No. 36408-9-III

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

In re the Matter of Personal Restraint of:

KIMO ALBERT HENRIQUES,

Petitioner.

BRIEF OF PETITIONER IN SUPPORT OF PERSONAL RESTRAINT PETITION

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A. STATEMENT OF THE CASE

A jury found Kimo Albert Henriques guilty of seven counts: five counts of possession of a stolen firearm (counts 1-5); one count of second degree unlawful possession of a firearm (count 6); and one count of first degree unlawful possession of a firearm (count 7). *State v. Henriques*, No. 26528-5-III, 2009 WL 1114599, at *1, 3 (Wash. Ct. App. Apr. 21, 2009); *see also* App. A, Amended Felony Judgment and Sentence filed December 14, 2009. At his sentencing hearing, the trial court dismissed count 6, second degree unlawful possession of a firearm, based upon the parties' agreement. *Henriques*, 2009 WL 1114599, at *3; *see also* App. B, Verbatim Report of Proceedings, Sentencing Hearing, October 8, 2007, pgs. 2-3. The trial court also granted Mr. Henriques motion to arrest judgment on counts 4 and 5. *Henriques*, 2009 WL 1114599, at *3; *see also* App. B, pgs. 3-16. The trial court then proceeded to sentence Mr. Henriques on four counts, counts 1-3 and count 7. *Henriques*, 2009 WL 1114599, at *3; *see also* App. B, pgs. 16-47.

Defense counsel filed a sentencing memorandum. *See* App. C, Defendant's Memorandum Pertaining to Sentencing, filed September 21, 2007. Defense counsel requested the court impose "the minimum sentence possible within the discretion of the court[,]" and stated:

> 3. The statute seems to require the court to sentence the [unlawful possession of a firearm] and [possession of a stolen firearm] crimes consecutively. Should the court do so, and the

> court sentences within the standard range, the court should sentence at the low end of the standard range on each. . . . Note, however, that the court could go below the standard range on the [possession of a stolen firearm] and [unlawful possession of a firearm] counts by finding mitigating factors (see four below).
>
> 4. The court should consider 9.94A.535(1)(g); whether the multiple offense policy on 9.94A.589 results in a presumptive sentence clearly excessive for the purpose of this chapter.
>
> 5. At the time of sentencing, the defense will present facts pertaining to the defendant's background and . . . this case, which the defense believe [sic] will support the court's consideration as noted in 5 [sic] above. The defendant had just enrolled in college. The defendant had a girlfriend and was in a positive relationship with her. The defendant was employed. That another individual was the driving force behind this incident.

App. C, pg. 3.

The State also filed a sentencing memorandum. *See* App. D, Sentencing Memorandum, filed October 5, 2007.[1] The State argued that the sentences for each of the crimes of possession of a stolen firearm and the crime of first degree unlawful possession of a firearm should be run consecutively. *See* App. D, pg. 5. The State argued:

> Supporting this position is State v. Murphy, 98 Wn App 42 (1999). In Murphy, the defendant was charged (along with a burglary) with five counts of Theft of a Firearm and five counts of Unlawful Possession of a Firearm in the Second Degree. In Murphy, the Court of Appeals ultimately held that all ten counts should be run consecutively. In the current case, there are six charges from 9.41.040(6). All six should be run consecutive. In the event that the court did arrest judgment on two charges, the remaining four would still run consecutive to each other.

[1] The State attached copies of Mr. Henriques' Judgment and Sentences from his prior convictions to its sentencing memorandum. These Judgment and Sentences are not appended here, as they are not relevant to Mr. Henriques' arguments made herein.

App. D, pg. 5.

At sentencing, the trial court stated:

> And before we start on that, the Murphy case seems to be dispositive on it talks about 9.94A sentencing. I mean I just didn't know it was that detailed but apparently the legislature has spoken on this consecutive sentence idea.

App. B, pg. 2.

The State argued:

> [P]ossession of stolen firearm all three and because of the plain language of the statute and its reading in State v. Murphy which has been reviewed, denied by the Washington State Supreme Court it is good law in the State of Washington and has been followed. Each one of those counts get . . . what the law says is they're still run consecutive to each other and to the unlawful possession of a firearm in the first degree.

App. B, pgs. 17-18.

The State further argued the trial court "should sentence within the midpoint of each of these standard ranges and run them each consecutively and that is what the legislature has said should happen and I don't think we ought to stray from it because Mr. Henriques has been a good son or a good boyfriend." App. B, pgs. 23, 37.

In his sentencing argument, defense counsel stated "State v. Murphy is not good for the defense. Not good for our argument." App. B, pg. 24. Defense counsel then compared the facts in the present case to *State v. Murphy*. *See* App. B, pgs. 24-26. Defense counsel argued:

> This defendant is completely different before the court. It's a case that cries out for leniency in my personal opinion I think it's a case where there is more than one way to skin a cat, Your Honor. And if the court would indulge me such a blasphemous idiom the court could find exceptional sentence downward.
> . . . .
> When we carve out a little specific exception for firearm when I say to the court Murphy specifically mentioned that the appellate court seems to hang its hat on the notion where a detail statute truism . . . . But you know out of the other side of your mouth - - and I know it's difficult for the court to put itself in a position where it's going to get overturned.
> . . . .
> The problem is that the SRA was drafted and dealt with and amended to deal with felony crimes and all of a sudden out of some sense of justice some bill gets passed and some little thing gets hooked on some last minute senate bill or house bill and all of a sudden we have consecutive sentences for multiple firearms. All of a sudden we have somebody doing a life sentence . . . for a bag of stolen property. So you know I want to make my record here. . . . I think the court can look at the letters I provided to the court, listen to the family members perhaps and find mitigating factors and sentence to one count of possession of a stolen firearm and make that consecutive to one count of felon with a firearm in the first degree.
> . . . .
> I have no legal basis really to support that other than contrast Murphy case with the case at bar and I am certain at some point that the supreme court is going to come back and revisit that especially those different states of mind.

