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STATE OF WASHINGTON
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NO. 100527-0

**SUPREME COURT OF THE
STATE OF WASHINGTON**

STATE OF WASHINGTON,

Respondent,

v.

ROBERT JESSE HILL,

Appellant.

ANSWER TO PETITION FOR REVIEW

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TABLE OF CONTENTS

I. INTRODUCTION 1

II. RESTATEMENT OF THE ISSUES 2

III. STATEMENT OF THE CASE.. 3

A. Hill, While Under the Influence, Refused to Leave a Business After Being Ordered to Leave, Assaulted a Store Employee, and Destroyed Store Property.. 3

B. The Jury Unanimously Reached Verdicts Finding Hill Guilty of Three Felonies Prior to a Juror Making Insensitive Remarks to Another Juror 6

C. The Sentencer Considered and Denied Hill's Request for a Mitigated Sentence 8

IV. ARGUMENT 9

A. Washington Courts Have Consistently Held That Courts Will Order a New Trial Only Where Actual Juror Misconduct Resulted in Prejudice to the Defendant.. 9

B. The Court of Appeals Properly Relied on This Court's Recent Alternative Means Analysis Jurisprudence to Properly Conclude that Burglary is Not an Alternative Means Offense 15

C. Hill Fails to Establish that the Trial Court Abused its Discretion in Declining His Request for a Mitigated Sentence 22

V. CONCLUSION 26

TABLE OF AUTHORITIES

State Cases

Johnson v. Liquor & Cannabis Bd., 197 Wn.2d 605,
486 P.3d 125 (2021)...20

State v. Balisok, 123 Wn.2d 114, 866 P.2d 631 (1994)...........10

State v. Barboza-Cortes, 194 Wn.2d 639,
451 P.3d 707 (2019)...15, 17, 18, 22

State v. Collins, 110 Wn.2d 253, 751 P.2d 837 (1988)............21

State v. Depaz, 165 Wn.2d 842, 204 P.3d 217 (2009).............10

State v. Garcia-Martinez, 88 Wn. App. 322,
944 P.2d 1104 (1997)...23

State v. Grayson, 154 Wn.2d 333,
111 P.3d 1183 (2005)..23, 25

State v. Hawkins, 72 Wn.2d 565, 434 P.2d 584 (1967)...........11

State v. Hill, 19 Wn. App. 2d 333,
495 P.3d 282 (2021)...11, 12, 19, 21

State v. Kilburn, 151 Wn.2d 36, 84 P.3d 1215 (2004).............12

State v. McFarland, 189 Wn.2d 47, 399 P.3d 1106 (2017).....23

State v. Owens, 180 Wn.2d 90, 323 P.3d 1030 (2014)......15, 17

State v. Peterson, 168 Wn.2d 763,
230 P.3d 588 (2010)...15, 16, 17, 22

State v. Reynoldson, 168 Wn. App. 543,
277 P.3d 700 (2012).. 10

State v. Sandholm, 184 Wn.2d 726,
364 P.3d 87 (2015)... 15, 17

State v. Smith, 17 Wn. App. 2d 146, 484 P.3d 550,
review denied, 198 Wn.2d 1005,
493 P.3d 747 (2021)..passim

State v. Williams, 144 Wn.2d 197, 26 P.3d 890 (2001)........... 12

Federal and Other Jurisdictions

Chaplinsky v. New Hampshire, 315 U.S. 568, 62 S. Ct. 766,
86 L.Ed. 1031 (1942)... 12

Jones v. Mississippi, ___ U.S. ___, 141 S. Ct. 1307,
209 L.Ed.2d. 390 (2021).. 24, 25

Statutes

RCW 9A.52.025(1) 18

RCW 9A.82.050(1) 17

Former RCW 46.61.502 (2008)……………………………17

Rules and Regulations

RAP 13.4(b).. 10, 23, 26

I. INTRODUCTION

It is well settled in Washington that when faced with an allegation of juror misconduct, a court will order a new trial only where actual juror misconduct resulted in prejudice to the defendant. Unable to meet this standard, Robert Jesse Hill resorts to conclusory allegations that a juror threatened another, when the record establishes that the juror merely made insensitive remarks not arising to a threat. The trial court and Court of Appeals tightly adhered to this Court's well-settled test in concluding that Hill failed to meet his burden of establishing actual misconduct and resulting prejudice. This Court should decline to revisit this well-plowed ground.

