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No. 50608-4-II

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

In re Personal Restraint Petition of:

AUSTIN MOORES-NELSON,

Petitioner.

PETITIONER'S SUPPLEMENTAL BRIEF

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A. INTRODUCTION

A rational person does not plead guilty to an unlawful charge that necessarily increases a person's time in prison. Among other charges, Austin Moores-Nelson pleaded guilty to a charge of animal cruelty with a firearm enhancement. Based on this firearm enhancement, Mr. Nelson's¹ sentence was increased by 18 months. But Mr. Nelson was misinformed about the consequences of his plea because firearm enhancements do not apply to "unranked" offenses, including the offense of animal cruelty that Mr. Nelson pleaded guilty to. Because Mr. Nelson's plea was involuntary and he was prejudiced by the misinformation through the imposition of a longer sentence, this Court should grant his personal restraint petition and order he be permitted to withdraw his plea.

Additionally, Mr. Nelson is entitled to withdraw his plea due to ineffective assistance of counsel. If he does not withdraw his plea, he is entitled to resentencing because the firearm enhancement on the animal cruelty conviction is illegal. Resentencing is also required because Mr. Nelson was deprived of his constitutional right to be sentenced in an impartial tribunal by an unbiased judge. His petition should be granted on these other grounds.

¹ Mr. Nelson prefers to go by the last name of Nelson rather than Moores-Nelson.

B. ASSIGNMENTS OF ERROR

1. In violation of due process as guaranteed by article I, section 3 of the Washington Constitution and the Fourteenth Amendment to the United States Constitution, Mr. Nelson's guilty plea was not knowing, intelligent, and voluntarily. The trial court erred in accepting his plea. (grounds 1, 6, and 7 in personal restraint petition).

2. In excess of its authority and in violation of the sentencing reform act, the trial court erred by imposing an 18-month firearm enhancement on count three, an unranked offense. (ground 1 in personal restraint petition).

3. During the plea bargaining process, Mr. Nelson was deprived of his right to the effective assistance of counsel under article I, section 22 of the Washington Constitution and the Sixth and Fourteenth Amendments to the United States Constitution. The trial court erred in accepting his plea. (grounds 5, 6, and 7 in personal restraint petition).

4. In violation of due process as guaranteed by article I, section 3 of the Washington Constitution and the Fourteenth Amendment to the United States Constitution, Mr. Nelson was deprived of his right to be sentenced by a neutral judge in an impartial tribunal. The trial judge erred by failing to recuse himself and by not transferring the matter to a different county. (ground 2 in personal restraint petition).

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Firearm enhancements do not apply to “unranked” offenses. Mr. Nelson pleaded guilty to a means of animal cruelty that is an unranked offense. This charge included a firearm enhancement. Based on this firearm enhancement, Mr. Nelson’s sentence was increased by 18 months. Is Mr. Nelson’s sentence illegal?

2. Affirmative misinformation about direct sentencing consequences like punishment makes a guilty plea involuntary and withdrawal is the remedy if there is prejudice. Prejudice is established if a rational person would not have pleaded guilty but for the misinformation. A rational person does not plead guilty to an illegal charge that increases one’s punishment. Mr. Nelson was affirmatively misinformed that the firearm enhancement allegation on the animal cruelty charge was legal and that the law required his sentence to be increased by 18 months if he pleaded guilty. Is Mr. Nelson entitled to withdraw his guilty plea where he pleaded guilty based on an erroneous belief his charge included a valid firearm enhancement that unlawfully increased his sentence?

3. If Mr. Nelson chooses not to withdraw his plea, is he entitled to vacation of the firearm enhancement and to a lawful sentence?

4. Defendants have the right to effective assistance of counsel during plea bargaining. Mr. Nelson’s trial attorney failed to recognize that

the firearm enhancement on the animal cruelty charge was illegal. He further misadvised Mr. Nelson about the range of punishment that would result if he pleaded guilty as charged. And he pressured Mr. Nelson to accept an offer to plead guilty in exchange for charges that appeared to result in a lower sentence. But in fact there had been no improvement because the charges were identical, except for an additional charge. Was Mr. Nelson deprived of his right of effective assistance of counsel, entitling him to withdraw his guilty plea?

5. Due process requires sentencing in an impartial tribunal by an unbiased judge. When there is an objective risk of bias in the tribunal that is too high to be constitutionally tolerable, due process is violated even if there is no proof of actual bias. The decedent in Mr. Nelson's case was a court-employee who worked in the same building where Mr. Nelson was sentenced. The judge received victim impact statements from other court-employees, whom the judge did not disclaim knowing. Under these circumstances, was Mr. Nelson deprived of his right to an impartial tribunal where an objective risk of bias existed at sentencing that was too high to be constitutionally tolerable?

D. STATEMENT OF THE CASE

Austin Moores-Nelson (Mr. Nelson) was born on September 4, 1996. CP 91. His father had a lengthy criminal history and his mother used

methamphetamine during her pregnancy. App. B at 1-2. Mr. Nelson's father physically abused him and both parents neglected him. App. B at 1-2, 4-6; CP 48-49. Child protective services became involved and Mr. Nelson was placed in foster care when he was two years old. App. B at 1-2. Mr. Nelson had various foster placements and lived with his mother on and off. App. B at 1-2; CP 48-49. He also lived with his maternal grandparents, who tried to provide some stability. App. B at 2, 6. After being placed back with his mother, who had remarried, Mr. Nelson again returned to foster care when he was about 8 years old because his mother and step-father were arrested on drug charges. App. B at 2.

Due to trauma from the abuse and neglect, Mr. Nelson was diagnosed with post-traumatic stress disorder and episodic mood disorder, but inexplicably was not treated. App. B at 3. He had delayed motor skills and speech. App. B at 3. Due to his delays and learning disabilities, he qualified for an Individualized Educational Program (IEP). App. B at 3; CP 48. He struggled in school both educationally and socially with his peers. App. B at 4-7; CP 48.

In September 2016, around the time Mr. Nelson turned 19, Mr. Nelson began a relationship with a teenage girl. CP 29. The girl's mother, Teresa Ryan, did not approve of the relationship. CP 29. In January 2016, Ms. Ryan's daughter broke up with Mr. Nelson. CP 29.

Mr. Nelson did not want the relationship to end. CP 29. About a week after the breakup and still upset, Mr. Nelson vandalized his ex-girlfriend's car at her school's parking lot. CP 29.

A couple of days later, Mr. Nelson contacted a friend to buy "BHO oil," which is a type of concentrated marijuana. App. D at 1. Mr. Nelson bought some clear gel pills containing what he believed to be the marijuana concentrate. App. D at 1. Late that evening, Mr. Nelson took some of the pills and consumed more in the middle of the night. App. D at 1. That morning, he felt paranoid and very strange. App. D at 1. Everything was brightly colored and he heard odd noises. App. D at 1. Once sober following his arrest, Mr. Nelson concluded the pills he consumed contained PCP (phencyclidine). App. D at 2; App. E at 1.