App. B, pgs. 26-28, 30.

The trial court sentenced Mr. Henriques to consecutive sentences, totaling 349 months confinement:

> I will impose a standard range sentence on these four crimes. On count one 84 months, count two 84 months, Count Three 84 months and count 7 would be 97 months. That's midpoint of the standard range. When you get to the point where you have 9

> points walking into a case and then you have other current offenses that really aren't being scored here, that justifies midpoint.
> . . . .
> I don't know that the legislature envisioned having you in prison for 349 months for this type of conduct but that's what they have done. I am - - just like you, sir. I have to follow the law. That's what the law tells me I have to do.

App. B, pgs. 40-41.

Mr. Henriques appealed, and the State cross-appealed. *Henriques*, 2009 WL 1114599, at *3. Defense appellate counsel argued the evidence was insufficient to support his convictions, and the trial court erred by denying Mr. Henriques' motion for funds to obtain a haircut before trial. *Id*. at *3-6. This Court rejected these arguments. *Id*. at *3-6. The State argued the trial court erred in arresting judgment on counts 4 and 5. *Id*. at *6-8. This Court agreed, reinstated Mr. Henriques' convictions for counts 4 and 5, and remanded for resentencing on those counts. *Id*. at *6-8, 10.

In a Statement of Additional Grounds (SAG), Mr. Henriques argued, in relevant part, that his three counts of possession of a stolen firearm were same criminal conduct, and therefore, the sentences should have run concurrent, rather than consecutive, to each other. *Id*. at *8, 9; *see also* App. E, Statement of Additional Grounds for Review, filed June 30, 2008. This Court rejected this argument, concluding that "[u]nder the plain language of RCW 9.94A.589(1)(c), Mr. Henriques was required to serve consecutive sentences for each of his listed

convictions, since all four crimes were felony crimes listed in that subsection." *Id*. at 8-9.

Following this Court's remand, the trial court resentenced Mr. Henriques on December 14, 2009. *See* App. A; *see also* App. F, Transcript of Proceedings, Sentencing Hearing, December 14, 2009. The State explained the scope of the resentencing hearing as follows:

> [W]e are back before the Court for a resentencing on Counts 4 and 5. 1, 2, 3, and 7 have already been affirmed by the Court of Appeals. I don't think we need to do anything to those, but we do need to come back and set a sentence on Counts 4 and 5.

App. F, pg. 5.

The State requested a sentence of 84 months each on counts 4 and 5, the midpoint of the standard range. *See* App. F, pg. 6.

Defense counsel requested a sentence of 72 months each of counts 4 and 5, the low end of the standard range. *See* App. F, pg. 8.

The trial court followed defense counsel's recommendation and imposed "[s]eventy-two on each and they'll run consecutive per the statute." App. F, pg. 8. The trial court stated "the only thing I'm changing is we'll add seventy-two months consecutive on each of those two . . . I'm not gonna change my original sentence." App. F, pgs. 8-9. The trial court's sentence totaled 493 months confinement, with all six counts running consecutive. *See* App. A; App. F, pg. 12. Mr. Henriques did not appeal.

On October 31, 2018, Mr. Henriques filed this personal restraint petition. He argues *State v. McFarland*, 189 Wn.2d 47, 399 P.3d 1106 (2017), was a significant change in the law. Mr. Henriques argues he is entitled to resentencing under *McFarland*, because the trial court erroneously believed it could not sentence Mr. Henriques to concurrent sentences upon finding mitigating factors. Mr. Henriques argues that he raised this error on direct appeal.

The State filed a response to Mr. Henriques' personal restraint petition. The State argues Mr. Henriques personal restraint petition is time-barred, and that he cannot show the trial court would have imposed concurrent sentences if it was alerted of its ability to do so. In its response, the State noted: "[a]s part of his Personal Restraint Petition, Mr. Henriques contends that the sentencing court believed that it was limited to impose a standard range sentence. The State does not contest that assertion." *See* Respondent's Response to Petitioner's Personal Restraint Petition, pg. 3, n.2.

This Court appointed the undersigned counsel to represent Mr. Henriques in this personal restraint petition. The undersigned counsel now submits this brief in support of Mr. Henriques' personal restraint petition.

B. ARGUMENT

1. Mr. Henriques challenge to his sentence is not time barred.

"The appellate court will only grant relief by a personal restraint petition if other remedies which may be available to petitioner are inadequate under the

circumstances and if such relief may be granted under RCW 10.73.090, or .100." RAP 16.4(d). Under RCW 10.73.090, "[n]o petition or motion for collateral attack on a judgment and sentence in a criminal case may be filed more than one year after the judgment becomes final if the judgment and sentence is valid on its face and was rendered by a court of competent jurisdiction." RCW 10.73.090(1). "Collateral attack" includes a personal restraint petition. RCW 10.73.090(2). If no appeal is filed from a judgment and sentence, it becomes final, for purposes of RCW 10.73.090, on the date it is filed with the clerk of the trial court. *See* RCW 10.73.090(3); *see also In re Pers. Restraint of Adams*, 178 Wn.2d 417, 427, 309 P.3d 451 (2013); *In re Pers. Restraint of Snively*, 180 Wn.2d 28, 30, 320 P.3d 1107 (2014).

Here, Mr. Henriques did not appeal following his resentencing hearing and entry of his amended judgment and sentence. The amended judgment and sentence was filed with the clerk of the trial court on December 14, 2009. *See* App. A. Therefore, his amended judgment and sentence became final on that date. *See* RCW 10.73.090(3); *see also Adams*, 178 Wn.2d at 427; *Snively*, 180 Wn.2d at 30.

