Supreme Court No. 96915-9
(COA No. 77437-9-I)

THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

CAMERON PATTERSON,

Petitioner.

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

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER

Cameron Patterson, petitioner here and appellant below, asks this Court to accept review of the Court of Appeals decision terminating review designated in Part B of this petition pursuant to RAP 13.3 and RAP 13.4.

B. COURT OF APPEALS DECISION

Mr. Patterson seeks review of the Court of Appeals decision dated February 5, 2019, attached as Appendix A.

C. ISSUES PRESENTED FOR REVIEW

1. Is resentencing required where the trial court failed to consider all of the statutory reasons for departing from the standard range?

2. May a trial court depart from the standard range based on the aberrational nature of Mr. Patterson's decision to commit these crimes?

3. Is a trial court authorized to reduce the time a person must serve for a firearm enhancement?

D. STATEMENT OF THE CASE

Nothing is more important to Mr. Patterson than his children. At 37 years-old, he has five children of his own and

considers his wife's two children as his, who range in age from 6 to 15 years old. RP 11, CP 45.[1] He spends his time helping them to grow into responsible adults, helping to coach their football teams and encouraging them to make the honor roll. *Id.* He has no prior felony convictions. RP 11.

Mr. Patterson wanted his children to have better lives than his. CP 46. He grew up in a rough part of San Diego. RP 11. He played sports and the clarinet as a child. CP 46. His life was constantly at risk. *Id.* He witnessed his first drive-by shooting at 6-years-old while playing with friends. *Id.*

These dangers affected him. As an 8-year-old child, he woke to find his father's throat slit ear to ear by his mother and his house covered in blood. CP 47, RP 11. His home life remained unstable throughout his childhood. *Id.*

Mr. Patterson promised his children would not suffer like he did. He graduated from high school. CP 47. He worked regularly. *Id.* He tried to develop himself as an entrepreneur. *Id.*

[1] The original transcript was missing critical parts of the guilty plea statement and a second transcript was created. In this brief, the original transcript will be referred to as RP. The second transcript will include its date and be referred to as 8/8/17 RP.

According to his wife, Jeni Patterson:

> When Cameron got himself in the situation he is now I was dumbfounded because this did not seem to be the sort of thing he would ever do. After he got locked up I began to talk to his family and friends which includes his parents, his sibling, his baby mamas, and his kids. While doing this, each and every one confirmed what I was thinking and feeling about him. That he is a wonderful, caring, loving, intelligent, amazing father, friend, son, brother, uncle, and now my husband. I am lucky to be able to call him my husband and best friend.

CP 48.

Mr. Patterson's mother agreed, stating, "Cameron is and has been a good man, son, and father." CP 48. His father confirmed Mr. Patterson has "been of great help within his family structure." CP 49. A friend told the court "Cam is the type of person to go out of his way to help someone else, he's a great father and a great asset to society." CP 49-50. Others recognized it was "out of character" for him to be in jail. CP 50. His friends witnessed his "leadership and responsiveness" to his community, family, and friends. *Id.* He was a "role model" for others. CP 51. He was "highly regarded and respected." *Id.* He was "kind and generous" and always willing to "go the extra

mile." CP 52. His actions were "completely uncharacteristic" and left friends in "dismay." CP 50.

While in custody, Mr. Patterson enrolled in the adult education classes. CP 54. His teacher described Mr. Patterson as a "mature learner" who can be "counted on to respect class standards." She believed he could be a role model for others as a chemical dependency counselor. *Id.* More than once he told his counselor, "I won't be back." CP 55.

Unfortunately, Mr. Patterson fell on hard times. CP 59. School was about to start and he needed to purchase a football uniform for his son. *Id.* He remembered how traumatic it was to drop out of sports as a child, and he began to "stress" about his circumstances. *Id.*

When a friend told him about a crime he intended to commit, Mr. Patterson agreed to take part. CP 55. He thought this was an inside job, where they would pretend to rob a marijuana dispensary. CP 55, RP 16. The store's employees would be in on the crime and no one would be hurt. *Id.*

While one of the employees was part of the conspiracy, two other employees were not. RP 16. When an off-site employee

watched the incident unfold on video, he immediately called the police. CP 7. The police arrived and arrested Mr. Patterson. *Id.*

This was the worst mistake of Mr. Patterson's life. CP 58. He wanted to take responsibility early in the proceedings, but his first attorneys did not engage in plea-bargaining on his behalf. RP 14. When he finally did plea bargain, it was not until just before trial, compromising his ability to make a deal. *Id.*

Mr. Patterson pled guilty to robbery in the first degree and unlawful imprisonment. 8/8/17 RP 25. The government also filed a firearm enhancement for the robbery charge. CP 29. The prosecution and Mr. Patterson's attorney offered an agreed sentence to the court, 36-months of confinement, in addition to the 60-month firearm enhancement. 8/8/17 RP 12.

