

No. 79150-3  
COA No. 34484-0-II

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

---

---

In re the Personal Restraint of Daniel C. Mulholland,

STATE OF WASHINGTON,

Petitioner,

v.

DANIEL C. MULHOLLAND,

Respondent.

---

---

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

The Honorable Karen Strombom, Judge

07/09/12  
AP 012  
Clerk  
CR  
K. Strombom  
JUDGE

---

SUPPLEMENTAL BRIEF OF RESPONDENT

---

---

CHRISTOPHER H. GIBSON  
Attorney for Respondent

NIELSEN, BROMAN & KOCH, PLLC  
1908 East Madison  
Seattle, WA 98122  
(206) 623-2373

**TABLE OF CONTENTS**

	Page
A. STATEMENT OF FACTS .....	1
B. ARGUMENT.....	5
1. THE SENTENCING COURT FAILED TO RECOGNIZE IT HAD DISCRETION TO IMPOSE CONCURRENT SENTENCES. ....	5
2. CIRCUMSTANCES EXIST WARRANTING A MITIGATED EXCEPTIONAL SENTENCE. ....	13
3. MULHOLLAND WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL. ....	17
C. CONCLUSION.....	20

## TABLE OF AUTHORITIES

	Page
 <u>WASHINGTON CASES</u>	
 <u>In re Personal Restraint of Maxfield,</u> 133 Wn.2d 332, 945 P.2d 196 (1997).....	18
 <u>In re the Personal Restraint of Charles,</u> 135 Wn.2d 239, 955 P.2d 798 (1998).....	10
 <u>State v. Aho,</u> 137 Wn.2d 736, 975 P.2d 512 (1999).....	18
 <u>State v. Batista,</u> 116 Wn.2d 777, 808 P.2d 1141 (1991).....	14, 15
 <u>State v. Chester,</u> 133 Wn.2d 15, 940 P.2d 1374 (1997).....	7
 <u>State v. Fisher,</u> 108 Wn.2d 419, 739 P.2d 683 (1987).....	14
 <u>State v. Flett,</u> 98 Wn. App. 799, 992 P.2d 1028, <u>review denied,</u> 141 Wn.2d 1002 (2000).....	1, 8-12
 <u>State v. Garcia-Martinez,</u> 88 Wn. App. 322, 944 P.2d 1104 (1997), <u>review denied,</u> 136 Wash.2d 1002, 966 P.2d 902 (1998).....	13
 <u>State v. Grayson,</u> 154 Wn.2d 333, 111 P.3d 1183 (2005).....	12
 <u>State v. Hale,</u> 65 Wn. App. 752, 829 P.2d 802 (1992) .....	7
 <u>State v. Halgren,</u> 137 Wn.2d 340, 971 P.2d 512 (1999).....	11

**TABLE OF AUTHORITIES** (CONT'D)

Page

WASHINGTON CASES (CONT'D)

<u>State v. Hortman</u> , 76 Wn. App. 454, 886 P.2d 234 (1994), <u>review denied</u> , 126 Wn.2d 1025, 896 P.2d 64 (1995) .....	13, 15
<u>State v. Jacob</u> , 154 Wn.2d 596, 115 P.3d 281 (2005) .....	11, 12
<u>State v. Jeannotte</u> , 133 Wn.2d 847, 947 P.2d 1192 (1997) .....	9
<u>State v. Maurice</u> , 79 Wn. App. 544, 903 P.2d 514 (1995) .....	18
<u>State v. McFarland</u> , 127 Wn.2d 322, 899 P.2d 1251 (1998) .....	18
<u>State v. McGill</u> , 112 Wn. App. 95, 47 P.3d 173 (2002) .....	7, 13
<u>State v. Oxborrow</u> , 106 Wn.2d 525, 723 P.2d 1123 (1986) .....	8
<u>State v. Sanchez</u> , 69 Wn. App. 255, 848 P.2d 208, <u>review denied</u> , 122 Wn.2d 1007, 859 P.2d 604 (1993) .....	14, 15
<u>State v. Saunders</u> , 120 Wn. App. 800, 86 P.3d 23 (2004) .....	18
<u>State v. Thomas</u> , 109 Wn.2d 222, 743 P.2d 816 (1987) .....	17
<u>State v. Ward</u> , 125 Wn. App. 243, 104 P.3d 670 (2004) .....	18

**TABLE OF AUTHORITIES** (CONT'D)

Page

WASHINGTON CASES (CONT'D)

State v. Wright,  
76 Wn. App. 811, 888 P.2d 1214 (1995)..... 13

FEDERAL CASES

Roe v. Flores-Ortega,  
528 U.S. 470, 120 S. Ct. 1029,  
145 L. Ed. 2d 985 (2000)..... 18

Strickland v. Washington,  
466 U.S. 668, 80 L. Ed. 2d 674,  
104 S. Ct. 2052 (1984)..... 17, 18

RULES, STATUTES AND OTHERS

Former RCW 9.94A.390..... 11

Former RCW 9.94A.390(1)(g) ..... 11

Laws of 2000, ch. 28, § 7..... 10

Laws of 2001, ch. 10, § 6..... 8, 10, 11

RCW 9.94A.010(1)-(3)..... 16

RCW 9.94A.030(41)(a)(v)..... 6

RCW 9.94A.120(4)..... 10

RCW 9.94A.345 ..... 6

**TABLE OF AUTHORITIES (CONT'D)**

Page

**RULES, STATUTES AND OTHERS (CONT'D)**

RCW 9.94A.505 .....	8
RCW 9.94A.535 .....	7, 8, 11, 12, 17, 19, 21
RCW 9.94A.535(1)(g).....	7, 12, 17
RCW 9.94A.540 .....	8, 10, 12
RCW 9.94A.540(1)(b).....	8
RCW 9.94A.589(1).....	1, 6, 11, 12
RCW 9.94A.589(1)(b).....	1, 6, 12
RCW 9.94A.590 .....	10
U.S. Const. amend. 6 .....	17
Wash. Const. art. 1, § 22.....	17

A. STATEMENT OF FACTS

Respondent Daniel C. Mulholland, petitioner below, was charged and convicted in Pierce County Superior Court of six counts of first degree assault with a firearm and one count of drive-by shooting. Judgment and Sentence (attached as Appendix A). The bases for the charges against Mulholland are set forth in State v. Mulholland, No. 29650-1-II.<sup>1</sup> In summary, Mulholland was accused of retaliating against a family for failing to return his son's television by shooting at their house from his car. Mulholland admitted demanding the return of his son's television, but denied committing the shooting. Appendix B at 1-4.

In a sentencing memorandum,<sup>2</sup> the State claimed that because first degree assault is a "serious violent offense," RCW 9.94A.589(1)(b) required Mulholland to serve the assault sentences consecutively. The State also claimed that under State v. Flett, 98 Wn. App. 799, 992 P.2d 1028, review denied, 141 Wn.2d 1002 (2000), the consecutive nature of the sentences is "not subject to a mitigated exceptional sentence." Appendix C at 4-6.

---

<sup>1</sup> A copy of the unpublished opinion is attached as Appendix B.

<sup>2</sup> A copy of the memorandum is attached as Appendix C.

Mulholland's trial counsel also filed a sentencing memorandum.<sup>3</sup> Counsel argued the assault convictions constitute "same criminal conduct" and therefore should be treated as a single offense for purposes of sentencing. Appendix D at 2-6. Counsel also argued that if the assaults are "same criminal conduct," then the firearm enhancements for each must be served concurrently. Appendix F at 6-7.

In response to the defense memorandum,<sup>4</sup> the State noted defense counsel's failure to address the "same victim" element necessary for a "same criminal conduct" finding and argued the element could not be met because there was a different victim in each assault. Appendix E at 1-2. The State also argued that under the applicable version of the Sentencing Reform Act, all weapon enhancements must be served consecutively to the base sentences and each other. Appendix E at 2-3.

A sentencing hearing was held November 8, 2002, before the Honorable Karen L. Strombom. See Appendix F.<sup>5</sup> The State

---

<sup>3</sup> A copy of the defense memorandum is attached as Appendix D.

<sup>4</sup> A copy of the State's response is attached as Appendix E.

<sup>5</sup> Appendix F is a copy of the sentencing transcript from November 8, 2002. Page numbering for this transcript begins with "577." This brief refers to the page numbers as set forth in the transcript.

recommended a sentence of 927 months (77.25 years). Appendix F at 581.

Defense counsel made the following presentation at sentencing:

Your Honor, we also will not pepper the oral record with the same arguments presented in the brief. I think the court does have the discretion to find the same criminal conduct for purposes of concurrent sentencing, treating each assault as a point on the offender score, rather than the consecutive prospect the prosecutor urges.

In either event, Your Honor, the sentences are horrendously long, almost unfathomably long, but I think the court does have discretion at this time to find same or similar criminal conduct and run the sentences concurrently rather than consecutively.

Appendix F at 581.

The court rejected defense counsel's "same criminal conduct" argument because each count involved a different victim. The court then stated:

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.

Appendix F at 582.

The sentencing court heard from Jeannine Tullar, a victim of the drive-by shooting and one of the assaults. Appendix F at 585. Tullar told the court how the shooting had adversely affected her family, particularly her 70-year old husband, who, like Mulholland, suffers from post-

traumatic stress as a result of his military service. Appendix F at 585-86.

Tullar added:

On the other side of that, because my husband suffers from post-traumatic stress, I also know what Mr. Mulholland suffers through, and I also feel a lot of compassion and pity for his family, and I know when you suffer from that, you can do things that afterwards you don't even remember doing.

I've seen my husband do things that he would never, never, never do and say things he would never, never say, and not be able to remember it as a result of this.

At the same time, in my heart I know that that's possible, that that's what Mr. Mulholland went through. Maybe he did this. Maybe it's out of character because I've heard he suffers from post-traumatic stress. Maybe -- maybe that's what happened.

So I guess I'm here because I just felt like I needed to come and bring my point of balance to it. That's all.

Appendix F at 586-87.

After Mrs. Tullar's presentation, the Court addressed Mulholland:

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 your 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 any 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.

Appendix F at 587-88.

B. ARGUMENT

1. THE SENTENCING COURT FAILED TO RECOGNIZE IT HAD DISCRETION TO IMPOSE CONCURRENT SENTENCES.

The sentencing court incorrectly believed its only choice was to impose an aggregate sentence of 927 months. The court's oral ruling, immediately following Mrs. Tullar's request for leniency on Mulholland's behalf, indicates the court would have imposed a lesser sentence if it realized it could.

In fact, as the Court of Appeals correctly held, the trial court could have imposed a lesser aggregate sentence of 420 months as an exceptional sentence by imposing minimum concurrent 60-month sentences for each of the assaults, a concurrent sentence of 60 months or less for the drive-by shooting, and, consecutive to the underlying sentences and each other, six 60-month firearm enhancements.<sup>6</sup> The court's failure to recognize its authority in this regard constitutes an abuse of discretion requiring remand for resentencing.

---

<sup>6</sup> State v. Mulholland, No. 34484-0-II, at 3-4. A copy of the decision is attached as Appendix G.

Assault in the first degree is a "serious violent offense." RCW 9.94A.030(41)(a)(v).<sup>7</sup> When a standard range sentence is imposed for two or more serious violent offenses, the SRA generally requires that they be served consecutively:

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.

RCW 9.94A.589(1)(b).

Where mitigating circumstances exist, however, a court has discretion to depart from the presumptive requirement for consecutive standard range sentences:

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

---

<sup>7</sup> Mulholland's offenses were committed in November, 2001. The laws in effect at that time are the ones applicable to the issues raised herein. RCW 9.94A.345. Citation to the current statutes are used here, however, as there is no material difference in the relevant provisions from November, 2001 to present.

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).

RCW 9.94A.535.

RCW 9.94A.535 specifically lists as a "Mitigating Circumstance" that, "[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 purposes of this chapter, as expressed in RCW 9.94A.010." RCW 9.94A.535(1)(g). The plain language of this statute gives trial courts the authority not to impose consecutive sentences for multiple current serious violent offenses in certain circumstances. Appendix G at 3; State v. McGill, 112 Wn. App. 95, 99, 47 P.3d 173 (2002); State v. Hale, 65 Wn. App. 752, 758, 829 P.2d 802 (1992); see State v. Chester, 133 Wn.2d 15, 21, 940 P.2d 1374 (1997) (where a statute is unambiguous its meaning is derived from its language alone).

In addition to its authority to impose concurrent sentences, if there are mitigating circumstances, the sentencing court may also impose terms of incarceration below the standard ranges. RCW 9.94A.535; see State v. Oxborrow, 106 Wn.2d 525, 535, 723 P.2d 1123 (1986) (holding aggravated exceptional sentence for multiple offenses may be both consecutive (despite presumption of concurrency) and sentences above the standard range). Thus, if the court found mitigating circumstances as to any of Mulholland's

offenses, it could impose exceptional sentences below the standard range, provided that for the assaults the sentences could not be less than 60-months each. RCW 9.94A.540(1)(b) (requiring 5-year minimum sentence for first degree assault).

To the extent the State may rely on State v. Flett to argue the trial court had no authority to impose concurrent sentences for the six assaults, such reliance would be misplaced because the Flett court did not address the argument raised here. Flett was convicted of four counts of first degree assault, each with a firearm enhancement. 98 Wn. App. at 802. The presumptive standard range, including firearm enhancements, was 639-769 months. 98 Wn. App. at 808.

Mr. Flett was sentenced to 459 months based upon four consecutive base standard range sentences totaling 399 months, together with a consecutive 60-month firearm enhancement running concurrently with the other firearm enhancements as an exceptional sentence pursuant to RCW 9.94A.400.<sup>[8]</sup> Mr. Flett unsuccessfully argued on reconsideration that the base sentences should be decreased and the firearm enhancements should run consecutively to the base sentences to result in the same 459-month sentence. Mr. Flett appealed over a wide front, including the sentence. The State cross-appealed the exceptional sentence.