This personal restraint petition was filed more than one year after December 14, 2009, the date Mr. Henriques' judgment and sentence became final. RCW 10.73.100 sets forth exceptions to the one-year time limit set forth in RCW 10.73.090. *See* RCW 10.73.100. The statute provides, in relevant part:

> The time limit specified in RCW 10.73.090 does not apply to a petition or motion that is based solely on one or more of the following grounds . . .
> (6) There has been a significant change in the law, whether substantive or procedural, which is material to the conviction, sentence, or other order entered in a criminal or civil proceeding instituted by the state or local government, and either the legislature has expressly provided that the change in the law is to be applied retroactively, or a court, in interpreting a change in the law that lacks express legislative intent regarding retroactive application, determines that sufficient reasons exist to require retroactive application of the changed legal standard.

RCW 10.73.100(6).

Thus, "[a] petitioner can overcome the one-year time bar under RCW 10.73.100(6) if he can identify '(1) a [significant] change in the law (2) that is material and (3) that applies retroactively.'" *In re Pers. Restraint of Light-Roth*, 191 Wn.2d 328, 333, 422 P.3d 444 (2018) (alteration in original) (quoting *In re Pers. Restraint of Colbert*, 186 Wn.2d 614, 619, 308 P.3d 504 (2016)).

Here, Mr. Henriques' challenge to his sentence is not time barred, because as argued below, *State v. McFarland* is a significant change in the law, that is material to Mr. Henriques' sentence, that applies retroactively. *See State v. McFarland*, 189 Wn.2d 47, 399 P.3d 1106 (2017).

a. *State v. McFarland* is a significant change in the law that is material to Mr. Henriques' sentence.

At the time Mr. Henriques was sentenced, RCW 9.41.040(6) and RCW 9.94A.589(1)(c), the statutes governing sentencing of unlawful possession of a firearm and possession of a stolen firearm, stated as follows:

> (6) Nothing in chapter 129, Laws of 1995 shall ever be construed or interpreted as preventing an offender from being charged and subsequently convicted for the separate felony crimes of theft of a firearm or possession of a stolen firearm, or both, in addition to being charged and subsequently convicted under this section for unlawful possession of a firearm in the first or second degree. *Notwithstanding any other law, if the offender is convicted under this section for unlawful possession of a firearm in the first or second degree and for the felony crimes of theft of a firearm or possession of a stolen firearm, or both, then the offender shall serve consecutive sentences for each of the felony crimes of conviction listed in this subsection*.

RCW 9.41.040(6) (emphasis added); *see also* Laws of 2005, ch. 453, § 1; Laws of 2009, ch. 293, § 1.

> (c) If an offender is convicted under RCW 9.41.040 for unlawful possession of a firearm in the first or second degree and for the felony crimes of theft of a firearm or possession of a stolen firearm, or both, the standard sentence range for each of these current offenses shall be determined by using all other current and prior convictions, except other current convictions for the felony crimes listed in this subsection (1)(c), as if they were prior convictions. *The offender shall serve consecutive sentences for each conviction of the felony crimes listed in this subsection (1)(c), and for each firearm unlawfully possessed.*

RCW 9.94A.589(1)(c) (emphasis added); *see also* Laws of 2002, ch. 175, § 7.

In *McFarland*, the defendant was sentenced to one count of first degree burglary as an accomplice, 10 counts of theft of a firearm as an accomplice, and 3 counts of second degree unlawful possession of a firearm. *McFarland*, 189 Wn.2d at 50. The State argued the defendant's sentences for her 13 firearm convictions must run consecutive to each other, pursuant to RCW 9.41.040(6) and RCW 9.94A.589(1)(c). *Id.* Defense counsel agreed these counts should run

consecutively, but requested sentences at the bottom of the standard range. *Id.* at 50-51. Defense counsel expressed concern about the overall sentence length. *Id.* However, defense counsel did not request, and the trial court did not consider, imposing concurrent sentences for the firearm offenses, upon finding mitigating factors. *Id.* at 51.

The trial court imposed sentences at the bottom of the standard range for each of the 13 firearm convictions, entering a total sentence of 237 months. *Id.* The trial court stated: "I don't have – apparently [I] don't have much discretion, here. Given the fact that these charges are going to be stacked one on top of another, I don't think – I don't think [the] high end is called for, here." *Id.* The trial court noted that the defendant's 237 month sentence was "just a little shy of 20 years, which is what people typically get for murder in the second degree . . . ." *Id.*

The defendant appealed, arguing the trial court erred by not running her 13 firearm-related sentences concurrently as a mitigated exceptional sentence. *Id.* Our Supreme Court agreed, holding:

> [I]n a case in which standard range consecutive sentencing for multiple firearm-related convictions "results in a presumptive sentence that is clearly excessive in light of the purpose of [the SRA]," a sentencing court has discretion to impose an exceptional mitigated sentence by imposing concurrent firearm-related sentences.

Id. at 55 (quoting RCW 9.94A.535(1)(g)).

The Court reasoned "[t]here is no provision prohibiting exceptional sentences for firearm-related convictions generally, and '[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.'" *Id*. at 53-54 (second alteration in original) (quoting RCW 9.94A.535).

The Court built upon the logic in its prior decision of *In re Personal Restraint of Mulholland*, 161 Wn.2d 322, 166 P.3d 677 (2007). *Id*. at 53-55, 59. In *Mulholland*, the Court "recognized the authority of a sentencing court to impose an exceptional downward sentence for serious violent offenses by running presumptively consecutive sentences under RCW 9.94A.589(1)(b) concurrently pursuant to RCW 9.94A.535." *Id*. at 53; *see also In re Pers. Restraint of Mulholland*, 161 Wn.2d 322, 327-31, 166 P.3d 677 (2007). The Court found "[w]hile *Mulholland* involved serious violent offenses under 9.94A.589(1)(b) and not firearm-related offenses under RCW 9.94A.589(1)(c), we find no statutory basis to distinguish between the consecutive sentencing language in these two subsections." *Id*. at 53.

The Court recognized that unlike serious violent offenses, firearm-related offenses are also subject to a second sentencing provision, RCW 9.41.060(6), providing for consecutive sentencing "'[n]otwithstanding any other law.'" *Id*. at 54 (alteration in original) (quoting RCW 9.41.040(6)). The Court found this difference did not preclude extending the rationale of its *Mulholland* decision,

because "RCW 9.41.040(6) was originally enacted as part of the Hard Time for Armed Crime Act . . . [and] the act does not preclude exceptional sentences downward." *Id*.