In addition, in September 2021, this Court denied review of a previous published Court of Appeals decision holding that burglary is not an alternative means crime. In that decision, Division Two properly applied this Court's well-settled alternative means analysis to conclude that burglary is not an alternative means crime. In the unpublished portion of the Court

of Appeals decision here, the Court properly applied its previous holding to similarly conclude that burglary is not an alternative means crime. As the Court of Appeals relied on clear precedent from this Court on analyzing alternative means crimes to properly conclude that burglary is an alternative means crime, this Court should once again deny review on this issue, just as it did just a few months ago.

Washington courts have also consistently held that when a defendant makes a request for an exceptional sentence, the sentencer must give due consideration to the request. Contrary to Hill's assertion, the trial court did consider the request and deny it. Thus, Hill offers no arguments which merit review by this Court and the Court should deny the petition.

II. RESTATEMENT OF THE ISSUES

A. Should this Court deny review where this Court previously held that a new trial is warranted only where juror misconduct prejudiced the defendant and the trial court properly applied this standard?

B. Should this Court deny review where the Court of Appeals properly applied this Court's well-settled alternative means test to conclude that burglary is not an alternative means crime and this Court denied review on this exact issue just a few months ago?

C. Should this Court deny review where this Court previously held that a trial court must consider a request for an exceptional sentence and the record reflects that the trial court did so?

III. STATEMENT OF THE CASE

A. Hill, While Under the Influence, Refused to Leave a Business After Being Ordered to Leave, Assaulted a Store Employee, and Destroyed Store Property

In August 2019, Hill walked into Urban Bud Dispensary after consuming at least five large beers and two shots of brandy. 4VRP at 410, 426-29. Hill stopped just inside the door at a podium that acted as a "security check-in station." 3VRP at 214. Hill began writing on a clipboard at the podium, erroneously believing it was a sign-in sheet despite the paperwork being clearly marked as a security report. *Id*. at 268. Alvaro Salaverry, the security guard on duty, began to worry that Hill was under the influence as he smelled of alcohol and could not provide a rational explanation for why he wrote on the security paperwork.

Id. at 268-29, 272. Salaverry told Hill, "[s]ir, you're going to need to grab your bags and leave. We're not going to sell to you. You're under the influence. I smell alcohol." *Id*. at 272.

Hill ignored Salaverry and attempted to walk past the security station into the store. 3VRP at 273-74. Salaverry grabbed Hill by his back pocket and pulled him backwards, causing Hill to fall. *Id*. Salaverry attempted to drag Hill out of the store, but Hill persisted and continued to try to crawl back into the store. *Id*. at 274.

The store manager, Christian Muridan, heard the commotion at front of the store, walked over, and saw Salaverry on the ground struggling to restrain Hill. 3VRP at 202. Muridan observed Hill screaming incoherently and noticed that he smelled strongly of alcohol. *Id*. at 203. Muridan told Hill at least five times that he needed to leave. *Id*. Hill stood up, pushed past the security system, and attempted to kick open the door to an employee breakroom. *Id*. at 204, 216, 242, 276. Salaverry tackled Hill just before he entered the breakroom. 4VRP at 348-49. Hill

then bit Salaverry's left forearm, causing Salaverry to jump up quickly. 3VRP at 277-78. Hill "scrambled to his feet, he threw a kick that …just grazed [Salaverry's] nose … kicked … just past the chin and the nose." *Id*. at 278. "He yelled this primal scream and just grinned and showed his teeth and growled. And [Salaverry's] blood was all over his front teeth and on the side of like the corner of his mouth." *Id*.

Hill picked up a water jug and threw it at Salaverry. 3VRP at 278-79. He then returned to the employee breakroom to pick up a water dispenser and threw it into the middle of the store. *Id*. Hill then kicked and destroyed multiple display cases in the store because he was upset from the "emotional drama" of the situation. 2VRP at 196-976; 3VRP at 279; 4VRP at 424, 453.