98 Wn. App. at 802-03.

The issues regarding the exceptional sentence in Flett were whether there was a basis to impose a mitigated exceptional sentence and whether

the trial court erred in ordering concurrent firearm enhancements. Flett argued the court should have accepted his argument on reconsideration to reduce the base sentences for the assaults and then run the firearm enhancements consecutively. The State agreed the firearm enhancements must be served consecutively and claimed there was no basis for a mitigated exceptional sentence. 98 Wn. App. at 805.

The court rejected the State's argument that there was no basis to impose an exceptional sentence, noting a recent decision holding that failed defenses may justify a mitigated exceptional sentence. 98 Wn. App. at 807-08 (citing State v. Jeannotte, 133 Wn.2d 847, 947 P.2d 1192 (1997)). The Court agreed, however, that the firearm enhancements must be served consecutively, at least if the base sentences are served consecutively as presumed for serious violent offenses under RCW 9.94A.400 (see note 8, supra). 98 Wn. App. at 806-07.<sup>9</sup>

With regard to the base sentences, Flett argued the trial court could have imposed four consecutive mitigated exceptional base sentences for the assaults totaling 219 months, plus four consecutive 60-month firearm enhancements for a total sentence of 459 months, the same as already

---

<sup>8</sup> Recodified as RCW 9.94A.505 by Laws of 2001, chapter 10, § 6.

<sup>9</sup> The Flett Court noted the requirement for concurrent firearm enhancements found in In re the Personal Restraint of Charles, 135 Wn.2d

imposed, just structured differently. See 98 Wn. App. 807. The Court rejected this argument on the basis that the minimum sentence for first degree assault is 60 months<sup>10</sup> and therefore the minimum mitigated exceptional consecutive sentences had to total 240 months, i.e., four consecutive 60-month sentences. Id.

There is language in Flett stating consecutive sentences for multiple first degree assault convictions are mandatory. 98 Wn. App. at 806. The Flett decision also states that a base sentence for four first degree assault convictions "is not subject to an exceptional sentence below 240 months." 98 Wn. App. at 808. But Flett never argued the sentencing court could have ordered the base sentences be served concurrently as allowed under former RCW 9.94A.390(1)(g) (recodified as RCW 9.94A.535 by Laws of 2001, ch. 10, §6). Because the Flett Court never considered this argument, now raised by Mulholland, Flett is not controlling.<sup>11</sup> See State v. Halgren, 137 Wn.2d

---

239, 955 P.2d 798 (1998), only applies if the bases sentences are served concurrently. 98 Wn. App. at 806.

<sup>10</sup> See the 1995 (the year of Flett's offense) version of RCW 9.94A.120(4) (providing for five-year minimum sentence for first degree assault). In 2000, the legislature added a new statute, RCW 9.94A.590, reiterating this requirement. Laws of 2000, ch. 28, § 7. That provision was subsequently recodified by Laws of 2001, ch. 10, § 6, as RCW 9.94A.540.

<sup>11</sup> Further evidence that the Flett Court never considered the argument here is revealed by the fact that the decision never cites or discusses the "Departure from the Guidelines" statute, former RCW 9.94A.390.

340, 346 n.3, 971 P.2d 512 (1999) (comments on issues that do not control the outcome are dicta).

As with Flett, reliance on State v. Jacob, 154 Wn.2d 596, 115 P.3d 281 (2005), to argue that RCW 9.94A.589(1) precludes a sentencing court from running sentences on current serious violent offenses concurrently would similarly be misplaced. The Jacob Court stated, "[a]lthough 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." Jacob, 154 Wn.2d at 602 (emphasis added). The "for the most part" language is an implicit acknowledgment that there are exceptions to the rule. Mulholland's case represents one of those exceptions.

Furthermore, to the extent language in Flett and Jacob imply the consecutive sentence presumption for multiple serious violent offenses under RCW 9.94A.589(1)(b) is not subject to mitigation, it directly conflicts with the language of RCW 9.94A.535(1)(g). Although RCW 9.94A.540 states its mandatory minimum sentences are not subject to modification under RCW 9.94A.535, nothing precludes a sentencing court from exercising its discretion under RCW 9.94A.535(1)(g) to order multiple mandatory minimum sentences to be served concurrently. In other words,

---

the restriction in RCW 9.94A.540 only precludes applying RCW 9.94A.535 to reduce the sentence for a *single* offense below the mandatory 60-month minimum, but does not restrict how multiple mandatory minimum sentences are served.

Here, the sentencing court failed to recognize its authority under RCW 9.94A.535 *not* to impose consecutive sentences and to impose sentences for each offense below the standard range. It erroneously concluded it had no authority to impose anything less than 927 months. Appendix G at 586-88. This was an abuse of discretion.

Every defendant has the right to have the trial court exercise its discretion to actually consider available sentence alternatives. State v. Grayson, 154 Wn.2d 333, 341-42, 111 P.3d 1183 (2005). In failing to recognize its discretion, and in failing to exercise its discretion, the trial court abused its discretion.<sup>12</sup> It also violated Mulholland's right to equal protection at sentencing because his sentencing court failed to give consideration to all of the sentencing options available. See State v.

---

<sup>12</sup> The failure to exercise discretion is itself an abuse of discretion. State v. Garcia-Martinez, 88 Wn. App. 322, 330, 944 P.2d 1104 (1997) (refusal to exercise discretion in imposing an exceptional sentence below the range is reviewable error), rev. denied, 136 Wn.2d 1002 (1998); State v. Wright, 76 Wn. App. 811, 829, 888 P.2d 1214 (1995) (failure to exercise discretion in determining whether offenses constitute the same criminal conduct).

Garcia-Martinez, 88 Wn. App. 322, 330, 944 P.2d 1104 (1997) (equal protection is not violated when court considers all sentencing options), review denied, 136 Wash.2d 1002, 966 P.2d 902 (1998).

The appropriate remedy is to remand for resentencing because it is apparent the trial court would have imposed a lesser sentence had it recognized it could. State v. McGill, 112 Wn. App. 95, 100, 47 P.3d 173 (2002) (court's failure to exercise discretion out of belief that it lacked authority to do so requires remand if reviewing court cannot say same sentence would have been imposed even if sentencing court were aware of its options). Therefore, this Court should affirm the Court of Appeals.

2. CIRCUMSTANCES EXIST WARRANTING A MITIGATED EXCEPTIONAL SENTENCE.

In both 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), and State v. Sanchez, 69 Wn. App. 255, 260-62, 848 P.2d 208, review denied, 122 Wn.2d 1007, 859 P.2d 604 (1993), 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. The court of appeals affirmed, holding 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 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 the inverse of the Batista rule applies when considering 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.<sup>13</sup> 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)).

A "trivial or trifling" finding is warranted here. Mulholland's offenses do not meet the legal definition of "same criminal conduct." They did, however, arise from a single criminal act - shooting from his car at the Tular's home. There is no indication Mulholland knew anyone was 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.

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

---

<sup>13</sup> The Sanchez Court went on to analyze only the harm alternative and not the culpability alternative. 69 Wn. App. at 261-62.

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 -- were 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, 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 virtually identical acts but for which there was, fortuitously, only a single victim. See RCW 9.94A.010(1)-(3) (setting forth purposes of the SRA).

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 known of its authority under RCW 9.94A.535(1)(g), it likely would have ordered concurrent base sentences for 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 sentences. Appendix F at 586-88.

3. MULHOLLAND WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL.

The State may argue that Mulholland claims must fail because they were not raised at trial or on direct appeal. To the extent this argument has any merit, Mulholland was denied effective assistance of counsel.

The federal and state constitutions guarantee the right to effective representation. U.S. Const. amend. 6; Const. art. 1, § 22; Strickland v. Washington, 466 U.S. 668, 80 L. Ed. 2d 674, 104 S. Ct. 2052 (1984); State v. Thomas, 109 Wn.2d 222, 229, 743 P.2d 816 (1987). A defendant has received ineffective assistance of counsel when (1) counsel's performance was deficient, and (2) the deficient representation prejudiced the defendant. Strickland, 466 U.S. at 687; State v. Aho, 137 Wn.2d 736, 745, 975 P.2d 512 (1999). The same test applies to claims of ineffective assistance of appellate counsel. In re Personal Restraint of Maxfield, 133 Wn.2d 332, 343-44, 945 P.2d 196 (1997) (claim of ineffective assistance of appellate counsel has merit where petitioner shows prejudice from appellate counsel's failure to raise a meritorious issue).

Counsel's performance is deficient if it falls below an objective standard of reasonableness. State v. Maurice, 79 Wn. App. 544, 551-52,

903 P.2d 514 (1995). The failure to make meritorious sentencing arguments on behalf of a defendant is deficient performance. See State v. Saunders, 120 Wn. App. 800, 824-25, 86 P.3d 23 (2004) (failure to argue same criminal conduct when evidence supported claim establishes deficient performance). While an attorney's decisions are afforded deference, conduct for which there is no legitimate strategic or tactical reason is constitutionally inadequate. State v. McFarland, 127 Wn.2d 322, 335-36, 899 P.2d 1251 (1998). Moreover, tactical or strategic decisions by defense counsel must still be reasonable. Roe v. Flores-Ortega, 528 U.S. 470, 481, 120 S. Ct. 1029, 145 L. Ed. 2d 985 (2000); State v. Ward, 125 Wn. App. 243, 250, 104 P.3d 670 (2004).

A defendant suffers prejudice where there is a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Strickland, 466 U.S. at 694. A "reasonable probability is a probability sufficient to undermine confidence in the outcome." Strickland, at 694.

Here, trial counsel failed to request an exceptional sentence and to inform the sentencing court of its authority to impose a mitigated exceptional sentence under RCW 9.94A.535. Appellate counsel failed to raise the sentencing error in Mulholland's direct appeal. These failures

constitute deficient performance by both trial counsel and appellate counsel.

As trial counsel noted at sentencing, the 927-month sentence requested by the State was "horrendously long, almost unfathomably long." Appendix F at 581. Despite this recognition, counsel made the untenable argument that the court should impose concurrent sentences based on a "same criminal conduct" analysis, despite settled law that a "same criminal conduct" finding is barred when the crimes involve different victims.

Mulholland was prejudiced by counsel's deficient performance. Had counsel properly informed the court of its authority to impose concurrent sentences as an exceptional sentence under RCW 9.94A.535, there is a reasonable probability the court would have done so, particularly in light of Mrs. Tullar's plea for leniency on Mulholland's behalf and the court's recognition of Mulholland's past contributions to society. Appendix F at 585-88. Instead, counsel allowed the court to labor under an erroneous understanding of the law and impose a "horrendously long" sentence. There was no reason not to request an exceptional sentence.

Mulholland was similarly prejudiced by appellate counsel's deficient performance. The same record presented here was available on direct appeal. As demonstrated, the record shows the sentencing court's

failure to exercise discretion is reversible error. There was no strategic reason not to raise this issue on direct appeal.

C. CONCLUSION

The sentencing court's failure to recognize the extent of its sentencing options constitutes an abuse of discretion. Trial counsel's decision to pursue a legally frivolous same criminal conduct argument 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. Therefore, this Court should affirm the court of appeals decision to remand for resentencing.

DATED this 3<sup>rd</sup> day of January, 2007.

Respectfully submitted,

NIELSEN, BROMAN & KOCH, PLLC,



---

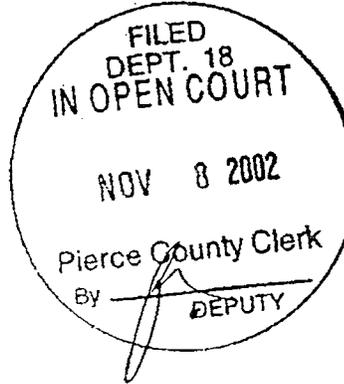
CHRISTOPHER H. GIBSON

WSBA No. 25097

Office ID No. 91051

Attorneys for Respondent

Appendix A



IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON  
IN AND FOR THE COUNTY OF PIERCE

NOV 12 2002

STATE OF WASHINGTON,  
Plaintiff,  
vs.  
DANIEL CHARLES MULHOLLAND,  
Defendant.  
DOB: 02/19/1948  
SID NO.: Unknown

CAUSE NO.01-1-06114-5  
JUDGMENT AND SENTENCE (JS)  
 Prison  
 Jail One year or less  
 First Time Offender  
 Special Sexual Offender  
Sentencing Alternative  
 Special Drug Offender  
Sentencing Alternative  
 Breaking The Cycle (BTC)

I. HEARING

1.1 A sentencing hearing in this case was held on 11-8-02 and the defendant, the defendant's lawyer and the (deputy) prosecuting attorney were present.

II. FINDINGS

There being no reason why judgment should not be pronounced, the court FINDS:

2.1 CURRENT OFFENSE(S): The defendant was found guilty on 09/25/2002 by  plea  jury-verdict  bench trial of:

JUDGMENT AND SENTENCE (JS)  
(Felony)(6/2000)

02-9-13089-0

01-1-06114-5

1  
2  
3 Count No.: I  
Crime: ASSAULT IN THE FIRST DEGREE W/FASE, Charge Code: (E23)  
4 RCW: 9A.36.011(1)(a)  
Date of Crime: 11/26/2001  
5 Incident No.: 01-330-0910

6 Count No.: II  
Crime: ASSAULT IN THE FIRST DEGREE W/FASE, Charge Code: (E23)  
7 RCW: 9A.36.011(1)(a)  
Date of Crime: 11/26/2001  
8 Incident No.: 01-330-0910

9 Count No.: III  
Crime: ASSAULT IN THE FIRST DEGREE W/FASE, Charge Code: (E23)  
10 RCW: 9A.36.011.(1)(a)  
Date of Crime: 11/26/2001  
11 Incident No.: 01-330-0910

12 Count No.: IV  
Crime: ASSAULT IN THE FIRST DEGREE W/FASE, Charge Code: (E23)  
13 RCW: 9A.36.011(1)(a)  
Date of Crime: 11/26/2001  
14 Incident No.: 01-330-0910

15 Count No.: V  
Crime: ASSAULT IN THE FIRST DEGREE W/FASE, Charge Code: (E23)  
16 RCW: 9A/36/011(1)(a)  
Date of Crime: 11/26/2001  
17 Incident No.: 01-330-0910

18 Count No.: VI  
Crime: ASSAULT IN THE FIRST DEGREE W/FASE, Charge Code: (E23)  
19 RCW: 9A.36.011(1)(a)  
Date of Crime: 11/26/2001  
20 Incident No.: 01-330-0910

21 Count No.: VII  
Crime: DRIVE-BY SHOOTING, Charge Code: (E14A)  
22 RCW: 9A.36.045(1)  
Date of Crime: 11/26/2001  
23 Incident No.: 01-330-0910

24 as charged in the Second Amended Information.