Unaware that he was under the influence PCP and hallucinating, Mr. Nelson drove to his ex-girlfriend's home with the intent to retrieve some of his belongings. App. D at 1. He parked nearby and walked to the door. App. D at 1. By this point, Mr. Nelson's vision was tilting and spinning. App. D at 1. After no one answered the door, he heard a loud noise and turned, seeing a shape coming towards him. App. D at 2. Mr. Nelson drew a gun and fired at the shape, who was Ms. Ryan. App. D at 2; CP 29. He ran to the back of the house and broke in by shattering a sliding glass door. App. D at 2. When another large shape making noises came at

him, Mr. Nelson fired the gun at what was actually dog. App. D at 2; CP 29-30. Mr. Nelson fled. App. D at 2.

Police found Ms. Ryan lying by the driver's side door of a vehicle that was parked in the road in front of her house. CP 29. She had been shot three times and died as a result. CP 29. Ms. Ryan was an employee at the Pierce County District Court. RP 25.²

Mr. Nelson was arrested at his grandfather's house. CP 30. At jail, the effects of the drugs ceased. App. D at 2.

The Pierce County prosecutor's office charged Mr. Nelson with three counts: first degree murder; first degree burglary; and first degree animal cruelty. CP 1-2. All three charges alleged firearm enhancements. CP 1-2.

Mr. Nelson was appointed Edward DeCosta to represent him. CP 28. As explained in further detail in the argument section, Mr. DeCosta incorrectly told Mr. Nelson that his minimum sentence under the charges was about 47 years. App. C at 1; App. E at 1. Mr. DeCosta obtained a plea agreement where the ultimate sentencing range would be about 35 to 42 years. CP 78. Mr. Nelson accepted the offer, which was actually an agreement to plead guilty as charged and to an additional charge of second

² The "RP" citations refer to the transcript from the plea and sentencing hearing held on September 9, 2016. A copy is attached as Appendix A.

degree malicious mischief for vandalizing his ex-girlfriend's car. CP 71-85.

On September 9, 2016, Mr. Nelson pleaded guilty to the amended information in Pierce County Superior Court. RP 3-11. The court immediately proceeded to sentencing. RP 12.

At sentencing, the court considered victim impact statements, some of which were submitted by Pierce County District Court employees who worked with Ms. Ryan. CP 62-64, 67-68, 107-08; RP 17-18. The Pierce County District Court is located in the same building as the Superior Court. RP 25.

The prosecution sought a high-end sentence of about 42 years. RP 19. In support, the prosecution cited the victim impact statements. RP 19.

Based on Mr. Nelson's youth and other mitigating factors, including his troubled childhood, Mr. Nelson sought a low-end sentence of about 34 years. RP 19-24; CP 28-46. Mr. Nelson personally apologized. RP 24-25.

The court disclaimed knowing Ms. Ryan, but did not disclaim knowing the district court employees who had submitted victim impact statements. RP 25. Opining that Mr. Nelson was "a parent's worst nightmare," the court sentenced Mr. Nelson to the high end sentence. RP 25-26.

Mr. Nelson timely filed a personal restraint petition, seeking withdrawal of his plea, sentencing relief, or a new sentencing hearing.

E. ARGUMENT

1. Mr. Nelson’s guilty plea is involuntary because he was misinformed that his sentence would be increased based on an unlawful firearm enhancement. Because Mr. Nelson’s sentence was increased based on this unlawful firearm enhancement, he establishes prejudice and is entitled to withdraw his plea.

a. A guilty plea is involuntary if the defendant is misinformed as to a sentencing consequence.

Due process requires that a defendant’s guilty plea be knowing, voluntary, and intelligent. Boykin v. Alabama, 395 U.S. 238, 242, 89 S. Ct. 1709, 23 L. Ed. 2d 274 (1969); In re Pers. Restraint of Isadore, 151 Wn.2d 294, 297, 88 P.3d 390 (2004); U.S. Const. amend. XIV; Const. art. I, § 3. Under the court rules, a plea must be “made voluntarily, competently and with an understanding of the nature of the charge and the consequences of the plea.” CrR 4.2(d). Before a guilty plea is accepted, the defendant must be informed of all the “direct” consequences. State v. A.N.J., 168 Wn.2d 91, 113-14, 225 P.3d 956 (2010). Direct consequences include the punishment imposed as a result of the plea. State v. Ross, 129 Wn.2d 279, 284-86, 916 P.2d 405 (1996). Thus, “[a] plea is knowing and voluntary only when the person pleading guilty understands the plea’s

consequences, including possible sentencing consequences.” State v. Buckman, 190 Wn.2d 51, 59, 409 P.3d 193 (2018).

b. Firearm sentence enhancements do not apply to “unranked” offenses. Because Mr. Nelson was misinformed that a firearm enhancement would apply to his sentence on an unranked offense, his plea is involuntary.

When charged and proved, additional time is added to a standard sentence range for felony crimes if the person was armed with a firearm. RCW 9.94A.533(3); State v. Houston-Sconiers, 188 Wn.2d 1, 16-17, 391 P.3d 409 (2017). This is referred to as a “firearm enhancement.”

Firearm enhancements, however, do not apply to “unranked” offenses. State v. Soto, 177 Wn. App. 706, 714-15, 309 P.3d 596 (2013); State v. Vazquez, 200 Wn. App. 220, 225-28, 402 P.3d 276 (2017), review denied, 189 Wn.2d 1040, 409 P.3d 1070 (2018). An “unranked” offense means an offense that has not been assigned a seriousness level by the legislature. Soto, 177 Wn. App. at 711; RCW 9.94A.515, 520. Excluding animal cruelty by means of sexual conduct or contact, the offense of animal cruelty in the first degree is an unranked offense. Soto, 177 Wn. App. at 710; RCW 9.94A.515; RCW 16.52.205(3).

Alleging he shot a dog, the State charged Mr. Nelson with first degree animal cruelty under means that are unranked. CP 72; RCW

16.52.205(1)(b), (c). Although the charged offense is unranked, the State alleged a firearm enhancement. CP 72.

Mr. Nelson agreed to plead guilty to this and other charges. RP 11-12. He was informed the firearm enhancement for animal cruelty in count three carried a mandatory penalty of 18 months' of total confinement that must run consecutive to any other sentence or enhancement. CP 76, 78, 82; RP 6-7. Consistent with the agreement, the court imposed an additional 18 months for the firearm enhancement. CP 92, 95; RP 26.

A person cannot agree to a sentence in excess of that allowed by law. In re Pers. Restraint of Hinton, 152 Wn.2d 853, 861, 100 P.3d 801 (2004); In re Pers. Restraint of Goodwin, 146 Wn.2d 861, 867-72, 50 P.3d 618 (2002). Because firearm enhancements do not apply to unranked offenses, the trial court lacked authority to impose the additional sentence of 18 months. Soto, 177 Wn. App. at 713, 716. It follows that Mr. Nelson was misinformed about the sentencing consequences of his plea. Accordingly, his plea was neither knowing nor intelligent, and is involuntary. Buckman, 190 Wn.2d at 59-60.

c. Based on the error, Mr. Nelson's sentence was increased. Because this establishes prejudice, Mr. Nelson is entitled to withdraw his plea.

