Supreme Court No. _____
Court of Appeals No. 39429-8-III

IN THE WASHINGTON SUPREME COURT

STATE OF WASHINGTON,

Respondent,

v.

SEAN KYLE MARTIN,

Petitioner.

PETITION FOR REVIEW

ESTER GARCIA
Attorney for Petitioner

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 610
Seattle, Washington 98101
(206) 587-2711
wapofficemail@washapp.org

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Constitutional Provisions

United States Supreme Court

Washington Supreme Court

Washington Court of Appeals

Statutes

Rules

A. IDENTITY OF PETITIONER AND DECISION BELOW

Sean Kyle Martin, the petitioner, asks this Court to grant review of the Court of Appeals' decision terminating review, entered on December 5, 2024. The Court of Appeals denied Mr. Martin's motion to reconsider on January 7, 2025. Copies are attached.

B. ISSUES FOR WHICH REVIEW SHOULD BE GRANTED

1. A trial court retains discretion to impose an exceptional sentence below the standard range even when the parties ask for a standard range sentence. But contrary to settled law, the Court of Appeals ruled the trial court lacked any discretion because Mr. Martin pled guilty and the parties agreed to recommend a low end, standard range sentence. Should this Court grant review to address the trial court's sentencing discretion due to the Court of Appeals misunderstanding of the law and as a matter of substantial public interest?

2. A trial court must impose a firearms enhancement and run the term consecutive to any other sentence. Once this time is added to an individual's sentence, it becomes a part of their standard range sentence. Recent Supreme Court cases have reached conflicting results regarding the trial court's ability to make discretionary decisions on sentences involving firearm enhancements. Additionally, the Eighth Amendment and article I, section 14 of the Washington State constitution categorically bar sentencing practices that prohibit modification through an exceptional sentence. The Court of Appeals declined to reach this issue. Should this Court grant review to address the trial court's discretion to modify a standard range sentence that includes a firearm enhancement due to the conflicting case law and as a matter of substantial public interest?

C. STATEMENT OF THE CASE

At 22 years of age, Mr. Martin pled guilty to four counts of first-degree robbery with three firearms enhancements. CP 46. He confessed to police he had committed the crime. RP 12.

Mr. Martin had severe depression and was unable to provide for his young family. RP 38. And so, after these four restaurants closed for the day, he used a gun to steal money. CP 19. While nobody was physically hurt and there was no indication he would actually hurt anyone, he did use a gun to threaten the employees. CP 21-26, RP 34.

At sentencing, the prosecutor painted the case as far more egregious than the convictions showed. It claimed the four robberies Mr. Martin admitted committing actually involved "using a firearm in 17 different felonies, which [would] result[ ] in a minimum of 85 years just in weapons enhancements alone and then the base sentence as well for whatever was charged." RP 12. This referenced the fact that during the four robberies, 17 employees were present. CP 62. The prosecutor informed the court:

> . . . there are firearm enhancements in three of the counts. Each of those firearm enhancements are 60 months, and they all run consecutive to each other and the base sentence in each of the counts.

> Counts I through IV are all 77 to 102 months, standard range. This is a joint recommendation for a low end of 77 months with the firearms enhancements for a total of 257 months.

RP 13.

Mr. Martin's attorney explained the plea rested on an agreed sentencing recommendation. RP 36. He told the court that "despite being a horrendously long sentence, [the plea] still is the best option available." RP 34. He explained that Mr. Martin had been severely depressed when he committed the crimes and, due to his young age, had made some poor decisions. RP 32-36. He told the court Mr. Martin was "risking looking at potentially 65 to 85 years of prison." RP 33-34. And, stating that "the Court has very limited discretion," asked the court to follow the recommendation. RP 36.

Mr. Martin admitted he "made some horrible mistakes" but hoped he could get a lower sentence. RP 37-38. He told the court:

> I feel like I'm not just battling depression; I feel like I'm battling something worse than that. I was

> hoping I could get maybe under ten years. I deserve to go to prison, yeah. I don't think for 20 years though. I'm going to try really hard to not let it destroy me.

Id.