25 [X] A special verdict/finding for use of a firearm was returned on  
Counts I, II, III, IV, V, and VI. RCW 9.94A.125, .310.

26 [ ] A special verdict/finding for use of deadly weapon other than a  
firearm was returned on Count(s) \_\_\_\_\_. RCW 9.94A.125, .310.

27  
28 JUDGMENT AND SENTENCE (JS)  
(Felony)(6/2000)

2 of \_\_\_\_\_

01-1-06114-5

- 1
- 2
- 3 [ ] A special verdict/finding of **sexual motivation** was returned on
- 4 Count(s)\_\_\_\_\_. RCW 9.94A.127.
- 5 [ ] A special verdict/finding for violation of the **Uniform Controlled**
- 6 **Substances Act** was returned on Count(s)\_\_\_\_\_, RCW 69.50.401 and RCW.
- 7 69.50.435, taking place in a school, school bus, or within 1000
- 8 feet of the perimeter of a school grounds or within 1000 feet of a
- 9 school bus route stop designated by the school district; or in a
- 10 public park, public transit vehicle, or public transit stop
- 11 shelter; or in, or within 1000 feet of the perimeter of, a civic
- 12 center designated as a drug-free zone by a local government
- 13 authority, or in a public housing project designated by a local
- 14 government authority as a drug-free zone.
- 15 [ ] A special verdict/finding that the defendant committed a crime
- 16 involving the manufacture of methamphetamine **when a juvenile was**
- 17 **present in or upon the premises of manufacture** was returned on
- 18 Count(s) \_\_\_\_\_. RCW 9.94A, RCW 69.50.401(a), RCW 69.50.440.
- 19 [ ] The defendant was convicted of **vehicular homicide** which was
- 20 proximately caused by a person driving a vehicle while under the
- 21 influence of intoxicating liquor or drug or by the operation of a
- 22 vehicle in a reckless manner and is therefore a violent offense.
- 23 RCW 9.94A.030.
- 24 [ ] This case involves **kidnapping** in the first degree, kidnapping in
- 25 the second degree, or unlawful imprisonment as defined in chapter
- 26 9A.40 RCW, where the victim is a minor and the offender is not the
- 27 minor's parent. RCW 9A.44.130.
- 28 [ ] The court finds that the offender has a **chemical dependency** that
- has contributed to the offense(s). RCW 9.94A.129.
- [ ] The crime charged in Count(s)\_\_\_\_\_involve(s) **domestic**
- violence.**
- [ ] Current offenses encompassing the same criminal conduct and
- counting as one crime in determining the offender score are
- (RCW 9.94A.400):
- [ ] Other current convictions listed under different cause numbers used
- in calculating the offender score are (list offense and cause
- number):
- 2.2 **CRIMINAL HISTORY:** Prior convictions constituting criminal history
- for purposes of calculating the offender score are (RCW 9.94A.360):

<u>Crime</u>	<u>Date of Sentence</u>	<u>Sentencing Court (County &amp; State)</u>	<u>Date of Crime</u>	<u>Adult or Juv</u>	<u>Crime Type</u>
Assault 1	Current	Pierce Co., WA	11/26/01	Adult	SV
Assault 1	Current	Pierce Co., WA	11/26/01	Adult	SV
Assault 1	Current	Pierce Co., WA	11/26/01	Adult	SV
Assault 1	Current	Pierce Co., WA	11/26/01	Adult	SV

JUDGMENT AND SENTENCE (JS)  
(Felony)(6/2000)

3 of \_\_\_\_\_

1

2

01-1-06114-5

3 Assault 1 Current Pierce Co., WA 11/26/01 Adult SV  
 4 Assault 1 Current Pierce Co., WA 11/26/01 Adult SV  
 4 Drive-By Current Pierce Co., WA 11/26/01 Adult V

5 [ ] The defendant committed a current offense while on community placement (adds one point to score). RCW 9.94A.360

6 [ ] the court finds that the following prior convictions are one offense for purposes of determining the offender score (RCW 9.94A.360):

8 [ ] The following prior convictions are not counted as points but as enhancements pursuant to RCW 46.61.520:

9 2.3 SENTENCING DATA:

Count	Offender Score	Serious Level	Standard Range (w/o enhancement)	Plus Enhancement*	Total Standard Range	Maximum Term
I	<u>1</u>	XII	<u>102-136</u>	FIREARM	<u>112-146</u>	LIFE
II	<u>0</u>	XII	<u>93-123</u>	FIREARM	<u>153-183</u>	LIFE
III	<u>0</u>	XII	<u>93-123</u>	FIREARM	<u>153-183</u>	LIFE
IV	<u>0</u>	XII	<u>93-123</u>	FIREARM	<u>153-183</u>	LIFE
V	<u>0</u>	XII	<u>93-123</u>	FIREARM	<u>153-183</u>	LIFE
VI	<u>0</u>	XII	<u>93-123</u>	FIREARM	<u>153-183</u>	LIFE
VII	<u>12</u>	VII	<u>87-116</u>	<del>FIREARM</del>	<u>87-116</u>	10 Years

16 \*(F) Firearm, (D) Other deadly weapons, (V) VUCSA in a protected zone,  
 17 (VH) Vehicular Homicide, See RCW 46.61.520, (JP) Juvenile Present.

18 2.4 [ ] EXCEPTIONAL SENTENCE: Substantial and compelling reasons exist which justify an exceptional sentence [ ] above [ ] below the standard range for Count(s) \_\_\_\_\_. Findings of fact and conclusions of law are attached in Appendix 2.4. The Prosecuting Attorney [ ] did [ ] did not recommend a similar sentence.

21 2.5 ABILITY TO PAY LEGAL FINANCIAL OBLIGATIONS. The court has considered the total amount owing, the defendant's past, present and future ability to pay legal financial obligations, including the defendant's financial resources and the likelihood that the defendant's status will change. The court finds that the defendant has the ability or likely future ability to pay the legal financial obligations imposed herein. RCW 9.94A.142.

25 [ ] The following extraordinary circumstances exist that make restitution inappropriate (RCW 9.94A.142):

28 JUDGMENT AND SENTENCE (JS)  
 (Felony)(6/2000)

01-1-06114-5

2.6 For violent offenses, most serious offenses, or armed offenders recommended sentencing agreements or plea agreements are [ ] attached [ ] as follows:

III. JUDGMENT

3.1 The defendant is GUILTY of the Counts and Charges listed in Paragraph 2.1.

3.2 [ ] The Court DISMISSES Count(s) \_\_\_\_\_. [ ] The defendant is found NOT GUILTY of Count(s) \_\_\_\_\_.

IV. SENTENCE AND ORDER

IT IS ORDERED:

4.1 Defendant shall pay to the Clerk of this Court (Pierce County Clerk, 930 Tacoma Ave #110, Tacoma, WA 98402):

\$ \_\_\_\_\_ Restitution to: \_\_\_\_\_

\$ \_\_\_\_\_ Restitution to: \_\_\_\_\_

\$ \_\_\_\_\_ Restitution to: \_\_\_\_\_  
(Name and Address-address may be withheld and provided confidentially to Clerk's Office).

\$ 500 Victim assessment RCW 7.68.035

\$ 110 Court costs, including RCW 9.94A.030, 9.94A.120, 10.01.160, 10.46.190

Criminal filing fee \$ \_\_\_\_\_

Witness costs \$ \_\_\_\_\_

Sheriff service fees \$ \_\_\_\_\_

Jury demand fee \$ \_\_\_\_\_

Other \$ \_\_\_\_\_

\$ \_\_\_\_\_ Fees for court appointed attorney RCW 9.94A.030

\$ \_\_\_\_\_ Court appointed defense expert and other defense costs RCW 9.94A.030

\$ \_\_\_\_\_ Fine RCW 9A.20.021 [ ] VUCSA additional fine waived due to indigency RCW 69.50.430

\$ \_\_\_\_\_ Drug enforcement fund of \_\_\_\_\_ RCW 9.94A.030

JUDGMENT AND SENTENCE (JS)  
(Felony)(6/2000)

5 of \_\_\_\_\_

01-1-06114-5

3 \$ \_\_\_\_\_ Crime Lab fee [ ] deferred due to indigency RCW 43.43.690  
 4 \$ \_\_\_\_\_ Extradition costs RCW 9.94A.120  
 5 \$ \_\_\_\_\_ Emergency response costs (Vehicular Assault, Vehicular  
 6 Homicide only, \$1000 maximum) RCW 38.52.430  
 7 \$ \_\_\_\_\_ Other costs for: \_\_\_\_\_  
 8 \$ 610 TOTAL RCW 9.94A.145

9 [ ] The above total does not include all restitution or other legal  
 10 financial obligations, which may be set by later order of the  
 11 court. An agreed order may be entered. RCW 9.94A.142. A  
 12 restitution hearing:  
 [ ] shall be set by the prosecutor  
 [ ] is scheduled for \_\_\_\_\_

13 [ ] RESTITUTION. See attached order.  
 14 [ ] Restitution ordered above shall be paid jointly and severally with:  
 \_\_\_\_\_

15	<u>NAME OF OTHER DEFENDANT</u>	<u>CAUSE NUMBER</u>	<u>VICTIM NAME</u>	<u>AMOUNT-\$</u>
16	_____	_____	_____	_____
17	_____	_____	_____	_____
18	_____	_____	_____	_____

19 [ ] The Department of Corrections (DOC) may immediately issue a Notice  
 of Payroll Deduction. RCW 9.94A.200010.  
 20 [X] All payments shall be made in accordance with the policies of the  
 clerk and on a schedule established by DOC, commencing immediately,  
 21 unless the court specifically sets forth the rate here: Not less  
 than \$ \_\_\_\_\_ per month commencing \_\_\_\_\_.  
 RCW 9.94A.145.

22 [ ] In addition to the other costs imposed herein, the Court finds that  
 the defendant has the means to pay for the cost of incarceration  
 23 and is ordered to pay such costs at the statutory rate.  
 RCW 9.94A.145.

24 [ ] The defendant shall pay the costs of services to collect unpaid  
 legal financial obligations. RCW 36.18.190.

25 [X] The financial obligations imposed in this judgment shall bear  
 26 interest from the date of the judgment until payment in full, at  
 the rate applicable to civil judgments. RCW 10.82.090. An award

28 JUDGMENT AND SENTENCE (JS)  
 (Felony)(6/2000)

6 of \_\_\_\_\_

01-1-06114-5

of costs on appeal against the defendant may be added to the total legal financial obligations. RCW 10.73.

4.2 [ ] HIV TESTING. The health Department or designee shall test and counsel the defendant for HIV as soon as possible and the defendant shall fully cooperate in the testing. RCW 70.24.340.

DNA TESTING. The defendant shall have a blood sample drawn for purposes of DNA identification analysis and the defendant shall fully cooperate in the testing. The appropriate agency, the county or DOC, shall be responsible for obtaining the sample prior to the defendant's release from confinement. RCW 43.43.754.

4.3 The defendant shall not have contact with Tullars or their residence (name, DOB) including, but not limited to, personal, verbal, telephonic, written or contact through a third party for \_\_\_\_\_ years (not to exceed the maximum statutory sentence).  
[ ] Domestic Violence Protection Order or Antiharassment Order is filed with this Judgment and Sentence.

4.4 OTHER: \_\_\_\_\_

4.4(a) Bond is hereby exonerated.

4.5 CONFINEMENT OVER ONE YEAR: The defendant is sentenced as follows:

(a) CONFINEMENT: RCW 9.94A.400. Defendant is sentenced to the following term of total confinement in the custody of the Department of Corrections (DOC):

<u>162</u> months on Count No. I	<u>153</u> months on Count No. II
<u>153</u> months on Count No. III	<u>153</u> months on Count No. IV
<u>153</u> months on Count No. V	<u>153</u> months on Count No. VI
<u>87</u> months on Count No. VII	

(a)(i) CONFINEMENT (Sentence Enhancement): A special finding/verdict having been entered as indicated in Section 2.1, the defendant is sentenced to the following additional term of total confinement in the custody of the Department of Corrections:

<u>60</u> months on Count No. I	<u>60</u> months on Count No. II
<u>60</u> months on Count No. III	<u>60</u> months on Count No. IV
<u>60</u> months on Count No. V	<u>60</u> months on Count No. VI

JUDGMENT AND SENTENCE (JS)  
(Felony) (6/2000)

01-1-06114-5

Sentence enhancements in Counts I, II, III, IV, V, and VI shall run

[ ] concurrent [X] consecutive to each other.

Sentence enhancements in Counts I, II, III, IV, V, and VI shall be served

[X] flat time [ ] subject to earned good time credit.

Actual number of months of total confinement ordered is 927.  
(Add mandatory firearm and deadly weapons enhancement time to run consecutively to other counts, see Section 2.3 above).

(b) CONSECUTIVE/CONCURRENT SENTENCES. RCW 9.94A.400. All counts shall be served concurrently, except for the portion of those counts for which there is a special finding of a firearm or other deadly weapon as set forth above at Section 2.3, and except for the following counts which shall be served consecutively:

Counts I, II, III, IV, V, and VI shall run consecutively

The sentence herein shall run consecutively to all felony sentences in other cause numbers that were imposed prior to the commission of the crime(s) being sentenced.

