Supreme Court No. 97964-2
(COA No. 78153-7)

THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

FRANCISCO VAZQUEZ,

Petitioner.

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

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER

Frankie Vazquez,[1] 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. RAP 13.3; RAP 13.4.

B. COURT OF APPEALS DECISION

Mr. Vazquez seeks review of the Court of Appeals decision dated November 12, 2019, attached as Appendix A.

C. ISSUES PRESENTED FOR REVIEW

1. Did precluding Frankie from examining the incentivized witnesses on the deals they made with the government deprive him of his right to a fair trial?

2. Was Frankie's right to confrontation denied to him when the court restricted his ability to examine the government's witnesses on the deals they made in exchange for their testimony?

3. Did the prosecution's vouching for its witnesses during closing arguments deprive Frankie of his right to a fair trial?

4. Do errors at sentencing, including a misunderstanding of *State v. Houston-Sconiers*, require a new sentencing hearing?

[1] Because Frankie was a juvenile when the government accused him of committing this crime, he is referred to by his first name in this petition.

D. STATEMENT OF THE CASE

Frankie Vazquez was seventeen-years-old when the government prosecuted him for trying to rob two Seattle drug dealers who came to Everett intending to sell thousands of dollars of marijuana and prescription pills to Frankie and his friend, John Mulstein. CP 179-80, 1/29/18 RP 147.[2]

Frankie and Mr. Mulstein tried to run from the failed transaction, but one of the sellers, Brian Wingender, shot them. CP 179-80. Mr. Wingender killed Mr. Mulstein and seriously injured Frankie. CP 179-80. The government charged Frankie with attempted robbery in the first degree, while armed with a firearm. CP 179-80.

Mr. Wingender and Dustin Bradshaw sold marijuana and pills. 1/23/18 RP 336. Working with a person known as "John Proctor," they agreed to sell several thousand dollars' worth of marijuana and pills to "Tae" and his friends. 1/23/18 RP 344. This transaction would occur in Everett, near Clark Park. 1/23/18 RP 367.

Both Mr. Wingender and Mr. Bradshaw had concealed weapon permits. 1/23/18 RP 339. They left Seattle armed with their pistols.

[2] Several transcriptionists completed the record of proceedings in this case, resulting in non-sequential pagination. To avoid confusion, references to the record will include the date of the proceedings. *E.g.*, 1/29/18 RP 147.

1/24/18 RP 595. A mini-AK 47 was also in their trunk. 1/23/18 RP 404. Mr. Bradshaw had his gun on the seat, while Mr. Wingender kept his in his holster. 1/23/18 RP 361, 1/24/18 RP 559. They stored the marijuana and pills in a duffle bag. 1/23/18 RP 361.

When Mr. Wingender and Mr. Bradshaw got to the park, they made brief contact with two people they thought they were supposed to meet, before these two people ran away. 1/23/18 RP 364, 1/24/18 RP 561. Mr. Wingender texted and phoned "Tai." 1/23/18 RP 366. They agreed to a new meeting spot close to a nearby church. 1/23/18 RP 366.

The two Seattle drug dealers drove to the church and parked their car. 1/23/18 RP 367, 1/24/18 RP 567. According to their testimony, two persons approached the vehicle. 1/23/18 RP 368. Mr. Mulstein immediately jumped into the backseat of their car and pistol-whipped Mr. Wingender. 1/23/18 RP 368, 372. Meanwhile, the government's witnesses claimed Frankie reached into the driver's window and began struggling with Mr. Bradshaw. 1/23/18 RP 371.

After struggling with Mr. Mulstein, Mr. Wingender fled the car, with the marijuana and pills. 1/24/18 RP 569-70, 577. Mr. Wingender stated that the two buyers chased after him. 1/24/18 RP 579. Fearing for his safety, Mr. Wingender fired his pistol at them. 1/24/18 RP 579.

He shot Mr. Mulstein, killing him. 1/24/18 RP 582, 1/25/18 RP 664. Mr. Wingender claimed he stopped running but heard someone charging towards him. 1/24/18 RP 588. He yelled at that person to stop, and when he did not, he shot him two times. 1/24/18 RP 588-89. These shots hit Frankie in the abdomen and the shoulder. 1/24/18 RP 589, 1/23/18 RP 280-81.

Frankie explained the events differently. He did not deny he and Mr. Mulstein were there to buy marijuana. 1/29/18 RP 155. He said they were smoking much of the day and were looking to buy an ounce of marijuana. 1/29/18 RP 158, 162. He did not know the sellers were prepared to sell pounds of the drug. 1/29/18 RP 193.

Frankie had no idea Mr. Mulstein intended to steal the marijuana. 1/29/18 RP 154, 193. He denied using his phone to text about the delivery, stating Mr. Mulstein was the person who sent the texts, as his flip-phone was incapable of efficient texting. 1/29/18 RP 157. Frankie panicked when he realized what his friend was doing and ran away when Mr. Mulstein fled with the marijuana. 1/29/18 RP 170. Frankie never intended to engage in a robbery. 1/29/18 RP 177. Frankie said Mr. Wingender shot him as he ran away, almost immediately after Mr. Wingender shot Mr. Mulstein. 1/29/18 RP 171.

After shooting Frankie and Mr. Mulstein, Mr. Wingender fled the scene, running through a breezeway connected to the church. 1/29/18 RP 590-91. He called Mr. Bradshaw on his phone, who had driven away in his car. 1/29/18 RP 593. An approaching police officer arrested the two men before they could get away. 1/29/18 RP 595.

Frankie then emerged from the bushes, telling the police he had been shot. 1/23/18 RP 277. He then collapsed. 1/23/18 RP 277. He provided few other details about who shot him and did not give a statement to the police. 1/23/18 RP 282.

The police discovered Mr. Mulstein shortly afterward, already dead. 1/26/18 RP 892. They found a pistol near him. 1/26/18 RP 896.