Urban Bud had significant security measures including security fencing on the outside doors and windows, and an advanced security camera system which captured the incident from multiple angles. 3VRP at 211-20, 232-33. The video recording of the incident was played for the jury and trial court.

Law enforcement eventually responded to the store, observing a bloody, swollen two-inch diameter bite mark on Salaverry's left arm. 3VRP at 287; 4VRP at 339-40, 393-94. Hill was uncooperative with the officers, who eventually had to carry him out of the store. 4VRP at 341.

B. The Jury Unanimously Reached Verdicts Finding Hill Guilty of Three Felonies Prior to a Juror Making Insensitive Remarks to Another Juror

Hill proceeded to a jury trial on second-degree assault, second-degree malicious mischief, harassment, and first-degree burglary. CP 39-41. After the close of evidence, the jury began deliberations. On the second day of deliberations, at 10:42 a.m., the jury informed the judicial assistant (JA) that it was deadlocked on one of the counts. CP 297. At 10:51 a.m., juror 2 informed the JA that she wanted to leave because she did "not want to be talked to like that." CP 297; 6VRP at 534. After a 10-minute break, juror 2 informed the JA that she had received "threats." 6VRP at 534. At this time, the jury had already reached verdicts on three of the four counts. *Id*. at 537.

After consulting with the parties, the trial court polled the jury on whether they could reach a verdict on the remaining count within a reasonable time. *Id*. at 538-39. After the jury unanimously indicated that they could not, the parties and the court agreed that the jury was deadlocked. *Id*. at 538-40. The parties agreed to voir dire juror 2 to determine whether the jury could continue. *Id*. at 534-36.

When questioned by the court, juror 2 stated that another juror (juror X) told her, "karma should come back at me, and someone should come to my house and do that to me, and she hopes that I am the next person that happens to if I don't agree with her." 6VRP at 542. Despite these comments, juror 2 indicated that she could continue to deliberate. *Id*. at 543.

The trial court next denied Hill's motion for a mistrial. 6VRP at 545-46. The court opined that the comments did not taint the deliberations and stated that "I don't think it is that unusual for deliberations to get heated and people to say untoward things." *Id*. at 546. The court also reasoned that

replacing or discharging juror 2 was unnecessary because she stated that she could continue deliberating and the jury had already reached verdicts on three of the four counts. *Id*. at 544.

The jury found Hill guilty of second-degree malicious mischief, felony harassment, and first-degree burglary. 6VRP at 548. The jury was unable to reach a verdict on the second-degree assault charge. *Id*. The court polled the jury and confirmed the verdicts. *Id*. at 548-49.

C. The Sentencer Considered and Denied Hill's Request for a Mitigated Sentence

At sentencing, Hill requested an exceptional downward sentence on the theory that the victim, Salaverry, initiated the physical contact. 7VRP at 561. The trial court allowed Hill an opportunity to exercise his right of allocution. *Id*. at 562-04. Hill apologized for going into the Urban Bud store, but stated, "I'm not sorry for biting Salaverry." *Id*. at 562. The sentencer stated to Hill that it had an opportunity to observe the video evidence played at trial and found it concerning. *Id*. at 564. The court noted that Hill had previously stated that he was responsible for caring

for his elderly mother, and that "in the last seven years [Hill was] constantly in and out, in and out, in and out, at a time when [Hill's elderly mother is] a vulnerable adult now and needs assistance, when maybe, you know, needs [Hill's] support." *Id*. at 564-65.

The court asked Hill to comment on how his criminal behavior was going to stop. *Id*. at 565. Hill was unable to provide insight into how he could curb his criminal behavior. *Id*. at 565-67. After fully listening to Hill and his attorney's request for a mitigated sentence, the court denied Hill's request for an exceptional sentence by adopting the State's sentencing recommendation of 87 months. *Id*. at 567. Hill did not object to the sentence or request that the court provide further explanation for its sentence. *Id*. at 567-73.