At sentencing, Mr. Patterson presented significant evidence of his good character. CP 62-108. These letters largely explained that Mr. Patterson was a good man who made a serious mistake. *Id.* This crime was aberrational from his general character, which demonstrated his devotion to his family. *Id.* His wife also told the court he took full responsibility

for what he did, had complete remorse, but had found himself caught in a really hard spot and did something stupid. RP 18-19.

The sentencing court empathized with Mr. Patterson at sentencing. RP 19. The court made clear:

> That if there was what I felt to be any wiggle room in terms of as I look at what exceptional sentences mean and what are the standards under which they can be applied where -- where somebody would think I'm not abusing my discretion, I would go there. I've done it. But I can't find it here.

RP 21.

The sentencing court believed it could not find a statutory basis for departing from the standard range and, while conceding Mr. Patterson's sentence was "harsh" for his conduct, imposed the minimums set forth in the standard range, including 36 months for the robbery, in addition to 60 months for the firearm, for a total of 8 years. RP 20.

E. ARGUMENT

1. **This Court should grant review of whether facts presented to the trial court provided it with the authority to depart from the standard range.**

The Court of Appeals held the trial court properly considered the facts to determine whether an exceptional sentence existed and determined it did not. App. at 9. The Court

also held that the trial court did not have the authority to depart from the standard range based on the aberrational nature of Mr. Patterson's criminal conduct. App. at 10. This Court should grant review of these holdings. They are issues of substantial importance this Court should resolve and are inconsistent with other opinions of this Court. RAP 13.4.

In fact, this Court's recent holdings suggest the legislature never intended for the Sentencing Reform Act to be so restrictive that it deprives the judiciary of discretion at sentencing. In *State v. O'Dell*, this Court ordered resentencing when the trial court failed to consider the personal characteristics of the defendant, his youthfulness, at sentencing. 183 Wn.2d 680, 696, 358 P.3d 359 (2015). In *State v. Houston-Sconiers*, this Court ordered a new sentencing hearing where the trial court failed to consider youthfulness at sentencing. 188 Wn.2d 1, 9, 391 P.3d 409 (2017). At least two of the justices in *Houston-Sconiers* would have reached this conclusion regardless of the Eighth Amendment, recognizing the legislature intended for structured discretionary sentencing. *Id.* at 35 (Madsen, concurring). Likewise, in *State v. McFarland*, this Court held

that where multiple firearm enhancements results in a clearly excessive sentence, a court may depart from the standard range. 189 Wn.2d 47, 55, 399 P.3d 1106 (2017).

The legislature intended for the Sentencing Reform Act to create accountability to the public "by developing a system for the sentencing of felony offenders which structures, but does not eliminate, discretionary decisions affecting sentences." RCW 9.94A.010. Three of the Sentencing Reform Act's purpose statement are relevant here. First, to ensure that the punishment for a criminal offense is proportionate to the seriousness of the offense and the offender's criminal history. *Id.* Second, to promote respect for the law by providing punishment which is just. *Id.* Third, to be commensurate with the punishment imposed on others committing similar offenses. *Id.*

In order to achieve these purposes, the Sentencing Reform Act gives sentencing courts the discretion to impose sentences outside of the standard range:

> The court may impose a sentence outside the standard range for an offense if it finds, considering the purpose of this chapter, that there are substantial and compelling reasons justifying an exceptional sentence.

RCW 9.94A.535.

While sentencing courts have considerable discretion, they must still act within its strictures and the principles of due process. *State v. Grayson*, 154 Wn.2d 333, 342, 111 P.3d 1183 (2005) (*State v. Mail*, 121 Wn.2d 707, 712, 854 P.2d 1042 (1993)). A court abuses its discretion when it fails to consider a mitigating factor on the mistaken belief it is barred from such consideration. *O'Dell*, 183 Wn.2d at 696. Where an 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 the proper remedy. *In Re Mulholland*, 161 Wn.2d 322, 334, 166 P.3d 677 (2007) (quoting *State v. McGill*, 112 Wn. App. 95, 100-01, 47 P.3d 173 (2002)).