The sentence herein shall run concurrently with felony sentences in other cause numbers that were imposed subsequent to the commission of the crime(s) being sentenced unless otherwise set forth here. [ ] The sentence herein shall run consecutively to the felony sentence in cause number(s) \_\_\_\_\_

The sentence herein shall run consecutively to all previously imposed misdemeanor sentences unless otherwise set forth here: \_\_\_\_\_

Confinement shall commence immediately unless otherwise set forth here: \_\_\_\_\_

(c) The defendant shall receive credit for time served prior to sentencing if that confinement was solely under this cause number. RCW 9.94A.120. The time served shall be computed by the jail unless the credit for time served prior to sentencing is specifically set forth by the court: 47 days

JUDGMENT AND SENTENCE (JS)  
(Felony)(6/2000)

B of \_\_\_\_\_

01-1-06114-5

4.6 [X] COMMUNITY CUSTODY (post 6/30/00 offenses) is ordered as follows:

- Count I for a range from 24 to 48 months;
- Count II for a range from 24 to 48 months;
- Count III for a range from 24 to 48 months;
- Count IV for a range from 24 to 48 months;
- Count V for a range from 24 to 48 months;
- Count VI for a range from 24 to 48 months;
- Count VII for a range from 18 to 36 months.

or for the period of earned release awarded pursuant to RCW 9.94A.150(1) and (2), whichever is longer, and standard mandatory conditions are ordered. [See RCW 9.94A.120 for community placement/custody offenses-- serious violent offense, second degree assault, any crime against a person with a deadly weapon finding, Chapter 69.50 or 69.52 RCW offense. Community custody follows a term for a sex offense. Use paragraph 4.7 to impose community custody following work ethic camp.]

While on community placement or community custody, the defendant shall: (1) report to and be available for contact with the assigned community corrections officer as directed; (2) work at DOC-approved education, employment and/or community service; (3) not consume controlled substances except pursuant to lawfully issued prescriptions; (4) not unlawfully possess controlled substances while in community custody; (5) pay supervision fees as determined by DOC; and (6) perform affirmative acts necessary to monitor compliance with the orders of the court as required by DOC. The residence location and living arrangements are subject to the prior approval of DOC while in community placement or community custody. Community custody for sex offenders may be extended for up to the statutory maximum term of the sentence. Violation of community custody imposed for a sex offense may result in additional confinement.

[ ] The defendant shall not consume any alcohol.  
[ ] Defendant shall have no contact with: \_\_\_\_\_  
[ ] Defendant shall remain [ ] within [ ] outside of a specified geographical boundary, to-wit: \_\_\_\_\_

[ ] The defendant shall participate in the following crime-related treatment or counseling services: \_\_\_\_\_

[ ] The defendant shall undergo an evaluation for treatment for [ ] domestic violence [ ] substance abuse [ ] mental health [ ] anger management and fully comply with all recommended treatment.

JUDGMENT AND SENTENCE (JS)  
(Felony)(6/2000)

01-1-06114-5

1  
2  
3 [ ] The defendant shall comply with the following crime-related  
4 prohibitions: \_\_\_\_\_

5 Other conditions may be imposed by the court or DOC during community  
6 custody, or are set forth here: \_\_\_\_\_

7  
8 4.7 [ ] WORK ETHIC CAMP. RCW 9.94A.137, RCW 72.09.410. The court  
9 finds that the defendant is eligible and is likely to qualify for work  
10 ethic camp and the court recommends that the defendant serve the  
11 sentence at a work ethic camp. Upon completion of work ethic camp, the  
12 defendant shall be released on community custody for any remaining time  
of total confinement, subject to the conditions below. Violation of the  
conditions of community custody may result in a return to total  
confinement for the balance of the defendant's remaining time of total  
confinement. The conditions of community custody are stated in Section  
4.6.

13 4.8 OFF LIMITS ORDER (known drug trafficker) RCW 10.66.020. The  
14 following areas are off limits to the defendant while under the  
supervision of the County Jail or Department of Corrections:  
15 \_\_\_\_\_

#### 16 17 V. NOTICES AND SIGNATURES

18 5.1. COLLATERAL ATTACK ON JUDGMENT. Any petition or motion for  
19 collateral attack on this judgment and sentence, including but not  
20 limited to any personal restraint petition, state habeas corpus  
21 petition, motion to vacate judgment, motion to withdraw guilty plea,  
motion for new trial or motion to arrest judgment, must be filed within  
one year of the final judgment in this matter, except as provided for  
in RCW 10.73.100. RCW 10.73.090.

22 5.2 LENGTH OF SUPERVISION. For an offense committed prior to July 1,  
23 2000, the defendant shall remain under the court's jurisdiction and the  
24 supervision of the Department of Corrections for a period up to 10  
25 years from the date of sentence or release from confinement, whichever  
26 is longer, to assure payment of all legal financial obligations unless  
27 the court extends the criminal judgment an additional 10 years. For an  
offense committed on or after July 1, 2000, the court shall retain  
jurisdiction over the offender, for the purposes of the offender's  
compliance with payment of the legal financial obligations, until the  
obligation is completely satisfied, regardless of the statutory maximum  
for the crime. RCW 9.94A.145 and RCW 9.94A.120(13).

28 JUDGMENT AND SENTENCE (JS)  
(Felony)(6/2000)

10 of \_\_\_\_\_

01-1-06114-5

5.3 NOTICE OF INCOME-WITHHOLDING ACTION. If the court has not ordered an immediate notice of payroll deduction in Section 4.1, you are notified that the Department of Corrections may issue a notice of payroll deduction without notice to you if you are more than 30 days past due in monthly payments in an amount equal to or greater than the amount payable for one month. RCW 9.94A.200010. Other income-withholding action under RCW 9.94A may be taken without further notice. RCW 9.94A.200030.

5.4. RESTITUTION HEARING.

[ ] Defendant waives any right to be present at any restitution hearing (defendant's initials): \_\_\_\_\_

5.5 Any violation of this Judgment and Sentence is punishable by up to 60 days of confinement per violation. RCW 9.94A.200.

5.6 FIREARMS. You must immediately surrender any concealed pistol license and you may not own, use or possess any firearm unless your right to do so is restored by a court of record. (The court clerk shall forward a copy of the defendant's driver's license, identicard, or comparable identification to the Department of Licensing along with the date of conviction or commitment). RCW 9.41.040, 9.41.047.

5.7 OTHER: \_\_\_\_\_

DONE in Open Court and in the presence of the defendant this date:

11-8-2002

*Karen Stromborg*

JUDGE Print Name: Karen Stromborg

*Fred C. Wist*

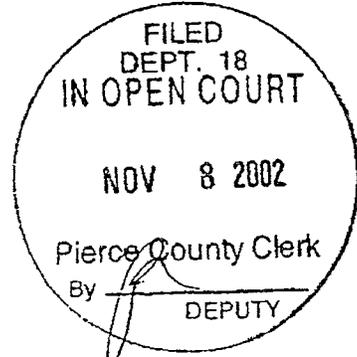
Deputy Prosecuting Attorney  
Print Name: Fred C. Wist  
WSB# 23057

*Ann Stenberg*

Attorney for Defendant  
Print name: Ann Stenberg  
WSB# 22596

*Charles Daniel Mulholland*

Defendant  
Print name: Charles Daniel Mulholland



JUDGMENT AND SENTENCE (JS)  
(Felony)(6/2000)

01-1-06114-5

CERTIFICATE OF INTERPRETER

Interpreter signature/Print name: \_\_\_\_\_  
I am a certified interpreter of, or the court has found me otherwise qualified to interpret, the \_\_\_\_\_ language, which the defendant understands. I translated this Judgment and Sentence for the defendant into that language.

CERTIFICATE OF CLERK

CAUSE NUMBER of this case: 01-1-06114-5

I, Bob San Soucie, Clerk of this Court, certify that the foregoing is a full, true and correct copy of the judgment and sentence in the above-entitled action now on record in this office.

WITNESS my hand and seal of the said Superior Court affixed on this date: \_\_\_\_\_

Clerk of said County and State, by: \_\_\_\_\_, Deputy Clerk

IDENTIFICATION OF DEFENDANT

SID No.: Unknown Date of Birth: 02/19/1948  
(If no SID take fingerprint card for WSP)

FBI No. Unknown Local ID No. \_\_\_\_\_

PCN No. \_\_\_\_\_ Other \_\_\_\_\_

Alias name, SSN, DOB: \_\_\_\_\_

Race:	Ethnicity:	Sex:
[ ] Asian/Pacific Islander	[ ] Hispanic	[x] Male
[ ] Black/African-American	[x] Non-Hispanic	[ ] Female
[x] Caucasian		
[ ] Native American		
[ ] Other: _____		

JUDGMENT AND SENTENCE (JS)  
(Felony)(6/2000)

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

01-1-06114-5

FINGERPRINTS

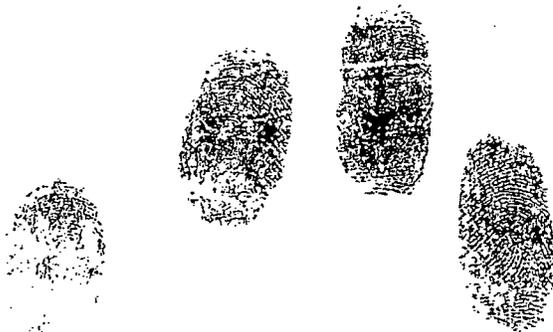
Right four fingers taken simultaneously

Right thumb



Left four fingers taken simultaneously

Left thumb



I attest that I saw the same defendant who appeared in Court on this Document affix his or her fingerprints and signature thereto. Clerk of the Court, BOB SAN SOUCIE:

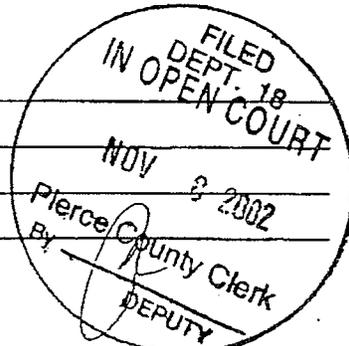
*Bob San Soucie*, Deputy Clerk.

Dated: 11.8.02

DEFENDANT'S SIGNATURE: *[Signature]*

DEFENDANT'S ADDRESS: \_\_\_\_\_

DEFENDANT'S PHONE#: \_\_\_\_\_



FINGERPRINTS

13 of \_\_\_\_\_



COURT OF APPEALS  
DIVISION II

RECEIVED

JUN 16 2004

04 JUN 16 2004 15  
STATE OF WASHINGTON  
BY \_\_\_\_\_  
DEPUTY

LAW OFFICES OF  
MONTE E. HESTER, INC., P.S.

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON,

No. 29650-1-II

Respondent,

v.

DANIEL CHARLES MULHOLLAND,

UNPUBLISHED OPINION

Appellant.

HOUGHTON, P.J. -- Daniel Mulholland appeals his conviction of six counts of first degree assault and one count of drive-by shooting, arguing insufficient evidence, instructional error, and ineffective assistance of counsel. We affirm.

FACTS<sup>1</sup>

According to Joshua Tullar, on November 26, 2001, two males arrived at the Tacoma home of his grandmother, Jeannine Tullar.<sup>2</sup> One man emerged from the passenger side of a van and asked for Joshua's uncle. Joshua replied that his uncle was at work and asked whether he could assist.

<sup>1</sup> We set forth the facts elicited during trial.

<sup>2</sup> We use first names for clarity.

According to Joshua, the man got out of the van, approached him, and said: "Look son, this is the way it's gonna be. If I don't have my TV at my house in 24 hours, I'm shooting your house, and if it's necessary, I'll chop up your bodies and scatter them across the state,' and he didn't care who was in the house." II Report of Proceedings (RP) at 58.

Joshua told Jeannine about the threat. Joshua identified the vehicle as a black mini Astro van with a slanted front end and white line. And at trial, he identified a photograph of Mulholland's van as the one at his grandmother's home on the day of the shooting.

Later that day, around 5 P.M., six Tullar family members ate dinner in their illuminated living room. The living room window, which looked out onto the street, did not have drawn curtains or blinds. The Tullars heard gunfire and took cover on the floor. A family member removed a baby from a highchair and another put Jeannine's wheelchair-bound husband on the floor and gave him heart medicine. After the gunfire stopped, Russell Tullar called 911.

About the same time, Jeannine's neighbor, Edward Dean, walked on the street opposite the Tullar home. He noticed a white man in the driver seat of a dark blue or black van with a white line parked on the opposite side of the street in front of the Tullar residence. Dean also heard gunfire and took cover. After the gunfire ceased, Dean saw the van move quickly away, driving up and over the curb. Dean later identified a photograph of Mulholland's van as the van he had seen in front of the Tullar residence at the time of the shooting.

Police officers responded to the 911 call. They saw bullet damage to the front of the house, found three shell casings, and noted damage to the house interior. Because his grandmother had not called 911 when Joshua reported the earlier threat, he told the police about it and described the van and driver.

No. 29650-1-II

Later that evening, police dispatch received a request for a “civil standby” to assist in recovering a television set. III RP at 207. The requester wanted law enforcement assistance at the Tullar residence.

Dispatch told the responding officer that the vehicle description of the person requesting the civil standby matched the description that had been broadcast earlier as being involved in the Tullar residence shooting. Officer Todd Kitselman located the vehicle, contacted Mulholland, and asked him to step out of the van. Kitselman saw a shell casing in the middle of the driver’s seat when Mulholland left the van. Kitselman placed Mulholland in wrist restraints and advised him of his *Miranda*<sup>3</sup> rights. Kitselman said that Mulholland admitted being at the Tullar residence earlier asking for his television set, but he denied making any threats.