The court sentenced Mr. Martin to 257 months, which includes a "60-month enhancement on each of those [three] incidents or these counts." RP 40.

On appeal, Mr. Martin argued that the trial court erred in failing to exercise its discretion to consider Mr. Martin's request for an exceptional sentence. The Court of Appeals held that by entering a guilty plea, Mr. Martin waived his right to appeal from a standard range sentence. Opinion at 3. Mr. Martin asked for reconsideration but the court denied Mr. Martin's motion to reconsider without comment.

D. ARGUMENT WHY REVIEW SHOULD BE GRANTED

1. Review should be granted to decide whether a person who enters a guilty plea can ask for an exceptional sentence and whether a sentencing court errs by refusing to consider an exceptional sentence

a. Mr. Martin's plea deal did not preclude the court from considering his request for an exceptional sentence.

The Court of Appeals concluded that because Mr. Martin entered a plea and received a standard range, he waived the right to appeal his sentence. Opinion at 3. This is incorrect.

Mr. Martin did not waive his right to an appeal simply by entering a guilty plea. Instead, his guilty plea statement expressly listed the rights that he waived. CP 46-55. The plea statement explicitly provided:

> The judge *does not* have to follow anyone's recommendation as to sentence. The judge must impose a sentence within the standard range *unless* the judge finds substantial and compelling reasons not to do so.

CP 49 (emphasis added).

Therefore, while Mr. Martin waived several important constitutional and statutory rights, he did not waive the right to

receive a sentence outside of the standard range if "the judge finds substantial and compelling reasons" to do so. CP 46-55.

Mr. Martin asked the court to give him a sentence outside of the standard range. RP 38. There was no objection by the prosecution after this request was made. The prosecution did not state this request was contrary to the plea deal. Instead, the court simply declined to address, much less consider, this request. RP 40.

b. The trial court erred by failing to consider an exceptional sentence.

Every defendant is entitled to ask the sentencing court to consider an exceptional sentence and to have their request be "actually considered." *State v. Grayson*, 154 Wn.2d 333, 342, 111P.3d 1183 (2005). "While no defendant is entitled to challenge a sentence within the standard range, this rule does not preclude a defendant from challenging on appeal the underlying legal determinations by which the sentencing court reaches its decision." *State v. McFarland*, 180 Wn.2d 47, 56,

399 P.3d 1105 (2017) (referencing *State v. Garcia-Martinez*, 88 Wn. App. 332, 330, 944 P.2d 1107 (1997)). Therefore, a reviewing court has authority "to address arguments belatedly raised when necessary to produce a just resolution." *Id.*

A sentencing court errs when "it refuses categorically to impose an exceptional sentence below the standard range under any circumstances" or when it operates under the "mistaken belief that it did not have the discretion to impose a mitigated exceptional sentence for which [a defendant] may have been eligible." *McFarland*, 189 Wn.2d at 56.

The legislature has long recognized that there are many circumstances in which a person deserves lesser punishment than what is provided in the SRA's standard range sentencing scheme. Therefore, RCW 9.94A.535(1) provides sentencing courts with a statutory list of mitigating circumstances that permit an exceptional sentence. This list is "illustrative only," and does not provide "exclusive reasons" for the court to impose an exceptional sentence. *Id.*

An exceptional sentence is warranted in circumstances where the multiple offense policy of RCW 9.94A.589 makes the presumptive sentence "clearly excessive in light of the purpose" of the SRA. RCW 9.94A.535(1)(g). Another statutory basis for an exceptional mitigated sentence is if the person committed the crime under "compulsion insufficient to constitute a complete defense but which significantly affected his or her conduct." RCW 9.94A.535(1)(c). A court may also impose an exceptional sentence if a person's diminished capacity reduced their ability to appreciate the wrongfulness of the conduct or to conform his or her conduct to the requirements of the law. RCW 9.94A.535(1)(e). This includes 22-year-olds like Mr. Martin, whose brains have not fully matured. *State v. O'Dell*, 183 Wn.2d 680, 691-92, 358 P.3d 359 (2015) ("psychological and neurological studies showing that the 'parts of the brain involved in behavior control' continue to develop well into a person's 20s.").