The Court acknowledged that from the sentencing statutes applicable to the defendant's firearm-related convictions, RCW 9.41.040(6) and RCW 9.94A.589(1)(c), "lower courts have concluded that the standard sentences for multiple firearm-related convictions must be served consecutively." *Id*. at 55 (citing *State v. McReynolds*, 117 Wn. App. 309, 342-43, 71 P.3d 663 (2003); *State v. Murphy*, 98 Wn. App. 42, 49, 988 P.2d 1018 (1999)). The Court acknowledged that *McReynolds* "not[ed] that RCW 9.41.040(6) 'clearly and unambiguously prohibits concurrent sentences' for firearm-related crimes[.]" *Id*. at 53 (quoting *McReynolds*, 117 Wn. App. at 342-43).

The Court remanded the case for resentencing, "because the sentencing court erroneously believed it could not impose concurrent sentences, and the record demonstrates that it might have done so had it recognized its discretion under RCW 9.94A.535." *Id*. at 56. The Court found remand for resentencing was warranted because "[a]s in *Mulholland*, the record suggests at least the possibility that the sentencing court would have considered imposing concurrent firearm-related sentences had it properly understood its discretion to do so." *Id*. at 59. The Court reasoned:

> [W]hile the sentencing court's language did not indicate the same level of sympathy or discomfort with the sentence as expressed by

> the court in *Mulholland*, the court indicated some discomfort with his apparent lack of discretion and even commented that [the defendant's] standard range sentence was equivalent to that imposed for second degree murder.

Id. at 58-59.

"A 'significant change in the law' occurs 'when an intervening appellate decision overturns a prior appellate decision that was determinative of a material issue.'" *Light-Roth*, 191 Wn.2d at 333 (quoting *State v. Miller*, 185 Wn.2d 111, 114, 371 P.3d 528 (2016)). "An intervening appellate decision that settles a point of law without overturning prior precedent or simply applies settled law to new facts does not constitute a significant change in the law." *Id*. at 333-334 (internal quotation marks omitted) (quoting *Miller*, 185 Wn.2d at 114-15). "A 'significant change in the law' is likely to have occurred if the defendant was unable to argue the issue in question before publication of the intervening decision." *Id*. at 334 (quoting *Miller*, 185 Wn.2d at 115).

In *Miller*, the defendant, convicted of two serious violent offenses sentencing consecutively, filed an untimely collateral attack, arguing that *Mulholland* was a significant change in the law that retroactively applied to his sentence. *Miller*, 185 Wn.2d at 113-14; *see also Mulholland*, 161 Wn.2d at 327-31. Our Supreme Court held *Mulholland* does not qualify as a significant change in the law, and therefore, the defendant cannot meet the exception set forth in RCW 10.73.100(6) allowing an untimely collateral attack. *Id*. at 114-116. The Court reasoned that "*Mulholland* did not overturn a prior appellate decision that

was determinative of a material issue. Rather, *Mulholland* interpreted RCW 9.94A.589(1)(b) for the first time." *Id*. at 115-16. The Court rejected the defendant's argument that *Mulholland* was a significant change in the law because it "debunked dicta relied on in practice for years." *Id*. at 115-16. The Court found "[d]ispelling dicta, however, does not constitute a significant change in the law." *Id*. at 116. The Court stated "[a] 'significant change in the law' requires that the law, not counsels' understanding of the law on an unsettled question, has changed." *Id*. The Court found "[n]othing prevented [the defendant] from arguing at sentencing that the trial court had discretion to impose concurrent sentences." *Id*.

In contrast to *Miller*, *McFarland* did not dispel dicta, but overturned prior appellate decisions that was determinative of a material issue. *See McReynolds*, 117 Wn. App. at 342-43; *Murphy*, 98 Wn. App. at 47-51; *State v. Haggin*, 195 Wn. App. 315, 324, 381 P.3d 137 (2016). "Dicta is language not necessary to the decision in a particular case." *In re Marriage of Roth*, 72 Wn. App. 566, 570, 865 P.2d 43 (1994) (citing *Pedersen v. Klinkert*, 56 Wn.2d 313, 317, 320, 352 P.2d 1025 (1960)). The language in the three cases discussed below was not dicta, but rather, necessary to the decision in each case.

In *McReynolds*, the defendant was convicted of possession of stolen property, possession of stolen firearms, and unlawful possession of firearms. *McReynolds*, 117 Wn. App. at 316. The defendant argued the trial court erred in

imposing consecutive sentences for each of his firearm convictions. *Id*. at 342-44. The Court of Appeals rejecting this argument, holding that RCW 9.41.040(6), "clearly and unambiguously prohibits concurrent sentences for the listed firearms crimes." *Id*. at 343; *see also McFarland*, 189 Wn.2d at 52-53 (acknowledging this holding in *McReynolds*). The court stated "[a]lthough [the defendant] urges the court to apply varies rules of statutory construction, there is no need for such an analysis because the statute is unambiguous." *Id*.

In *Murphy*, the defendant was convicted of one count of first degree burglary, five counts of theft of a firearm, and five counts of second degree unlawful possession of a firearm. *Murphy*, 98 Wn. App. at 45. At sentencing, the trial court ran the five counts of theft of a firearm concurrently to each other, and the five counts of second degree unlawful possession of a firearm concurrently to each other. *Id*. at 46. The trial court then ran the two groups of firearm charges consecutively to one another and to the first degree burglary count. *Id*. The State appealed, arguing in relevant part that the trial court erred by running the theft of a firearm and unlawful possession of a firearm counts concurrently. *Id*. at 44, 47-51.