Kitselman also testified that when he asked Mulholland where he had been earlier that evening, Mulholland replied that he had been at McChord Air Force Base buying earrings for his wife. Mulholland said that a receipt inside his vehicle corroborated his alibi. But the receipt identified an earring purchase at the Tacoma Mall Sears store on a different day some two weeks earlier. According to Kitselman, Mulholland shrugged his shoulders in reply to being asked about the discrepancy and said, “I don’t know.” III RP at 224. Kitselman then asked Mulholland about the shell casings he found in the van. Mulholland responded that he did not own a gun and he believed that the casings came from his target shooting some three weeks earlier.

Based on these incidents, the State charged Mulholland with six counts of first degree assault and one count of drive by shooting. Mulholland testified at trial and claimed an alibi. He

---

<sup>3</sup> *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

No. 29650-1-II

said that on the evening of the shooting, he had dropped one son off at home and then had driven to his other son's apartment to help him move. He also testified that he owned a black Oldsmobile Silhouette van and not a Chevy Astro van. Mulholland further testified that he did not own a gun and that the shell casings found in his van remained after target shooting three weeks earlier.

The parties stipulated that someone used Mulholland's ATM card to purchase gasoline at 5:20 P.M. on November 26, 2001, at 2523 Pacific Avenue in Tacoma. Mulholland testified that he bought gas there.

Police forensic specialists collected and compared three shell casings and a spent bullet recovered at the Tullar residence and two shell casings found in Mulholland's van. A forensic expert testified that the ammunition was fired from the same .45 caliber automatic weapon. The weapon was never recovered.

A jury convicted Mulholland as charged and he appeals.

## ANALYSIS

### Sufficiency of the Evidence

Mulholland first contends that insufficient evidence supports his conviction of first degree assault. He asserts that no evidence placed him at the shooting or established intent to inflict great bodily harm.

Sufficient evidence supports a conviction when, viewed in the light most favorable to the State, it permits any rational fact finder to establish the essential elements of the crime beyond a reasonable doubt. *State v. Green*, 94 Wn.2d 216, 221, 616 P.2d 628 (1980). We accord circumstantial and direct evidence equal weight. *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). We reserve credibility determinations for the fact finder and we need not be

No. 29650-1-II

convinced of Mulholland's guilt beyond a reasonable doubt, but only that substantial evidence supports the State's case. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992); *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990).

In order to convict, the State must prove the defendant's identity and his presence at the crime scene beyond a reasonable doubt. *State v. Thomson*, 70 Wn. App. 200, 211, 852 P.2d 1104 (1993), *aff'd*, 123 Wn.2d 877 (1994). Here, taken in the light most favorable to the State, the evidence shows that on November 26, 2001, Mulholland purchased gasoline in Tacoma around the time of the shooting. The evidence also shows that Mulholland owned a van that he drove to the Tullar residence where he threatened the Tullar family. And expert testimony linked the evidence found in Mulholland's van with that found at the Tullar home. The jury chose not to believe Mulholland's alibi and we do not question such credibility determinations on appeal. Thus, Mulholland's identity argument fails.

Mulholland also argues that insufficient evidence demonstrated his intent to inflict the great bodily harm required to convict him of assault.<sup>4</sup> A fact finder may infer intent to harm from an event's facts and circumstances, and the State may show intent through prior threats and the manner of assault. *State v. Shelton*, 71 Wn.2d 838, 839, 431 P.2d 201 (1967); *State v. Ferreira*, 69 Wn. App. 465, 468-69, 850 P.2d 541 (1993).

Citing *Ferreira*, 69 Wn. App. at 468-69, Mulholland argues that because no injuries occurred, he had no intent to cause great bodily harm as first degree assault requires. Mulholland misplaces his reliance on *Ferreira*. In *Ferreira*, insufficient evidence supported a juvenile

---

<sup>4</sup> RCW 9A.36.011 provides: "(1) A person is guilty of assault in the first degree if she or she, with intent to inflict great bodily harm: (a) Assaults another with a firearm or any deadly weapon or by any force or means likely to produce great bodily harm or death."

adjudication of first degree assault because the juvenile fired into a house that was only “likely apparent” to be occupied. 69 Wn. App. at 469. Instead, the trial court found the juvenile guilty of second degree assault because Ferreira “intended to create apprehension or fear to the likely occupants of the house.” *Ferriera*, 69 Wn. App. at 469-70.

Here when shots were fired into the home, six Tullar family members sat in an illuminated and unobscured living room where its windows looked out onto the street. The Tullars’ occupation was readily apparent when the shots were fired. In response, they all dove or were pulled to the floor. This, coupled with Mulholland’s earlier threat and his rapid retreat, establishes sufficient evidence of his intent to inflict great bodily harm. His argument fails.

#### Jury Instructions

##### Alternative Means of First Degree Assault

Mulholland further contends that the trial court erred in giving instruction 11 because insufficient evidence supported its second paragraph. He asserts that instruction 11 denoted alternative means of committing the crime and that the court may not instruct the jury on an alternative means absent sufficient evidence to support it. And Mulholland argues, absent sufficient evidence supporting both alternative means, where the jury renders a general verdict, it cannot stand.

Our constitutions guarantee a criminal defendant the right to an expressly unanimous jury verdict. U.S. CONST. amend. VI; WASH. CONST. art. I, § 22; *State v. Kitchen*, 110 Wn.2d 403, 409, 756 P.2d 105 (1988). In an alternative means case, “the evidence includes only one event, even though it discloses alternative means by which the defendant may have participated in that event.” *State v. Hanson*, 59 Wn. App. 651, 657 n.7, 800 P.2d 1124 (1990); *Kitchen*, 110 Wn.2d at 410.

RCW 9A.36.011<sup>5</sup> specifies three alternative means of committing first degree assault.

Here, the State charged Mulholland with, and the court instructed the jury on, only one means-- assault with a firearm. Instruction 11 provided:

An assault is an act, done with intent to inflict bodily injury upon another, tending, but failing to accomplish it and accompanied with the apparent present ability to inflict the bodily injury if not prevented. It is not necessary that bodily injury be inflicted.

An assault is also an act, done with the intent to create in another apprehension and fear of bodily injury, and which in fact creates in another a reasonable apprehension and imminent fear of bodily injury even though the actor did not actually intend to inflict bodily injury.

Clerk's Papers (CP) at 112.

The court's "to convict" jury instruction provided:

INSTRUCTION NO. 6

To convict the defendant of the crime of Assault in the First Degree as charged in Count III, each of the following elements of the crime must be proved beyond a reasonable doubt:

- (1) That on or about the 26th day of November, 2001, the defendant intentionally assaulted another person, thereby assaulting Joshua Tullar;
- (2) That the assault was committed with a firearm;
- (3) That the defendant acted with intent to inflict great bodily harm; and
- (4) That the acts occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all of the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

CP at 107.

---

<sup>5</sup> RCW 9A.36.011(1) states:

A person is guilty of assault in the first degree if he or she, with intent to inflict great bodily harm:

- (a) Assaults another with a firearm or any deadly weapon or by any force or means likely to produce great bodily harm or death; or
- (b) Administers, exposes, or transmits to or causes to be taken by another, poison, the human immunodeficiency virus as defined in chapter 70.24 RCW, or any other destructive or noxious substance; or
- (c) Assaults another and inflicts great bodily harm.

Mulholland argues that because the jury instruction gave two definitions of assault, this created an alternative means case.<sup>6</sup> We disagree. Although instruction 11 provided two alternative definitions of assault, the sole “to convict” instruction instructed the jury to find Mulholland guilty if he assaulted the victims with a firearm while acting with intent to inflict great bodily harm. Mulholland’s argument fails.<sup>7</sup>

#### Transferred Intent

Mulholland further contends that instruction 14<sup>8</sup> does not fairly state the law on transferred intent when no victim sustains injury. Because Mulholland failed to object at trial, we decline to review this issue. RAP 2.5(a).<sup>9</sup>

#### Statement of Additional Grounds

In his statement of additional grounds (SAG), Mulholland contends that he received ineffective assistance of counsel.

The Washington State and United States constitutions guarantee a criminal defendant the right to effective assistance of counsel. U.S. CONST. amend. VI; WASH. CONST. art. I, § 22. We determine whether a defendant received effective assistance of counsel under a two-part test: the

---

<sup>6</sup> Mulholland argues that *State v. Bland*, 71 Wn. App. 345, 860 P.2d 1046 (1993), supports his contention. In *Bland*, the court reversed where the defendant fired a wild shot that showered glass on a sleeping victim and the jury was instructed on assault through an unlawful touching or fear and apprehension. The court held that insufficient evidence supported finding fear or apprehension in a sleeping victim. The *Bland* case differs factually from Mulholland’s.

<sup>7</sup> Also, that Mulholland shot at an obviously occupied home sufficiently supports the trial court’s giving an alternative methods of assault definitional instruction.

<sup>8</sup> Instruction 14 provided: “It is not a defense to the charge of Assault in the First Degree that a victim of the assaultive acts was not the intended victim. A person is guilty of assault if he acts intentionally to assault one person but assaults another person.” CP at 115.

<sup>9</sup> Although we decline to fully review this issue, we note that assault can occur in the absence of injury.

No. 29650-1-II

defendant must show deficient performance resulting in prejudice. *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). We presume effective representation. *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995). And we do not consider legitimate tactical or trial strategy decisions. *State v. Hughes*, 118 Wn. App. 713, 730, 77 P.3d 681 (2003).

Mulholland first asserts that his counsel was ineffective because she did not present evidence on his behalf at trial. He contends that he gave her a “white plastic bag of spent cartridges [sic] and clips that [he] and [his] grandson had collected for two years.” SAG at 1. Nothing in the record supports Mulholland’s assertion and we do not review it. *McFarland*, 127 Wn.2d at 335.

Mulholland next asserts that he did not understand the arresting officer when advised of his *Miranda* rights because Mulholland did not have his hearing aid. He argues that his counsel should have presented a Veteran’s Administration letter noting that his hearing aids were in Denver when the police arrested him in Tacoma.

Here, the trial court held a CrR 3.5 hearing and determined that Mulholland voluntarily, intelligently, and knowingly signed a *Miranda* rights waiver and then spoke to the police. He does not challenge these findings. *State v. Rehn*, 117 Wn. App. 142, 153, 69 P.3d 379 (2003). Mulholland’s argument fails.

Mulholland also asserts that his attorney failed to talk to his witnesses until immediately before trial and that she did little to substantiate his defense.

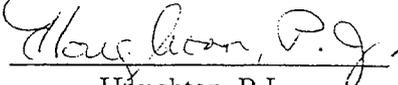
An attorney has a duty to investigate the case and interview witnesses. *State v. Burri*, 87 Wn.2d 175, 181, 550 P.2d 507 (1976). Mulholland’s claim fails because counsel interviewed the

No. 29650-1-II

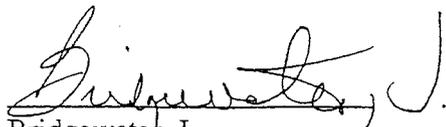
witnesses, albeit just before trial, and the decision whether to call witnesses was a trial tactic that we do not review on an ineffective assistance of counsel claim. *State v. Maurice*, 79 Wn. App. 544, 552, 903 P.2d 514 (1995).

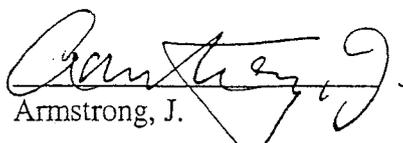
Affirmed.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

  
Houghton, P.J.

We concur:

  
Bridgewater, J.

  
Armstrong, J.





01-1-06114-5 17428685 MM 10-14-02

FILED  
IN COUNTY CLERK'S OFFICE  
PIERCE COUNTY, WASHINGTON  
A.M. OCT 11 2002 P.M.  
BOB SAN SOUCIE  
COUNTY CLERK  
BY: [Signature] DEPUTY

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON  
IN AND FOR THE COUNTY OF PIERCE

STATE OF WASHINGTON,  
  
Plaintiff,  
  
vs.  
  
DANIEL CHARLES MULHOLLAND,  
  
Defendant.

CAUSE NO. 01-1-06114-5  
  
STATE'S SENTENCING  
MEMORANDUM

I. ISSUES PRESENTED:

- A. Whether the assaults the defendant committed when he fired into the Tullar residence occupied by nine persons are separate and distinct criminal conduct?
- B. Whether the defendant's six convictions for assault in the first degree are required to be served consecutively?
- C. Whether the six firearm enhancements must be added to the base sentence for each count of assault and be served consecutively?

**ORIGINAL**

Office of Prosecuting Attorney  
930 Tacoma Avenue South, Room 946  
Tacoma, Washington 98402-2171  
Main Office: (253) 798-7400

1 **II. LAW AND ARGUMENT:**

2 **Separate and Distinct Criminal Conduct**

3  
4 The defendant was charged by amended information with one count of Drive-by shooting  
5 naming Christian Cowey, and/or Jesse Tullar, and/or Hannah Tullar as the victims and six counts  
6 of Assault in the first degree under RCW 9A.36.011 (1)(a) naming six different victims. Crimes  
7 which involve different victims constitute separate and distinct criminal conduct. State v.  
8 Godwin, 57 Wn. App. 760, 764, 790 P.2d 641 (1990), *review denied*, 115 Wn.2d 1006 (1990).

9  
10 The term "assault" is not defined in the criminal code, and thus Washington courts have  
11 turned to the common law for its definition. State v. Hupe, 50 Wn. App. 277, 282, 748 P.2d 263,  
12 *review denied*, 110 Wn.2d 1019 (1988). The court instructed the jury on two of the three  
13 definitions of assault recognized in Washington: (1) an attempt, with unlawful force, to inflict  
14 bodily injury upon another [attempted battery]; and (2) putting another in apprehension of harm  
15 whether or not the actor intends to inflict or is capable of inflicting that harm [common law  
16 assault].

