A”**

*Order Granting Petition*



01-1-08114-5 25863004 CPRM 07-26-08

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

DIVISION II

FILED IN COUNTY CLERK'S OFFICE

A.M. JUL 26 2006 P.M.

PIERCE COUNTY, WASHINGTON  
KEVIN STOCK, County Clerk  
No. 34484-0-II

STATE OF WASHINGTON  
BY DEPUTY

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COURT OF APPEALS  
DIVISION II

In re the  
Personal Restraint Petition of  
  
DANIEL C. MULHOLLAND,  
  
Petitioner.

ORDER GRANTING PETITION

01-1-06114-5

Daniel C. Mulholland seeks relief from personal restraint imposed following his conviction of six counts of first degree assault with a firearm and one count of drive-by shooting. Mulholland, who was 54 years old at the time of sentencing, received a standard range sentence of 927 months.<sup>1</sup> Mulholland argues that the trial court abused its discretion and violated his right to equal protection in failing to recognize that it could have imposed an exceptional sentence downward. He also contends that he received ineffective assistance of counsel when his attorneys at trial and on appeal failed to argue for such a sentence.

First degree assault is a serious violent offense. RCW 9.94A.030(37)(a)(v).<sup>2</sup> Whenever a person is convicted of two or more serious violent offenses arising from separate and distinct criminal conduct, the sentences imposed for those violent offenses are to be served consecutively to each other. RCW 9.94A.589(1)(b). This provision is part of the multiple offense policy outlined in RCW 9.94A.589.

<sup>1</sup> Mulholland had no criminal history that counted toward his sentence.

<sup>2</sup> For ease of reference, this order uses current statutory citations. The substance of the statutes cited has not changed since Mulholland committed his offenses in 2001.

Although RCW 9.94A.589(1)(b) states that sentences for serious violent offenses “shall be served consecutively to each other,” this seemingly mandatory provision is subject to the exceptional sentence provisions of RCW 9.94A.535. This statute states at the outset that “[a] departure from the standards in RCW 9.94A.589(1) . . . governing whether sentences are to be served consecutively . . . is an exceptional sentence subject to the limitations in this section[.]”

RCW 9.94A.535(1) then provides a list of non-exclusive, illustrative factors that justify an exceptional sentence downward. One such factor is when “[t]he 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 this chapter, as expressed in RCW 9.94A.010.”<sup>3</sup> RCW 9.94A.535(1)(g). Since RCW 9.94A.535(1)(g) references RCW 9.94A.589 in general, and does not exclude subsection (1)(b), this mitigating factor applies to sentences for serious violent offenses.

Mulholland was found guilty of firing shots from his car toward a home and its six residents. The State advised the court that consecutive sentencing on the resulting six assault convictions was mandatory under RCW 9.94A.589(1)(b). Defense counsel urged concurrent sentencing on the basis that the assaults could be found to be the same criminal conduct and thus count as one offense. *See* RCW 9.94A.589(1)(a) (offenses constitute the same criminal conduct if they require the same criminal intent, were committed at the same time and place, and involved the same victim). Because Mulholland’s assaults involved different victims, the trial court was left with only one

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<sup>3</sup> These purposes include ensuring punishments that are proportionate to the seriousness of the offense and the offender’s criminal history, promoting respect for the law by providing punishment which is just, encouraging commensurate punishments for offenders who commit similar offenses, protecting the public,

apparent option: to impose consecutive base sentences and consecutive firearm enhancements.<sup>4</sup> The court referred several times to its lack of discretion in sentencing Mulholland:

So I don't believe there is any discretion that this court has with regard to running the sentences concurrent. I think the law requires me to run them consecutive. I don't believe there's any discretion that this court has in that regard.

... Mr. Mulholland, I know that this incident has impacted your family tremendously and it's impacted you, and I can't ignore what you gave to this country. It's a sacrifice to serve in the military and we--that's important and we recognize that. But when I'm looking at the counts and what the jury decided, I don't have discretion to do anything but follow the law. I don't have the discretion to have the sentences in my view run at the same time.

As I read the law, it requires them to run consecutively. I believe that's what I have to do. I'm going to be imposing the sentence as requested by the prosecutor. At this point I understand that's--that's a life sentence, as far as you are concerned, but there's nothing I can do about that.