Here, all three of these mitigation circumstances apply to Mr. Martin and yet, the trial court had the mistaken belief that it lacked discretion and refused to consider the evidence supporting an exceptional sentence in Mr. Martin's case.

Like *McFarland*, Mr. Martin's defense attorney did not expressly request an exceptional downward departure from the sentencing range. *McFarland*, 189 Wn.2d at 56-57. Instead, Mr. Martin's counsel highlighted the injustice of this sentence and expressed "concern for the harshness of the punishment." *McFarland*, 189 Wn.2d at 56; RP 34. Mr. Martin's attorney believed Mr. Martin faced "potentially 65 to 85 years of prison. . . [but] [t]hat this [requested sentence], despite being a horrendously long sentence, still is the best option available." RP 34. Emphasizing how drastically long the recommended sentence was in proportion to Mr. Martin's young age, his attorney highlighted, "That's a very large percentage of his adult life, almost as old as he is at this point, Your Honor." RP 36.

And, like *McFarland*, Mr. Martin's counsel "agreed with the State that the sentencing court was required to impose consecutive sentences on the firearm-related charges." *McFarland*, 189 Wn.2d at 57-58; RP 13. Mr. Martin's counsel additionally informed the court he thought "the court has very limited discretion." RP 36.

In *McFarland,* the result was that the sentencing court was "never advised of its discretion to impose concurrent sentences as a mitigated exceptional sentence." *Id.* The Supreme Court found the sentencing judge failed to exercise meaningful discretion by "categorically" refusing to consider a sentencing alternative request. *Id.* at 58 (citing *Grayson*, 154 Wn.2d at 342).

The same is true in Mr. Martin's case. The court was never advised it had discretion to depart downward. It was presented with evidence of Mr. Martin's mental health and youth, both of which mitigated his culpability. RP 34-35. It was provided with evidence that this sentences was extremely long

given the circumstances. RP 34-36. But like in *McFarland,* defense counsel stated the standard range sentence was the "best option available." RP 34, 36. Mr. Martin also highlighted his untreated mental health stating, "I'm not just battling depression; I feel like I'm battling something worse than that." RP 38. He asked the court for a shorter sentence:

> I deserve to go to prison, yeah. I don't think for 20 years though. I'm going to try really hard to not let it destroy me.

Id. All of these factors relate directly to RCW 9.94A.535(1)(c), (e), (g) and existing case law that enables the court to exercise its discretion. But, the court did not consider this request because, like *McFarland*, the "sentencing court was never advised of its discretion to impose concurrent sentences as a mitigated exceptional sentence." *McFarland*, 189 Wn. at 57.

Ultimately, the trial court sentenced Mr. Martin without considering the evidence supporting an exceptional sentence.

2. Review should be granted to decide whether firearm enhancements are subject to the exceptional sentencing provisions.

The Court of Appeals declined to reach the issue of whether firearm enhancements are subject to exceptional provisions based on the incorrect ruling that Mr. Martin waived his right to appeal the issue. Opinion at 5. However, this Court should accept review as this case raises a serious question about the plain language interpretation and discretion of RCW 9.94A.533 and RCW 9.94A.535.

The parties in Mr. Martin's case proceeded under the mistaken belief the firearm sentencing enhancements were mandatory and could not be modified pursuant to a determination an exceptional sentence was appropriate. This Court should accept review as decisions interpreting the firearm enhancement provisions in RCW 9.94A.533 should no longer bind this Court's interpretation of the firearm enhancement statues.

a. Under the plain language of the statute, RCW 9.94A.533 does not preclude reduction of a standard range sentence under RCW 9.94A.535's exceptional sentencing provisions.

The firearm sentencing enhancement is a mandatory addition to a standard range sentence, but the statute should not be read to prohibit a reduction in a standard range sentence in cases such as Mr. Martin's where there is a basis for an exceptional sentence. Once a firearm enhancement is imposed pursuant to RCW 9.94A.533(3)(e), it becomes a part of the standard range sentence subject to RCW 9.94A.535's exceptional sentencing provisions. *State v. Mohamed*, 187 Wn. App. 630, 639, 350 P.3d 671 (2015).