17  
18 The court's jury instructions required the State to prove that, with intent to inflict great bodily  
19 injury, the defendant assaulted another with a firearm. A person acts with intent "when he acts  
20 with the objective or purpose to accomplish a result which constitutes a crime. RCW  
21 9A.08.010(1)(a). Evidence of a defendant's intent may be gathered from all of the circumstances  
22 of the case, including not only the manner and act of inflicting the wound, but also the nature of  
23 the prior relationship and any previous threats. State v. Ferreira, 69 Wn. App. 465, 468, 850 P.2d  
24 541 (1993), *quoting State v. Woo Won Choi*, 55 Wn. App. 895, 906, 781 P.2d 505 (1989),  
25 *review denied*, 114 Wn.2d 1002, 788 P.2d 1077 (1990); State v. Wilson, 125 Wn.2d 212, 217,  
26  
27

28 STATE'S SENTENCING MEMORANDUM -2

Office of Prosecuting Attorney  
930 Tacoma Avenue South, Room 946  
Tacoma, Washington 98402-2171  
Main Office: (253) 798-7400

1 883 P.2d 320 (1994). "Specific intent cannot be presumed, but it can be inferred as a logical  
2 probability from all of the facts and circumstances." State v. Salamanca, 69 Wn. App. 817, 826,  
3 851 P.2d 1242, review denied, 122 Wn.2d 1020, 863 P.2d 1353 (1993).  
4

5 The term "great bodily harm" is defined as "bodily injury which creates a probability of death  
6 or which causes significant serious permanent disfigurement, or which causes a significant  
7 permanent loss or impairment of the function of any bodily part or organ. RCW  
8 9A.04.110(4)(c).  
9

10 In State v. Wilson, 125 Wn.2d 212, 213, the defendant was charged with four counts of  
11 Assault in the first degree under RCW 9A.36.011 after discharging several bullets from a firearm  
12 into a tavern after being asked to leave for argumentative behavior. The bullets from the  
13 defendant's gun missed his intended victims, but did strike two unintended victims. Id. at 214.  
14 A jury convicted the defendant of all counts and appealed on the basis that an intent to inflict  
15 great bodily harm upon an intended victim does not transfer to an unintended victim. Id. at 216.  
16 The court of Appeals vacated the two convictions of assault against the unintended victims. The  
17 Supreme Court held under a literal interpretation of RCW 9A.36.011, that once mens rea is  
18 established, any unintended victim is assaulted if they fall within the terms and conditions of the  
19 statute, and therefore, reinstated the two convictions.  
20  
21

22 In the matter before this court, the defendant went to the Tullar residence at approximately  
23 2:00 p.m. and made specific threats to kill everyone in the house if his demands were not met.  
24 Hours later at approximately 5:10 p.m. the defendant returned to the Tullar residence and while  
25 armed with a firearm fired multiple rounds at the house, one of which penetrated through the  
26 exterior wall, travelled through a dresser, and lodged in a drawer face. The State presented  
27

28 STATE'S SENTENCING MEMORANDUM -3

Office of Prosecuting Attorney  
930 Tacoma Avenue South, Room 946  
Tacoma, Washington 98402-2171  
Main Office: (253) 798-7400

1 testimony from five of the occupants of the residence who expressed their fear as a result of the  
2 defendant's actions and how upon hearing the gunshots everyone in the living room, with the  
3 exception of eighteen month old Christian Cowey, who was in his high chair, immediately  
4 jumped down on the floor to avoid being shot. Jeannine Tullar also testified as to the details of  
5 her husband Carl's health and how she administered him first aid for his heart condition. The  
6 evidence certainly establishes that the defendant had the specific intent to inflict great bodily  
7 harm on some specific person when he fired several .45 caliber copper jacketed bullets into the  
8 front of the Tullar residence. Once this specific intent was established, the defendant's assault of  
9 different, perhaps unintended, victims rose to the level of assault in the first degree. The  
10 convictions on the seven counts each naming a different victim were based upon separate and  
11 distinct criminal conduct.

#### 12 Offender Score and Consecutive versus Concurrent Sentences

13 Under the Sentencing Reform Act (SRA), a defendant's offender score is calculated from his  
14 criminal history. See RCW 9.94A.030(12) (definition of criminal history) and RCW 9.94A.525  
15 (offender score).

16 The defendant's only prior convictions are for Criminal Trespass in the First Degree and  
17 Patronizing a Prostitute, both of which are Misdemeanors and do not constitute criminal history  
18 for purposes of calculating the defendant's offender score.

19 RCW 9.94A.589(1)(b) provides that the court *shall* sentence a defendant convicted of two or  
20 more serious violent offenses arising from 'separate and distinct' criminal conduct to consecutive  
21 sentences. The definition of 'serious violent offense' includes Assault in the first degree. RCW  
22 9.94A.030(37) Whenever a person is convicted of two or more serious violent offenses arising

23 STATE'S SENTENCING MEMORANDUM -4

1 from separate and distinct criminal conduct, the standard range for the offense with the highest  
2 seriousness level under RCW 9.94A.515 shall be determined using the offender's prior  
3 convictions and other current convictions that are not serious violent offenses in the offender  
4 score and the standard sentence range for other serious violent offenses shall be determined by  
5 using an offender score of zero. RCW 9.94A.589

6  
7 For Count I the State calculates the defendant's offender score to be 1 (one) with a  
8 corresponding base sentence range of 102-136 months before adding the firearm sentencing  
9 enhancement. A sentencing enhancement is added to the base sentence to reach a single  
10 presumptive sentence for a particular offense. In re Charles, 135 Wn.2d 239, 955 p.2d 798  
11 (1998). Five years (60 months) *shall* be added to the standard range for any felony defined under  
12 any law as a class A felony or with a statutory maximum sentence of at least 20 (twenty) years.  
13 Assault in the first degree is a class A felony. RCW 9A.36.011(2). If an offender is being  
14 sentenced for more than one offense, the firearm enhancement or enhancements must be added to  
15 the total period of confinement for all offenses. RCW 9.94A.510(3). Therefore, the presumptive  
16 standard range sentence for Count I is 162-196 months.

17  
18 For each of Counts II, III, IV, V, and VI the State calculates the defendant's offender score to  
19 be 0 (zero) with a corresponding base sentence range of 93-123 months, before adding the  
20 firearm sentencing enhancement. After adding the mandatory five year firearm sentencing  
21 enhancement, the presumptive standard range sentence for each of Counts II, III, IV, V, and VI is  
22 153-193 months.

23  
24 A person convicted of Assault in the first degree by use of force or means likely to result in  
25 death or who intended to kill the victim *shall* be sentenced to a term of total confinement not less  
26

27  
28 STATE'S SENTENCING MEMORANDUM -5

Office of Prosecuting Attorney  
930 Tacoma Avenue South, Room 946  
Tacoma, Washington 98402-2171  
Main Office: (253) 798-7400

1 than five (5) years. RCW 9.94A.540 (previously codified as 9.94A.120(4)). In State v. Flett, 98  
2 Wn. App. 799, 992 P.2d 1028 (2000) the defendant was found guilty of four counts of assault in  
3 the first degree while armed with a firearm from an incident wherein he shot into a car occupied  
4 by four persons. In applying former RCW 9.94A.120(4); the court held that four consecutive  
5 sentences means twenty (20) years requiring at least a 240 month base sentence. Id. at 807.  
6 Thus, in the present case, six consecutive sentences means 30 years (360 months) of the base  
7 sentence is not subject to a mitigated exceptional sentence.  
8

9  
10 Count VII which involved a different victim and arose from separate and distinct criminal  
11 conduct is *not* a "serious violent offense.", therefore, RCW 9.94A.589(1)(a) is applicable and  
12 the sentence range for that offense shall be determined by using all other current and prior  
13 convictions as if they were prior convictions for the purpose of determining the defendant's  
14 offender score. For Count VII the State calculates the defendant's offender score to be 6 (six)  
15 with a presumptive standard range sentence of 57-75 months to be served concurrent to all other  
16 counts.  
17

#### 18 Firearm Sentencing Enhancements to be Served Consecutively

19  
20 Notwithstanding any other provision of law, all firearm enhancements under this section are  
21 mandatory, *shall* be served in total confinement, and shall run consecutively to all other  
22 sentencing provisions, including other firearm or deadly weapon enhancements, for all offenses  
23 sentenced under this chapter. RCW 9.94A.510(3)(e). An enhancement "is a statutorily  
24 mandated increase to an offender's sentence range because of a specific factor in the commission  
25 of the offense." State v. Brown, 139 Wn.2d 20, 29, 983 P.2d 608 (1999), *citing*, In re Charles,  
26 135 Wn.2d at 253. Here, 60 month enhancements must be added to the base sentence for each of  
27

28 STATE'S SENTENCING MEMORANDUM -6

Office of Prosecuting Attorney  
930 Tacoma Avenue South, Room 946  
Tacoma, Washington 98402-2171  
Main Office: (253) 798-7400

1 the six counts of Assault in the first degree in order to reach the correct presumptive sentence.

2 The presumptive sentences are consecutive. Thus, 360 months of the consecutive presumptive  
3 sentences must be served representing the six sentence enhancements.  
4

5 **III. CONCLUSION:**

6 Based on the previous law and argument, the State respectfully requests that this court find  
7 that the presumptive standard range sentence is 927-1161 months. The State's sentencing  
8 recommendation within the standard range is: Count I = 162 months (102+60), Count II = 153  
9 months (93+60), Count III = 153 months (93+60), Count IV = 153 months (93+60), Count V =  
10 153 months (93+60), Count VI = 153 months (93+60), and Count VII = 57 months. Counts I, II,  
11 III, IV, V, and VI to run consecutive to each other, with each of the 60 months sentence  
12 enhancements to be served in total confinement. Total sentence of 927 months in the  
13 Department of Corrections. Additional conditions: \$110.00 costs, \$500.00 CVPA, no contact  
14 with victims and/or their residence, community custody for 24 to 48 months, or the period of  
15 earned release, whichever is longer.  
16  
17

18 DATED this 11<sup>th</sup> day of October, 2002.

19  
20  
21 Respectfully submitted,  
22 GERALD A. HORNE  
23 Pierce County  
24 Prosecuting Attorney

25   
26 FRED C. WIST  
27 Deputy Prosecuting Attorney  
28 WSB # 23057

STATE'S SENTENCING MEMORANDUM -7

Office of Prosecuting Attorney  
930 Tacoma Avenue South, Room 946  
Tacoma, Washington 98402-2171  
Main Office: (253) 798-7400





01-1-06114-5 17540115 MM 11-05-02

16  
VED

2002

GERALD A. HORNE  
PIERCE COUNTY PROSECUTING ATTORNEY

FILED  
IN COUNTY CLERK'S OFFICE  
PIERCE COUNTY, WASHINGTON

A.M. NOV 04 2002 P.M.

BOB SAN BOUGIE  
COUNTY CLERK DEPUTY

3

4

5

6

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

26

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON  
IN AND FOR THE COUNTY OF PIERCE

STATE OF WASHINGTON, )  
 )  
Plaintiff, )  
 )  
vs. )  
 )  
DANIEL C. MULHOLLAND )  
 )  
Defendant. )

No. 01-1-06114-5

**DEFENDANT'S SENTENCING  
MEMORANDUM**

To: The Honorable Judge Karen Strombom  
Fred Wist, Deputy Prosecuting Attorney

COMES NOW the defendant, DANIEL MULHOLLAND, by and through his attorney,  
Ann Stenberg, and submits the Defendant's Memorandum in support of his sentencing  
recommendation. This memorandum will address this issues of whether the defendant's six  
convictions for assault in the first degree are the same criminal conduct for the purpose of

**DEFENDANT'S SENTENCING  
MEMORANDUM**

Page 1

**ANN STENBERG  
PATRICK HANLEY, JR.**  
ATTORNEYS AT LAW  
707 PACIFIC AVENUE  
TACOMA, WA 98402  
(253) 779-8124  
FAX: (253) 779-8126

**ORIGINAL**

1 imposing concurrent sentences and whether the six firearm enhancements should be imposed  
2 consecutively or concurrently to one another.

3 ARGUMENT

4 I. SAME CRIMINAL CONDUCT TO DETERMINE CONCURRENT OR  
5 CONSECUTIVE SENTENCES

6 In the case at bar, the first issue is whether Mr. Mulholland's six convictions for first  
7 degree assault should be treated as part of the "same criminal conduct" and, therefore, counted as  
8 one crime for sentencing purposes pursuant to RCW 9.94A.400(1)(a). RCW 9.94A.400(1)(a)  
9 provides in part:  
10

11 [W]henever a person is to be sentenced for two or more current offenses, the  
12 sentence range for each current offenses shall be determined by using all other current and  
13 prior convictions as if they were prior convictions for the purpose of the offender score:  
14 PROVIDED, That if the court enters a finding that some or all of the current offenses  
15 encompass the same criminal conduct then those current offenses shall be counted as one  
16 crime. Sentences imposed under this subsection shall be served concurrently. Consecutive  
17 sentences may only be imposed under the exceptional sentence provisions.... "Same  
18 criminal conduct," as used in this subsection, means two or more crimes that require the  
19 same criminal intent, are committed at the same time and place, and involve the same  
20 victim.

21 Accordingly, under subsection (a)(1), the offender score for each current conviction is  
22 determined by using all other current convictions as if they were prior convictions. The process is  
23 repeated in turn for each current conviction. The resulting offender score is used to determine the  
24 sentence range applicable for each conviction. Under this subsection, a sentence is then imposed

25 **DEFENDANT'S SENTENCING**  
26 **MEMORANDUM**  
**Page 2**

**ANN STENBERG**  
**PATRICK HANLEY, JR.**  
ATTORNEYS AT LAW  
707 PACIFIC AVENUE  
TACOMA, WA 98402  
(253) 779-8124  
FAX: (253) 779-8126

1 for each current conviction, which are served concurrently unless an exceptional sentence is  
2 imposed.