IV. ARGUMENT

A. Washington Courts Have Consistently Held That Courts Will Order a New Trial Only Where Actual Juror Misconduct Resulted in Prejudice to the Defendant

It is well-settled in Washington that when faced with an allegation of juror misconduct, the trial court will order a new

trial only where juror misconduct has prejudiced the defendant. *State v. Depaz*, 165 Wn.2d 842, 856, 204 P.3d 217 (2009); *see also State v. Reynoldson*, 168 Wn. App. 543, 548, 277 P.3d 700 (2012). Both the trial court and Court of Appeals tightly adhered to this principle in reaching their decisions. As this rule is clear and unequivocal, no clarification is necessary from this Court. Because this Court has spoken on this issue, the lower courts correctly applied this rule, and sound considerations underlie the rule, there is no basis for review under RAP 13.4(b).

This Court has unequivocally held that a new trial is warranted only where juror misconduct has actually prejudiced the defendant. *Depaz*, 176 Wn.2d at 845. A strong, affirmative showing of misconduct is required to "overcome the policy favoring stable and certain verdicts and the secret, frank and free discussion of the evidence by the jury." *State v. Balisok*, 123 Wn.2d 114, 117-18, 866 P.2d 631 (1994). Further, the party alleging juror misconduct bears the heavy burden to show that

misconduct occurred. *State v. Hawkins*, 72 Wn.2d 565, 658, 434 P.2d 584 (1967).

Unable to meet this standard, Hill merely makes a conclusory allegation that juror X "committed misconduct by threatening another juror during deliberations." Pet. at 7. Not so. As the trial court observed, "it is [not] unusual for deliberations to get heated and people to say untoward things." 6VRP at 546. And as the Court of Appeals noted, juror X's statement was "not a threat." *State v. Hill*, 19 Wn. App. 2d 333, 344, 495 P.3d 282 (2021). "Juror X was telling juror 2 to put themselves in the victim's place, albeit in an extremely offensive and disrespectful way. Further, although juror 2 felt threatened, they were able to continue deliberating. The actions were not misconduct." *Id*.

This Court's well-settled precedent establishes that a true "threat" is "a statement made 'in a context or under such circumstances wherein a reasonable person would foresee that the statement would be interpreted …. as a serious expression of intention to inflict bodily harm upon or to take the life of [another

individual].'" *State v. Williams*, 144 Wn.2d 197, 207-08, 26 P.3d 890 (2001) (quoting *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572, 62 S. Ct. 766, 86 L.Ed. 1031 (1942)). Three years later, this Court reiterated the *Williams* test and further explained that "[w]hether a statement is a true threat or [not a true threat] is determined in light of the entire context, and the relevant question is whether a reasonable person in the [listener's] place would foresee that in context the listener would interpret the statement as a serious threat." *State v. Kilburn*, 151 Wn.2d 36, 46, 84 P.3d 1215 (2004).

Contrary to Hill's assertions otherwise, juror X's statement does not amount to threat, either explicit or implicit. Juror X attemped to put juror 2 in the victim's position, albeit in "an extremely offensive and disrespectful" manner, *Hill*, 19 Wn. App. 2d at 344, by stating that "she *hopes*" that the same thing happens to juror 2 and "someone *should*" come and do that to her. 6VRP at 542 (emphasis added). Hill fails to demonstrate that juror X actually threatened juror 2. Juror X's language does not

amount to a threat as it is not a serious expression of intent to inflict harm. Thus, Hill fails to demonstrate juror misconduct and there is no issue for this Court to review.

Even assuming arguendo that juror X's statement constitutes a true "threat," Hill fails to establish prejudice as juror 2 expressly indicated that she could continue to deliberate, thus establishing that the alleged misconduct did not interfere with her ability to deliberate. 6VRP at 543. Moreover, Hill could not possibly have been prejudiced because the jury had already reached a verdict on three of the counts *prior* to juror X's remarks, and was unable to reach a verdict on the other count. *Id*. at 548. It was only approximately 20 minutes after the jury informed the court that it was deadlocked on one count, and thus, necessarily implying that it had reached verdicts on the other three counts, that juror 2 reported the statement to the JA. CP 297. Stated otherwise, juror 2 only notified the JA that she wanted to leave and had been threatened *after* the jury notified the court that it had reached a decision on three of the four counts.