RP 11-08-02 at 582, 588. The trial court imposed low-end standard range sentences on each count, ran the sentences for the assault counts consecutively, and then ran the six firearm enhancements on those counts consecutively, for a total of 927 months.

The trial court erred in concluding that it had no discretion to do otherwise. Under RCW 9.94A.535(1)(g), a sentencing court has the discretion to consider and impose an exceptional sentence downward if the multiple offense policy of RCW 9.94A.589 results in a clearly excessive sentence. *State v. McGill*, 112 Wn. App. 95, 99, 47 P.3d 173 (2002). The trial court either could have run the base sentences for the

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offering the offender an opportunity for self-improvement and making frugal use of the State's resources. *State v. Hortman*, 76 Wn. App. 454, 463, 886 P.2d 234 (1994) (citing RCW 9.94A.010).

<sup>4</sup> Consecutive firearm enhancements were required under RCW 9.94A.533(3)(e).

assault convictions concurrently or imposed lower sentences on each count. *State v. Hale*, 65 Wn. App. 752, 758, 829 P.2d 802 (1992).<sup>5</sup> As the court stated in *Hale*,

Where a lesser sentence is supported by the factors set out in [RCW 9.94A.535(1)], an exceptional sentence for multiple current offenses may consist of either shortening the sentences or imposing concurrent sentences where consecutive sentences are standard. *See State v. Batista*, 116 Wn.2d 777, 787, 808 P.2d 1141 (1991). When more than one mitigating factor is present, an exceptional sentence may include both elements: i.e., shortening the sentences and making them run concurrently. *State v. Oxborrow*, 106 Wn.2d 525, 723 P.2d 1123 (1986).

65 Wn. App. at 758; *but see State v. Flett*, 98 Wn. App. 799, 806-07, 992 P.2d 1028 (2000) (mitigated exceptional sentence for multiple counts of first degree assault must include consecutive sentences on each assault).

The presumptive sentence imposed under RCW 9.94A.589 for multiple offenses is clearly excessive if the difference between the effects of the first offense and the subsequent offenses was nonexistent, trivial, or trifling. *State v. Calvert*, 79 Wn. App. 569, 583, 903 P.2d 1003 (1995); *State v. Sanchez*, 69 Wn. App. 255, 260-61, 848 P.2d 208 (1993). It is not for this court to make this determination regarding Mulholland's offenses in the first instance. Nor can this court determine whether other mitigating factors might apply. Because the trial court failed to realize that it had discretion to impose a mitigated sentence, and because its comments indicate that it would have considered an exceptional sentence downward had it known such a sentence was lawful, this matter must be remanded so that the trial court can determine whether a mitigated exceptional sentence is appropriate. *See McGill*, 112 Wn. App. at 100-01 (where appellate court cannot say that the sentencing court would have imposed the same

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<sup>5</sup> It does not appear, however, that those sentences could have gone below the five-year minimum set forth in RCW 9.94A.540(1)(b).

sentence had it known an exceptional sentence was an option, it must remand for the court to exercise its principled discretion).<sup>6</sup> Accordingly, it is hereby

ORDERED that this petition is granted and this matter is remanded for resentencing.

DATED this 24<sup>th</sup> day of July, 2006.

Pearson, J.  
Hart, J.  
Dougherty, P.J.

cc: Daniel C. Mulholland  
Pierce County Clerk  
County Cause No. 01-1-06114-5  
Kathleen Proctor  
Christopher H. Gibson

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<sup>6</sup> This resolution makes it unnecessary to reach Mulholland's equal protection and ineffective assistance of counsel claims.

## **APPENDIX "B"**

*RCW 9.94A.540*

§ 9.94A.540. Mandatory minimum terms

(1) Except to the extent provided in subsection (3) of this section, the following minimum terms of total confinement are mandatory and shall not be varied or modified under RCW 9.94A.535:

(a) An offender convicted of the crime of murder in the first degree shall be sentenced to a term of total confinement not less than twenty years.

(b) An offender convicted of the crime of assault in the first degree or assault of a child in the first degree where the offender used force or means likely to result in death or intended to kill the victim shall be sentenced to a term of total confinement not less than five years.