When a plea is determined to be involuntary on collateral review, the defendant should be permitted to withdraw their plea if prejudice is

established. Buckman, 190 Wn.2d at 65. The inquiry is objective rather than subjective. Id. at 66; In re Pers. Restraint of Stockwell, 179 Wn.2d 588, 602, 316 P.3d 1007 (2014). The defect must be one of “substance” rather than mere “procedure.” Buckman, 190 Wn.2d at 68. Thus, where it is objectively reasonable to conclude that a rational person would not have pleaded guilty if the person knew of the error, prejudice is established from an involuntary plea. Id. at 66-67, 70-71.

Mr. Nelson establishes prejudice. The error is one of substance rather than mere procedure. Due to the error, his sentence was increased by a year and half. Unlike in Buckman and Stockwell, Mr. Nelson establishes prejudice because he received additional prison time as a result of his involuntary plea. Cf. Buckman, 190 Wn.2d at 59-60, 70-71 (misinformation that defendant faced a maximum sentence of life in prison but who received a special sex offender sentencing alternative did not establish sufficient prejudice); Stockwell, 179 Wn.2d at 591, 603 (misinformation that defendant’s maximum sentence was 20 years when the maximum was actually life did not prejudice defendant because he received an exceptional downward sentence below both the stated maximum and the actual maximum). A rational person does not plead guilty to charges that are illegal and *necessarily* increases one’s sentence

by a year and half. Thus, a rational person in Mr. Nelson's position would not have pleaded guilty if he knew of the error.

Because Mr. Nelson establishes prejudice from his involuntary plea, this Court should grant his petition and order that he be permitted to withdraw his plea.

2. Firearm enhancements do not apply to unranked offenses. Mr. Nelson's sentence is illegal, requiring vacation of the sentence and resentencing without the firearm enhancement.

Setting aside whether Mr. Nelson's plea was involuntary, Mr. Nelson's sentence is illegal. The firearm enhancement did not apply to Mr. Nelson's conviction for animal cruelty. The court lacked authority to enhance Mr. Nelson's sentence by 18 months. Soto, 177 Wn. App. at 713, 716. Accordingly, Mr. Nelson's sentence is illegal. He is entitled to resentencing without the firearm enhancement. Goodwin, 146 Wn.2d at 877-78.

3. Mr. Nelson was deprived of his constitutional right to the effective assistance of counsel during the plea bargaining process. This deprivation entitles Mr. Nelson to withdraw his plea.

a. Defendants have a constitutional right to the effective assistance of counsel during the plea bargaining process and in deciding whether to plead guilty or exercise their right to trial.

Our state and federal constitutions guarantee the right to the effective assistance of counsel to criminal defendants. U.S. Const. amend.

VI, XIV; Const. art. I, § 22. A person is denied that right where counsel's deficient performance results in prejudice. Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. Reichenbach, 153 Wn.2d 126, 130, 101 P.3d 80 (2004). Once this standard is satisfied, prejudice for purposes of a personal restraint petition is necessarily satisfied. In re Pers. Restraint of Crace, 174 Wn.2d 835, 846-47, 280 P.3d 1102 (2012).

The right to effective assistance extends to plea bargaining. Lafler v. Cooper, 566 U.S. 156, 162, 132 S. Ct. 1376, 182 L. Ed. 2d 398 (2012); A.N.J., 168 Wn.2d at 110-11. The right includes assisting the defendant in making an informed choice on whether to plead guilty or exercise their right to a trial. Lee v. United States, ___ U.S. ___, 137 S. Ct. 1958, 1964, 198 L. Ed. 2d 476 (2017); A.N.J., 168 Wn.2d at 111-12. For example, when deficient performance leads a defendant to not accept a favorable plea or results a defendant being deprived of the opportunity to accept a plea, the defendant is entitled to be put back in their previous position before the plea. Lafler, 566 U.S. at 170-74; Missouri v. Frye, 566 U.S. 134, 147, 132 S. Ct. 1399, 182 L. Ed. 2d 379 (2012); State v. Drath, 7 Wn. App. 2d 255, 270-71, 431 P.3d 1098 (2018). Relatedly, when counsel's deficient performance deprives a defendant of a trial by causing the defendant to plead guilty, the defendant is entitled to withdraw their plea if

there is a reasonable probability the defendant would not have accepted the plea absent the attorney's deficient performance. Lee, 137 S. Ct. at 1965.

b. Defense counsel's performance during the plea bargaining process was deficient.

Mr. Nelson was deprived of his constitutional right to effective assistance of counsel during the plea bargaining process. Trial counsel failed to recognize the illegality of the firearm enhancement allegation by the prosecution on the charge of animal cruelty. This resulted in Mr. Nelson pleading guilty to an illegal enhancement and receiving a sentence that was a year and half longer than it should have been. Additionally, trial counsel misadvised Mr. Nelson regarding the range of punishment he faced if he pleaded guilty as originally charged. This made the later plea offer that Mr. Nelson accepted seem like an improvement, when in fact it was not. Relatedly, trial counsel pressured Mr. Nelson to plead guilty to these amended charges, which appeared to have a lesser range of punishment than the original charges. Mr. Nelson, an unsophisticated and scared young man with learning disabilities, accepted this "deal" and pleaded guilty.

It is well established that the duty of effective assistance of counsel includes the duty to research the relevant law. State v. Estes, 188 Wn.2d

450, 459-60, 395 P.3d 1045 (2017). Here, trial counsel failed to research whether firearm enhancements could apply to an unranked offense like the one Mr. Nelson was charged with. If he had done so, he would have found this Court's decisions in State v. Soto, 177 Wn. App. 706, 309 P.3d 596 (2013) and State v. Vazquez, 200 Wn. App. 220, 402 P.3d 276 (2017). In fact, Vazquez was issued several weeks before Mr. Nelson pleaded guilty. Defense counsel should have spotted the problem if he kept abreast of new appellate decisions. Instead, Mr. DeCosta recommended that Mr. Nelson plead guilty to an illegal firearm enhancement, which increased his time in prison by a year and a half. This was deficient performance because a reasonable attorney would have negotiated a plea without this illegal sentence enhancement. Estes, 188 Wn.2d at 459-60.

Additionally, a little less than three months before Mr. Nelson pleaded guilty, Mr. DeCosta met with his client and incorrectly told Mr. Nelson that a low-end sentence under the current charges was about 47 and half years. As recounted in the defense investigator's report:

Attorney DeCosta explained the sentencing guideline matrix, showing Nelson the matrix, as it would apply in his case if he was found guilty as he was currently charged. The state has alleged murder in the first degree, animal cruelty in the first degree and burglary in the first degree. Nelson was told that based on the investigation to date, it was likely he would be found guilty of murder in the first degree. With a "gun enhancement" charge, the "low end" of Nelson's sentencing range would be approximately 47 ½

years. Nelson had been told by Attorney DeCosta last week that the assigned deputy prosecutor had offered a 50 year sentence in exchanged [sic] for his guilty plea.