The Court of Appeals agreed with the State and held that "under the plain language of the [Hard Time for Armed Crime Act], the trial court should have run each of [the defendant's] 10 firearm theft and unlawful possession convictions consecutively to one another." *Id*. at 49. The court stated "[i]t is the province of

the Legislature, if it so chooses, not the appellate courts, to ameliorate any undue harshness arising from consecutive sentences for multiple firearm counts." *Id*. at 49 n.8.

In *Haggin*, the defendant was convicted of several crimes, including two counts of first degree unlawful possession of a firearm. *Haggin*, 195 Wn. App. at 318. The trial court ordered the defendant's sentences on these two counts to run consecutively. *Id*. The defendant appealed, arguing in relevant part, that the trial court erred in running these two sentences consecutively. *Id*. The Court of Appeals agreed, concluding the trial court should have run the sentences concurrently. *Id*. at 324. The court found "RCW 9.94A.589(1)(c) only requires trial courts to run sentences consecutively when a person is convicted of unlawful possession *in addition to* firearm theft *or* possession of a stolen firearm." *Id*. The court found "RCW 9.94A.589(1)(c) does not apply here because the jury acquitted [the defendant] of possessing a stolen firearm . . . ." *Id*.

McFarland overruled *McReynolds*, *Murphy*, and *Haggin*; therefore, it was a significant change in the law. *McFarland* held a sentencing court has discretion to impose a mitigated sentence by imposing concurrent firearm-related sentences, overruling the holdings of *McReynolds*, *Murphy*, and *Haggin* that concurrent sentences for multiple firearm-related sentences were prohibited. *See McFarland*, 189 Wn.2d at 55; *McReynolds*, 117 Wn. App. at 342-43; *Murphy*, 98 Wn. App. at 47-51; *Haggin*, 195 Wn. App. at 324.

Because of *McReynolds* and *Murphy*, defense counsel was unable to argue for concurrent mitigated sentences before the publication of *McFarland*, showing that a significant change in the law occurred. *See Light-Roth*, 191 Wn.2d at 334 (defining "significant change in the law") (quoting *Miller*, 185 Wn.2d at 115). Prior to *McFarland*, *Murphy* advised it was not the province of the appellate courts "to ameliorate any undue harshness arising from consecutive sentences for multiple firearm counts." *Murphy*, 98 Wn. App. at 49 n.8.

The State, defense counsel, and trial counsel acknowledged the trial court was bound by *Murphy*. The State and the trial court relied upon *Murphy* to conclude the trial court had no discretion, but instead was required to imposed consecutive sentences. *See* App. B, pgs. 2, 17-18; App. D, pg. 5. Even defense counsel, while requesting a mitigated sentence, acknowledged *Murphy* and conveyed that the trial court would be defying precedent by imposing a mitigated sentence. *See* App. B. at 24-28, 30. At resentencing, the parties assumed the sentences on counts 4 and 5 would run consecutively to each other and the other firearm-related offenses. *See* App. F, pgs. 6, 8-9, 12.

The State does not contest the assertion that sentencing court believed that it was limited to impose a standard range sentence. *See* Respondent's Response to Petitioner's Personal Restraint Petition, pg. 3, n.2.

McFarland is material to Mr. Henriques' sentence, as he was sentenced to multiple firearm-related convictions pursuant to RCW 9.94A.589(1) and RCW

9.41.040(6), the statutes before the Court in *McFarland*. Had the trial court known it could consider mitigated concurrent sentences, the trial court may have done so. *See*, *e.g., In re Pers. Restraint of Marshall*, No. 49302-1-III, 2019 WL 4621681, *5 (Wash. Ct. App. Sept. 24, 2019) (finding that a case that constituted a significant change in the law was material to the defendant's sentence, where it would allow the defendant to make a different argument to the sentencing court, and the sentencing court may have imposed a different sentence).[2]

In his personal restraint petition, Mr. Henriques argues he raised the sentencing issue raised here on direct appeal. *See* Personal Restraint Petition filed October 31, 2018, pgs. 1, 3, 5-7. However, Mr. Henriques did not raise this sentencing issue on direct appeal; he did not argue he is entitled to resentencing because the trial court erroneously believed it could not sentence him to concurrent sentences upon finding mitigating factors. *See* App. E; *see also Henriques*, 2009 WL 1114599, at *8-9. Instead, Mr. Henriques argued, in his SAG, that his three counts of possession of a stolen firearm were same criminal conduct, and therefore, the sentences should have run concurrent, rather than consecutive, to each other. *See* App. E; *see also Henriques*, 2009 WL 1114599, at *8-9.

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[2] This case is cited as persuasive authority only. *See* GR 14.1(a) (authorizes citation to unpublished opinions of the Court of Appeals filed on or after March 1, 2013, as nonbinding authority).

This same criminal conduct argument raised by Mr. Henriques in his SAG is not the same as the issue currently before this Court. *See, e.g., In Pers. Restraint of Wade*, No. 78761-6-I, 2019 WL 5698791, at *1-3 (Wash. Ct. App. Nov. 4, 2019) (after the trial court resentenced the defendant under *McFarland*, the defendant argued the resentencing court erred in concluding the same criminal conduct analysis was inapplicable to his firearm offenses; Division 1 of this Court agreed the same criminal conduct analysis was inapplicable, because RCW 9.94A.589(1)(c), rather than RCW 9.94A.589(1)(a) controls).[3] Furthermore, even if Mr. Henriques had raised the sentencing issue raised here in his direct appeal, he is permitted to re-raise the issue, in the interests of justice, because *McFarland* was an intervening change in the law. *See In re Pers. Restraint of Stenson*, 142 Wn.2d 710, 719-20, 16 P.3d 1 (2001) (stating that "a personal restraint petitioner may not renew an issue that was raised and rejected on direct appeal unless the interests of justice require relitigation of that issue[,]" and that "[t]his burden can be met by showing an intervening change in the law . . . .").

b. *State v. McFarland* applies retroactively, because RCW 9.94A.589(1)(c) had meant what *McFarland* said it means since the time of its enactment.