(c) An offender convicted of the crime of rape in the first degree shall be sentenced to a term of total confinement not less than five years.

(d) An offender convicted of the crime of sexually violent predator escape shall be sentenced to a minimum term of total confinement not less than sixty months.

(2) During such minimum terms of total confinement, no offender subject to the provisions of this section is eligible for community custody, earned release time, furlough, home detention, partial confinement, work crew, work release, or any other form of early release authorized under RCW 9.94A.728, or any other form of authorized leave of absence from the correctional facility while not in the direct custody of a corrections officer. The provisions of this subsection shall not apply: (a) In the case of an offender in need of emergency medical treatment; (b) for the purpose of commitment to an inpatient treatment facility in the case of an offender convicted of the crime of rape in the first degree; or (c) for an extraordinary medical placement when authorized under RCW 9.94A.728(4).

(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.

**HISTORY:** ♦ 2005 c 437 § 2; 2001 2nd sp.s. c 12 § 315; ♦ 2000 c 28 § 7. Formerly RCW 9.94A.590.

# **APPENDIX "C"**

*RCW 9.94A.535*

§ 9.94A.535. Departures from the guidelines

The court may impose a sentence outside the standard sentence range for an offense if it finds, considering the purpose of this chapter, that there are substantial and compelling reasons justifying an exceptional sentence. Facts supporting aggravated sentences, other than the fact of a prior conviction, shall be determined pursuant to the provisions of RCW 9.94A.537.

Whenever a sentence outside the standard sentence range is imposed, the court shall set forth the reasons for its decision in written findings of fact and conclusions of law. A sentence outside the standard sentence range shall be a determinate sentence.

If the sentencing court finds that an exceptional sentence outside the standard sentence range should be imposed, the sentence is subject to review only as provided for in RCW 9.94A.585(4).

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 subject to the limitations in this section, and may be appealed by the offender or the state as set forth in RCW 9.94A.585 (2) through (6).

(1) Mitigating Circumstances -- Court to Consider

The court may impose an exceptional sentence below the standard range if it finds that mitigating circumstances are established by a preponderance of the evidence. The following are illustrative only and are not intended to be exclusive reasons for exceptional sentences.

(a) To a significant degree, the victim was an initiator, willing participant, aggressor, or provoker of the incident.

(b) Before detection, the defendant compensated, or made a good faith effort to compensate, the victim of the criminal conduct for any damage or injury sustained.

(c) The defendant committed the crime under duress, coercion, threat, or compulsion insufficient to constitute a complete defense but which significantly affected his or her conduct.

(d) The defendant, with no apparent predisposition to do so, was induced by others to participate in the crime.

(e) 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.

(f) The offense was principally accomplished by another person and the defendant manifested extreme caution or sincere concern for the safety or well-being of the victim.

(g) The 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 this chapter, as expressed in RCW 9.94A.010.

(h) The defendant or the defendant's children suffered a continuing pattern of physical or sexual abuse by the victim of the offense and the offense is a response to that abuse.

(2) Aggravating Circumstances -- Considered and Imposed by the Court

The trial court may impose an aggravated exceptional sentence without a finding of fact by a jury under the following circumstances:

(a) The defendant and the state both stipulate that justice is best served by the imposition of an exceptional sentence outside the standard range, and the court finds the exceptional sentence to be consistent with and in furtherance of the interests of justice and the purposes of the sentencing reform act.

(b) The defendant's prior unscored misdemeanor or prior unscored foreign criminal history results in a presumptive sentence that is clearly too lenient in light of the purpose of this chapter, as expressed in RCW 9.94A.010.

(c) The defendant has committed multiple current offenses and the defendant's high offender score results in some of the current offenses going unpunished.

(d) The failure to consider the defendant's prior criminal history which was omitted from the offender score calculation pursuant to RCW 9.94A.525 results in a presumptive sentence that is clearly too lenient.

(3) Aggravating Circumstances -- Considered by a Jury -Imposed by the Court

Except for circumstances listed in subsection (2) of this section, the following circumstances are an exclusive list of factors that can support a sentence above the standard range. Such facts should be determined by procedures specified in RCW 9.94A.537.