Id. at 534; CP 297. Because the jury had reached verdicts on three of the counts and was deadlocked on the fourth, deliberations were essentially over when juror X made the remarks. Thus, Hill cannot demonstrate prejudice.

Moreover, the cases from other jurisdictions cited by Hill for the proposition that a threat made by a juror against another juror constitutes misconduct are inapposite because juror X did not make a threat against juror 2. Hill's alternative argument that "[t]hreatening physical harm on a fellow juror—in order to intimidate that juror into changing her mind" constitutes "structural error," Petition for Review at 14, also fails because juror X did not actually threaten juror 2. As discussed above, Hill fails in his burden of establishing juror misconduct as juror X's statements, albeit rude, do not arise to a threat.

This Court has clearly held that courts will only order a new trial if actual juror misconduct resulted in actual prejudice to the defendant. Here, both the trial court and Court of Appeals properly found that although juror X's comments were "heated,"

"offensive and disrespectful," they did not arise to a "threat" constituting actual misconduct. The trial court's denial of Hill's motion for a mistrial tightly adhered to long-standing precedent from this Court and there is no conflict of authority for this Court to review. This Court should decline to revisit this well-settled rule.

B. The Court of Appeals Properly Relied on This Court's Recent Alternative Means Analysis Jurisprudence to Properly Conclude that Burglary is Not an Alternative Means Offense

The Court of Appeals relied on recent developments in the alternative means analysis from this Court to properly conclude that burglary is not an alternative means crime. In *State v. Smith*, 17 Wn. App. 2d 146, 484 P.3d 550, *review denied*, 198 Wn.2d 1005, 493 P.3d 747 (2021), the Court of Appeals astutely noted that this Court "refined the alternative means analysis" in a series of recent cases[1] and applied this Court's precedents to hold that

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[1] *State v. Peterson*, 168 Wn.2d 763, 768-69, 230 P.3d 588 (2010); *State v. Owens*, 180 Wn.2d 90, 323 P.3d 1030 (2014); *State v. Sandholm*, 184 Wn.2d 726, 364 P.3d 87 (2015); and *State v. Barboza-Cortes*, 194 Wn.2d 639, 451 P.3d 707 (2019).

burglary is not an alternative means offense. Here, the Court of Appeals properly relied on *Smith* to similarly conclude that burglary is not an alternative means offense. As the Court of Appeals tightly adhered to this Court's alternative means analysis, no clarification is necessary and this Court should deny review.

In *Smith*, the Court of Appeals noted that this Court "has made it clear that an alternative means offense is not created if … separate acts simply represent different aspects of a single type of criminal conduct. The focus is on the actual conduct that the applicable statute prohibits." *Smith*, 17 Wn. App. 2d at 156 (internal citation omitted). *Smith* analyzed this Court's updated cases clarifying the alternative means analysis. In *Peterson*, this Court held that the three different ways of violating the failure to register as a sex offender statute (after becoming homeless, after moving between fixed residences within a county, and after moving from one county to another) merely described the same single act: failure to register as a sex offender after moving.

Peterson, 168 Wn.2d at 768-71, 770. In *Owens*, this Court held that the statute criminalizing trafficking in stolen property, which provides that a person is guilty of trafficking if he or she "knowingly initiates, organizes, plans, finances, directs, manages, or supervises the theft of property for sale to others, " RCW 9A.82.050(1), does not create an alternative means offense because the statute merely describes "different ways of committing one act, specifically stealing." *Owens*, 180 Wn.2d at 99. In *Sandholm*, this Court held that the statute criminalizing driving under the influence did not create an alternative means offense because the different ways of violating the statute all contemplated "only one type of conduct: driving a vehicle under the 'influence of' or while 'affected by' certain substances." *Sandholm*, 184 Wn.2d at 735 (citing former RCW 46.61.502 (2008)). Finally, in *Barboza-Cortes*, the Court held that the statute prohibiting the unlawful possession of a firearm did not create an alternative means offense because the different statutory provisions "all describe ways of accessing guns."

Barboza-Cortes, 194 Wn.2d at 646. Thus, these cases collectively stand for the principle that a statute does not create alternative means of committing an offense if the separate acts in the statute simply represent different aspects of a single type of criminal conduct.