The Sentencing Reform Act permits trial courts to depart from the standard range when there are substantial and compelling reasons justifying an exceptional sentence. RCW 9.94A.535. The Sentencing Reform Act sets forth a non-exclusive list of factors the court may consider in exercising its discretion to impose an exceptional sentence. *Id.* A court may also impose an exceptional sentence based on non-statutory factors. RCW

9.94A.535(1). A non-statutory factor must be something not necessarily considered by the legislature and sufficiently substantial and compelling to distinguish this crime in question from others in the same category. *O'Dell*, 183 Wn.2d at 690.

In *O'Dell*, this Court disapproved of its earlier "sweeping conclusion" that personal characteristics of a defendant cannot justify a downward departure. 183 Wn.2d at 695. Instead, this Court found that youthfulness, even for a young adult, can amount to a substantial and compelling reason for a departure, explicitly disavowing contrary holdings. *Id.* at 696 (overruling *State v. Ha'mim*, 132 Wn.2d 834, 847, 940 P.2d 633 (1997)).

While this Court has not held other personal characteristics of a defendant may be considered at sentencing, it has not had an opportunity to do so since *O'Dell*. The most recent decision of this Court was *State v. Fowler*, a split decision issued in 2002. 145 Wn.2d 400, 402, 38 P.3d 335 (2002). In *Fowler*, the dissent argued that sentencing courts should be able to consider whether aberrational behavior and a low risk to reoffend justify departing from the standard range. *Id.* at 342 (Madsen, dissenting). This is the same argument made by the

concurrence in *Houston-Sconiers*. 188 Wn.2d at 35 (Madsen, concurring).

It is also the position taken in other jurisdictions with sentencing guidelines. In the federal system, aberrational behavior is grounds for departing from standard range sentencing. *See Zecevic v. United States Parole Comm'n*, 163 F.3d 731, 735 (2nd Cir. 1998); *United States v. Garcia*, 340 F.3d 1013, 1018 (9th Cir. 2003). To warrant a departure, the permissible factors must illustrate some unique circumstance, some element of abnormal or exceptional behavior. *United States v. Constantine*, 263 F.3d 1122, 1127 (10th Cir. 2001) (quoting *United States v. Benally*, 215 F.3d 1068, 1074 (10th Cir. 2000)). All of the federal circuits recognize aberrational behavior as a factor that may justify an exceptional sentence downward. *See generally* Elizabeth Williams, Annotation, *Downward Departure from United States Sentencing Guidelines (U.S.S.G. §§ 1A1.1 et seq.) Based on Aberrant Behavior*, 164 A.L.R. Fed. 61, §§ 2, 3 (2000).

Some crimes represent the truly unusual behavior of individuals who are generally non-violent and law-abiding.

Fowler, 145 Wn.2d at 414 (Madsen, dissenting). In these circumstances, a departure from the Sentencing Reform Act's standard range may be justified. *Id.* at 415. Because the facts in this case warrant such a conclusion, review should be granted.

At Mr. Patterson's sentencing hearing, the court recognized the harshness of its sentence. RP 19-20. It looked to see if there were circumstances that would justify a downward departure, empathizing with Mr. Patterson. *Id.* The court wrongly concluded there were none. *Id.*

First, there were statutory reasons to depart from the standard range. A failed defense may constitute a mitigating factor. *See State v. Hutsell*, 120 Wn.2d 913, 921, 845 P.2d 1325 (1993); *State v. Jeannotte*, 133 Wn.2d 847, 851, 947 P.2d 1192 (1997). Where there are "circumstances that led to the crime, even though falling short of establishing a legal defense, [that] justify distinguishing the conduct" from other similar cases. *Jeannotte*, 133 Wn.2d at 852 (quoting *Hutsell*, 120 Wn.2d at 921).

Mr. Patterson had an incomplete defense to the robbery and unlawful imprisonment charges. Mr. Patterson never

intended to be part of a robbery. RP 16. He believed he was part of an inside job where everyone in the marijuana store knew about the fake robbery. *Id.* While Mr. Patterson was clearly complicit in the theft, he never intended to be part of a robbery or an unlawful imprisonment. *Id.*

Although the Court of Appeals found otherwise, there record does not establish the sentencing court considered whether Mr. Patterson's claim presented an incomplete defense, instead only looking to whether duress applied. RP 20. This restrictive view of when a mitigating factor may be considered is not consistent with the law. *Houston-Sconiers*, 188 Wn.2d at 35 (Madsen, concurring). Mr. Patterson's lack of intent to commit the more serious offenses constituted grounds to depart from the standard range established in the Sentencing Reform Act.