(a) The defendant's conduct during the commission of the current offense manifested deliberate cruelty to the victim.

(b) The defendant knew or should have known that the victim of the current offense was particularly vulnerable or incapable of resistance.

(c) The current offense was a violent offense, and the defendant knew that the victim of the current offense was pregnant.

(d) The current offense was a major economic offense or series of offenses, so identified by a consideration of any of the following factors:

(i) The current offense involved multiple victims or multiple incidents per victim;

(ii) The current offense involved attempted or actual monetary loss substantially greater than typical for the offense;

(iii) The current offense involved a high degree of sophistication or planning or occurred over a lengthy period of time; or

(iv) The defendant used his or her position of trust, confidence, or fiduciary responsibility to facilitate the commission of the current offense.

(e) The current offense was a major violation of the Uniform Controlled Substances Act, chapter 69.50 RCW (VUCSA), related to trafficking in controlled substances, which was more onerous than the typical offense of its statutory definition: The presence of ANY of the following may identify a current offense as a major VUCSA:

(i) The current offense involved at least three separate transactions in which controlled substances were sold, transferred, or possessed with intent to do so;

(ii) The current offense involved an attempted or actual sale or transfer of controlled substances in quantities substantially larger than for personal use;

(iii) The current offense involved the manufacture of controlled substances for use by other parties;

(iv) The circumstances of the current offense reveal the offender to have occupied a high position in the drug distribution hierarchy;

(v) The current offense involved a high degree of sophistication or planning, occurred over a lengthy period of time, or involved a broad geographic area of disbursement; or

(vi) The offender used his or her position or status to facilitate the commission of the current offense, including positions of trust, confidence or fiduciary responsibility (e.g., pharmacist, physician, or other medical professional).

(f) The current offense included a finding of sexual motivation pursuant to RCW 9.94A.835.

(g) The offense was part of an ongoing pattern of sexual abuse of the same victim under the age of eighteen years manifested by multiple incidents over a prolonged period of time.

(h) The current offense involved domestic violence, as defined in RCW 10.99.020, and one or more of the following was present:

(i) The offense was part of an ongoing pattern of psychological, physical, or sexual abuse of the victim manifested by multiple incidents over a prolonged period of time;

(ii) The offense occurred within sight or sound of the victim's or the offender's minor children under the age of eighteen years; or

(iii) The offender's conduct during the commission of the current offense manifested deliberate cruelty or intimidation of the victim.

(i) The offense resulted in the pregnancy of a child victim of rape.

(j) The defendant knew that the victim of the current offense was a youth who was not residing with a legal custodian and the defendant established or promoted the relationship for the primary purpose of victimization.

(k) The offense was committed with the intent to obstruct or impair human or animal health care or agricultural or forestry research or commercial production.

(l) The current offense is trafficking in the first degree or trafficking in the second degree and any victim was a minor at the time of the offense.

(m) The offense involved a high degree of sophistication or planning.

(n) The defendant used his or her position of trust, confidence, or fiduciary responsibility to facilitate the commission of the current offense.

(o) The defendant committed a current sex offense, has a history of sex offenses, and is not amenable to treatment.

(p) The offense involved an invasion of the victim's privacy.

(q) The defendant demonstrated or displayed an egregious lack of remorse.

(r) The offense involved a destructive and foreseeable impact on persons other than the victim.

(s) The defendant committed the offense to obtain or maintain his or her membership or to advance his or her position in the hierarchy of an organization, association, or identifiable group.

(t) The defendant committed the current offense shortly after being released from incarceration.

(u) The current offense is a burglary and the victim of the burglary was present in the building or residence when the crime was committed.

(v) The offense was committed against a law enforcement officer who was performing his or her official duties at the time of the offense, the offender knew that the victim was a law enforcement officer, and the victim's status as a law enforcement officer is not an element of the offense.

(w) The defendant committed the offense against a victim who was acting as a good samaritan.

(x) The defendant committed the offense against a public official or officer of the court in retaliation of the public official's performance of his or her duty to the criminal justice system.

(y) The victim's injuries substantially exceed the level of bodily harm necessary to satisfy the elements of the offense. This aggravator is not an exception to RCW 9.94A.530(2).