App. C at 1 (emphasis added). Mr. Nelson himself similarly recalls that his attorney told him his “low range sentence would be 47½ years and that the state had offered 50 years.” App. E at 1.³

This information was incorrect. If Mr. Nelson pleaded guilty to the three charges in the information, this would have produced an offender score of three on the charge of first degree murder, resulting in a standard range of 271-361 months. See RCW 9.94A.30(34), (47), (56); 9.94A.510, 515, 525(1); 9A.52.020(2); 9A.52.020(2). CP 1-2. With firearm enhancements on the murder and burglary charges, this would have added 120 months. See RCW 9.94A.533(3)(a); 9A.32.030(2); 9A.52.020(2). In total, the *low end* of the range was 391 months—about 32 and half years.⁴ In other words, trial counsel’s calculation about the low end of the range if Mr. Nelson pleaded guilty was off by *about 15 years*.

Moreover, including the firearm enhancements, the high end of the range was 481 months, about 40 years. This is well below even the “low

³ Handwritten and circled in the mitigation report summary on the right side are the words “STATE 47 + YRS LIFE SENTENCE!” App. E. at 1.

⁴ This calculation excludes the 18 months that were erroneously added for the firearm enhancement allegation on the animal cruelty charge. As explained, this was allegation was illegal because firearm enhancements do not apply to unranked offenses, which included the animal cruelty charge.

end” that Mr. Nelson was erroneously told about, indicating that the high end sentence Mr. Nelson was informed about was similarly incorrect.⁵

Based on the false information about the minimum sentence, trial counsel pressured Mr. Nelson to accept a plea deal. On August 30, 2016, his lawyer informed him of a plea offer and told him he should accept it. App. D at 2. Under the plea, Mr. Nelson was informed his total sentencing range, including firearm enhancements, would be 419 months to 512 months (about 35 years to about 42 years). See CP 76, 78; RP 6-7, 19. Mr. Nelson agreed to plead guilty to this offer.

Compared to the “low end” range sentence of 47 and half years that defense counsel told Mr. Nelson he faced, the sentencing consequences of this plea appear to be much more lenient than what Mr. Nelson had faced under the initial charges. But Mr. Nelson was actually pleading to *the same* charges plus *an additional* charge of second degree malicious mischief. Mr. Nelson, who was an unsophisticated young man with learning disabilities, did not understand this. See App. E at 1; App. B at 3; CP 48. And when trial counsel visited Mr. Nelson the day of the

⁵ Trial counsel also incorrectly told Mr. Nelson he would get the death penalty if he did not plead guilty. App. E at 1. Absent a charge of aggravated murder first degree murder, Mr. Nelson could not get the death penalty. RCW 10.95.020, 030. Moreover, there was moratorium on death sentences in effect. *Gov. Jay Inslee announces capital punishment moratorium*, Feb. 11, 2014, available at <https://www.governor.wa.gov/news-media/gov-jay-inslee-announces-capital-punishment-moratorium> (last accessed Jan. 10, 2020).

hearing on the plea, he quickly had Mr. Nelson sign the form, which included the amended charges. App. D at 2-3.

In evaluating whether performance is deficient, the “relevant question is not whether counsel’s choices were strategic, but whether they were reasonable.” Roe v. Flores–Ortega, 528 U.S. 470, 481, 120 S. Ct. 1029, 145 L. Ed. 2d 985 (2000). Here, trial counsel’s performance during the plea bargaining process was deficient because it was objectively unreasonable. Notwithstanding published caselaw, trial counsel was unaware the firearm enhancement on the animal cruelty charge was unlawful. He misadvised Mr. Nelson that if he pleaded guilty as charged, his minimum sentence would be 47 and half years. And when he brought Mr. Nelson a plea offer with a “lower” sentencing range, he failed to advise Mr. Nelson that this plea was actually to greater charges and pressured Mr. Nelson to quickly initial and sign the paperwork.

c. There is a reasonable probability that counsel’s deficient performance prejudiced Mr. Nelson, entitling him to withdraw his guilty plea.

Trial counsel’s deficient performance was prejudicial, meaning there is a reasonable probability the result of the proceeding would have been different. Strickland, 466 U.S. at 694. “A reasonable probability is a probability sufficient to undermine confidence in the outcome.” Id. at 694. This does not require “100 percent certainty” or even a “showing on a

more-likely-than-not basis.” Estes, 188 Wn.2d at 466. In the context of ineffective assistance of counsel claims where the defendant pleaded guilty, this means that but for the deficient performance, there is a reasonable probability the defendant would have (1) insisted on going to trial, or (2) obtained a lesser sentence, such as by negotiating a better plea bargain. Lee, 137 S. Ct. at 1965; Lafler, 566 U.S. at 165 (“any amount of additional jail time has Sixth Amendment significance”) (cleaned up); Drath, 7 Wn. App. 2d at 270.

Mr. Nelson establishes a reasonable probability of a different result absent the deficient performance of trial counsel. Absent the deficient performance, defense counsel would have at least negotiated a plea bargain without the illegal firearm enhancement. See Estes, 188 Wn.2d at 466. The proper remedy is to place Mr. Nelson back in the position he would have been but for this deficient performance. Drath, 7 Wn. App. 2d at 270. Therefore, Mr. Nelson should have the opportunity to accept or refuse a plea offer without the illegal firearm enhancement. If he accepts the plea, he should be resentenced without it. If he refuses, he should be permitted to withdraw his plea so he can be placed back at the same stage of the plea bargaining process.

As for the deficient performance in misinforming Mr. Nelson that the minimum sentence under the charges was 47 and half years and

advising him to plea to what were actually greater charges, there is a reasonable probability that Mr. Nelson would have refused to accept the plea agreement. If Mr. Nelson had known that the original charges resulted in a sentencing range of about 32 years to 40 (instead of a minimum of 47 and half years), it is reasonably likely that he would not have accepted a plea to a *greater* sentence range of about 35 years to 42 years. He would have negotiated a better plea or gone to trial. As Mr. Nelson's declaration states, "But for the information from Mr. DeCosta about my minimum being 47½ years under the charges, I would not have accepted the later plea offer or pleaded guilty." App. E at 1. Thus, for this deficient performance, he should be permitted to withdraw his plea. See A.N.J., 168 Wn.2d at 119-20 (misinformation from defense counsel entitled defendant to withdraw plea).

In sum, Mr. Nelson should be offered a plea without the illegal firearm enhancement. If he does not accept the plea, he should be permitted to withdraw his plea.

Alternatively, if the prosecution offers competing evidence and there is a disputed issue of material fact, the remedy is a reference hearing to resolve the dispute. See In re Pers. Restraint of Khan, 184 Wn.2d 679, 692-93, 363 P.3d 577 (2015); In re Pers. Restraint of Yung-Cheng Tsai, 183 Wn.2d 91, 107, 351 P.3d 138 (2015).

4. Mr. Nelson was deprived of his due process right to be sentenced by an unbiased judge in a neutral tribunal. A new sentencing hearing is required.

a. Under due process, defendants have a right to be sentenced by an unbiased judge in a neutral tribunal, one untainted by an unconstitutional risk of bias.