Second, there was substantial evidence that Mr. Patterson's decision to commit this crime was aberrational. Despite his difficult childhood, Mr. Patterson had avoided becoming a felon. RP 16. He grew up in a tough San Diego neighborhood, where he witnessed a drive-by shooting. RP 13.

His mother had seriously assaulted his father, cutting his throat. *Id.*

At 37, Mr. Patterson had attempted to live a clean life that revolved around his seven children. RP 11. He coached his children's sport's teams. *Id.* He taught them to be comfortable with who they are and to see themselves as "cool" when they made the honor roll. *Id.* He tried to be a good father and role model. RP 17, 18.

Mr. Patterson's wife told the court Mr. Patterson was a "wonderful person" who got caught in a "really hard spot." RP 17-18. Mr. Patterson likewise could not explain his behavior, telling the court he knew better. RP 19.

The sentencing court found Mr. Patterson's behavior was aberrational. RP 20. The court stated:

> But what I see is a man who, albeit making a horrible decision. And as I read those letters, I don't understand what you're doing here.
>
> I don't understand how you are before me having gone through what you went through as a child, having seen what you saw as a child, how that decision would be made.

RP 20.

The court recognized the punishment imposed by the legislature "frankly, is harsh." RP 20. The court also acknowledged the minimum sentence "may seem unfair." RP 20-21. The Court then examined the statute, stating it could not find grounds for a downward departure from the standard range. RP 21. The court declined to impose a sentence below the standard range, believing this Court would overrule the decision of the sentencing court if it did depart from the standard range. RP 22.

This decision is inconsistent with the recent holdings in other cases, where this Court has held that the personal characteristics of a person can warrant a downward departure and that a downward departure can be justified where the sentence required by the Sentencing Reform Act is clearly excessive. *O'Dell*, 183 Wn.2d at 690; *McFarland*, 189 Wn.2d at 57; *Houston-Sconiers*, 188 Wn.2d at 35 (Madsen, concurring).

These issues are also question of substantial public interest this Court should resolve. Mr. Patterson demonstrated an incompete defense, which the sentencing court did not appreciate. He also demonstrated the aberrational nature of his

misdeeds, which the trial court appreciated, but did not believe could be a basis for a downward departure from the standard range. This Court should accept review of this issue of substantial public interest in order to resolve whether these errors require a new sentencing hearing. RAP 13.4(b).

2. This Court should grant review to address whether a trial court had the authority to reduce the length of time a person must serve on a firearm enhancement.

The Court of Appeals held it was bound by decisions of this Court to deny Mr. Patterson's request for resentencing on his firearm enhancements. App. at 11. This Court should take review of whether its recent decisions require a reexamination of its determination that firearm enhancements must be imposed in their entirety. RAP 13.4(b).

In 1999, this Court held in a split decision that sentencing courts lack the discretion to reduce mandatory firearm enhancements. *State v. Brown*, 139 Wn.2d 20, 22, 983 P.2d 608, 610 (1999), *overruled by Houston-Sconiers*, 188 Wn.2d 1. The basis for that decision was the following statutory language:

> Notwithstanding any other provision of law, all firearm enhancements under this section are mandatory, shall be served in total confinement, and shall run consecutively to all other sentencing

> provisions, including other firearm or deadly weapon enhancements, for all offenses sentenced under this chapter.

RCW 9.94A.533(3)(e).

This holding has been questioned and overruled, at least to a degree. *McFarland*, 189 Wn.2d at 53 (exceptional sentences permit firearm enhancements to be served concurrently); see also Houston Sconiers, 188 Wn.2d at 426. In fact, the firearms statute's broad language does not say the time imposed for a firearm enhancement cannot be modified as an exceptional sentence under RCW 9.94A.535. It is different from the restrictive language used in RCW 9.94A.540(1), which instructs that mandatory minimum terms for certain offenses "shall not be varied or modified under RCW 9.94A.535." RCW 9.94A.540(1).

The decision by the legislature not to include the restrictive language in the firearm enhancement provisions indicates the legislature intended to allow for shortened firearm enhancement terms as exceptional sentence. *See State v. Conover*, 183 Wn.2d 706, 713, 355 P.3d 1093 (2015). ("[T]he legislature's choice of different language indicates a different

legislative intent."). Even if there are other interpretations, the rule of lenity requires the reasonable interpretation that is most favorable to the defendant be applied. *Id.* at 711-12.

The concurrence in *Houston-Sconiers* supports this analysis. The concurrence agreed with the result in *Houston-Sconiers*, but reasoned this was because the given to sentencing courts by the Sentencing Reform Act "includes the discretion to depart from the otherwise mandatory sentencing enhancements when the court is imposing an exceptional sentence." *Houston-Sconiers*, 188 Wn.2d at 34 (Madsen, concurring). Because the legislature did not specifically forbid exceptional sentences for firearm enhancements, but forbade them in other circumstances, courts must be free to depart from the maximum sentence allowed. *Id.* at 36.