RCW 9.94A.533 is reasonably interpreted to require a court to impose an enhancement to establish the standard range sentence regardless of any other statute, and run this term consecutive to any other sentence. However, once (3)(e)'s directive is achieved, the time added for the enhancement becomes part of the defendant's standard range sentence. The

"enhanced range is considered a standard range term and a departure from that range is an exceptional sentence." *Gutierrez v. Dep't of Corr.*, 146 Wn. App. 151, 155, 188 P.3d 546 (2008).

There is no plain reading prohibition on subsequently reducing this standard range sentence when imposing an exceptional sentence. RCW 9.94A.535 permits the sentencing court to "impose a sentence outside the standard sentence range for an offense" when the court identifies substantial and compelling reasons in light of purposes of the Act. RCW 9.94A.535; *see also In re Mulholland*, 161 Wn.2d 322, 328-30, 166 P.3d 677 (2007).

b. Recent Supreme Court cases have held the SRA's "mandatory" sentencing provisions are subject to a court's discretion to impose an exceptional sentence downward based on mitigating factors.

Additionally, this Court should accept review because there is a need to clarify existing case law regarding discretionary decisions and firearm enhancements. The SRA seeks to ensure that punishment for criminal conduct is

"proportionate to the seriousness of the offense and the offender's criminal history" and "commensurate with the punishment imposed on others committing similar offenses." *McFarland*, 189 Wn.2d at 52 (quoting RCW 9.94A.010(1), (3)). Accordingly, the SRA "structures, but does not eliminate, discretionary decisions affecting sentences." RCW 9.94A.010.

By explicitly stating that an excessive sentence which contravenes the purpose of the SRA is a mitigating circumstance, the legislature recognized that when a sentencing statute mandates punishment that does not fit with the facts and circumstances of the underlying offense, judicial discretion is the only way to maintain fidelity to proportionate punishment under the SRA. RCW 9.94A.010(1).

As discussed in section (a), *supra*, a judge may impose an exceptional sentence when the court identifies substantial and compelling reasons in light of purposes of the Act. RCW 9.94A.535; RCW 9.94A.505 (2)(a)(i), (x); *see also Mulholland*, 161 Wn.2d at 329-30.

In *Mulholland,* the Court held the trial court may impose an exceptional sentence downward for multiple serious violent offenses, including concurrent terms, notwithstanding RCW 9.94A.589(1)(b)'s provision that all sentences imposed under the section "shall be served consecutively to each other." 161 Wn.2d at 329-31. *Mulholland* explained that no statute, including the exceptional sentence provisions in RCW 9.94A.535, bars a mitigated sentence for serious violent offenses. *Id.*

Then in *McFarland*, the Court held that RCW 9.94A.589(1)(c)'s requirement that a person "shall serve consecutive sentences" for unlawful firearm offenses did not divest the sentencing court of authority to depart from the standard range and impose concurrent sentences as an exceptional sentence. 189 Wn.2d at 54-55. This is despite the fact that, unlike the serious violent-offense provision at issue in *Mulholland,* firearm-related offenses require consecutive sentencing "[n]otwithstanding any other law." 189 Wn.2d at 54.

McFarland concluded this mandatory language did not preclude the trial judge from imposing an exceptional sentence downward. *Id.* 54-55.

But, most recently in *Kelly*, the Court relied on *Brown* to find the plain reading of RCW 9.94A.533(3)(e) "does not imply that a sentencing court has discretion to impose an exceptional sentence with respect to firearm enhancements." *State v. Kelly*, ___ Wn.3d ___, 561 P.3d 246, 258 (2024).

All of these cases were decided after *State v. Brown*, which incorrectly found the firearm sentencing enhancements were not subject to the exceptional sentencing provisions, 139 Wn.2d 20, 29, 983 P.2d 608 (1999), *overruled on other grounds by State v. Houston-Sconiers*, 188 Wn.2d 1, 25-26, 391 P.3d 409 (2017). The question in *Brown* was whether a standard range sentence that includes enhancements under the former version of RCW 9.94A.533 was subject to modification when there were "substantial and compelling reasons justifying an exceptional sentence" as currently codified in RCW 9.94A.535.