Due process entitles defendants to an impartial judge at all stages, including at sentencing. U.S. Const. amend. XIV; Const. art. I, § 3; In re Murchison, 349 U.S. 133, 136, 75 S. Ct. 623, 99 L. Ed. 942 (1955); State v. Solis-Diaz, 187 Wn.2d 535, 539, 387 P.3d 703 (2017); State ex rel. McFerran v. Justice Court of Evangeline Starr, 32 Wn.2d 544, 550, 202 P.2d 927 (1949).

Because “our system of law has always endeavored to prevent even the probability of unfairness,” due process demands more than just the absence of actual bias by the judge. Murchison, 349 U.S. at 136. Due process requires the absence of an unconstitutional “*risk of bias.*” Rippo v. Baker, ___ U.S. ___, 137 S. Ct. 905, 907, 197 L. Ed. 2d 167 (2017). As the United States Supreme Court has explained, the “Due Process Clause has been implemented by objective standards that do not require proof of actual bias.” Caperton v. A.T. Massey Coal Co., Inc., 556 U.S. 868, 883, 129 S. Ct. 2252, 173 L. Ed. 2d 1208 (2009).

For this reason, the inquiry focuses on “the objective risk of bias.” Williams v. Pennsylvania, ___ U.S. ___, 136 S. Ct. 1899, 1905, 195 L. Ed.

2d 132 (2016). “The Court asks not whether a judge harbors an actual, subjective bias, but instead whether, as an objective matter, the average judge in his position is likely to be neutral, or whether there is an unconstitutional potential for bias.” Id. (internal quotation omitted).

Thus, due process may be violated even if a judge is not actually biased. Aetna Life Ins. Co. v. Lavoie, 475 U.S. 813, 825, 106 S. Ct. 1580, 89 L. Ed. 2d 823 (1986). In short, the inquiry is “whether, considering all the circumstances alleged, the risk of bias was too high to be constitutionally tolerable.” Rippo, 137 S. Ct. at 907.

A due process claim that a person was deprived of a neutral and unbiased judge is an issue of manifest constitutional error. State v. Blizzard, 195 Wn. App. 717, 725-27, 381 P.3d 1241 (2016).

b. Mr. Nelson was sentenced by a Pierce County judge in the same building where the decedent had worked. The judge considered victim impact statements from Pierce County court-employees whom the judge did not disclaim knowing. These circumstances created an unconstitutional risk of bias.

Ms. Ryan was an employee of the Pierce County District Court. Pierce County District Court is located in the same building as the Pierce County Superior Court.⁶

⁶ In early January 2012, the District Court completed its move to the County-City Building where the Superior Court is located. *District Court completes move; begins operations in new courtrooms*, Jan. 9, 2012, available at <https://www.co.pierce.wa.us/CivicAlerts.aspx?AID=13&ARC=2923> (last accessed January 10, 2020).

Mr. Nelson was sentenced in Pierce County Superior Court, before the Honorable Edmund Murphy, a Pierce County judge. At sentencing, the court received many victim impact statements from Pierce County District Court employees who had worked with Ms. Ryan. In other words, Judge Murphy sentenced Mr. Nelson for crimes committed against a person that worked in the same building as he did and received victim impact statements from persons who also worked in the same building.

Judge Murphy stated he had not known Ms. Ryan and did not think he had met her. RP 25. But he did not disavow knowing the district court employees who submitted victim impact statements.⁷ RP 17-18. These included at least four persons: Tiffany Bacon; Angela (no last name); Grant Cogswell; and Jaime Childs. CP 62-64, 67-68, 107-08; RP 17-18.

Ms. Bacon emphasized the difficulty she experienced at work due to the loss. CP 62. Angela wrote that she felt the “trauma everyday I work and can literally turn around and see the building that her murderer gets to LIVE in.” CP 64 (emphasis in original). Mr. Cogswell spoke of how he

⁷ Before his elevation to the bench in 2010, Judge Murphy was a Pierce County Prosecutor since 1984. *Gov. Gregoire appoints Edmund Murphy to Pierce County Superior Court*, May 11, 2010, available at <https://www.co.pierce.wa.us/1069/Superior-Court-Department-9>; <https://www.digitalarchives.wa.gov/GovernorGregoire/news/news-view.asp?pressRelease=1493&newsType=1> (last accessed Jan. 10, 2020); <https://www.co.pierce.wa.us/1069/Superior-Court-Department-9> (brief biography of Judge Murphy) (last access Jan. 10, 2020).

started work at the district court the same day as Ms. Ryan and immediately formed a lasting friendship with her. CP 67. Ms. Childs expressed how difficult it was to “walk into this building, knowing that she’s not going to be here” while they could see the jail housing Mr. Nelson from their windows. RP 17; CP 108.

These circumstances created an objective risk of actual bias on the part of Judge Murphy in sentencing Mr. Nelson that was too high to be constitutionally tolerable. Rippo, 137 S. Ct. at 907. Ms. Ryan worked in the same building as the judge and was a court employee, albeit the district court. In deciding how to sentence Mr. Nelson, the judge heard statements from other district court employees who also worked in the same building. Although stating he had not known Ms. Ryan, Judge Murphy did not disclaim knowing the district court employees. RP 25. To be sure, the superior court and district court are technically separate courts. But a reasonable observer would find this legal distinction immaterial particularly because employees of both courts work in the same building. See Banowsky v. Guy Backstrom, DC, 193 Wn.2d 724, 744, 445 P.3d 543 (2019) (employing a “commonsense approach” in analyzing the jurisdictions of the two courts and recognizing the reality that mistakes in filings may happen when district courts and superior courts are on different floors of the same building).

A recent decision from the Louisiana Supreme Court supports the conclusion that there was an unconstitutional risk of bias in Judge Murphy sentencing Mr. Nelson in Pierce County Superior Court. State v. Daigle, 241 So. 3d 999 (La. 2018). There, the trial judge had worked with the victim's widow, who was a court employee. Id. at 1000. This widow was a designated witness in the case. Id. Applying the United State Supreme Court decision in Rippo, the Louisiana Supreme Court in Daigle held due process required recusal because these circumstances showed an actual risk of bias that was too high. Id. That there had "been no allegation or showing that the trial judge harbors any actual bias or that he is not a diligent district court judge" did not matter. Id.

This Court's recent decision in In re Dependency of A.E.T.H., 9 Wn. App. 2d 502, 446 P.3d 667 (2019) further supports Mr. Nelson's position. There, this Court reversed orders terminating parent-child relationships because the parents were deprived of their due process right to a fair and unbiased tribunal. A.E.T.H., 9 Wn. App. 2d. at 517. While the trial judge "displayed no personal bias and attempted to conduct an unbiased proceeding," the proceedings violated the right to a neutral tribunal "because of the involvement of superior court employees working against the parents in this case." Id.

As in Daigle and A.E.T.H., whether the trial judge was actually neutral and fair is not dispositive. Similar to those cases, court employees who would *appear* to have some kind of professional or working relationship with Judge Murphy made statements asking the Judge to impose the harshest sentence against Mr. Nelson. And Mr. Nelson was sentenced in a Pierce County court for crimes perpetrated against a Pierce County court-employee. These circumstances constitute an actual risk of bias on the part of Judge Murphy that was too high to be constitutionally tolerable. Rippo, 137 S. Ct. at 907. The Court should hold that Mr. Nelson’s due process right to an unbiased sentencing hearing was violated.

c. The due process deprivation requires a new sentencing hearing before a different judge in a different county.