"Whether a changed legal standard applies retroactively is a distinct inquiry from whether there has been a significant change in the law." *In re Pers.*

[3] This case is cited as persuasive authority only. *See* GR 14.1(a) (authorizes citation to unpublished opinions of the Court of Appeals filed on or after March 1, 2013, as nonbinding authority).

Restraint of Tsai, 183 Wn.2d 91, 103, 351 P.3d 138 (2015); *see also Colbert*, 186 Wn.2d at 619.

Our Supreme Court has applied the federal retroactivity analysis established in *Teague v. Lane*. *In re Pers. Restraint of Haghighi*, 178 Wn.2d 435, 441, 309 P.3d 459 (2013); *see also Colbert*, 186 Wn.2d at 623-27; *see also Teague v. Lane*, 489 U.S. 288, 109 S. Ct. 1060, 103 L. Ed. 2d 34 (1989).

"Under the *Teague* analysis, a new rule of criminal procedure applies retroactively to all cases pending on direct review or not yet final." *Haghighi*, 178 Wn.2d at 443. "A new rule, however, will not apply retroactively to final judgments unless the rule places certain kinds of private conduct beyond the State's power to proscribe or requires the observance of procedures implicit in the concept of ordered justice." *Id*. "A new rule is one that breaks new ground or . . . was not *dictated* by precedent existing at the time the defendant's conviction became final." *Id*. (internal quotation marks omitted) (quoting *In re Pers. Restraint of Eastmond*, 173 Wn.2d 632, 639, 272 P.3d 188 (2012)).

The first *Teague* exception "involves a rule that either decriminalizes a class of private conduct or prohibits the imposition of capital punishment on a particular class of persons." *Colbert*, 186 Wn.2d at 625. The second *Teague* exception involves "a watershed rule of criminal procedure" and "is limited to new procedures considered essential for an accurate conviction." *Id*.

Our Supreme Court has recognized that *Teague* was developed for different federal purposes: "to achieve the goals of federal habeas while minimizing federal intrusion into state criminal proceedings [and] . . . to limit the authority of federal courts to overturn state convictions – not to limit a state court's authority to grant relief for violations of new rules of constitutional law when reviewing its own State's convictions." *In re Pers. Restraint of Gentry*, 179 Wn.2d 614, 626, 316 P.3d 1020 (2014) (quoting *Danforth v. Minnesota*, 552 U.S. 264, 280-81, 128 S. Ct. 1029, 169 L. Ed. 2d 859 (2008)). Therefore, our Supreme Court has recognized "[t]here may be a case where our state statute would authorize or require retroactive application of a new rule of law when *Teague* would not." *State v. Evans*, 154 Wn.2d 438, 448-49, 114 P.3d 627 (2005). The Court further recognized "[l]imiting a state statute on the basis of the federal court's caution in interfering with State's self-governance would be, at least, peculiar." *Id*. at 449.

In *Tsai*, our Supreme Court made clear that *Teague* does not necessarily dictate whether a significant change in the law applies retroactivity in Washington. *See Tsai*, 183 Wn.2d at 99-103. *Tsai* demonstrates a recent departure by our Supreme Court from *Teague v. Lane*. *See Tsai*, 183 Wn.2d at 99-103.

Further, under *Teague*, *McFarland* does not constitute a "new" rule of criminal procedure because is interpreted what RCW 9.94A.589(1)(c) meant since

its enactment. RCW 9.94A.400 was recodified as RCW 9.94A.589 in 2001. *See* Laws of 2001, ch. 10, § 6. Section (1)(c) was added to RCW 9.94A.400 in 1998. *See* Laws of 1998, ch. 235, § 2.

"[W]here a statute has been construed by the highest court of the state, the court's construction is deemed to be what the statute has meant since its enactment." *State v. Moen*, 129 Wn.2d 535, 538, 919 P.2d 69 (1996). "In other words, there is no question of retroactivity." *Id.*; *see also Colbert*, 186 Wn.2d at 619-20 (acknowledging this rule as correct, but not applying this rule, on the basis that the case constituting a significant change in the law at issue there, *State v. W.R.*, 181 Wn.2d 757, 336 P.3d 1134 (2014), did not involve statutory interpretation).[4] Our Supreme Court has long observed this rule that once it has construed a statute, this is what the statute has meant since its enactment. *See In re Pers. Restraint of Hinton*, 152 Wn.2d 853, 859-60, n.2., 100 P.3d 801 (2004); *In re Pers. Restraint of Johnson*, 131 Wn.2d 558, 568, 933 P.2d 1019 (1997); *Moen*, 129 Wn.2d at 538; *In re Pers. Restraint of Moore*, 116 Wn.2d 30, 38, 803 P.2d 300 (1991).

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[4] In a footnote in *Colbert*, the Court notes that "[e]ven if *W.R.* was grounded in statutory interpretation, and it was not, it would have overruled a previous interpretation of the rape statute. In other words, it was *reinterpretation* of the statute, and the principle that the court's construction is deemed to be what the statute has meant since its enactment does not logically appear to apply." *In re Pers. Restraint of Colbert*, 186 Wn.2d 614, 620 n.5, 308 P.3d 504 (2016). Mr. Henriques' case is distinguishable, because *McFarland* was not a *reinterpretation* of RCW 9.94A.589(1)(c), but rather, the first time it was construed by the highest court of the state, as opposed to lower appellate courts. *See McFarland*, 189 Wn.2d at 53-55. In contrast, *W.R.* overruled two prior Washington Supreme Court opinions. *See State v. W.R.*, 181 Wn.2d 757, 768-69, 336 P.3d 1134 (2014).

Accordingly, RCW 9.94A.589(1)(c) had meant what *McFarland* said it means since the time of its enactment. *See Hinton*, 152 Wn.2d at 859-60, n.2; *Johnson*, 131 Wn.2d at 568; *Moen*, 129 Wn.2d at 538; *Moore*, 116 Wn.2d at 38. Therefore, this Court need not engage in an analysis as to retroactivity. *See Id*. *State v. McFarland* applies to Mr. Henriques' final judgment.