Before trial, the prosecutor asked the court to limit defense cross-examination on the deals Mr. Wingender and Mr. Bradshaw made in exchange for their testimony. 1/22/18 RP 9. Defense counsel objected. 1/22/18 RP 10. The prosecutor argued allowing the defense to cross-examine on the negotiated deals was "inviting commentary" on his office's charging decisions. 1/22/18 RP 14. The court determined Frankie could only cross-examine the witnesses on what the prosecutor charged, rather than the prison time and charges they might have faced,

also precluding cross-examination on deals the witnesses may have made in exchange for their testimony. 1/22/18 RP 13.

In closing arguments, one of the prosecutor's focuses was the credibility of Mr. Wingender and Mr. Bradshaw. When addressing the credibility of these witnesses, the prosecutor told the jury it did not need to worry about holding Mr. Wingender accountable, as the government would do that in "a whole other case." 1/30/18 RP 326. Frankie objected, and the court told the jury to disregard the statement. 1/30/18 RP 326. The prosecutor nevertheless returned to this subject, arguing about "this case," again vouching for the credibility of the government's witnesses. 1/30/18 RP 327. The court again admonished the prosecutor. 1/30/18 RP 327. After closing arguments, Frankie moved for a mistrial, which was denied. 1/30/18 RP 339, 327.

A jury found Frankie guilty of attempted robbery in the first degree, while armed with a firearm. 1/31/18 RP 347-48.

At sentencing, the prosecutor asked for the top end of the standard range and the maximum prescribed under the firearm enhancement rule, for a total of 76.5 months. 2/23/18 RP 968. The court found Frankie had an eighth-grade education, was homeless when this occurred, and showed insight into his mistakes. 3/8/18 RP 998-

1000. Rather than seeing these as signs of youthfulness, the court misinterpreted these factors as signs of maturity. 3/8/18 RP 999.

The court then analyzed whether it should sentence Frankie under *State v. O'Dell*, which holds courts may consider youthfulness as a mitigating factor at sentencing for young adult offenders rather than under *State v. Houston-Sconiers*, which holds there are no mandatory minimums for youth prosecuted in adult court. 3/8/18 RP 997 (S*ee State v. O'Dell*, 183 Wn.2d 680, 689, 358 P.3d 359 (2015); *State v. Houston-Sconiers*, 188 Wn.2d 1, 8, 391 P.3d 409 (2017)).

The court imposed the minimum standard range sentence and the maximum firearm enhancement, for a total of 66.7 months. 3/8/18 RP 1001. The court stated, "While it may seem unfair to you, under these circumstances the law is clear and there is nothing I can do other than impose what I've imposed in relation to that." 3/8/18 RP 1002.

The Court of Appeals upheld Frankie's conviction and sentence. App. 1. Because Frankie was deprived of his constitutional rights to a fair trial and because the trial court committed constitutional error at Frankie's sentencing hearing, he asks this Court to accept review.

E. ARGUMENT

1. Precluding Frankie from cross-examining the incentivized witnesses on the deals they made with the government to testify violated Frankie's right to present a defense.

The testimony of incentivized witnesses is unreliable. Incentivized testimony is, for example, the leading cause of wrongful convictions in capital cases. Rob Warden, *The Snitch System*, Northwestern School of Law, Center on Wrongful Convictions, 3 (2004). Nearly a quarter of death-row exonerations in this country stem from cases where the prosecutor relied on incentivized testimony. *Id*.

In fact, incentivized testimony is one of the leading factors in wrongful convictions, being present in twenty-one percent of the original 250 exonerated cases. Jessica A. Roth, *Informant Witnesses and the Risk of Wrongful Convictions,* 53 Am. Crim. L. Rev. 737, 738 (2016) (citing Brandon L. Garrett, *Convicting the Innocent: Where Criminal Prosecutions Go Wrong*, 123-41 (2011)). Incentivized testimony results in an unbalanced system, where witnesses testify to satisfy their end of their bargain, rather than to tell the truth. Alexandra Natapoff, *Beyond Unreliable: How Snitches Contribute to Wrongful Convictions*, 37 Golden Gate U.L. Rev. 107, 112 (2006).

One of the only methods to control incentivized testimony is to allow a rigorous cross-examination by the defense. Katie Zavadski and Mois Syed, *30 Years of Jail House Snitch Scandals*, ProPublica (December 4, 2019).[3] In order to allow the jury to know of the promises made by the government to the incentivized witness, the defense must be allowed to challenge not only what a witness pled guilty to but also the deal the prosecution made with the witness to avoid more serious charges. *See, e.g., Giglio v. United States*, 405 U.S. 150, 153, 92 S. Ct. 763, 31 L. Ed. 2d 104 (1972). Limiting Frankie's ability to cross-examine the witnesses on their deals deprived Frankie of his right to challenge the government's witnesses and present a defense. *State v. Jones*, 168 Wn.2d 713, 719, 230 P.3d 576 (2010).

The Court of Appeals erred when it held Frankie was not deprived of his right to a fair trial by limitations placed on his ability to cross-examine the government's incentivized witnesses. App. 5. The Court held that the trial court's limitation on Frankie's ability to discuss firearm enhancements was not a limitation on Frankie's ability to cross-examine the witnesses. *Id*. at 6.

[3] Showing the ineffectiveness of the limited reforms that have been made to reduce the impact of incentivized testimony on the wrongfully accused. Available at https://projects.propublica.org/graphics/jailhouse-informants-timeline.