Brown held that judicial discretion to impose an exceptional sentence does not extend to a deadly weapon enhancement because of the requirement that sentencing enhancements be mandatory and consecutive "[n]otwithstanding any other provision of law." *Id.* at 29.

Brown's analysis turned on an erroneous distinction between an enhancement and a standard range sentence: "the structure of the SRA is that a sentencing court calculates a standard range sentence by applying the defendant's offender score with the seriousness level of a crime. The court then adds any enhancements to a given base sentence." *Id. (*citing *Matter of Charles,* 135 Wn.2d 239, 254, 955 P.2d 798 (1998)).

This is incorrect as RCW 9.94A.533 mandates the addition of an enhancement to the standard range sentence established by RCW 9.94A.510 or 9.94A.517 which becomes the final standard range sentence, not a separate sentence. *Mohamed*, 187 Wn. App. at 639 (an enhancement is not considered to be a separate sentencing provision from the base

"standard range"). This Court should accept review to correct this error.

Additionally, the Court's decisions in the intervening years indicate that *Brown's* reasoning is effectively overruled and should no longer bind this Court. *Houston-Sconiers* essentially overruled *Brown* in holding that, notwithstanding mandatory language in a sentencing statute, courts must exercise full discretion and consider a juvenile's individual culpability in imposing an appropriate sentence. 188 Wn.2d 1, 21 & n.5. This includes firearm enhancements that run consecutive to a base sentence. *Id.*

After *McFarland*, *Brown* should no longer bind the sentencing court's discretion to reduce the sentence for a firearm enhancement when mitigating factors support an exceptional sentence because the "absolute" language of RCW 9.94A.533(3)(e) is nearly identical to the statute at issue in *McFarland*.

Finally, the Eighth Amendment to the United States Constitution and article I, section 14 of the Washington State Constitution both categorically bar sentencing practices based on disproportionality "between the culpability of a class of offenders and the severity of the penalty." *Miller v. Alabama*, 567 U.S. 460, 470, 132 S. Ct. 2455, 183 L. Ed. 2d 407 (2012); *State v. Bassett*, 192 Wn.2d 67, 84, 428 P.3d 343 (2018).

Unless the firearm enhancement provisions are subject to modification through an exceptional sentence, whether due to a person's youth or other bases, they are unconstitutional. Under the doctrine of constitutional avoidance, this Court should find the court has discretion to reduce the firearm sentencing enhancements when it finds an offender's culpability is reduced. *Utter v. Bldg. Indus. Ass'n of Washington*, 182 Wn.2d 398, 434, 341 P.3d 953 (2015).

c. This Court should accept review of this issue to address a sentencing court's ability to exercise its discretion to consider an exceptional sentence.

In *Mulholland,* the trial court's incorrect interpretation of the statutes that applied to the assault sentences was a fundamental defect that required remand for resentencing. *Mulholland,* 161 Wn.2d at 332–33. If the court's incorrect interpretation of the statutes required reversal for resentencing on collateral review, it is certainly required in Mr. Martin's appeal, where the court wrongly believed it lacked discretion to reduce the firearm enhancements and impose an exceptional sentence. *Grayson,* 154 Wn.2d at 342.

Here the sentencing court rejected Mr. Martin's request for a mitigated sentence on the mistaken belief it could not depart below the mandatory firearm enhancements. RP 40-41. The Court of Appeals refused to address the issue. Opinion at 5. This Court should accept review of these issues.

E. CONCLUSION

The trial court failed to recognize its discretion and imposed a standard range sentence without considering the mitigating factors in this case. Review should be granted to correct this incorrect application of the law, which is also a matter of substantial public interest. RAP 13.4(b)(1), (4).

This document contains 3428 words and complies with RAP 18.17.

Respectfully submitted this 6th day of February, 2025.