2. Mr. Henriques is entitled to resentencing.

Mr. Henriques is entitled to be resentenced because the trial court erroneously believed it could not impose concurrent sentences and there is at least a possibility it might have done so had it recognized its discretion.

In order to obtain relief in a personal restraint petition, the petitioner must establish either "(1) that he was actually and substantially prejudiced by a violation of his constitutional rights; or (2) 'that the claimed error constitutes a fundamental defect which inherently results in a complete miscarriage of justice.'" *In re Pers. Restraint of Lord*, 152 Wn.2d 182, 188, 94 P.3d 952 (2004) (quoting *In re Pers. Restraint of Cook,* 114 Wn.2d 802, 812, 792 P.2d 506 (1990)). "If a petitioner is claiming a constitutional error, he or she has the burden of demonstrating the former; and if a nonconstitutional error is claimed, the petitioner has the burden of demonstrating the latter." *Mulholland*, 161 Wn.2d at 332.

Here, Mr. Henriques is claiming a nonconstitutional error, a statutory error. *See Mulholland*, 161 Wn.2d at 332-33 (analyzing the sentencing error as

this type of error). In *Mulholland*, our Supreme Court found that for the serious violent offense convictions, six counts of first degree assault:

> The error in this case was the trial court's failure to recognize that it had the discretion to impose a mitigated exceptional sentence. In our view, the trial court's incorrect interpretation of the statutes that applied to the assault sentences is a fundamental defect.

Id. at 332-33.

Here, Mr. Henriques has demonstrated a fundamental defect in his sentencing, the trial court's incorrect interpretation of the statutes that applied to his firearm-related convictions.

The *Mulholland* court further explained when a remand for resentencing is necessary:

> The record does not show that it was a certainty that the trial court would have imposed a mitigated exceptional sentence if it had been aware that such a sentence was an option. Nonetheless, the trial court's remarks indicate that it was a possibility. In our view, this is sufficient to conclude that a different sentence might have been imposed had the trial court applied the law correctly. Where the appellate court "cannot say that the sentencing court would have imposed the same sentence had it known an exceptional sentence was an option," remand is proper.

Mulholland, 161 Wn.2d at 334 (quoting *State v. McGill*, 112 Wn. App. 95, 100-101, 47 P.3d 173 (2002)).

The *McFarland* court found remand for resentencing was warranted because "[a]s in *Mulholland*, the record suggests at least the possibility that the sentencing court would have considered imposing concurrent firearm-related

sentences had it properly understood its discretion to do so." *McFarland*, 189 Wn.2d at 59.

Here, Mr. Henriques is entitled to be resentenced because the trial court erroneously believed it could not impose concurrent sentences and there is at least a possibility it might have done so had it recognized its discretion.

At both Mr. Henriques' initial sentencing and at his resentencing following appeal, the trial court did not understand that it could impose an exceptional mitigated sentence. *See* App. B, pgs. 2, 40-41; *see also* App. F., pgs. 8-9, 12. At Mr. Henriques' initial sentencing, the trial court stated "the Murphy case seems to be dispositive on it talks about 9.94A sentencing[,]" and "apparently the legislature has spoken on this consecutive sentence idea." App. B, pg. 2. The trial court stated "I have to follow the law. That's what the law tells me I have to do." App. B, pg. 41. The trial court did not understand that it could impose an exceptional mitigated sentence. *See* App. B, pgs. 2, 40-41. Likewise, at Mr. Henriques' resentencing following appeal, the trial court assumed it was required to impose consecutive sentences. *See* App. F., pgs. 8-9, 12.

There is at least a possibility the trial court might have imposed an exceptional mitigated sentence had it recognized its discretion. *See* App. B, pgs. 40-41; *see also* App. F, pgs. 6, 8-9. At Mr. Henriques' initial sentencing, when imposing sentence on counts 1-3 and count 7, although it imposed sentences at the

midpoint of the standard range, the trial court expressed misgivings about Mr. Henriques overall sentence length, stating "I don't know that the legislature envisioned having you in prison for 349 months for this type of conduct but that's what they have done." App. B, pg. 41. Further, when the case came back to the trial court for resentencing following Mr. Henriques appeal, the trial court rejected the State's request for mid-range sentences and followed defense counsel's recommendation for sentences to the low-end of the standard range on counts 4 and 5. *See* App. F, pgs. 6, 8-9.

The State argues like the defendant in *State v. Ramirez*, Mr. Henriques cannot show the trial court would have imposed concurrent sentences "had it been alerted of its ability to do so." *See* Respondent's Response to Petitioner's Personal Restraint Petition, pg. 6; *see also State v. Ramirez*, 5 Wn. App. 2d 118, 425 P.3d 534 (2018).

In *Ramirez*, the trial court imposed consecutive sentences for two serious violent offense convictions, two murder counts. *Ramirez*, 5 Wn. App. at 129. On appeal, the defendant argued, in relevant part, that his case should be remanded for resentencing, because the trial court failed to recognize it had discretion to impose a mitigated concurrent sentence under RCW 9.94A.535, rather than being required to impose consecutive sentences under RCW 9.94A.589(1)(b). *Id*. at ¶ 68. The court addressed the argument in an unpublished portion of the opinion. *Id*. at ¶ ¶ 68-69; *see also* GR 14.1(a) (authorizes citation to unpublished opinions

of the Court of Appeals filed on or after March 1, 2013, as nonbinding authority). The court agreed that "despite statutory language to the contrary, a sentencing judge has discretion to run multiple sentences for serious violent offenses concurrently as an exceptional sentence." *Id.* at ¶ 69 (citing *Mulholland*, 161 Wn.2d at 329-31). The court found the defendant "has not shown he was prejudiced by any mistaken belief that concurrent sentences were unavailable." *Id.* The court reasoned that "the court never expressed any misgivings about imposing consecutive sentences or [the defendant's] overall sentence length." *Id.* The court further reasoned "the court imposed *high end sentences* for each of the two murder counts, something it would not have done had it thought consecutive sentences excessive." *Id.* (emphasis added).