But merely limiting testimony to the guilty plea of an incentivized witness deprives the accused of "a fair opportunity" to defend against the government's accusations. *Jones*, 168 Wn.2d at 720 (quoting *Chambers v. Mississippi*, 410 U.S. 284, 294, 93 S. Ct. 1038, 35 L. Ed. 2d 297 (1973)). This "fair opportunity" is only satisfied through meaningful cross-examination. *State v. Darden*, 145 Wn.2d 612, 620-21, 41 P.2d 1189 (2002). The failure to provide this fair opportunity violates the state and federal constitutions. U.S. Const. amends. V, VI, XIV; Const. art. I, § 3, § 22.

By only knowing the benefit the witnesses received for testifying, there is no way the jury could know how much prison time the witnesses avoided by testifying and the magnitude of their incentive to please the prosecution through their testimony. Because the credibility of the witnesses was critical to Frankie's case, he was entitled to challenge the veracity of the witnesses' statements by challenging their motives. *Jones*, 168 Wn.2d at 720.

Limiting cross-examination to the guilty pleas critically impacted Frankie's ability to challenge the credibility of the government's witnesses. The jury could not have known the charges or the sentences the witnesses avoided without knowing what the

witnesses faced before the cooperated. And because Mr. Wingender and Mr. Bradshaw were the only witnesses who could testify about whether an attempted robbery occurred, cross-examination was the only means available for Frankie to contest the government's charges. *Darden*, 145 Wn.2d at 620.

Frankie's right to present a defense was undermined by the trial court's decision to limit his cross-examination to the plea bargains the witnesses made with the prosecution. The Court of Appeals' decision holding otherwise conflicts with the decisions of this Court. *Jones*, 168 Wn.2d at 719. It is also a significant question under the federal and state constitutions. *See* U.S. Const. amends. V, VI, XIV; Const. art. I, § 3, § 22. Frankie asks this Court to grant review. RAP 13.4(b).

2. Frankie was deprived of his right to confrontation by the trial court's decision to limit cross-examination on the incentives the witnesses had to testify against him.

The Court of Appeals held Frankie's right to confrontation was not denied by the trial court's decision to limit cross-examination. App. 8. The Court of Appeals held that because Mr. Bradshaw was never charged with a firearm enhancement or that the evidence did not show Mr. Wingender received any benefit for testifying, that there was no need to confront them on what deals they might have made in exchange

for their testimony. *Id*. This holding looks past the need for confrontation to expose the bias, instead of evaluating only the evidence that the trial court allowed to be heard by the jury. Because the right to confront incentivized witnesses is a significant question of constitutional law, review should be granted. RAP 13.4(b).

The right to confront witnesses is enshrined in the federal and state constitutions. *Davis v. Alaska*, 415 U. S. 308, 315, 94 S. Ct. 1105, 39 L. Ed. 2d 347 (1974); *Darden*, 145 Wn.2d at 620; U.S. Const. amend. VI; Const. art. I, § 22. The Confrontation Clause guarantees the right to conduct a meaningful cross-examination of witnesses, allowing a defendant to test a witness's "perception, memory, and credibility." *Darden*, 145 Wn.2d at 620.

By preventing Frankie from cross-examining the witnesses on the deals they made in exchange for their testimony, the court deprived Frankie of his right to confront the witnesses testifying against him. *Darden*, 145 Wn.2d at 622. While the Court of Appeals discounts the incentives the witnesses avoided, this Court should not in evaluating whether review should have been granted. Both men risked prosecution for felony murder. See RCW 9A.32.050(1)(b). Even with no prior history, the standard range for murder in the second degree is 123-220

months. RCW 9.94A.510. Because they used a firearm, they faced an additional 60 months. RCW 9.94A.533(3). And even if the deals they made did not involve a reduction from a serious charge, but something of a lesser degree, preventing cross-examination on that issue still violates the right to confrontation. *Darden*, 145 Wn.2d at 620.

And here, the deals the witnesses made with the government were relevant to the witness's credibility. Bias and partiality are "always relevant as discrediting the witness and affecting the weight of his testimony." *Davis*, 415 U.S. at 316. Whatever the deal, the witnesses had a strong incentive to testify for the government, making this evidence more than minimally relevant. ER 401.

This Court should accept review of whether Frankie's right to confrontation was deprived by the limits placed on his cross-examination. The deals the witnesses made, whatever they were, were critical in this case, where the credibility of these witnesses was central. The jury had to rely on two men who were trying to sell large quantities of drugs to young persons. In doing so, they killed one of them. Their incentive to avoid serious consequences was high. The jury was entitled to know what these consequences were and Frankie had the constitutional right to confront the witnesses on their biases. The Court

of Appeals' decision does not address this issue within the structure provided to it by this Court, along with the state and federal constitutions. This Court should grant review of this significant question of constitutional law because it meets this requirement, along with conflicting with decisions of this Court. RAP 13.4(b).

3. The prosecution's misconduct in closing arguments deprived Frankie of his right to a fair trial.

The Court of Appeals held that while assuring the jury that the government would prosecute the witnesses in another trial was improper, the remarks were not so prejudicial as to have had a substantial likelihood of affecting the jury's verdict. App. 10. Because this constitutional question conflicts with cases of this Court, review should be granted. RAP 13.4(b); *State v. Ish*, 170 Wn.2d 189, 196, 241 P.3d 389 (2010).

The state and federal constitutions protect against prosecutorial misconduct. U.S. Const. amend. VI, XIV; Const. art. I, § 3, § 22. Trial proceedings must not only be fair, but they must also "appear fair to all who observe them." *Wheat v. United States*, 486 U.S. 153, 160, 108 S. Ct. 1692, 100 L. Ed. 2d 140 (1988).

Misconduct is especially egregious when it occurs in closing arguments. *State v. Johnson*, 158 Wn. App. 677, 685, 243 P.3d 936

(2010). Because juries give special weight to the prosecutor's office, due to its prestige and its fact-finding facilities, misconduct in closing arguments is a special concern. *In re Glasmann*, 175 Wn.2d 696, 706, 286 P.3d 673 (2012). The prosecution improperly vouches for a witness when it suggests information to the jury that was not presented as evidence. *Ish*, 170 Wn.2d at 196.