And because the limitations in the Sentencing Reform Act do not apply to firearm enhancements, courts must infer the legislature did not intend to make them mandatory. *Houston-Sconiers*, 188 Wn.2d at 34 (Madsen, concurring) (citing *Queets Band of Indians v. State*, 102 Wn.2d 1, 5, 682 P.2d 909 (1984)). Thus, RCW 9.94A.540 does not deprive a sentencing court of its

ability to consider an exceptional sentence when imposing a firearm enhancement. *Id.* at 36.

It is improper to read in additional prohibitions into RCW 9.94A.533(3)(e). The legislature was silent as to whether firearm enhancements could be modified. RCW 9.94A.533(3)(e). As RCW 9.94.540(1) shows, the legislature knows how to prohibit this, but did not. Accordingly, RCW 9.94A.533(3)(e) should not be read to deprive sentencing courts of their discretion.

"Proportionality and consistency in sentencing are central values of the SRA, and courts should afford relief when it serves these values." *State v. McFarland*, 189 Wn.2d 47, 57, 399 P.3d 1106 (2017). *Brown* has "robbed judges of the discretion that the legislature, through the SRA, expressly gives them in order to fulfill the purposes of the act." *Houston-Sconiers*, 188 Wn.2d at 39 (Madsen, concurring). As Mr. Patterson's case shows, this creates mandatory sentences that are "may be as long as or even vastly exceed the portion imposed for the substantive crimes." *Id.* at 25. This is a "travesty." *Id.* at 40 (Madsen, concurring).

This Court should accept review of the question of whether a sentencing court must impose the maximum time

authorized by the firearm enhancement statute. Because this Court has held that such departures are authorized under certain circumstances, like youthfulness and when a sentence is excessive, taking review of this case is necessary to resolve the conflict between the Court of Appeals decision here and this Court's decision in other cases. RAP 13.4(b). This is also an issue of substantial importance this Court should resolve. *Id.*

F. CONCLUSION

Based on the foregoing, petitioner Cameron Patterson respectfully requests this Court to grant review pursuant to RAP 13.4 (b).

DATED this 5th day of March 2019.

Respectfully submitted,

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APPENDIX

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IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. CAMERON F. PATTERSON, Appellant.	)	No. 77437-9-I DIVISION ONE UNPUBLISHED OPINION FILED: February 5, 2019

ANDRUS, J. — Cameron Patterson pleaded guilty to robbery in the first degree and unlawful imprisonment after participating in an armed robbery of a marijuana dispensary. CP 29-30. The court sentenced Patterson to 36 months for count one (robbery), a concurrent 3-month sentence for count two (unlawful imprisonment), and a 60-month firearm enhancement, to be served consecutively to the 36-month sentence. We affirm Patterson's sentence.

FACTS

Patterson agreed to participate in what he thought was the organized robbery of the Have a Heart marijuana dispensary in the Greenwood neighborhood of Seattle at the suggestion of his friend, John Stewart. CP 31. Patterson believed it was an "inside job" in which all of the employees knew what was going to happen and intended to split the proceeds. RP (8/25/17) 16. One of the dispensary

employees, Sean Sylve, assured Patterson that the robbery would be a "grab and go," where the marijuana and money would be in plain view and easily available for taking. CP 56.

On the evening of August 7, 2016, Patterson, Stewart, and Sylve executed the plan. CP 31. Slyve was working at the dispensary, along with his co-workers, Alanna Wells and McKenna O'Meara. CP 31. Wells and O'Meara were unaware of the plan. While Sylve checked the outside perimeter of the premises, a routine closing duty, Patterson and Stewart donned Halloween masks and approached him. CP 31. Sylve knocked on the store's locked door which Wells opened for him. CP 31. Sylve whispered to Wells to lock the door because they were being robbed. CP 31. When Wells tried to close the door, Patterson and Stewart pushed the door open and entered the dispensary. CP 31. Holding a gun, Stewart demanded that Sylve and Wells lie down on the floor with their hands behind their backs. CP 31. Patterson and Stewart used zip ties to bind the employees' hands together. CP 31. Patterson and Stewart spotted O'Meara, who was in a different room counting her cash tray. CP 31. They ordered her to lie down on the floor, again at gunpoint, as they zip tied her hands together. CP 32.