Ester Garcia, WSBA 55380
Washington Appellate Project, 91052
Attorneys for Appellant

Tristen L. Worthen
Clerk/Administrator

(509) 456-3082
TDD #1-800-833-6388

The Court of Appeals of the State of Washington Division III

500 N Cedar ST
Spokane, WA 99201-1905

Fax (509) 456-4288
http://www.courts.wa.gov/courts

December 5, 2024

E-mail
Ester Garcia
Washington Appellate Project
1511 3rd Ave Ste 610
Seattle, WA 98101-1683
ester@washapp.org
wapofficemail@washapp.org

E-mail
Spokane County Prosecutor's Office
1100 W Mallon Ave
Spokane, WA 99260-0270
alundgren@spokanecounty.org
scpaappeals@spokanecounty.org

CASE # 394298
State of Washington v. Sean Kyle Martin
SPOKANE COUNTY SUPERIOR COURT No. 131018536

Counsel:

Enclosed please find a copy of the opinion filed by the court today. A party need not file a motion for reconsideration as a prerequisite to discretionary review by the Supreme Court. RAP 13.3(b); 13.4(a). If a motion for reconsideration is filed, it should state with particularity the points of law or fact which the moving party contends the court has overlooked or misapprehended, together with a brief argument on the points raised. RAP 12.4(c). Motions for reconsideration which merely reargue the case should not be filed.

Motions for reconsideration, if any, must be filed within twenty (20) days after the filing of the opinion. Please file the motion electronically through the court's e-filing portal or, if in paper format, only the original motion need be filed. If no motion for reconsideration is filed, any petition for review to the Supreme Court must be filed in this court within thirty (30) days after the filing of this opinion. The motion for reconsideration and petition for review must be received (not mailed) on or before the dates they are due. RAP 18.5(c).

Sincerely,

Tristen Worthen
Clerk/Administrator

TW/pb
Enc.

c: **E-mail** Hon. Michelle Szambelan (Hon. Linda Tompkins' case)
c: **E-mail** Sean Kyle Martin
#374554
Airway Heights Corrections Center
P.O. Box 2049
Airway Heights, WA 99001

FILED
DECEMBER 5, 2024
In the Office of the Clerk of Court
WA State Court of Appeals, Division III

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE

STATE OF WASHINGTON, Respondent, v. SEAN KYLE MARTIN, Appellant.	)))))))))	No. 39429-8-III UNPUBLISHED OPINION

LAWRENCE-BERREY, C.J. — Sean Martin appeals his standard range sentence and asks us to direct the trial court to strike various legal financial obligations (LFOs). We conclude that Martin waived his right to appeal a standard range sentence, but remand for the trial court to strike the challenged LFOs.

FACTS

In 2014, Sean Martin pleaded guilty to four counts of first degree robbery, including three firearm enhancements. He committed the robberies when he was 22 to 23 years old. Martin completed a statement on plea of guilty that included a waiver of his right to appeal his sentence if the trial court sentenced him within the standard range. The sentencing judge, however, incorrectly stated that if Martin pleaded guilty he had no right to appeal.

At sentencing, the State informed the trial court that the parties had reached a joint recommendation for a low-end standard range sentence, which, after adding 60 months for each of the three firearm enhancements, totaled 257 months. The State also mentioned that Martin had confessed to "using a firearm in 17 different felonies, which resulted in a minimum of 85 years just in weapons enhancements alone." Rep. of Proc. (May 21, 2014) (RP) at 12. Defense counsel, in asking for the court to accept the joint recommendation, acknowledged that the 257-month (or 21-year, 5 month) sentence was substantial, but emphasized that the plea allowed Martin to avoid the risk of a sentence between 65 and 85 years. The trial court asked Martin if he had anything to say before it imposed sentence. Martin said he "was hoping [he] could get maybe under ten years." RP at 38.

The trial court imposed the jointly recommended sentence of 257 months, and also ordered Martin to pay a $500.00 victim penalty assessment (VPA), a $200.00 criminal filing fee, a $100.00 DNA collection fee, and $11,072.61 in restitution.

In late 2022, Martin filed this appeal. Because the trial court had misinformed Martin of his limited right to appeal, we enlarged the time so to consider this appeal.

ANALYSIS

Martin argues the trial court erred by failing to exercise its discretion to consider an exceptional sentence below the standard range. The State responds that Martin waived his right to appeal from a standard range sentence. We agree with the State.