The prosecutor committed misconduct when he assured the jurors the government would hold Mr. Wingender accountable for his crimes in a separate trial. 1/30/18 RP 326. The prosecutor stated:

> Now, make no mistake, I still want you to have that dividing line in your mind about what happened on Lombard is a whole other case. It's called *State of Washington vs. Brian Wingender*.

1/30/18 RP 326.

Even after an objection was sustained, the prosecution returned to this subject, speaking about how the evidence from Mr. Wingender's and Mr. Bradshaw's crimes related to "this case." 1/30/18 RP 327. The court again sustained Frankie's objection, admonishing the prosecutor not to "reference any other case or this case, we're only talking about the charge before the defendant." 1/30/18 RP 327.

Frankie's attorney rightly observed that the jury could not ignore this misconduct, even with an instruction from the court. Mr.

Wingender and Mr. Bradshaw were highly suspect witnesses. Mr. Bradshaw engaged in a second gunfight in King County after this one. 1/22/18 RP 20. Both men risked serious consequences for not cooperating, including possible homicide charges. The prosecutor's decision to vouch for the credibility of these witnesses by assuring the jurors that they did not need to worry about the prosecutor holding Mr. Wingender and Mr. Bradshaw responsible deprived Frankie of his right to a fair trial. *Ish*, 170 Wn.2d at 196.

The calculated decision of the prosecutor to commit misconduct substantially affected the verdict. Frankie is entitled to reversal and a new trial. *Glasmann*, 175 Wn.2d at 711, 286 P.3d 673. This Court should grant review of whether the prosecutor's misconduct deprived Frankie of his right to a fair trial, as this is a significant question of constitutional law and the decision of this Court of Appeals is in conflict with decisions of this Court. RAP 13.4(b).

4. The trial court erred at sentencing, treating Frankie like a young adult rather than a child and by misinterpreting factors of youthfulness as signs of maturation.

The Court of Appeals held that the trial court did not err in sentencing Frankie and properly exercised its discretion when it sentenced Frankie within the standard range. App. 16. But when

Frankie was sentenced, the trial court stated, "the law is clear and there is nothing I can do other than impose" the firearm enhancement. 3/8/18 RP 1002. This misapprehension of law is contrary to this Court's holdings. *See, State v. Houston-Sconiers*, 188 Wn.2d 1, 21, 391 P.3d 409 (2017); *State v. Bassett*, 192 Wn.2d 67, 81, 428 P.3d 343 (2018). This Court should accept review of this issue, which is also a significant question of constitutional law and an issue of substantial public interest. RAP 13.4(b).

Courts "must have discretion to impose any sentence below the otherwise applicable SRA range and/or sentence enhancements." *Houston-Sconiers*, 188 Wn.2d at 21. Although *Houston-Sconiers* authorizes a sentencing court to impose no time for juveniles prosecuted as adults, the court felt constrained by other cases, primarily relying on *State v. O'Dell*[4] and *State v. Solis-Diaz*.[5] 3/8/18 RP 997. Because *O'Dell* addresses how youthful adult offenders, rather than juvenile offenders who are prosecuted as adults should be sentenced, this was an abuse of discretion. *O'Dell*, 183 Wn.2d at 689.

[4] *State v. O'Dell*, 183 Wn.2d 680, 358 P.3d 359 (2015).

[5] *State v. Solis-Diaz*, 194 Wn. App. 129, 376 P.3d 458 (2016), reversed in part, 187 Wn.2d 535, 387 P.3d 703 (2017).

The trial court only referenced *O'Dell* when it examined what ability it had to depart from the standard range. 3/8/18 RP 997. Nonetheless, the Court of Appeals held that the trial court did not misunderstand what it could do after *Houston-Sconiers* was published. App. 15. Instead, the Court of Appeals interpreted the trial court's statement that "the law is clear and there is nothing I can do" to mean the court properly exercised its discretion. *Id.*

Nothing in the record suggests the trial court was aware that for juveniles, courts must have the discretion to impose any sentence below the standard range. *Houston-Sconiers,* 188 Wn.2d at 21; *Bassett,* 192 Wn.2d at 81. Instead, the court was clear that it was confined by its interpretation of *O'Dell*, which does not involve a juvenile but a young adult. *O'Dell*, 183 Wn.2d at 689. These are not the same standards. O'Dell does not hold that a court is obligated to find youthfulness justifies a departure from the standard range for a young adult. *Id*. at 698. For a youth prosecuted in adult court, however, sentencing courts must have complete discretion. Houston-Sconiers, 188 Wn.2d at 21.

A court abuses its discretion when its discretion exercised on untenable grounds or for untenable reasons. *In re Det. of Duncan*, 167 Wn.2d 398, 403, 219 P.3d 666 (2009). The failure to exercise

discretion is an abuse of discretion subject to reversal, as is a mistake of law. *State v. Grayson*, 154 Wn.2d 333, 342, 111 P.3d 1183 (2005). Where an appellate court cannot say 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). This Court should accept review of this issue to make clear to trial courts there is a distinction between adults and children and that when sentencing a child, the trial court must have complete discretion.

The trial court also abused its discretion by misinterpreting the hallmark of youthfulness as signs of maturity, which conflicts with this Court's holding in *State v. Bassett*, where the trial court made the same mistake. 192 Wn.2d at 81. Like *Bassett*, the sentencing court recognized the factors of youthfulness, but misinterpreted them. *Id*. Frankie lacked structure and support, with only an eighth-grade education. 3/8/18 RP 998. His homeless did not demonstrate his ability to take care of himself, but the lack of structure required to help him make good choices. 3/8/18 RP 999. His true remorse and hope for change at sentencing were not a sign of his maturity, but a

demonstration of how youth can change and why courts must provide them with the opportunity to do so. 3/8/18 RP 1000.

