

IN THE  
**ARIZONA COURT OF APPEALS**  
DIVISION TWO

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THE STATE OF ARIZONA,  
*Appellee,*

*v.*

GILBERT GONZALES OLIVAS,  
*Appellant.*

No. 2 CA-CR 2019-0254  
Filed June 11, 2020

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THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND  
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.  
NOT FOR PUBLICATION  
*See* Ariz. R. Sup. Ct. 111(c)(1); Ariz. R. Crim. P. 31.19(e).

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Appeal from the Superior Court in Pima County  
No. CR20102517002  
The Honorable Christopher Browning, Judge

**AFFIRMED**

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COUNSEL

Mark Brnovich, Arizona Attorney General  
Michael T. O'Toole, Chief Counsel  
By Amy M. Thorson, Assistant Attorney General, Tucson  
*Counsel for Appellee*

Robert A. Kerry, Tucson  
*Counsel for Appellant*

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**MEMORANDUM DECISION**

Chief Judge Vásquez authored the decision of the Court, in which Presiding Judge Staring and Judge Brearcliffe concurred.

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V Á S Q U E Z, Chief Judge:

¶1 In this appeal from his resentencing after three of his 2012 convictions were vacated in a federal habeas proceeding, Gilbert Olivas argues the trial court erred in not reconsidering whether his term of imprisonment for count two, aggravated assault with a deadly weapon, be served concurrently with his other terms of imprisonment. For the following reasons, we affirm.

**Factual and Procedural Background**

¶2 The underlying facts of Olivas’s convictions are not in dispute. In 2012, Olivas was convicted of aggravated assault with a deadly weapon in counts one and two, vehicle theft in count seven, armed robbery in count eight, and aggravated robbery in count nine. The trial court found that Olivas had been “previously convicted of two or more historical prior dangerous nature felony convictions” and sentenced him to a total of thirty-five years’ imprisonment. The court ordered that counts seven, eight, and nine were to be served concurrently with count one and that count two was to run consecutively with count one.

¶3 Olivas filed a notice of and petition for post-conviction relief, alleging numerous errors in the trial court’s ruling, including an improper dangerous-nature enhancement on count nine. The court granted relief on the petition as to count nine, denied relief on the remaining claims, and resentenced Olivas to 11.25 years’ imprisonment for count nine. Olivas’s resentencing did not affect the aggregate time of imprisonment from the original sentencing.

¶4 Olivas later filed a petition for writ of habeas corpus in the United States District Court. He argued five grounds for relief including that his trial counsel had been ineffective for failing to object at sentencing when the trial court enhanced his sentence using two historical prior dangerous felony convictions despite only having one prior dangerous felony conviction. The parties later stipulated that Olivas’s counsel had been “constitutionally ineffective” with respect to counts one, two, and

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eight and that his sentence for those counts had been improperly enhanced. The district court accepted the parties' stipulation and granted Olivas habeas relief as to those counts, and it ordered the matter remanded to the trial court for resentencing "in accordance with the parties' stipulation that . . . Olivas has one historical prior dangerous felony conviction for sentence enhancement purposes."

¶5 During resentencing, Olivas argued the trial court was authorized "to adjust whether the[] counts run concurrent[ly] or consecutive[ly]" with regard to counts one, two, and eight. The court disagreed, explaining that "it only has the authority . . . and has only been directed to reconsider and adjust appropriately the ranges associated with Counts 1, 2 and 8, and not the concurrent consecutive determinations" because there was no "clear directive from either a Federal court or a higher State court" that would permit it to alter the original concurrent and consecutive determinations on remand.

¶6 The trial court subsequently resentenced Olivas to 11.25 years' imprisonment for count one, ten years' imprisonment for count two, and fourteen years' imprisonment for count eight and affirmed its previous concurrent and consecutive distinctions for a total term of imprisonment of 21.25 years. This appeal followed. We have jurisdiction pursuant to A.R.S. §§ 12-120.21(A)(1), 13-4031, and 13-4033(A)(1).

### Discussion

¶7 Olivas argues the trial court erred in determining that it "did not have discretion to reconsider making the sentence for count two concurrent" with his remaining counts. "A trial court has broad discretion in sentencing and, if the sentence imposed is within the statutory limits, we will not disturb the sentence unless there is a clear abuse of discretion." *State v. Ward*, 200 Ariz. 387, ¶ 5 (App. 2001).