Plea agreements are treated as contracts binding on both the State and the defendant, with a "strong public interest in enforcing the terms of plea agreements which are voluntarily and intelligently made." *In re Pers. Restraint of Breedlove*, 138 Wn.2d 298, 309, 979 P.2d 417 (1999). Where a defendant agrees to plead guilty to avoid a potentially more severe sentence, "[h]e must be held to his bargain, just as the State is bound by the plea agreement." *State v. Hilyard*, 63 Wn. App. 413, 420, 819 P.2d 809 (1991). "The benefits of plea bargains include finality, acceptance of responsibility, preservation of resources, and the exercise of mercy." *State v. Westwood*, 10 Wn. App. 2d 543, 549, 448 P.3d 771 (2019). A defendant who enters into a negotiated plea agreement that specifically waives the right to appeal a standard range sentence cannot raise nonjurisdictional challenges to the constitutionality of a standard range sentence. *State v. Moten*, 95 Wn. App. 927, 929-34, 976 P.2d 1286 (1999).

Martin, citing *State v. McFarland*, 189 Wn.2d 47, 399 P.3d 1106 (2017), argues that his waived right to appeal does not foreclose him from arguing that the trial court

erred by failing to exercise its discretion to impose an exceptional sentence below the standard range. We disagree.

In *McFarland*, the court held that RCW 9.94A.535(1)(g) gives sentencing courts discretion to impose concurrent firearm-related sentences when multiple firearm-related convictions result in a presumptive sentence that is clearly excessive in light of the purpose of the Sentencing Reform Act of 1981, chapter 9.94A RCW. *Id.* at 55. The court further held, even though RCW 9.94A.585(1) generally prohibits a defendant from appealing a standard range sentence, a defendant may appeal such a sentence when a "'court has refused to exercise discretion at all or has relied on an impermissible basis for refusing to impose an exceptional sentence below the standard range.'" *Id.* at 56 (internal quotation marks omitted) (quoting *State v. McGill*, 112 Wn. App. 95, 100, 47 P.3d 173 (2002)).

McFarland is distinguishable. The defendant in *McFarland* did not waive his right to appeal a standard range sentence.

As mentioned previously, plea bargains are contracts. In general, a waiver of rights is enforceable. Here, in the plea agreement, Martin waived numerous rights—the right to a speedy and public trial by an impartial jury, the right to remain silent, the right to hear and question witnesses, the right to testify, the right to be presumed innocent, and

the right to appeal a finding of guilt. These rights are constitutionally based. These constitutional rights are waivable. *Boykin v. Alabama*, 395 U.S. 238, 243, 89 S. Ct. 1709, 23 L. Ed. 2d 274 (1969); *State v. Branch*, 129 Wn.2d 635, 642, 919 P.2d 1228 (1996). Because constitutional rights are waivable in a plea agreement, it follows that statutory rights are also waivable.

Here, Martin does not contest that his plea was knowing, intelligent, and voluntary. In exchange for his plea and waiver of right to appeal a standard range sentence, Martin received a sentence of 21 years, 5 months, and avoided a sentence that could have been several times longer. We conclude that Martin waived his right to appeal the standard range sentence he received, and with it, any argument that his three firearm convictions should have been sentenced concurrently rather than consecutively.

LEGAL FINANCIAL OBLIGATIONS

Martin requests that we direct the trial court to strike three LFOs imposed in his judgment—the criminal filing fee, the DNA collection fee, and the VPA.

In 2018, the legislature prohibited courts from imposing the criminal filing fee on indigent defendants. LAWS OF 2018, ch. 269, § 17(2)(h). In 2023, the legislature eliminated DNA collection fees and prohibited courts from imposing victim penalty assessments on indigent defendants. LAWS OF 2023, ch. 449, §§ 1, 4.

Statutory changes to cost statutes apply prospectively. *State v. Ramirez*, 191 Wn.2d 732, 748-49, 426 P.3d 714 (2018). A statute operates prospectively when the precipitating event for its application occurs after the effective date of the statute. *Id.* at 749. The precipitating event of the statute is the termination of the case. *Id.* Because Martin's case is on appeal, it has not yet terminated and the challenged LFOs must be struck, subject to a showing that he is indigent.