**HISTORY:** ♦ 2005 c 68 § 3; ♦ 2003 c 267 § 4; ♦ 2002 c 169 § 1; 2001 2nd sp.s. c 12 § 314; ♦ 2000 c 28 § 8; ♦ 1999 c 330 § 1; ♦ 1997 c 52 § 4. Prior: ♦ 1996 c 248 § 2; ♦ 1996 c 121 § 1; ♦ 1995 c 316 § 2; ♦ 1990 c 3 § 603; ♦ 1989 c 408 § 1; 1987 c 131 § 2; 1986 c 257 § 27; 1984 c 209 § 24; 1983 c 115 § 10. Formerly RCW 9.94A.390.

# **APPENDIX “D”**

*RCW 9.94A.589*

§ 9.94A.589. Consecutive or concurrent sentences

(1) (a) Except as provided in (b) or (c) of this subsection, whenever a person is to be sentenced for two or more current offenses, the sentence range for each current offense shall be determined by using all other current and prior convictions as if they were prior convictions for the purpose of the offender score: PROVIDED, That if the court enters a finding that some or all of the current offenses encompass the same criminal conduct then those current offenses shall be counted as one crime. Sentences imposed under this subsection shall be served concurrently. Consecutive sentences may only be imposed under the exceptional sentence provisions of RCW 9.94A.535. "Same criminal conduct," as used in this subsection, means two or more crimes that require the same criminal intent, are committed at the same time and place, and involve the same victim. This definition applies in cases involving vehicular assault or vehicular homicide even if the victims occupied the same vehicle.

(b) Whenever a person is convicted of two or more serious violent offenses arising from separate and distinct criminal conduct, the standard sentence range for the offense with the highest seriousness level under RCW 9.94A.515 shall be determined using the offender's prior convictions and other current convictions that are not serious violent offenses in the offender score and the standard sentence range for other serious violent offenses shall be determined by using an offender score of zero. The standard sentence range for any offenses that are not serious violent offenses shall be determined according to (a) of this subsection. All sentences imposed under (b) of this subsection shall be served consecutively to each other and concurrently with sentences imposed under (a) of this subsection.

(c) 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.

(2) (a) Except as provided in (b) of this subsection, whenever a person while under sentence for conviction of a felony commits another felony and is sentenced to another term of confinement, the latter term shall not begin until expiration of all prior terms.

(b) Whenever a second or later felony conviction results in community supervision with conditions not currently in effect, under the prior sentence or sentences of community supervision the court may require that the conditions of community supervision contained in the second or later sentence begin during the immediate term of community supervision and continue throughout the duration of the consecutive term of community supervision.

(3) Subject to subsections (1) and (2) of this section, whenever a person is sentenced for a felony that was committed while the person was not under sentence for conviction of a felony, the sentence shall run concurrently with any felony sentence which has been imposed by any court in this or another state or by a federal court subsequent to the commission of the crime being sentenced unless the court pronouncing the current sentence expressly orders that they be served consecutively.

(4) Whenever any person granted probation under RCW 9.95.210 or 9.92.060, or both, has the probationary sentence revoked and a prison sentence imposed, that sentence shall run consecutively to any sentence imposed pursuant to this chapter, unless the court pronouncing the subsequent sentence expressly orders that they be served concurrently.

(5) In the case of consecutive sentences, all periods of total confinement shall be served before any partial confinement, community restitution, community supervision, or any other requirement or conditions of any of the sentences. Except for exceptional sentences as authorized under RCW 9.94A.535, if two or more sentences that run consecutively include periods of community supervision, the aggregate of the community supervision period shall not exceed twenty-four months.

**HISTORY:** ♦ 2002 c 175 § 7; ♦ 2000 c 28 § 14; ♦ 1999 c 352 § 11; ♦ 1998 c 235 § 2; ♦ 1996 c 199 § 3; ♦ 1995 c 167 § 2; ♦ 1990 c 3 § 704. Prior: 1988 c 157 § 5; 1988 c 143 § 24; 1987 c 456 § 5; 1986 c 257 § 28; 1984 c 209 § 25; 1983 c 115 § 11. Formerly RCW 9.94A.400.