Here, at Mr. Henriques' initial sentencing, the trial court expressed misgivings about Mr. Henriques overall sentence length. App. B, pg. 41. Further, at Mr. Henriques' resentencing following appeal, the trial court rejected the State's request for mid-range sentences and followed defense counsel's recommendation for sentences to the low-end of the standard range on counts 4 and 5. *See* App. F, pgs. 6, 8-9. At Mr. Henriques resentencing following appeal, the trial court gave what it believed was the lowest possible sentence, as only counts 4 and 5 were before the trial court for resentencing, and the trial court believed that the counts had to run consecutively. *See* App. F., pgs. 8-9, 12. As in *McFarland*, this record suggests at least a possibility that the trial court would

have considered imposing concurrent sentences for Mr. Henriques' firearm-related sentences, had it properly understood its discretion to do so. *See McFarland*, 189 Wn.2d at 59.

This case is distinguishable from *Ramirez*. *See Ramirez*, 5 Wn. App. at ¶ ¶ 68-69. The trial court here expressed misgivings, did not impose a high-end sentence, and imposed a low-end sentence on counts 4 and 5. *Cf. State v. Stone*, No. 49724-7-III, 2019 WL 1379726, at *8-9 (Wash. Ct. App. Mar. 26, 2019) (rejecting the argument that the trial court erred by failing to recognize its discretion to run firearm enhancements concurrently as an exceptional downward sentence, where the trial court imposed a high-end standard range sentence and did not express any regret or misgivings about the sentence length)[5]; *cf. also State v. Buchanan*, No. 76437-3-I, 2018 WL 4440610, at *4-5 (Wash. Ct. App. Sept. 17, 2018) (rejecting the defendant's argument that he should be resentenced because the trial court did not recognize its discretion to run his firearm-related sentences concurrently as an exceptional mitigated sentence, where the trial court rejected the defendant's request for a low-end standard range sentence due to his attitude, and instead imposed a mid-range sentence)[6], *review granted in part*, 192

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[5] This case is cited as persuasive authority only. *See* GR 14.1(a) (authorizes citation to unpublished opinions of the Court of Appeals filed on or after March 1, 2013, as nonbinding authority).

[6] This case is cited as persuasive authority only. *See* GR 14.1(a) (authorizes citation to unpublished opinions of the Court of Appeals filed on or after March 1, 2013, as nonbinding authority).

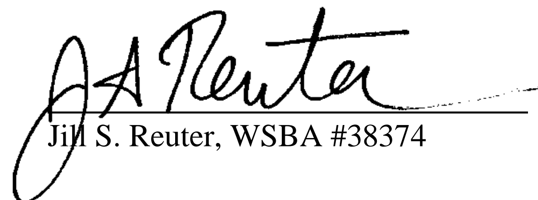
Wn.2d 1010, 432 P.3d 782 (2019) (review granted only as to legal financial obligations).

Mr. Henriques is entitled to have an exceptional sentence actually considered. *See McFarland*, 189 Wn.2d at 56 (quoting *State v. Garcia-Martinez*, 88 Wn. App. 322, 330, 944 P.2d 1104 (1997)). To warrant resentencing, a *certainty* that the trial court would have imposed a mitigated exceptional sentence is not required; only a *possibility* is required. *See Mulholland*, 161 Wn.2d at 334 (quoting *McGill*, 112 Wn. App. at 100-01). Here, there is at least a possibility the trial court would have imposed a mitigated exceptional sentence. This Court should remand this care for resentencing.

C. <u>CONCLUSION</u>

Mr. Henriques' personal restraint petition should be granted, and his case should be remanded for resentencing. His challenge to his sentence is not time barred, because *State v. McFarland* is a significant change in the law, that is material to his sentence, that applies retroactively. Mr. Henriques is entitled to be resentenced because there is a possibility the trial court might have imposed concurrent sentences, had it recognized its discretion.

Respectfully submitted this 12th day of November, 2019.



Jill S. Reuter, WSBA #38374

Appendices

Appendix A: Amended Felony Judgment and Sentence filed December 14, 2009

Appendix B: Verbatim Report of Proceedings, Sentencing Hearing, October 8, 2007

Appendix C: Defendant's Memorandum Pertaining to Sentencing, filed September 21, 2007

Appendix D: Sentencing Memorandum, filed October 5, 2007

Appendix E: Statement of Additional Grounds for Review, filed June 30, 2008

Appendix F: Transcript of Proceedings, Sentencing Hearing, December 14, 2009

COURT OF APPEALS
DIVISION III
OF THE STATE OF WASHINGTON

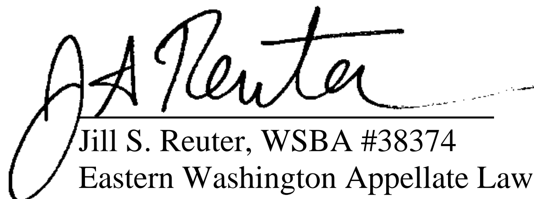
In re the Matter of Personal Restraint of:	)	COA No. 36408-9-III
	)	Kittitas County No. 06-1-00361-5
KIMO ALBERT HENRIQUES,	)	PROOF OF SERVICE
Petitioner.	)	

I, Jill S. Reuter, assigned counsel for the Appellant herein, do hereby certify under penalty of perjury that on November 12, 2019, I deposited for mailing by U.S. Postal Service first class mail, postage prepaid, a true and correct copy of the Petitioner's brief in support of personal restraint petition to:

Kimo Albert Henriques DOC No. 802932
Stafford Creek Corrections Center
191 Constantine Way
Aberdeen, WA 98520

Having obtained prior permission, I also served a copy of the same on the Kittitas County Prosecutor's Office, at prosecutor@co.kittitas.wa.us, using the Washington State Appellate Courts' Portal.

Dated this 12th day of November, 2019.



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