¶8 Generally, on remand a trial court is limited to those matters it has been specifically ordered to address by a reviewing court. *See State v. Nordstrom*, 230 Ariz. 110, ¶ 19 (2012) (ruling court did not have jurisdiction to consider validity of defendant's underlying convictions because matter was solely remanded for purposes of resentencing); *State v. Hartford*, 145 Ariz. 403, 405 (App. 1985) (explaining "remand for sentencing was not the proper occasion or forum to raise issues dealing solely with the validity of the underlying conviction" as it was "beyond the scope of the matter remanded"). However, a court may, under limited circumstances, independently determine the concurrent and consecutive distinctions on

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remand. For example, when a defendant is sentenced to death a court need not make a distinction between consecutive or concurrent as it is not “a sentence of imprisonment.” See *State v. Lambright*, 243 Ariz. 244, ¶¶ 3, 16-17 (App. 2017). If a death sentence is later vacated and remanded for resentencing, the defendant must be sentenced “anew,” and a court then has the discretion to impose the sentence consecutively or concurrently without specific direction to do so. See *id.* ¶ 18; see also *State v. Wallace*, 229 Ariz. 155, ¶ 39 (2012) (applying previous consecutive distinction on resentencing). Similarly, when a court is resentencing after a sentence has been vacated and “not modifying previously imposed sentences,” it is “sentencing anew” and free to “impose any sentences which were legally allowable” including new concurrent and consecutive distinctions. See *State v. Thomas*, 142 Ariz. 201, 202-04 (App. 1984) (during resentencing court ruled all sentences were concurrent when original sentence was both concurrent and consecutive).

¶9 On appeal, Olivas contends that the trial court erred in failing “to reconsider making the sentence for count two concurrent instead of consecutive.” He also contends that *State v. Healer*, 246 Ariz. 441 (App. 2019), on which the state relied below and on appeal, “does not control this case because it is limited to its unique facts and law” and instead suggests that the court “is entitled to great deference” to redetermine whether a sentence is to run concurrently or consecutively on remand. We disagree and find our analysis in *Healer* dispositive.

¶10 In *Healer*, our supreme court remanded the case to the trial court for resentencing after determining, as had this court, that *Healer*, a juvenile offender sentenced to life in prison without the possibility of release, was entitled to resentencing in light of the United States Supreme Court decision in *Miller v. Alabama*, 567 U.S. 460 (2012). 246 Ariz. 441, ¶¶ 2-3 (explaining *Miller* retroactively forbids sentencing scheme that authorizes life imprisonment without possibility of parole for juveniles). On remand, the trial court resentenced *Healer* to life imprisonment without the possibility of release on any basis for twenty-five years, concluded it did not have the authority to revisit the previous concurrent and consecutive distinctions, and affirmed the previously determined prison terms for the other offenses. *Id.* ¶¶ 4, 13.

¶11 *Healer* appealed the trial court’s resentencing and argued it had erred “when it stated it had no discretion to run the sentence for count one concurrently to the sentences for the other counts.” *Id.* ¶ 13. We disagreed. *Id.* ¶ 16. And in affirming the court’s ruling, we explained that on remand a trial court does not have the discretion to independently revisit

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whether to run a sentence concurrently or consecutively if the original sentence had previously made that determination. *Id.* We further clarified that because our supreme court had limited remand to a determination whether Healer was entitled to resentencing in light of *Miller*, and had not specifically “direct[ed] the trial court to look at any sentence other than his natural life sentence,” the trial court had correctly concluded it lacked the authority to revisit and change the previous consecutive distinction. *Id.* ¶ 19.

¶12 Here, the district court similarly ordered the trial court to resentence Olivas in light of the district court’s finding that he had only one prior dangerous felony conviction as to counts one, two, and eight. Thus, as explained in *Healer*, on remand the trial court was limited in scope to reviewing Olivas’s sentences for the enumerated counts and was not independently authorized to revisit the prior concurrent and consecutive determinations because the district court had not provided such an instruction to do so. *See id.* ¶¶ 13, 16, 19. Additionally, because the trial court was not resentencing “anew” but was instead making a “modification” to counts one, two, and eight it was not permitted to revisit Olivas’s concurrent and consecutive determinations. *See Wallace*, 229 Ariz. 155, ¶ 39; *Lambright*, 243 Ariz. 244, ¶¶ 3, 16-17. Therefore, the court did not abuse its discretion in ruling that it was not permitted to reconsider whether Olivas’s sentence for count two should run concurrently with his other terms of imprisonment. *See Ward*, 200 Ariz. 387, ¶ 5.

**Disposition**

¶13 For the reasons stated above, we affirm.