The denial of the constitutional right to an impartial hearing is per se prejudicial. Murchison, 349 U.S. at 136; Williams, 136 S. Ct. at 1909; Blizzard, 195 Wn. App. at 727. This “prejudice inheres in the violation.” See Crace, 174 Wn.2d at 843. Accordingly, this Court should vacate Mr. Nelson’s sentence and order a new sentencing hearing before a different judge in a county other than Pierce. See A.E.T.H., 9 Wn. App. 2d at 530 (remanding for new trial in a different county); Solis-Diaz, 187 Wn.2d at 541 (remanding for new sentencing hearing before a different judge).

F. CONCLUSION

Mr. Nelson's establishes that his guilty plea was involuntary and that he was prejudiced. He also establishes ineffective assistance of counsel during plea bargaining. For either reason, this Court should grant his petition and order that Mr. Nelson be permitted to withdraw his plea. If Mr. Nelson does not withdraw his plea, the sentence should be vacated due to the unlawful firearm enhancement. Resentencing should be before a different judge in a different county due to the unconstitutional risk of a biased tribunal in Pierce County Superior Court.

Respectfully submitted this 10th day of January 2020.



Richard W. Lechich – WSBA #43296
Washington Appellate Project – #91052
Attorney for Petitioner

Appendix A

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IN THE SUPERIOR COURT IN AND FOR THE COUNTY OF PIERCE
STATE OF WASHINGTON

STATE OF WASHINGTON,)
)
Plaintiff,)
)
vs.) No. 16-1-00282-1
)
AUSTIN RICHARD MOORES NELSON,)
)
Defendant.)
)

VERBATIM REPORT OF PROCEEDINGS

BE IT REMEMBERED that on the 9th day of
September 2016, the above-captioned cause came on duly
for hearing before the HONORABLE EDMUND MURPHY, Superior
Court Judge in and for the County of Pierce, State of
Washington; the following proceedings were had, to-wit:

APPEARANCES

FOR THE PLAINTIFF: JOHN SHEERAN
Deputy Prosecutor

FOR THE DEFENDANT: EDWARD DeCOSTA
AARON TALNEY
Attorneys at Law

Reported by
Angela McDougall, CSR, RMR, 82167

1 AFTERNOON SESSION

2 SEPTEMBER 9, 2016

3 THE COURT: Mr. Sheeran.

4 MR. SHEERAN: John Sheeran for the State of
5 Washington. State versus Austin Richard Moores Nelson,
6 16-1-00282-1. The defendant is present in court, in
7 custody. Also present for the defendant are his
8 attorneys, Mr. DeCosta and Mr. Talney.

9 I have handed forward to the Court an Amended
10 Information adding one count of Malicious Mischief
11 Second Degree as Count IV, the Prosecutor's Statement
12 regarding the Amended Information, Statement of
13 Defendant on Plea of Guilty to the charges, as well as a
14 stipulation to the criminal history.

15 MR. DECOSTA: Edward DeCosta on behalf of
16 Mr. Moores Nelson. Mr. Moores Nelson has received a
17 copy of the Amended Information. We waive formal
18 reading and join with the State in asking you to accept
19 filing.

20 THE COURT: I have reviewed the Amended
21 Information, also the Prosecutor's Statement regarding
22 the Amended Information. Based on the representations
23 in the Prosecutor's Statement, I will accept the filing
24 of the Amended Information contingent upon the defendant
25 entering a plea of guilty.

1 Mr. Sheeran, you have a place here for the
2 judge to sign on the Prosecutor's Statement. I am going
3 to cross that out.

4 MR. SHEERAN: Thank you.

5 MR. DECOSTA: Your Honor, I would like the
6 Court to know that I have reviewed the plea form with
7 Mr. Moores Nelson. We went over it thoroughly in the
8 jail yesterday. We went over it again today. You
9 should know that Mr. Moores Nelson has had an
10 opportunity to review all the discovery in the case. He
11 and I and Mr. Talney have discussed the applicable law.
12 We have met with Mr. Moores Nelson many times, as has
13 the author of the PSI report, Nancy Austring, and our
14 investigator, Mr. Ron Bone.

15 Mr. Moores Nelson indicated to me that after he
16 had a chance to review the discovery, discuss the
17 applicable law with me, that he had no further questions
18 for me. Consequently, Your Honor, I believe his plea
19 this afternoon is being entered knowingly, voluntarily
20 and intelligently. Thank you.

21 THE COURT: Is your correct legal name Austin
22 Richard Moores Nelson?

23 THE DEFENDANT: Yes.

24 THE COURT: You have heard what Mr. DeCosta has
25 told the Court. Do you agree with that?

1 THE DEFENDANT: Yes, Your Honor.

2 THE COURT: I have an 11 page Statement of
3 Defendant on Plea of Guilty. Did you have an
4 opportunity to go over this document with your attorney?

5 THE DEFENDANT: Yes, Your Honor.

6 THE COURT: Did you read the document, did they
7 read it to you, or both?

8 THE DEFENDANT: They read it to me.

9 THE COURT: Do you have any questions about
10 this document?

11 THE DEFENDANT: No.

12 THE COURT: Do you believe you understand it?

13 THE DEFENDANT: Yes.

14 THE COURT: You understand you are charged now
15 in Count I with the crime of Murder in the First Degree
16 with a Firearm Sentencing Enhancement; in Count II with
17 Burglary First Degree with a Firearm Sentencing
18 Enhancement; in Count III with Animal Cruelty First
19 Degree with a Firearm Sentencing Enhancement; and in
20 Count IV, Malicious Mischief in the Second Degree?

21 THE DEFENDANT: Yes, Your Honor.

22 THE COURT: The elements of those crimes are
23 the things the State would have to prove if this matter
24 went to trial in order for you to be found guilty. The
25 elements are contained in the Amended Information. Do

1 you understand the elements?

2 THE DEFENDANT: Yes, Your Honor.

3 THE COURT: Pages one and two of this statement
4 list a number of constitutional rights that you have,
5 such as the right to a jury trial, the right to remain
6 silent before and during trial, the right to hear and
7 question the witnesses who testify against you, the
8 right at trial to testify, to have witnesses testify for
9 you, the right to be presumed innocent until the State
10 proves the charge beyond a reasonable doubt or that you
11 enter a plea of guilty and the right to appeal a finding
12 of guilt after a trial. Do you understand those
13 constitutional rights?