Relying on this refined alternative means analysis from this Court, the Court of Appeals correctly held in *Smith* that the residential burglary statute identified "a single means of committing residential burglary: entering or remaining unlawfully in a dwelling." *Smith*, 17 Wn. App. 2d at 157. The burglary statutes, which provide that a person is guilty of burglary if the person "enters or remains unlawfully," *see* RCW 9A.52.025(1), treat "entering and remaining as a single unit, suggesting that they be read together." *Smith*, 17 Wn. App. 2d at 156.

Here, the Court of Appeals properly applied its previous holding in *Smith* to conclude that "the statutory language 'enters or remains unlawfully in a building' does not create alternative

means of committing burglary in the first degree." *Hill*, 19 Wn. App. 2d 333, ¶ 50 (2021) (unpublished portion of opinion). As *Smith* properly relied on this Court's clear and refined alternative means analysis to properly conclude that the residential burglary statute does not create an alternative means crime, as a corollary, the Court of Appeals also properly concluded that first-degree burglary does not create an alternative means offense.

Moreover, as Hill notes in his petition, Smith petitioned this Court for review of the Court of Appeals on this very issue. *See* Petition for Review, *State v. Smith*, No. 99757-8 (Wash. May 10, 2021); Petition for Review at 17-18. There, Smith advanced virtually identical arguments as Hill does here to assert that the "enters or remains unlawfully" language created alternative means for burglary. *Id*. at 6-11. This Court denied review just a few months ago, on September 1, 2021. *Smith*, 198 Wn.2d 1005.

Hill implies that this Court declined to review *Smith* on the grounds that there, the prosecutor elected one of the alternative means in closing. *See* Petition for Review at 18. But Hill

misconstrues *Smith*, where the Court expressly held that residential burglary does not constitute an alternative means crime, but in dictum, went further and addressed the State's *alternative* argument "that even if residential burglary was not an alternative means offense, Smith's right to a unanimous verdict was not violated because the State elected to rely on the 'remains unlawfully' means of residential burglary and sufficient evidence supported that means." *Smith*, 17 Wn. App. 2d at 157. In addressing this alternative ground, the Court noted in dictum that "Smith's right to a unanimous verdict was not violated *even if residential burglary was not an alternative means offense*." *Smith*, 17 Wn. App. 2d at 160 (emphasis added). As this alternative argument was not necessary to decide the case, it is neither here nor there. *Johnson v. Liquor & Cannabis Bd.*, 197 Wn.2d 605, 518, 486 P.3d 125 (2021) ("[s]tatements in a case that do not relate to an issue before the court and are unnecessary to decide the case constitute obiter dictum, and need not be followed.")

Here, the Court of Appeals properly held that "the State was not required to present sufficient evidence to show that Hill unlawfully entered *and* unlawfully remained in Urban Bud." *Hill*, 19 Wn. App. 2d 333, ¶ 50 (2021) (unpublished portion of portion) (emphasis in original). The Court also noted that "it is undisputed that the State provided sufficient evidence that Hill remained unlawfully." *Id*. Thus, this Court should decline Hill's petition, just as it declined Smith's petition just a few months ago.

Hill's reliance on *State v. Collins*, 110 Wn.2d 253, 751 P.2d 837 (1988) is immaterial. There, this Court held that "on a case by case basis, an implied limitation on the scope of an invitation or license may be recognized" where a person "receives an invitation to the premises which is not expressly qualified as to area or purpose, and commits a crime while on the premises." *Collins*, 110 Wn.2d at 254. *Collins* does not support Hill's contention that the burglary statute creates an alternative means offense merely because it describes two different ways of

committing one act, specifically, being unlawfully present in a building. Rather, the burglary statute "describes minor nuances inhering in the same act," thus making it more "likely the various 'alternatives' are merely facets of the same criminal conduct." *Barboza-Cortes*, 194 Wn.2d at 644 (citing *Peterson*, 168 Wn.2d at 770).

The Court of Appeals properly applied this Court's clear alternative means analysis to correctly conclude that the burglary statute does not create an alternative means offense. Moreover, this Court denied review on this very issue recently. This Court should once again decline Hill's invitation to revisit well-plowed ground.