3 RCW 9.94A.400(1)(b), on the other hand, creates a "serious violent offenses" exception  
4 to subsection (1)(a). Specifically, RCW 9.94A.400(1)(b) provides for mandatory consecutive  
5 sentences and an alternative form of calculating offender scores whenever a person is convicted of  
6 two or more serious violent offenses, as defined in RCW 9.94A.030, arising from separate and  
7 distinct criminal conduct.  
8

9 Thus, under subsection (1)(b), the sentences are served consecutively instead of  
10 concurrently as provided in subsection (1)(a). State v. Salamanca, 69 Wash.App. 817, 827-28,  
11 851 P.2d 1242 (1993).

12 The State asserts that Mr. Mulholland's six first-degree assault convictions should be  
13 treated as "separate and distinct criminal conduct" pursuant to RCW 9.94A.400(1)(b) because  
14 they involve two or more serious violent offenses, as defined in RCW 9.94A.030. The State  
15 appears to concede that the single count of drive-by shooting is not a serious violent offense and  
16 as such, can run concurrently to the other current convictions  
17

18 The trial court can impose consecutive sentences on these counts if it finds that the  
19 shooting incidents constituted "separate and distinct" criminal conduct. It is Mr. Mulholland's  
20 position that the crimes involved were not "separate and distinct criminal conduct" for purposes  
21 of RCW 9.94A.400(1)(b) and therefore it would be error to find that the first degree assault  
22 counts were not the same criminal conduct for purposes of imposing the consecutive sentences.  
23

24 **DEFENDANT'S SENTENCING**

25 **MEMORANDUM**

26 **Page 3**

**ANN STENBERG**  
**PATRICK HANLEY, JR.**  
ATTORNEYS AT LAW  
707 PACIFIC AVENUE  
TACOMA, WA 98402  
(253) 779-8124  
FAX: (253) 779-8126

1 Courts look to the factors articulated in 9.94A.400(1)(a) defining "same criminal  
 2 conduct" to determine whether crimes are "separate and distinct" under RCW 9.94A.400(1)(b).  
 3 State v. Tili, 139 Wash.2d 107, 122, 985 P.2d 365 (1999). A court will consider two or more  
 4 crimes the "same criminal conduct" if they: (1) require the same criminal intent, (2) are committed  
 5 at the same time and place, and (3) involve the same victim. An appellate court will reverse a  
 6 sentencing court's determination of "same criminal conduct" under RCW 9.94A.400(1)(A) only if  
 7 it finds a clear abuse of discretion or misapplication of the law. State v. Haddock, 141 Wash.2d  
 8 103, 110, 3 P.3d 733 (2000) (citing State v. Elliott, 114 Wash.2d 6, 17, 785 P.2d 440, *cert.*  
 9 *denied*, 498 U.S. 838, 111 S.Ct. 110, 112 L.Ed.2d 80 (1990)); State v. Maxfield, 125 Wash.2d  
 10 378, 402, 886 P.2d 123 (1994).

12 Mr. Mulholland's assault convictions constitute the same criminal conduct because the  
 13 crimes were committed at the same time and place and involved the same criminal intent. There  
 14 was no evidence produced at trial to suggest that these shootings took place other than to occur  
 15 concurrently, almost simultaneously and extremely close in time. Even if there was a scintilla of  
 16 time between shots being fired off, the Supreme Court has specifically rejected a requirement that  
 17 the offenses occur simultaneously in order to be the same criminal conduct. State v. Porter, 133  
 18 Wash.2d 177, 183, 185-186, 942 P.2d 974 (1997).. Here, the court must find "continuing,  
 19 uninterrupted sequence of conduct," as in Porter, at 183. Clearly, the shooting incidents took  
 20 place within a sufficiently proximate time to meet this part of the same criminal conduct test.  
 21

22  
 23 **DEFENDANT'S SENTENCING**  
 24 **MEMORANDUM**  
 25 **Page 4**

26  
 ANN STENBERG  
 PATRICK HANLEY, JR.  
 ATTORNEYS AT LAW  
 707 PACIFIC AVENUE  
 TACOMA, WA 98402  
 (253) 779-8124  
 FAX: (253) 779-8126

1 The Supreme Court has held that in construing the "same criminal intent" prong,  
2 the standard is the extent to which the criminal intent, objectively viewed, changed from one  
3 crime to the next. State v. Dunaway, 109 Wash.2d 207, 215, 743 P.2d 1237 (1987)). In State v.  
4 Price, 103 Wash.App. 845, 14 P.3d 841 (Div. 2, 2000), *review denied*, 143 Wash.2d 1014, 22  
5 P.3d 803 (2001), the Court spoke to interpretation of this prong:

7 First, we must objectively view each underlying statute and determine whether the  
8 required intents are the same or different for each count. If they are the same, we next  
9 objectively view the facts usable at sentencing to determine whether a defendant's intent  
10 was the same or different with respect to each count. . When dealing with sequentially  
11 committed crimes, this inquiry can be resolved in part by determining whether one crime  
12 furthered the other. Thus, even crimes with identical mental elements will not be  
13 considered the "same criminal conduct" if they were committed for different purposes.  
14 Haddock, 141 Wash.2d at 113, 3 P.3d 733.

12 There is no argument by the State which advances a finding that Mr. Mulholland  
13 formed different criminal intents in the short time between the rounds of shootings. Instead, the  
14 evidence suggests that the shootings occurred almost simultaneously, and no evidence suggests  
15 the defendant committed the additional shootings for different purposes or to further the  
16 commission of the first shooting. It is highly likely that the shooter did not even know who, if  
17 anybody, was in the home at the time of the shootings.

19 Therefore, the question here is, as is was in Price, whether the defendant's actions were  
20 merely sequential, or part of a continuous, uninterrupted sequence of conduct. The extremely  
21 close time frame in which the shootings occurred in this case render it unlikely that the defendant  
22 formed an independent criminal intent between each separate shot.

23 **DEFENDANT'S SENTENCING**  
24 **MEMORANDUM**  
25 **Page 5**

26 **ANN STENBERG**  
**PATRICK HANLEY, JR.**  
ATTORNEYS AT LAW  
707 PACIFIC AVENUE  
TACOMA, WA 98402  
(253) 779-8124  
FAX: (253) 779-8126

1 This question was recently explored in Division III which upheld the imposition of  
 2 consecutive sentences for multiple assaults of the same victims because it reasoned that the  
 3 defendant had time to form new criminal intent. In re Personal Restraint Petition of Rangel, 99  
 4 Wash.App. 596, 600, 996 P.2d 620 (2000). The defendant, riding as a passenger, fired at the  
 5 victims' vehicle, which crashed. Then, the defendant's vehicle turned around, approached again,  
 6 and the defendant fired a second time. Rangel, 99 Wash.App. at 600, 996 P.2d 620. The Rangel  
 7 court held that the defendant was able to form a new criminal intent, because his acts were  
 8 sequential, not simultaneous or continuous. Rangel, 99 Wash.App. at 600, 996 P.2d 620. Here,  
 9 Mr. Mulholland's actions were almost simultaneous and did not afford him sufficient time to form  
 10 two different intents. The multiple counts of assault in the first degree should be considered the  
 11 same criminal conduct. The shootings were close in time, none of them done with a separate or  
 12 different intent or method, and the scheme of each shot was substantially similar to the first  
 13 shooting incident. Hence, Mr. Mulholland standard range should be determined by counting each  
 14 conviction as a prior conviction and the sentences should be imposed concurrently under the  
 15 "same criminal conduct" standard provided by RCW 9.94A.400(1)(a).  
 16

## 17 II. FIREARM ENHANCEMENTS TO RUN CONSECUTIVE OR CONCURRENT

18 According to State v. Price, 103 Wash.App. 845, 14 P.3d 841 (2000), *review*  
 19 *denied*, 143 Wash.2d 1014, 22 P.3d 803 (2001), the firearm enhancements shall run consecutively  
 20 to the underlying offense, but only run consecutively to one another if the base sentence is running  
 21 consecutively. First, the State apparently agrees the single count of drive-by shooting, since it is  
 22

23 **DEFENDANT'S SENTENCING**  
 24 **MEMORANDUM**

25 **Page 6**

26 **ANN STENBERG**  
**PATRICK HANLEY, JR.**  
 ATTORNEYS AT LAW  
 707 PACIFIC AVENUE  
 TACOMA, WA 98402  
 (253) 779-8124  
 FAX: (253) 779-8126

1 not a serious violent offense, should run concurrent with the assault counts and hence the firearm  
2 enhancement should run concurrently with the assault firearm enhancements. This court then  
3 must decide first whether the six counts of assault in the first degree are the same criminal  
4 conduct or separate and distinct conduct.

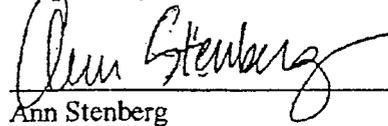
5 In other words, whether the firearm enhancements run consecutively or concurrently with  
6 each other depend on whether the total sentences run consecutively or concurrently according to  
7 the rules of the sentencing guidelines of RCW 9.94A.400. Price at 845.  
8

9 CONCLUSION

10 The defendant respectfully urges the court to find that the assault counts constitute the  
11 same criminal conduct for purposes of running the base sentences concurrently. Mr. Mulholland's  
12 sentencing range should be 240-318 months. The firearm enhancements should be imposed  
13 consecutively to the underlying base sentence but concurrent to each other for a total of 60  
14 months. This sentence would more accurately reflect a legitimate punishment consist with the  
15 criminal behavior displayed and the defendant's lack of scoreable criminal history.  
16

17 DATED this 4th day of November, 2002.

18 Respectfully submitted,

19   
20 \_\_\_\_\_

21 Ann Stenberg  
22 WSBA No. 22596  
23 Attorney for the Defendant

24 DEFENDANT'S SENTENCING  
25 MEMORANDUM

26 Page 7

FILED  
IN COUNTY CLERK'S OFFICE  
PIERCE COUNTY, WASHINGTON

A.M. NOV 04 2002 P.M.

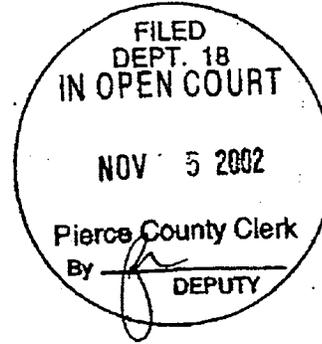
BOB SAN BONGIE  
COUNTY CLERK DEPUTY

ANN STENBERG  
PATRICK HANLEY, JR.  
ATTORNEYS AT LAW  
707 PACIFIC AVENUE  
TACOMA, WA 98402  
(253) 779-8124  
FAX: (253) 779-8126





01-1-06114-5 17549408 SRSP 11-06-02



1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON  
IN AND FOR THE COUNTY OF PIERCE

STATE OF WASHINGTON,

Plaintiff,

vs.

DANIEL CHARLES MULHOLLAND,

Defendant.

CAUSE NO. 01-1-06114-5

STATE'S RESPONSE TO DEFENSE  
SENTENCING MEMORANDUM

**I. Separate and Distinct Criminal Conduct**

Courts look to the factors articulated in 9.94A.589(1)(a) defining "same criminal conduct" to determine whether crimes are "separate and distinct" under RCW 9.94A.589(1)(b). State v. Tili, 139 Wn.2d 107, 122, 985 P.2d 365 (1999). If two crimes do not constitute the "same criminal conduct", they are necessarily separate and distinct." State v. Brown, 100 Wn. App. 104, 113, 995 P.2d 1278 (2000). A court will consider two or more crimes the "same criminal conduct" if they: (1) require the same criminal intent, (2) are committed at the same time and place, and (3)

STATE'S RESPONSE MEMORANDUM -1

**ORIGINAL**

Office of Prosecuting Attorney  
930 Tacoma Avenue South, Room 946  
Tacoma, Washington 98402-2171  
Main Office: (253) 798-7400

1 involve the same victim. RCW 9.94A.589 (1)(a). The absence of any one of the prongs prevents  
 2 a finding of "same criminal conduct." State v. Vike, 125 Wn.2d 407, 410, 885 P.2d 824 (1994).

3  
 4 The State concedes that each count of Assault in the First Degree (1) required the same  
 5 criminal intent and (2) was committed at the same time and place. However, the defense fails to  
 6 acknowledge or address that each of the crimes charged involved a separate named victim. The  
 7 Washington Supreme Court has repeatedly held that all three of these prongs must be met for a  
 8 finding of "same criminal conduct."  
 9

## 10 **II. Consecutive versus Concurrent Firearm Enhancements**

11 The defense reliance on State v. Price, 103 Wn. App. 845, 14 P.3d 841 (2000), *review denied*,  
 12 143 Wn.2d 1014, 22 P.3d 803 (2001), is misplaced. In Price the defendant was convicted of  
 13 multiple offenses, including four counts of attempted first degree murder based on participation  
 14 in two different shooting incidents that occurred in 1997. In evaluating whether firearm  
 15 enhancements are to always run consecutively, the court applied the former version of RCW  
 16 9.94A.310(3)(e) under the doctrine of ex post facto. Former RCW 9.94A.310(3)(e) provided:  
 17 Notwithstanding any other provision of law, any and all firearm enhancements under this section  
 18 are mandatory, shall be served in total confinement, and shall not run concurrently with any other  
 19 sentencing provision.<sup>1</sup> The Price court discussed In re Charles, 135 Wn.2d 239, 955 P.2d 798  
 20 (1998) where the court held that when base sentences are concurrent, weapon enhancements must  
 21 also be concurrent.  
 22  
 23  
 24  
 25

---

26 <sup>1</sup>Former RCW 9.94A.310 (3)(e), was amended by 1998 Laws of Washington, chapter  
 27 235, section 1.

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

In 1998, the Legislature expressly overruled Charles by amending the statute to make it clear that weapon enhancements always run consecutively to the base sentences and consecutively to each other. RCW 9.94A.510(3)(e) provides:

Notwithstanding any other provision of law, all firearm enhancements under this section are mandatory, shall be served in total confinement, and shall run consecutively to all other sentencing provisions, including other firearm or deadly weapon enhancements, for all offenses sentenced under this chapter.