14 THE DEFENDANT: Yes, Your Honor.

15 THE COURT: You understand that you give up
16 those rights when you enter a plea of guilty?

17 THE DEFENDANT: Yes, Your Honor.

18 THE COURT: Page two also lists your standard
19 sentencing range, which for you on Count I, based upon
20 an offender score of four, the standard range is 281 to
21 374 months in Department of Corrections, with a 60 month
22 sentencing enhancement, 36 months of community custody
23 and a maximum penalty of life in prison and a \$50,000
24 fine. Count II, based upon an offender score of four,
25 has a standard range of 36 to 48 months, also with a 60

1 month firearm sentencing enhancement, 18 months of
2 community custody and a maximum penalty of life in
3 prison and a \$50,000 fine. Count III, the standard
4 range is zero to 12 months, based on an offender score
5 of three, 18 months firearm sentencing enhancement and
6 maximum penalty of five years in prison and a \$10,000
7 fine. For Count IV, based on an offender score of
8 three, the standard range is two to six months with a
9 maximum penalty of five years in prison and a \$10,000
10 fine.

11 Do you understand the standard sentencing
12 ranges and maximum penalty for these crime?

13 THE DEFENDANT: Yes.

14 THE COURT: You understand that the firearm
15 sentencing enhancements run consecutive to any standard
16 range sentence? They also run consecutive to each
17 other, which means back to back. There is an additional
18 138 months of firearm enhancements consecutive to any
19 standard range sentence. Do you understand that?

20 THE DEFENDANT: Yes, Your Honor.

21 THE COURT: Page four lists the prosecutor's
22 recommendation at the time of sentencing. It says 374
23 months confinement, plus 60 months confinement on
24 Count I with a firearm sentencing enhancement, 36 months
25 of community custody, no contact with any Ryan family

1 members, you forfeit evidence or contraband in the
2 property room, you register as a felony firearm
3 offender, pay a \$500 crime victim penalty assessment,
4 \$200 court cost, \$100 DNA testing fee, and restitution
5 by later order of the court. They indicate you may ask
6 for the low end of the sentencing range.

7 For Count II, the State's recommendation is 41
8 months confinement plus 60 months with a firearm
9 sentencing enhancement, 18 months of community custody,
10 you abide by the conditions imposed in Count I. Count
11 III, 12 months of confinement plus 18 months with a
12 firearm sentencing enhancement. You abide by the
13 conditions imposed in Count I.

14 For Count IV, six months confinement, and you
15 abide by the conditions imposed in Count I. Total in
16 custody time recommended by the State is 512 months,
17 which is the high end of the range of 374 months on
18 Count I, plus 138 months on the firearm sentencing
19 enhancements. Do you understand the prosecutor's
20 recommendation?

21 THE DEFENDANT: Yes, Your Honor.

22 THE COURT: Do you understand the Court is not
23 bound by the recommendation?

24 THE DEFENDANT: Yes, Your Honor.

25 THE COURT: You understand all of these crimes

1 are felonies?

2 THE DEFENDANT: Yes.

3 THE COURT: You understand by having a felony
4 conviction, you may not possess, own or have under your
5 control, any firearm?

6 THE DEFENDANT: Yes.

7 THE COURT: You understand you'll be ineligible
8 to vote until that right is restored?

9 THE DEFENDANT: Yes, Your Honor.

10 THE COURT: You understand if you are not a
11 citizen of the United States, a plea of guilty to an
12 offense punishable as a crime under state law is grounds
13 for deportation, exclusion from admission to the
14 United States or denial of naturalization pursuant to
15 the laws of the United States?

16 THE DEFENDANT: Yes.

17 THE COURT: Mr. DeCosta, do you need additional
18 time to discuss that issue with your client?

19 MR. DECOSTA: I do not, Your Honor. Thank you.

20 THE COURT: You understand you'll be required
21 to have a biological sample collected for purposes of
22 DNA identification? There is a \$100 fee associated with
23 that.

24 THE DEFENDANT: Yes, Your Honor.

25 THE COURT: You understand the crimes in Counts

1 I, II and III are most serious or strike offenses?

2 THE DEFENDANT: Yes, Your Honor.

3 THE COURT: What does that mean to you?

4 THE DEFENDANT: It is a triple strike if I get
5 them all, just a single strike.

6 THE COURT: Washington has a three strikes law.
7 The fact that you are pleading guilty and being
8 sentenced at the same time on these means that is one
9 strike. If you would subsequently commit two other
10 strike offenses, at the time of sentencing the only
11 option the Court would have would be to sentence you to
12 life in prison without the possibility of parole. Do
13 you understand that?

14 THE DEFENDANT: Yes, Your Honor.

15 THE COURT: You understand you'll be required
16 to register as a felony firearm offender?

17 THE DEFENDANT: Yes, Your Honor.

18 THE COURT: Page nine, paragraph 11, you are
19 asked to state in your own words what you did that
20 causes you to be guilty of these crimes. The paragraph
21 reads, "In Pierce County, Washington, on January 18th,
22 2016, with premeditated intent to cause the death of
23 another person, I did cause the death of such person,
24 Theresa Ryan, when I shot her with a firearm. After
25 shooting Ms. Ryan, I unlawfully entered her home with a

1 firearm intending to commit a crime therein. I did
2 intentionally shoot and kill the Ryan dog once inside
3 the house. In Pierce County, Washington on January
4 15th, 2016, I unlawfully, knowingly and maliciously
5 caused more than \$750 worth of physical damage to the
6 property of another. The property I damaged was owned
7 by a person with whom I had been in a dating
8 relationship." Is that a true statement?

9 THE DEFENDANT: Yes, it is, Your Honor.

10 THE COURT: Is that something that was both
11 typed out and handwritten for you by your attorneys?

12 THE DEFENDANT: Yes, it was, Your Honor.

13 THE COURT: There are some initials at two
14 different spots in that paragraph. Are those your
15 initials?

16 THE DEFENDANT: Yes, it is.

17 THE COURT: Did you place them there to show
18 that you are agreeing with that statement and adopting
19 it as your own?

20 THE DEFENDANT: Yes, Your Honor.

21 THE COURT: Did you sign this Statement of
22 Defendant on Plea of Guilty on page ten?

23 THE DEFENDANT: Yes, Your Honor.

24 THE COURT: Has anyone made any promises to
25 you, other than the prosecutor's recommendation, in

1 order to get you to plead guilty?

2 THE DEFENDANT: No, Your Honor.

3 THE COURT: Has anybody threatened or coerced
4 you in any way in order to get you to plead guilty?

5 THE DEFENDANT: No, Your Honor.

6 THE COURT: What is your plea to the crime of
7 Murder in the First Degree with a Firearm Sentencing
8 Enhancement as charged in Count I, guilty or not guilty?

9 THE DEFENDANT: Guilty.

10 THE COURT: What is your plea to the crime of
11 Burglary in the First Degree with a Firearm Sentencing
12 Enhancement as charged in Count II, guilty or not
13 guilty?

14 THE DEFENDANT: Guilty, Your Honor.

15 THE COURT: What is your plea to the crime of
16 Animal Cruelty First Degree with a firearm sentencing
17 enhancement as charged in Count III, guilty or not
18 guilty?

19 THE DEFENDANT: Guilty, Your Honor.

20 THE COURT: What is your plea to the crime of
21 Malicious Mischief Second Degree, which is charged as a
22 domestic violence incident in Count IV, guilty or not
23 guilty?

24 THE DEFENDANT: Guilty, Your Honor.

25 THE COURT: The Court will accept your pleas of

1 guilty as being knowingly, intelligently and voluntarily
2 made.