Patterson took $900 from the dispensary's safe, while Stewart removed approximately $20,000 worth of marijuana products from the display case. CP 32. The dispensary's manager, who watched the events unfold through the store's surveillance system, called 9-1-1. CP 32. Seattle police officers responded and set up a containment area outside of the dispensary. CP 32. The officers watched Stewart and Patterson exit the store with two large duffel bags containing cash, a

money counting machine, marijuana, and other products. CP 32. When ordered to stop, Stewart and Patterson dropped the bags, the gun, their Halloween masks, and additional zip ties, and were eventually taken into custody. CP 32.

Patterson was initially charged with one count of first degree robbery and one count of first degree kidnapping, CP 2, but following negotiations, Patterson pleaded guilty to the robbery and unlawful imprisonment, CP 12, 14. Patterson agreed to a minimum standard range sentence for both counts: 36 months for the robbery and 3 months for the unlawful imprisonment, with a firearm enhancement of 60 months to be served consecutive to the robbery sentence. CP 18.

Patterson asked the court to follow the agreed sentencing recommendation. He argued that the low end sentence was appropriate because he was a loving, supportive father of seven young children, had experienced a difficult upbringing surrounded by poverty and gang and domestic violence, during which he had observed his mother cut his father's throat, had demonstrated high moral character and strong family and community support, had no prior felony convictions, and had intended to commit only a theft, not a robbery. CP 44-56; RP (8/25/17) at 11-17. At his sentencing hearing, Patterson's counsel argued Patterson lacked the intent to engage in an armed robbery:

> And that's been a very hard lesson for Mr. Patterson to learn because he never intended to be a part of a robbery. He never held the gun in his hand, he didn't think that his codefendant would have the gun; but his codefendant did come in with a gun to Mr. Patterson's surprise and at that point he was involved in a robbery and not a theft. And, hence, the long sentence that he's getting, here.

RP (8/25/17) at 16. Patterson also presented letters from family members and friends attesting to his good character, writing about the respect they have for his

leadership in the community, his commitment to his family, and his kindness. They all expressed how uncharacteristic his crime was. CP 59-108.

The sentencing court accepted the recommended sentence. CP 113. The court acknowledged the harshness of the sentence and indicated it had looked to see if it could impose an exceptional sentence but found an insufficient basis for departing from the standard sentencing range. RP (8/25/17) 20. The court stated:

> And I'm sure as your attorney has explained there are very, very few circumstances under which this court could make an exceptional sentence. And, trust me, I looked. I looked if there was any duress. I looked if there was anything.
>
> But what I see is a man who, albeit making a horrible decision. And as I read those letters, I don't understand what you're doing here. I don't understand how you are before me having gone through what you went through as a child, having seen what you saw as a child, how that decision would be made.
>
> You don't have the benefit of being a young, stupid kid who's not mature enough. You did this at age 36. You don't have the benefit of saying, "I didn't know what I was doing." You put on a mask. I mean, I – as I sit there and look for it, this was – you – there's nothing I can say.
>
> I recognize that the punishment that has been imposed by the legislature, frankly, is harsh. And I know that not every case fits into these circumstances, but there's very, very limited circumstances in which I can change those sentences. And as much as I look to that, I can't find it in this case.
>
> I'm going to impose the minimum. I will note that even that minimum, given the weapons enhancement, may seem unfair. But I want you to know that it's because of certain legislative dictates. That if there was what I felt to be any wiggle room in terms of as I look at what exceptional sentences mean and what are the standards under which they can be applied where – where somebody would think I'm not abusing my discretion, I would go there. I've done it. But I can't find it here.

RP (8/25/17) 19-21.

Patterson appeals his sentence, arguing the court refused to consider his failed "lack of intent to commit armed robbery" defense and the "aberrational conduct" information provided by his family and friends, both of which justified an exceptional sentence. He also argues the court abused its discretion in not reducing the duration of the firearm enhancement.

ANALYSIS

The Sentencing Reform Act (SRA) states that a sentence within the standard range may not be appealed. RCW 9.94A.585(1); see also State v. Herzog, 112 Wn.2d 419, 423, 771 P.2d 739 (1989) ("When the sentence given is within the presumptive sentence range then as a matter of law there can be no abuse of discretion and there is no right to appeal"). A defendant may, however, challenge the procedure by which a standard range sentence is calculated. When a defendant challenges the denial of an exceptional sentence, review is limited to whether the sentencing court categorically refused to impose an exceptional sentence downward under any circumstance or relied on an impermissible basis for refusing to do so. State v. Garcia-Martinez, 88 Wn. App. 322, 329-30, 944 P.2d 1104 (1997); see also State v. O'Dell, 183 Wn.2d 680, 697, 358 P.3d 359, 367 (2015) (a court abuses its discretion when it fails to consider a mitigating factor on the mistaken belief it is barred from such consideration).