The State asks, if we agree with Martin, that we remand without resentencing. We agree with Martin, yet Martin's presence in court could be required for him to establish his indigency. Rather than requiring the State to incur this expense, we simply direct the trial court to find that Martin is indigent and strike the challenged LFOs.

Affirm sentence, but remand to strike criminal filing fee, DNA collection fee, and VPA.

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

Lawrence-Berrey, C.J.

WE CONCUR:

Staab, J.

Cooney, J.

Tristen L. Worthen
Clerk/Administrator

(509) 456-3082
TDD #1-800-833-6388

The Court of Appeals of the State of Washington Division III

500 N Cedar ST
Spokane, WA 99201-1905

Fax (509) 456-4288
http://www.courts.wa.gov/courts

January 7, 2025

E-mail
Ester Garcia
Washington Appellate Project
1511 3rd Ave Ste 610
Seattle, WA 98101-1683
ester@washapp.org
wapofficemail@washapp.org

E-mail
Spokane County Prosecutor's Office
1100 W Mallon Ave
Spokane, WA 99260-0270
alundgren@spokanecounty.org
scpaappeals@spokanecounty.org

CASE # 394298
State of Washington v. Sean Kyle Martin
SPOKANE COUNTY SUPERIOR COURT No. 131018536

Counsel:

Enclosed is a copy of the order deciding a motion for reconsideration of this court's December 5, 2024 opinion.

A party may seek discretionary review by the Washington Supreme Court of a Court of Appeals' decision. RAP 13.3(a). A party seeking discretionary review must file a petition for review in this court within 30 days after the attached order on reconsideration is filed. RAP 13.4(a). Please file the petition electronically through the court's e-filing portal. The petition for review will then be forwarded to the Supreme Court. The petition must be received in this court on or before the date it is due. RAP 18.5(c). If the party opposing the petition for review wishes to file an answer, that answer should be filed in the Supreme Court within 30 days of the service on the party of the petition. RAP 13.4(d). The address of the Washington Supreme Court is Temple of Justice, P.O. Box 40929, Olympia, WA 98504-0929.

Sincerely,

Tristen Worthen
Clerk/Administrator

TW/pb
Enc.

FILED
January 7, 2025
In the Office of the Clerk of Court
WA State Court of Appeals, Division III

COURT OF APPEALS, DIVISION III, STATE OF WASHINGTON

STATE OF WASHINGTON,	)	**No. 39429-8-III**
	)	
Respondent,	)	
	)	
v.	)	**ORDER DENYING**
	)	**MOTION FOR**
SEAN KYLE MARTIN,	)	**RECONSIDERATION**
	)	
Appellant.	)	

The court has considered appellant's motion for reconsideration of this court's opinion dated December 5, 2024, and is of the opinion the motion should be denied.

THEREFORE, IT IS ORDERED that the motion for reconsideration is hereby denied.

PANEL: Judges Lawrence-Berrey, Staab and Cooney

FOR THE COURT:

Lawrence-Berrey, C.J.

ROBERT LAWRENCE-BERREY
CHIEF JUDGE

WASHINGTON APPELLATE PROJECT

February 06, 2025 - 4:02 PM

Transmittal Information

Filed with Court:	Court of Appeals Division III
Appellate Court Case Number:	39429-8
Appellate Court Case Title:	State of Washington v. Sean Kyle Martin
Superior Court Case Number:	13-1-01853-6

The following documents have been uploaded:

- 394298_Petition_for_Review_20250206160202D3686179_2410.pdf
  This File Contains:
  Petition for Review
  The Original File Name was washapp.020625-02.pdf

A copy of the uploaded files will be sent to:

- alundgren@spokanecounty.org
- scpaappeals@spokanecounty.org

Comments:

Sender Name: MARIA RILEY - Email: maria@washapp.org
Filing on Behalf of: Ester Garcia - Email: ester@washapp.org (Alternate Email: wapofficemail@washapp.org)

Address:
1511 3RD AVE STE 610
SEATTLE, WA, 98101
Phone: (206) 587-2711

Note: The Filing Id is 20250206160202D3686179