Frankie was still a child when he was accused of committing his crimes. This required the sentencing court to apply this Court's analysis in *Houston-Sconiers*, rather than *O'Dell*. The failure of the trial court to apply the right standard was an abuse of discretion. And like *Bassett*, the misinterpretation of the hallmark features of youth conflicts with this Court's opinions on how children should be sentenced. Because the Court of Appeals' decision conflicts with decisions of this Court on juvenile sentencing, review is warranted. RAP 13.4(b). Review of this significant constitutional question which involves an issue of substantial public interest, should be granted. *Id*.

F. CONCLUSION

Based on the above arguments, petitioner Frankie Vazquez respectfully requests that review be granted pursuant to RAP 13.4 (b).

DATED this 10th day of December 2019.

Respectfully submitted,

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APPENDIX

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Division I
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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

FRANCISCO CUAHUTEMOC VAZQUEZ,

Appellant.

No. 78153-7-I

DIVISION ONE

UNPUBLISHED OPINION

FILED: November 12, 2019

SMITH, J. — Francisco Vazquez was convicted of attempting to rob two drug dealers when he was 17 years old. He contends he is entitled to a new trial because he was denied his right to present a defense when the court limited his cross-examination of two State witnesses and because the prosecutor improperly bolstered a witness's credibility. He also contends the trial court failed to adequately consider his youth as a mitigating factor at sentencing. We affirm.

FACTS

This case involves a drug transaction on March 13, 2017, between four men that ended with the shooting death of one of the participants. Dustin Bradshaw and Brian Wingender were childhood friends. Both occasionally sold drugs. An acquaintance of Bradshaw's, John Proctor, arranged for Bradshaw to sell two pounds of marijuana to a friend of Proctor's. Bradshaw did not know the identity of the buyer, but Proctor gave him a phone number and a name that was "something like a Mel or something like that."

Bradshaw contacted the buyer and received instructions to meet on a residential street in Everett. He and Wingender left Kenmore around midnight. Both men had concealed pistol licenses and were carrying firearms. Wingender had a duffel bag containing the marijuana. Bradshaw also had 199 pills of Xanax in the trunk.

Bradshaw and Wingender arrived at the meeting location and waited in the car for about five to ten minutes. They saw two men approach the car and then quickly walk away. The men came back, walked up to the car, and asked Bradshaw and Wingender if they had heard sirens or seen flashing lights. Confused and unnerved by the encounter, Wingender told Bradshaw to drive away.

Bradshaw contacted the buyer and was directed to a church parking lot. After a short time, the same two men as before approached the car. One of the men, later identified as Vazquez, grabbed Bradshaw and tried to pull him out of the car. The other man, who was Vazquez's friend John Muhlstein, pulled out a gun and got into the backseat. Muhlstein began screaming at Bradshaw and Wingender to "give him everything [they] had" or he would "blow [their] brains out." He hit Wingender in the head with the gun and began punching him.

Wingender grabbed the duffel bag, jumped out of the car, and ran. He looked back and saw Muhlstein pursuing him. Muhlstein was still holding the gun and yelling that he would shoot if Wingender did not stop. Wingender reached into his waistband and pulled out his own gun. He looked over his shoulder and pulled the trigger. He heard Muhlstein cry out and saw him veer into a yard.

Wingender continued to run through the neighborhood, trying to get back to Bradshaw and the car. He heard footsteps and saw Vazquez running full-speed towards him with something in his hand. Believing it was a gun, Wingender twice yelled for Vazquez to stop. When Vazquez continued to run towards him, Wingender raised his gun and shot twice at Vazquez. Vazquez fell to the ground.

Nearby police officers heard the gunshots and responded in less than a minute. They found Bradshaw sitting inside the car and Wingender standing by the front passenger door, with the duffel bag and his gun at his feet. The officers arrested both Wingender and Bradshaw. Wingender's head was bleeding from where Muhlstein hit him with the gun.

A few minutes later, Vazquez approached the officers on foot, saying that he had been shot. He had bullet wounds in his abdomen and shoulder. Officers later discovered Muhlstein's body in a nearby yard.

In a search of Vazquez's cell phone, officers found several messages between Vazquez and a contact named "Tae" shortly before the drug deal was to take place. At 9:35 p.m., Vazquez received a text from "Tae" stating, "What's good." The subsequent messages between Vazquez's phone and Tae's phone reveal a plan to rob Bradshaw and Wingender. For example, when Vazquez told Tae that he was at the meeting location, Tae responded, "Ok be ready and think before you do don't do nothing we can't go back from get it and go." Vazquez asked, "Okay how many people is there and who is it." Tae responded, "Should

be one or 2 and it's this white boys plug[1] so idk really what or who he is . . . Just play it off if it looks like y'all can't hit it just game him like you can get better for cheaper." At 11:47 p.m., Tae sent a message to Vazquez stating, "Be ready, and . . . think before you do don't do nothing we can't go back from. Get it and go." At 11:59 p.m., Tae sent another message stating, "Don't use that thang if you don't need to real talk." Vazquez agreed, stating, "Okay G where they at." At around 12:30 a.m., Tae sent Vazquez more instructions about the planned robbery.

> The nigga is on the way it's just a white boy he has bars on him too I guess he said y'all can try them try and get a roll or 3 out of him just talk business as if you were me feel me keep him going.
> ...
>
> But if he has bars he's riding dirty so if y'all just jump on him with no whammy it's easy money at least put it in a bag or sum I'm telling you than Niggas can't get caught up at all.[2]

Vazquez texted, "Okay G" and "Say no more."

Vazquez testified that he and Muhlstein planned to buy an ounce of marijuana from Bradshaw and Wingender. He testified that he and Muhlstein each brought a hundred dollars to buy the marijuana. However, no money was found on either Vazquez or Muhlstein. Vazquez admitted to knowing Tae but denied knowing that Muhlstein planned to rob Bradshaw and Wingender. He claimed that Muhlstein borrowed his phone several times that evening and must have used it to contact Tae and set up the robbery.