**III. CONCLUSION:**

Based on the State's initial sentencing memorandum and the above law and argument, the State respectfully requests the court find that (1) each count of assault in the first degree constitutes "separate and distinct conduct", (2) each of the six firearm enhancements shall be imposed consecutively to the base sentence and consecutively to each other, and (3) the presumptive standard range sentence is 927-1,161 months.

DATED this 5<sup>th</sup> day of November, 2002.

Respectfully submitted,  
GERALD A. HORNE  
Pierce County  
Prosecuting Attorney

  
FRED C. WIST  
Deputy Prosecuting Attorney  
WSB # 23057



1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON  
IN AND FOR THE COUNTY OF PIERCE

STATE OF WASHINGTON,	)	<b>COPY</b>
	)	
Plaintiff,	)	
	)	
vs.	)	
	)	COA No. 29650-1-II
	)	
	)	No. 01-1-06114-5
DANIEL CHARLES MULHOLLAND,	)	
	)	VOLUME VII
	)	
Defendant.	)	

VERBATIM TRANSCRIPT OF PROCEEDINGS

BE IT REMEMBERED that on the 8th day of  
November, 2002, the following proceedings were  
held before the Honorable KAREN L. STROMBOM, Judge  
of the Superior Court of the State of  
Washington, in and for the County of Pierce,  
sitting in Department 18.

Laura L. Venegas, CCR  
Official Court Reporter  
(253) 798-6652

1 APPEARANCES:

2

3

The Plaintiff was represented by its  
attorney, FRED C. WIST;

4

5

The Defendant was represented by  
his attorney, ANN FARRELL STENBERG;

6

7

WHEREUPON, the following proceedings were  
had, to wit:

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

P-R-O-C-E-E-D-I-N-G-S

November 8, 2002

\* \* \* \* \*

MR. WIST: Good afternoon, Your Honor.

THE COURT: Good afternoon.

MR. WIST: For the record, Fred Wist on behalf of the State in the matter of Daniel Charles Mulholland, Cause No. 01-1-06114-5. The defendant is present in court this afternoon in custody represented by Ms. Stenberg. We are here before the court for purposes of sentencing after a jury returned a verdict of guilty on seven counts on September 25th. Six counts of assault in the first degree with a firearm sentencing enhancement and one count of drive-by shooting.

I know the court has received both the State's initial sentencing memorandum, Ms. Stenberg's response, and I actually filed a secondary response.

THE COURT: I've read them all.

MR. WIST: The State is prepared to proceed.

THE COURT: Ms. Stenberg, are you prepared as well?

MS. STENBERG: Yes, Your Honor. Good afternoon.

THE COURT: I did just this afternoon read a

1 letter from Lorraine Mulholland, Mr. Mulholland's  
2 mother. I received that yesterday. We realized it was  
3 related to this case and so I didn't open it and I  
4 believe, Ms. Stenberg, you were the one to open the  
5 envelope?

6 MS. STENBERG: That's right, Your Honor.

7 THE COURT: I think, Mr. Wist, you had an  
8 opportunity to read it as well?

9 MR. WIST: I did, Your Honor. Thank you.

10 THE COURT: I guess we first have this legal  
11 issue that needs to be addressed, and Mr. Wist, I'll  
12 hear from you.

13 MR. WIST: Your Honor, I don't want to belabor  
14 the oral record. Both my memorandums I think establish  
15 the State's position. I will indicate to the court I  
16 believe I made a clerical mistake in what would be page  
17 6 of my initial memorandum with regards to Count 7.

18 I neglected to recall from the sentencing manual  
19 that any serious violent offense has a multiplier of  
20 two as opposed to one. I counted each of those  
21 concurrent convictions for assault as one point. They  
22 should be two each. Therefore, the offender score by  
23 the State's calculation for Count 7 would be an  
24 offender score of 12, which has a standard range  
25 sentence of 87 to 116 months.

1           That surely no way affects what we were ultimately  
2 asking the court to do, which was to impose the low end  
3 within the standard range, which is 927 months was the  
4 request of the State and the high end still would  
5 remain at 1161 months. I'll rest on the pleadings.

6           I think this does -- on the initial sentencing  
7 memorandum there's one other change. 24 to 48 months  
8 would apply to each of the assault in the first degree  
9 convictions for community custody purposes. Drive-by  
10 shooting being a Class B violent offense, the community  
11 custody range on that would be 18 to 36 months.

12           THE COURT: Ms. Stenberg?

13           MS. STENBERG: Your Honor, we also will not  
14 pepper the oral record with the same arguments  
15 presented in the brief. I think the court does have  
16 the discretion to find the same criminal conduct for  
17 the purposes of concurrent sentencing, treating each  
18 assault as a point on the offender score, rather than  
19 the consecutive prospect the prosecutor urges.

20           In either event, Your Honor, the sentences are  
21 horrendously long, almost unfathomably long, but I  
22 think the court does have discretion at this time to  
23 find same or similar criminal conduct and run the  
24 sentences concurrently rather than consecutively.

25           THE COURT: Just with regard to the legal

1 issue that was raised, it seems to this court that the  
2 legal requirement to run concurrent isn't met in this  
3 instance because it was not the same victim, and I  
4 think that is the distinguishing factor here, and I  
5 don't believe the court has discretion in that regard.

6 I believe that both the State's memorandum and  
7 defense memorandum address that but, Ms. Stenberg, you  
8 didn't really address the issue of it not being the  
9 same victim, and I think that's probably a difficult  
10 issue to address because it wasn't the same victim  
11 here. Everyone had a different name. Unfortunately,  
12 there were that many people in the living room.

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

18 Mr. Mulholland, is there anything you would like  
19 to say this afternoon?

20 MR. MULHOLLAND: I believe the evidence is  
21 very circumstantial and I reemphasize a nonguilty plea.  
22 I think there was a mistake or two, three made. I  
23 don't know. I'm planning my recourse.

24 THE COURT: I'm sorry?

25 MR. MULHOLLAND: I am planning recourse.

1 MS. STENBERG: Your Honor, I do believe  
2 there's a person or two in the courtroom who wish to  
3 address the court. Would the court like to hear from  
4 them at this time?

5 THE COURT: Who?

6 MS. STENBERG: I believe Janet Mulholland.  
7 Did you want to speak to the judge?

8 MRS. MUHOLLAND: Hello, Your Honor.

9 THE COURT: Good afternoon.

10 MRS. MUHOLLAND: Hi. When I was on the  
11 witness stand I did tell the truth about what happened  
12 that night, about what time my husband left, what he  
13 was doing.

14 When I -- when I was contacted by the police that  
15 night that he was arrested, I told the policeman  
16 exactly what I said in court. He asked me, "When was  
17 the last time you saw your husband?" And I told him  
18 the same thing I said in court. I did not lie. I was  
19 telling the truth.

20 My husband is a kind man. He's always thinking  
21 about other people more than himself. Even sitting in  
22 jail he's more concerned about me than he is of  
23 himself. He did not do this. I swear he did not do  
24 this, and I just wish that you would be lenient on his  
25 sentencing.

1           He's 55 years old. I don't want him to spend the  
2 rest of his life in prison for something he did not do.  
3 There are many, many things about this case that were  
4 not brought out that I don't understand why they  
5 weren't, and I don't feel that it was in his interests  
6 that they were not brought out.

7           No. 1, I don't understand why they didn't check  
8 his hands for powder. We wouldn't be standing here  
9 today if they would have. I feel his rights as a human  
10 being were taken away at that time. I feel it was  
11 negligent that he wasn't given the right at that time  
12 to be proven innocent right there on the spot.

13           He is a good man. I've been married to him for  
14 almost 35 years. Next month it will be 35 years. I  
15 know this man inside and out, and I know he did not  
16 commit this crime. The time involved, where he was,  
17 just the circumstances around it, he did not do it.

18           THE COURT: Thank you.

19           MS. STENBERG: I believe Mr. Dave Holden would  
20 like to address the court as well.

21           MR. HOLDEN: I just wanted to talk on Dan's  
22 behalf for a moment because I still have a very  
23 difficult time believing he could have done what he  
24 did, or what he was accused of doing.

25           In all the time I've known him and in the

1 confidence of our counseling sessions I have never  
2 heard him once say he had any malice towards these  
3 people or intent on harming these people.

4 I know for certain that when he was called to put  
5 his life at forfeit for this country, he did that. He  
6 served honorably. He has suffered for the last 30 some  
7 years as a result of that service, and I hope you will  
8 take that into some consideration.

9 THE COURT: Thank you for coming.

10 MR. WIST: Your Honor, I should have indicated  
11 prior to allocution that Jeannine Tullar was also  
12 present, and I asked her this afternoon if she wished  
13 to address the court.

14 THE COURT: All right.

15 MS. TULLAR: My name is Jeannine Cecelia  
16 Tullar, and I'm one of the victims of the shooting. I  
17 wasn't going to come and address you today because I  
18 thought I'd just let the court go with what they had.  
19 Two things happened to me. One of them was I realized  
20 what I would feel like if this were my family. The  
21 other was my little girl came to me and said, "Mom, you  
22 just got to go. Look what it did to daddy." So I'm  
23 here to tell you how I feel both ways.

24 My husband served in the military. Because of  
25 serving in the military and things that happened at

1           that time in the Korean War he suffers a very severe  
2           case of post-traumatic stress syndrome.

3           Up until the shooting that was able to be  
4           controlled through medications. The longer it is -- my  
5           family suffers on a daily basis. He blacks out for  
6           anywhere from three to seven hours a day now. Can't  
7           remember what he does. Can't remember anything about  
8           it, and the things that he does are totally, totally  
9           out of character for him, and I've been married to him  
10          almost 50 years. So I know what his character is. So  
11          that's on the bad side. That's what -- one of the  
12          things that it's done to my family.

13          We have a lot of family members that live in the  
14          same house and this unfortunately is affecting all of  
15          us very, very strongly. There's been other things, but  
16          that's the major one. That's the biggest thing is what  
17          it's done to my husband. He's 70, by the way.

18          On the other side of that, because my husband  
19          suffers from post-traumatic stress, I also know what  
20          Mr. Mulholland suffers through, and I also feel a lot  
21          of compassion and pity for his family, and I know when  
22          you suffer from that, you can do things that afterwards  
23          you don't even remember doing.

24          I've seen my husband do things that he would  
25          never, never, never do and say things that he would

1 never, never say, and not be able to remember it as a  
2 result of this.

3 At the same time, in my heart I know that that's  
4 possible, that that's what Mr. Mulholland went through.  
5 Maybe he did this. Maybe it's out of character because  
6 I've heard he suffers from post-traumatic stress.  
7 Maybe -- maybe that's what happened.

8 So I guess I'm here because I just felt like I  
9 needed to come and bring my point of balance to it.  
10 That's all.

11 THE COURT: Thank you.

12 I knew there was going to be an issue with regard  
13 to the number of counts and the fact that there's a  
14 weapons enhancement because of the length of the  
15 sentence. My responsibility as a judge is to make sure  
16 that I follow the law in how I read it and how I  
17 understand it and how I apply it.

18 I know that this incident has impacted the victims  
19 tremendously. Mrs. Tullar has just told me more about  
20 how that has impacted them.

21 Mr. Mulholland, I know that this incident has  
22 impacted your family tremendously and it's impacted  
23 you, and I can't ignore what you gave to this country.  
24 It's a sacrifice to serve in the military and we --  
25 that's important and we recognize that. But when I'm

1           looking at the counts and what the jury decided, I  
2           don't have discretion to do anything but follow the  
3           law. I don't have the discretion to have the sentences  
4           in my view run at the same time.

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

11                  MR. WIST: Your Honor, I have calculated  
12          credit for time served as 47 days.

13                  THE COURT: All right.

14                  MR. WIST: If you want to take a recess, Your  
15          Honor, I'm happy to complete the paperwork.

16                  THE COURT: I will be at a short recess.

17                                  (Proceedings adjourned.)

18

19

20

21

22

23

24

25

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON  
IN AND FOR THE COUNTY OF PIERCE

---

STATE OF WASHINGTON, )  
 )  
Plaintiff, ) COA No. 29650-1-II  
 )  
vs. ) No. 01-1-06114-5  
 )  
DANIEL CHARLES MULHOLLAND, ) VOLUME VII  
 )  
Defendant. )

---

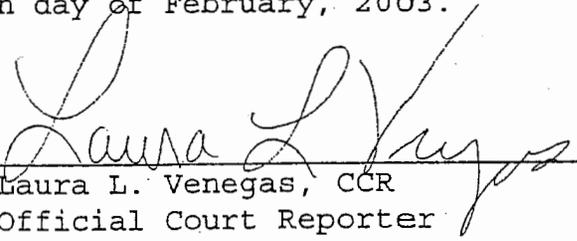
REPORTER'S CERTIFICATE

---

STATE OF WASHINGTON )  
 ) ss  
COUNTY OF PIERCE )

I, Laura L. Venegas, Official Reporter in the  
State of Washington, County of Pierce, do hereby  
certify that the foregoing transcript is full, true  
and accurate transcript of the proceedings taken in  
the matter of the above-entitled cause.

Dated this 10th day of February, 2003.

  
\_\_\_\_\_  
Laura L. Venegas, CCR  
Official Court Reporter  
CCR #299-06



Whit  
**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON**

**DIVISION II**

COPY RECEIVED

JUL 25 2006

GERALD A. HORNE  
PIERCE COUNTY PROSECUTING ATTORNEY  
APPELLATE DIVISION

STATE OF WASHINGTON  
BY DEPUTY

06 JUL 24 AM 10:28

FILED  
COURT OF APPEALS  
DIVISION II

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

No. 34484-0-II

ORDER GRANTING PETITION

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.

2006 Decision  
Pindle  
10 Costs

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

---

<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

---

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

---

<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.

Pengon, J.  
Hart, J.  
Douglas, P.J.

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

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