Patterson did not request an exceptional sentence. During the plea hearing, Patterson acknowledged the low end sentence was the product of an agreement "so that we cannot ask for a downward departure." RP (8/8/17) at 24. He nevertheless argues on appeal that the sentencing court refused to recognize his

failed *mens rea* defense and aberrational conduct arguments justified an exceptional sentence. App. Br. at 8-9. He claims the sentencing court's "failure to exercise discretion" is itself an abuse of discretion subject to reversal under O'Dell, 183 Wn.2d at 697. App. Br. at 13-14.

The State contends Patterson cannot claim on appeal the trial court abused its discretion because he never asked the court to exercise discretion in the first place, citing Colorado Structures, Inc. v. Blue Mountain Plaza, LLC, 159 Wn. App. 654, 660, 246 P.3d 835 (2011) and State v. Lile, 188 Wn.2d 766, 787, n.14, 398 P.3d 1052 (2017). But neither Colorado Structures nor Lile dealt with a trial court's purported refusal to consider mitigating circumstances.

A defendant's failure to request an exceptional sentence does not necessarily preclude a challenge on appeal. In State v. McFarland, the defendant did not request an exceptional sentence, despite facing 237 months confinement due to consecutively-imposed firearm enhancements, because both defense counsel and the sentencing court erroneously concluded an exceptional sentence was foreclosed by law. 189 Wn.2d 47, 49, 399 P.3d 1106 (2017).

The Supreme Court did not reject McFarland's appeal simply because she did not seek an exceptional sentence from the trial court. It reversed McFarland's sentence, holding that when consecutive sentences for multiple firearm-related convictions result in a sentence that is "clearly excessive" under RCW 9.94A.535(1)(g), a sentencing court has discretion to impose an exceptional, mitigated sentence by running the firearm-related sentences concurrently. Id. at 55. The Supreme Court remanded the case for resentencing, concluding that "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 56, 59; see also State v. McGill, 112 Wn. App 95, 100, 47 P.3d 173 (2002) (court erroneously believed it lacked discretion to depart from the standard range; this court reversed and remanded, reasoning that "the trial court's comments indicate it would have considered an exceptional sentence had it known it could").

Under McFarland, a defendant may appeal a standard sentence if the record establishes the sentencing court erroneously concluded an exceptional sentence was not available to a defendant.

Patterson contends the sentencing court erroneously held it lacked discretion to consider his failed lack of intent defense and his aberrational conduct arguments. We conclude the sentencing court considered his failed lack of intent defense and found it insufficient to justify an exceptional sentence, a decision Patterson may not appeal. And we conclude the sentencing court did not have the discretion to consider Patterson's "aberrational conduct" argument.

To determine if a factor supports departure from the standard sentencing range, we apply a two-part test. O'Dell, 183 Wn.2d at 690. First, a factor cannot support the imposition of an exceptional sentence if the legislature necessarily considered that factor when it established the sentence range. Id. This is a question of law reviewed de novo. Id. at 688.

Second, in order to justify an exceptional sentence, a factor must be "sufficiently substantial and compelling to distinguish the crime in question from

others in the same category." Id. at 690. The Supreme Court has said that "any such reasons must relate to the crime and make it more, or less, egregious." State v. Fowler, 145 Wn.2d 400, 404, 38 P.3d 335 (2002). If a sentencing court finds a particular factor meets the "substantial and compelling" test, the standard of review is clearly erroneous. Ha'mim, 132 Wn.2d at 840.

The Supreme Court has recognized, and the State does not dispute, that a trial court has the discretion to consider failed defenses, such as self-defense, duress, mental conditions not amounting to insanity, and entrapment, when evaluating the appropriateness of an exceptional sentence. State v. Jeannotte, 133 Wn.2d 847, 852, 947 P.2d 1192 (1997). "By allowing failed defenses to be treated as mitigating circumstances, the Legislature recognized there may be circumstances that led to the crime, even though falling short of establishing a legal defense, [that] justify distinguishing the conduct from that in other similar cases." Id. at 852 (internal quotation marks omitted) (quoting Hutsell, 120 Wn.2d at 921).