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[1] A "plug" is "a connection usually for a drug transaction."

[2] The investigating detective testified that "bars" is slang for Xanax. He explained that "riding dirty" means "that they are doing something illegal. If they were to get stopped by the police, then they would be potentially charged with a crime." He testified that one meaning of the word "whammy" is "firearm."

A jury convicted Vazquez as charged. Vazquez appeals.

DISCUSSION

Testimony Regarding Plea Agreements

Vazquez contends that the trial court violated his right to present a defense when it limited his ability to cross-examine Bradshaw and Wingender regarding any benefits they received in exchange for their testimony. The record shows that the court did not place any such limitations on Vazquez and he was not deprived of his right to present a defense.

The State charged both Bradshaw and Wingender with crimes arising from their conduct that night. At the time of Vazquez's trial, Bradshaw had pleaded guilty to possession of marijuana with intent to deliver. He had not yet been sentenced, but faced a standard sentencing range of between zero and six months. Wingender had been charged with possession of marijuana with intent to deliver, with a firearm enhancement. He was awaiting trial and faced a standard range sentence of 60 months.

The State moved to prohibit any reference to the firearm enhancement that Wingender potentially faced, arguing "that is the very enhancement that Mr. Vasquez is charged with, and it would be sort of a transparent way of letting the jury know what the punishment is that Mr. Vasquez is facing in this case." Defense counsel argued that Wingender and Bradshaw were "given sweetheart deals" to testify and that it was "appropriate for the jury to know what the benefit of the bargain is. That includes what they're avoiding in terms of being charged,

the amount of time they're avoiding having to serve . . . I think it is appropriate for the jurors to know that in terms of their testimony what they're getting."

The court prohibited defense counsel from specifically asking Wingender and Bradshaw about any firearm enhancements they were charged with. But the court otherwise allowed questioning about the potential sentence they faced and any benefits they were provided in exchange for their testimony.

> Well, you can reference that you're charged with this offense, but don't reference the firearm enhancement, the jurors don't need to know about that. And then you can reference if you're convicted with what you're charged with, your standard sentencing range . . . I'll permit that, but I don't know how you're going to infer or raise the issue that somehow they received a quote, unquote, sweetheart deal when it sounds like this is the way the cases were charged initially.
> ...
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> [Y]ou can ask them if as a result of his agreeing to testify in this case whether or not he received any benefit from an offer from the State. But the problem is, if he says no, I think you're stuck with that. I don't see how you can follow-up, but I will allow that question.

Bradshaw testified that he had been charged with possession with intent to deliver marijuana. He admitted that he had agreed to testify as part of his guilty plea and that he knew he "could potentially be facing more serious charges" if he did not testify truthfully.

The Sixth Amendment to the United States Constitution guarantees a criminal defendant "a meaningful opportunity to present a complete defense." Holmes v. South Carolina, 547 U.S. 319, 324, 126 S. Ct. 1727, 164 L. Ed. 2d 503 (2006). Where the trial court excludes relevant defense evidence, we review de

novo whether the exclusion violates the defendant's constitutional right to present a defense. State v. Clark, 187 Wn.2d 641, 648-49, 389 P.3d 462 (2017).

Here, the trial court did not preclude Vazquez from asking either Wingender or Bradshaw about the benefits they may have received for testifying. But there was no evidence that Wingender had reached any agreement with the State in exchange for his testimony. Nor was there any evidence that the State agreed to reduce or dismiss charges against Bradshaw for his cooperation. Although Vazquez argues that Bradshaw "risked prosecution for felony murder" and "faced an additional 60 months of hard time" due to the use of a firearm, his claim that the State chose not to charge Bradshaw with these crimes in exchange for Bradshaw's testimony is not supported by the evidence. Vazquez fails to show that the trial court erroneously excluded relevant evidence critical to his defense.

Vazquez also argues that the limits on cross-examination violated his rights of confrontation. The confrontation clause of the Sixth Amendment guarantees the right to impeach prosecution witnesses with evidence of bias or motive to testify. State v. Mohamed, 187 Wn. App. 630, 649, 350 P.3d 671 (2015). But the right to cross-examine adverse witnesses is not absolute; the trial court "has discretion to control the scope of cross-examination and may reject lines of questions that only remotely tend to show bias or prejudice, or where the evidence is vague or merely speculative or argumentative." State v. Kilgore, 107 Wn. App. 160, 185, 26 P.3d 308 (2001). We review alleged

violations of the confrontation clause de novo. State v. Koslowski, 166 Wn.2d 409, 417, 209 P.3d 479 (2009).

Here, testimony regarding the length of a possible firearm enhancement would not have been relevant to bias or motive to testify. There was no evidence that the State had ever charged Bradshaw with a firearm enhancement. Thus, avoiding a firearm enhancement was not a motive for Bradshaw to testify. Nor was there any evidence that Wingender was receiving a benefit in exchange for his testimony. Vazquez fails to establish a confrontation clause violation.

Prosecutorial Misconduct

Vazquez contends that the prosecutor committed misconduct by assuring the jury that Wingender had been charged with a crime for his conduct that night. He argues that this constituted improper vouching for Wingender's credibility.

During the State's rebuttal closing argument, the prosecutor argued that Bradshaw's and Wingender's version of events was credible because it was supported by the physical evidence, including the injuries and the bullet pattern. The prosecutor instructed the jury that its job was to focus on the charge of attempted robbery and not any crimes that Bradshaw and Wingender may have committed.

> PROSECUTOR: Now, make no mistake, I still want you to have that dividing line in your mind about what happened on Lombard is a whole other case. It's called State of Washington vs. Brian Wingender.
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> DEFENSE COUNSEL: Objection, Your Honor.
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> THE COURT: Sustained.