C. Hill Fails to Establish that the Trial Court Abused its Discretion in Declining His Request for a Mitigated Sentence

Hill raised a request for an exceptional sentence and the trial court engaged in an extensive discussion with Hill. After considering the request, the arguments of the parties, and Hill's allocution, the trial court necessarily denied Hill's request for a

mitigated sentence by adopting the State's sentencing recommendation. Hill offers no arguments on how this issue merits review under RAP 13.4(b) beyond a false allegation that the trial court's conclusion contradicts a previous decision from this Court. This Court should deny review.

When a defendant requests a trial court to make a discretionary sentencing decision, the sentencer must meaningfully consider the request and actually consider such a sentence. *State v. Grayson*, 154 Wn.2d 333, 342-43, 111 P.3d 1183 (2005). This Court has made clear that when a defendant requests an exceptional sentence, appellate review occurs only where the trial court refused to exercise discretion at all or relied on an impermissible basis for refusing to impose an exceptional sentence. *State v. McFarland*, 189 Wn.2d 47, 56, 399 P.3d 1106 (2017). A trial court abuses its discretion when "it refuses categorically to impose an exceptional sentence below the standard range under any circumstances." *Grayson*, 154 Wn.2d at 342 (citing *State v. Garcia-Martinez*, 88 Wn. App. 322, 330,

944 P.2d 1104 (1997)). "[I]f the sentencer has discretion to consider [mitigating factors], the sentencer necessarily *will* consider the defendant's [mitigating factors], especially if defense counsel advances an argument based on the [mitigating factors]." *Jones v. Mississippi*, ___ U.S. ___, 141 S. Ct. 1307, 1319, 209 L.Ed.2d. 390 (2021) (emphasis in original).

Here, Hill's counsel made a request for an exceptional sentence. 7VRP at 561. During his allocution, Hill apologized for going to the store, but also stated that he had no remorse for biting the victim, Salaverry. *Id*. at 562. The trial court engaged in an extensive conversation with Hill, noting that it found the video concerning and asked Hill to comment on how his criminal behavior would stop. *Id*. at 564-65. Hill was unable to provide any insight into how he would curb his rapidly escalating criminal behavior. *Id*. at 565-67. After engaging in an extended conversation with Hill and fully listening to his attorney's request for a mitigated sentence, the trial court rejected Hill's request for an exceptional sentence by adopting the State's

sentencing recommendation for a standard range sentence. *Id*. at 567.

Stated otherwise, Hill and his counsel both advanced an argument for a mitigated sentence. The sentencer had discretion to consider the mitigated sentence. It thus follows, that the sentencer necessarily considered Hill's request for an exceptional sentence, especially when defense counsel advanced an argument for a mitigated sentence based on the theory that Salaverry was an aggressor in the altercation. *Jones*, 141 S. Ct. at 1319.

Hill's reliance on *Grayson* is misplaced. There, this Court remanded for resentencing where the trial court *categorically* refused to consider the defendant's request for a drug offender sentencing alternative (DOSA) sentence. *Grayson*, 154 Wn.2d at 341-43. The sentencer foreclosed *any* possibility of a DOSA by stating, "my main reason for denying [the DOSA] is because of the fact that the State no longer has money available to treat people who go through a DOSA program." *Id*. at 337. Thus, the

sentencer there categorically refused to consider Grayson's request for a DOSA sentence. In sharp contrast here, the trial court did not categorically refuse to consider Hill's request, but in a proper exercise of its discretion, declined the request by adopting a standard range sentence.

Hill offers no reasons as to why review is warranted under RAP 13.4(b). Moreover, he fails in his burden of establishing an abuse of discretion where the trial court fully considered the request, heard Hill's allocution, engaged in an extended conversation with Hill, and exercised its discretion to impose a standard range sentence. This Court should deny review.

V. CONCLUSION

For the foregoing reasons, the State respectfully requests that this Court deny the petition for review.

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RESPECTFULLY SUBMITTED this 1st day of February, 2022.

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2/1/2022	*s/ Kimberly Hale*
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PIERCE COUNTY PROSECUTING ATTORNEY

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