The record establishes that the sentencing court considered this failed defense. While the sentencing court did not explicitly mention it, Patterson raised this defense in both his sentencing memo and at the hearing itself. The court said it considered all possible mitigating factors it could find in the materials presented:

> I'm sure as your attorney has explained there are very, very few circumstances under which this court could make an exceptional sentence. *And, trust me, I looked. I looked if there was any duress. I looked if there was anything.*
>
> . . .
>
> I recognize that the punishment that has been imposed by the legislature, frankly, is harsh. And I know that not every case fits into these circumstances, but there's very, very limited circumstances in which I can change those sentences. *And as much as I look to that, I can't find it in this case.*

RP (8/25/17) 19-20 (emphasis added). This record demonstrates the sentencing court knew an exceptional sentence was an option, considered the facts to see if it could justify an exceptional sentence, and concluded it could not. There is nothing in the record to suggest the sentencing court categorically refused to consider Patterson's failed defense argument.

Patterson also contends the sentencing court refused to consider that this crime was uncharacteristic (or an aberration) for him. App. Br. at 14. Patterson relies on federal case law and Justice Madsen's dissent in State v. Fowler, 145 Wn.2d 400, 412, 38 P.3d 335 (2002) for the proposition that aberrational behavior and a low risk of re-offending are sufficient bases for an exceptional sentence.

Fowler pleaded guilty to first degree robbery which carried a standard range of 31-41 months. Id. The sentencing court imposed a 15-month exceptional sentence because Fowler had no criminal history, his behavior during the crime was aberrational, and Fowler was unlikely to re-offend. Id. at 403-04. A majority of the Supreme Court reversed the exceptional sentence. It refused to follow federal cases that held aberrational conduct is a valid mitigating factor. Id. at 407. The majority reasoned that Fowler's aberrational conduct argument was similar to arguing "the defendant has not done anything like this before," analogous to saying the defendant has no criminal history, a factor already taken into account in the standard sentencing ranges under the SRA. Id. at 408 ("The fact that a defendant's criminal conduct is exceptional or aberrant does not distinguish the defendant's crime from others in the same category"). Under Fowler, a sentencing court may not consider the fact that a defendant's crime was an aberration because this factor

was necessarily taken into account by the legislature when it set standard sentence ranges.

Patterson argues that O'Dell abrogated Fowler *sub silentio*. He contends that under O'Dell, a sentencing court has the discretion to consider personal characteristics of a defendant. We disagree with this reading of O'Dell. In that case, the Supreme Court held the legislature had not necessarily considered youth when it established standard range sentences under the SRA. O'Dell, 183 Wn.2d at 690. As a result, it concluded that a trial court must be allowed to consider youth as a mitigating factor, explicitly disavowed any contrary holding in Ha'mim. We can find no language in O'Dell that broadens its holding to a defendant's aberrant conduct or a low likelihood to reoffend. Nor can we conclude the Supreme Court intended to abrogate Fowler; its decision in O'Dell did not analyze whether Fowler had been incorrectly decided. See State v. Stalker, 152 Wn. App. 805, 812, 219 P.3d 722 (2009)(Supreme Court abrogates prior decisions only if party seeking to have decision overruled demonstrates precedent is both incorrect and harmful).

Because our state Supreme Court has explicitly held, under a similar set of facts, that a sentencing court does not have the discretion to consider, as a mitigating factor, whether a defendant's conduct was an aberration from his general character, the sentencing court did not abuse its discretion in this case.

Finally, Patterson argues that the SRA gives the sentencing court discretion to shorten the duration of the 60-month firearm enhancement as an exceptional sentence. RCW 9.94A.533(3) provides that the firearm enhancement, if applicable, is mandatory, "notwithstanding any other provision of law." In State v.

Brown, 139 Wn.2d 20, 29, 983 P.2d 608 (1999), overruled on other grounds by State v. Houston-Sconiers, 188 Wn.2d 1, 391 P.3d 409 (2017), our Supreme Court held that "[j]udicial discretion to impose an exceptional sentence does not extend to a deadly weapon enhancement." Id. at 29. Although the Court's recent decision in Houston-Sconiers modified Brown, it did so only with respect to juvenile offenders and Eighth Amendment considerations. 188 Wn.2d at 34. The Court did not modify Brown's applicability to adult defendants.

Thus, under Brown, the sentencing court had no authority to shorten the duration of Patterson's firearm enhancement.

Affirmed.

WE CONCUR:

DECLARATION OF FILING AND MAILING OR DELIVERY

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original document **Petition for Review to the Supreme Court** to which this declaration is affixed/attached, was filed in the **Court of Appeals** under **Case No. 77437-9-I**, and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to the following attorney(s) or party/parties of record at their regular office or residence address as listed on ACORDS:

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