> PROSECUTOR: And you need to concentrate on what happened in that alleyway.
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> DEFENSE COUNSEL: Your Honor.
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> THE COURT: Jurors will disregard the comment in relation to any other case aside from this one.
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> PROSECUTOR: So they're separate, right? They're entirely separate.
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> DEFENSE COUNSEL: And, Your Honor –
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> PROSECUTOR: The way that they are linked is that, yes, physical evidence from the Lombard side of the street does end up providing corroborative evidence that supports the credibility of the State's witnesses. Mr. Pavey, Mr. Bradshaw, Mr. Wingender. And that is the value of that evidence as far as this case. O.K. Now, the order of people through the breezeway, as far as this case is concerned –
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> DEFENSE COUNSEL: Your Honor, objection to repeated reference of this case, that case. It is not accurate.
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> THE COURT: Just focus on the facts of this case.
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> PROSECUTOR: I think I'm doing that.
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> THE COURT: Don't have to reference any other case or this case, we're only talking about the charge before this defendant.
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> PROSECUTOR: Yes. I agree.

Vazquez moved for a mistrial, which the trial court denied.[3]

"A claim of prosecutorial misconduct requires the defendant to show both that the prosecutor made improper statements and that those statements caused prejudice." State v. Lindsay, 180 Wn.2d 423, 440, 326 P.3d 125 (2014). "If the defendant objected at trial, the defendant must show that the prosecutor's misconduct resulted in prejudice that had a substantial likelihood of affecting the

[3] Vazquez does not challenge the court's denial of the mistrial.

jury's verdict." State v. Emery, 174 Wn.2d 741, 760, 278 P.3d 653 (2012) (citing State v. Anderson, 153 Wn. App. 417, 427, 220 P.3d 1273 (2009)). In evaluating a claim of prosecutorial misconduct, we review a prosecutor's remarks "in the context of the total argument, the issues in the case, the evidence addressed in the argument, and the instructions given to the jury." State v. Brown, 132 Wn.2d 529, 561, 940 P.2d 546 (1997).

It is improper for the prosecution to vouch for the credibility of a government witness. State v. Ish, 170 Wn.2d 189, 196, 241 P.3d 389 (2010). Stating that information not presented to the jury supports the witness's testimony is a form of vouching. Ish, 170 Wn.2d at 196.

Here, the prosecutor's brief remark did not constitute vouching for Wingender's credibility. Rather, it served to remind the jury that their role was limited to determining whether Vazquez had committed a crime. To the extent that the prosecutor referred to facts not in evidence, the reference was improper. See State v. Ray, 116 Wn.2d 531, 550, 806 P.2d 1220 (1991) (a prosecutor may not make statements that are unsupported by the record). But Vazquez fails to show that the remarks were so prejudicial that they had a substantial likelihood of affecting the jury's verdict. Defense counsel had repeatedly informed the jury that Bradshaw had been charged with a separate crime for his actions that night. It was not unreasonable for the jury to assume that the State had also charged Wingender. And it is difficult to discern how being charged with a crime would have strengthened Wingender's credibility in the eyes of the jury. Vazquez has not established reversible error.

Sentencing

Vazquez committed the crime when he was a few weeks shy of his 18th birthday. He argues that the trial court abused its discretion when it determined, despite Vazquez's youth, that it was required to impose a term of 36 months for the firearm enhancement consecutive to the base sentence. Citing State v. Houston-Sconiers, 188 Wn.2d 1, 391 P.3d 409 (2017), he contends that he is entitled to resentencing because the court misunderstood the extent of its discretion.

A court "may impose a sentence outside the standard sentence range for an offense if it finds, considering the purpose of [the SRA], that there are substantial and compelling reasons justifying an exceptional sentence." RCW 9.94A.535. "When a trial court is called on to make a discretionary sentencing decision, the court must meaningfully consider the request in accordance with the applicable law." State v. McFarland, 189 Wn. 2d 47, 56, 399 P.3d 1106 (2017) (citing State v. Grayson, 154 Wn.2d 333, 342, 111 P.3d 1183 (2005)). "A discretionary sentence within the standard range is reviewable in 'circumstances where the court has refused to exercise discretion at all or has relied on an impermissible basis for refusing to impose an exceptional sentence below the standard range.'" McFarland, 189 Wn.2d at 56 (quoting State v. McGill, 112 Wn. App. 95, 100, 47 P.3d 173 (2002)). A trial court relies on an impermissible basis when it "operates under the 'mistaken belief that it did not have the discretion to impose a mitigated exceptional sentence for which [a defendant] may have been

eligible.'" McFarland, 189 Wn.2d at 56 (quoting In re Pers. Restraint of Mulholland, 161 Wn.2d 322, 333, 166 P.3d 677 (2007)).

Based on his offender score, Vazquez faced a standard sentencing range of between 30.75 and 40.5 months. Immediately prior to sentencing, defense counsel provided the court with a sentencing memorandum arguing that Vazquez's youth constituted a mitigating factor justifying an exceptional sentence below the standard range, based on State v. O'Dell, 183 Wn.2d 680, 358 P.3d 359 (2015). Vazquez argued that he had only an eighth grade education, had spent most of his life in juvenile detention, and was homeless at the time of the crime. He proposed that the trial court impose a sentence of 12 months on the attempted robbery conviction and 36 months for the firearm enhancement, for a total sentence of 48 months.

The court stated that it had found the facts of the case "more troubling and more difficult for me than any case I've ever had." The court stated it would impose an exceptional sentence downward if the law and the facts supported it. Otherwise, the court explained, it would impose a low-end standard range sentence.

> I can tell you this. Based on your arguments the likelihood is if I don't find a basis legally for the exceptional sentence, I probably would sentence your client to the low end of the standard range because of the issues that you've raised.

But after continuing the sentencing hearing approximately two weeks in order to review Vazquez's sentencing memorandum, the court determined that Vazquez's youth did not justify an exceptional sentence below the standard

range. The court noted that "age is not a per se mitigating factor automatically entitling every youthful defendant to an exceptional sentence." It compared Vazquez to the defendant in O'Dell, who was described by family and friends as immature for his age and whose bedroom still contained toys, stuffed animals, and posters of cartoon characters. In contrast, the court found, Vazquez's actions were not the result of youthful impulsivity, but were deliberate and intentional.

> Mr. Vazquez at the last hearing was articulate and was thoughtful. He did not appear to, and I'll just say that in quotes as it was referenced in relation to [O'Dell], only to be a kid, similar to that defendant in the [O'Dell] case.
>
> In this case, the actions were premeditated, planned and thought out ahead of time. They were not impulsive, as these cases indicate in relation to taking youth into consideration.
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> Additionally, there were opportunities to not follow through with the plan, especially when the first contact referenced to the police being nearby, and the plan was never abandoned.
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> The primary factual basis for the request for the exceptional sentence below the standard range in this case is really the age of the defendant, which alone is not sufficient.

The court also found that Vazquez's difficult life circumstances also did not merit an exceptional sentence.

> While it's true the defendant had had a lack of education, and homelessness, those are factors that are not attributable necessarily to youth as many adult offenders who appear before the court follow the same circumstances.
>
> While it's true that running away is often the behavior of a child, the Court does not find that this factor alone together with the age are appropriate for an exceptional sentence below the standard range in this case.

However, the court disagreed with the State's request for a high-end standard range sentence, finding that it was excessive considering Vazquez's youth. The court imposed 30.75 months on the attempted robbery conviction, the lowest possible sentence within the standard range.

As for the deadly weapon enhancement, the court imposed a term of 36 months, as requested by the parties. The court stated that it was required to impose the enhancement once the jury found by special verdict that Vazquez was armed with a deadly weapon.

> While it's true, Mr. Vazquez, that you did not possess a firearm, the jury concluded that the evidence established that as required by the law, and there is a basis for the enhancement. While that may seem unfair to you, *under these circumstances the law is clear and there is nothing I can do other than impose what I've imposed in relation to that.*

(Emphasis added).

In Houston-Sconiers, the defendants were 16 and 17 at the time they used a gun to rob several other juveniles of their Halloween candy and cell phones. They were convicted as adults of multiple offenses including several mandatory firearm enhancements. The trial court expressed frustration that it was required by RCW 9.94A.533(3)(e) to run the firearm enhancements consecutively, resulting in disproportionately long sentences. The Washington Supreme Court held that, when sentencing a juvenile in adult court, a trial court has absolute discretion to depart from both the standard sentencing ranges and mandatory sentence enhancements prescribed by the Sentencing Reform Act of 1981 (SRA), chapter 9.94A RCW. A court must consider circumstances related to the

defendant's youth, including age and its "hallmark features," such as the juvenile's "immaturity, impetuosity, and failure to appreciate risks and consequences." Houston-Sconiers, 188 Wn.2d at 23 (quoting Miller v. Alabama, 567 U.S. 460, 477, 132 S. Ct. 2455, 2468, 183 L. Ed. 2d 407 (2012)). It must also consider factors like "the nature of the juvenile's surrounding environment and family circumstances," "the extent of the juvenile's participation in the crime," and "any factors suggesting that the child might be successfully rehabilitated." Houston-Sconiers, 188 Wn.2d at 23 (citing Miller, 567 U.S. at 477). Because the trial court in Houston-Sconiers did not recognize that it possessed this discretion, the court remanded for resentencing.

Here, no one cited to nor discussed Houston-Sconiers, despite the fact that the decision was published over a year before the sentencing hearing. Nonetheless, the record does not show that the trial court misunderstood the extent of its discretion. The court recognized it had the opportunity to impose an exceptional sentence downward, and it explicitly chose not to do so. While the court told Vazquez "the law is clear and there is nothing I can do other than impose what I've imposed," this does not appear to signal a mistaken belief that the court lacked discretion to depart from the enhancement. Instead, the court was explaining that the deadly weapon enhancement applied to Vazquez based on the theory of accomplice liability even though Vazquez did not have a gun.

But even assuming the court was unaware of its discretion, the record does not suggest the court would have departed from the enhancement had it known it could do so. The court fully considered Vazquez's request to consider

his youth as a mitigating factor, and determined that the facts did not warrant an exceptional sentence below the standard range.

Vazquez also challenges the manner in which the court considered his youth as a mitigating factor. He argues that the court should have placed greater weight on his homelessness and lack of formal education. In doing so, he compares his case to State v. Bassett, 192 Wn. 2d 67, 72, 428 P.3d 343 (2018). In Bassett, the 16-year-old defendant had been kicked out of his parents' home and was living with a friend; he went back to his home and murdered his parents and brother. He was sentenced to three consecutive sentences of life without the possibility of parole. When he was resentenced pursuant to RCW 10.95.030, the court rejected his request for leniency and reimposed the original sentence. But Bassett provides no guidance here. The court in Bassett held that sentencing juveniles to life without the possibility of parole is categorically unconstitutional; it did not hold that the court abused its discretion in failing to consider the defendant's homelessness and lack of insight as mitigating factors.

Here, the trial court fully considered the factors identified in Houston-Sconiers, including Vazquez's level of maturity, his appreciation of the risks and consequences, his participation in the crime, and rehabilitative factors such as family support and career goals. The court found that these factors made the State's recommendation of a high-end standard range sentence inappropriate. But the court disagreed that these factors merited an exceptional sentence below the standard range. The court properly exercised its discretion, and thus its decision declining to impose an exceptional sentence is not reviewable.

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. 78153-7-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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