3 Are we proceeding to sentencing at this time?

4 MR. SHEERAN: Yes, Your Honor.

5 THE COURT: Mr. Sheeran.

6 MR. SHEERAN: There are two people who would
7 like to address the Court. I don't know if you want --
8 if you would like to hear from them before or after the
9 State's recommendation.

10 THE COURT: I will hear from them now.

11 If I could have you state your name and tell me
12 what you would like me to know before I impose sentence
13 in this matter.

14 MS. MICHALSKI: My name is Wendy Michalski.

15 THE COURT: What would you like to tell me?

16 MS. MICHALSKI: I would like to read my
17 statement.

18 THE COURT: You may.

19 MS. MICHALSKI: Says, "Your Honor, my name is
20 Wendy Michalski. Theresa Ryan was my sister. On
21 January 18th, 2016, Theresa Ryan was murdered by the
22 defendant. The defendant tore my sister out of my life
23 forever. I didn't even get to say good-bye or see her.
24 I will only have my memories of her. Words cannot
25 express the pain and anguish of our family, friends,

1 neighbors, co-workers, and community has endured since
2 her murder. She was my only sibling. Now I have no
3 sibling to grow old with. The defendant's decision to
4 take the life of a human being with no regard for the
5 effect it may have on others is unimaginable. The loss
6 of my sister is beyond any amount of words there will
7 be. There will be no more birthday parties, backyard
8 gatherings, holiday celebrations or other family
9 activities to share. The laughter, hugs, guidance,
10 advice, sense of security, and those opportunities to
11 say 'I love you' are forever gone. Our family is
12 forever broken. 'Compassion' is a word commonly used
13 for and by defendants. However, I ask how much
14 compassion the defendant considered when the decision
15 was made to murder my sister, Theresa Ryan.

16 "It is the request of my family and friends and
17 community that the maximum penalty for the crime for
18 which the defendant was convicted be imposed.

19 "On behalf of the family of Theresa Ryan, I
20 wish to express my sincerest gratitude for this
21 opportunity of expression."

22 THE COURT: Thank you.

23 If I could have you state your name and tell me
24 what you would like me to know before I impose sentence
25 in this matter.

1 MS. CHILDS: Jamie Childs. I too am going to
2 read my statement.

3 THE COURT: I ask, when you read you tend to go
4 faster. If you could just slow down a little bit so the
5 court reporter can get everything.

6 MS. CHILD: "When you work with someone for
7 eight years, you become family. Like a normal family,
8 you have good times and bad times. Man, did we have
9 some good times. The countless office pranks between
10 her, Jeff, Chris and Grant, all of them filling the
11 office with laughter. Her daily routine of walking into
12 the office and telling Grant, 'Good morning, jackass,'
13 so loud the entire office could hear it. The
14 conversations with her about our children, she loved
15 talking about her kids. She was so proud of them.
16 There was never any doubt that she loved them more than
17 anything. Sharing pictures of our vacations, families
18 and our dogs. The discussions we had about having a
19 crappy day at work or how much it sucks getting old.
20 Carpooling with her was an adventure. It was filled
21 with more conversations and occasionally some really bad
22 singing. Her crazy driving. The girl can tailgate like
23 I don't know. Then there was football. Her first love
24 was the Packers, although she did cheer on her Seahawks,
25 too.

1 "When it came to Green Bay versus Seattle, she
2 was Green Bay all the way. The bantering texts we would
3 send each other during those games would always and will
4 always bring a smile to my face.

5 "Her donations of Brent's garlic dip to the
6 office potluck was always a hit. Someone would always
7 ask her if she would make it, and she would always
8 respond, 'Hell no, Brent did,' and giggle.

9 "Her running into me with a shopping cart at
10 Fred Meyer and yelling, 'Hey, watch where the hell you
11 are going, would ya,' and her bursting into laughter
12 while everybody else in the aisle looked at us like we
13 were crazy.

14 "We went to the same hair salon. We had the
15 same stylist. So many times, I would run into her
16 there. I wish I could walk into that salon and see her
17 sitting there with her head full of foil looking like an
18 alien. When our stylist's father passed away, she took
19 the time to call me and make sure I knew about it.

20 "Even through bad times I still knew one thing,
21 if I ever needed her, Theresa would be there. We all
22 did. Theresa was as honest as they come. Sometimes
23 brutally honest. She was that friend who was never
24 afraid to tell you what she thought or felt about a
25 situation. If you would ask her advice, you would get

1 it. Hell, even if you didn't ask her advice, she could
2 give you an ear full. Most of the time, whether you
3 liked it or not, she was right.

4 "She was one of those people, from the moment
5 you met her, she made you feel like you had known her
6 forever. Theresa made our lives better just because she
7 was a part of it. Not everyone is blessed with a friend
8 like that. We all were.

9 "How do you put a value on friendship? How do
10 you put a value on the time we have lost with her? Her
11 daughters, her husband, her family and her friends, we
12 all have to live the rest of our lives without her.
13 That is our sentence that Austin has forced upon all of
14 us. A lifetime of pain. A lifetime of having a hole in
15 our hearts. A lifetime of an emptiness that will never
16 be filled. A lifetime of never going to see her smile
17 again, hear her laughter or her telling someone to fuck
18 off. We no longer get to share with Theresa all the
19 birthdays, holidays or special times ahead of us all.

20 "Judge, you get the final say on his sentence.
21 Will it ever be enough justice for Theresa? Absolutely
22 not. The time you give him will never be enough.
23 Whatever you decide, it will never take away the pain of
24 losing her. None of us get credit for time served. We
25 don't get time written off for good behavior. We are

1 reminded of the pain every day, five days a week we have
2 to walk into this building knowing that she's not going
3 to be here. We have to pull out of the parking lot and
4 not see her car sitting there. We have to walk past
5 these courtrooms every day, our view from our office
6 windows is the jail where he gets three meals a day and
7 visiting hours with his family. We don't get to visit
8 her. Even after he serves his time, he will be reunited
9 with his family. He will get to share the birthdays,
10 holidays and special times with his family and friends
11 that we no longer do. Theresa does not. His life will
12 get to go on. Theresa's does not.

13 "When Theresa died, a part of each one of us
14 died with her. Theresa didn't ask for this. None of us
15 did. Here we are. Before you make your ruling,
16 remember this: We are all here today because Theresa
17 meant something to every one of us. Theresa matters."

18 THE COURT: Thank you.

19 I should also indicate I did receive statements
20 from several people, all of which I have read, Randy
21 Michalski, Katherine Tyler, Elizabeth Moores, Brianne
22 Faulkner, Lisa Palmer, Keith Ryan, Jamie Childs, Brent
23 Ryan, Nicole Sayer, Rex Welter, Kelly Welter, Linea
24 Sager, Grant Cogswell, Sharon Murins, Tiffany Bacon,
25 Guntis Murins, Wendy Michalski, Christie Olsen, Madison

1 Olsen, Steve Carabelos, Crystal Carabelos, and
2 someone -- somebody known as Angela. Then I also did
3 receive letters from Tamara Rockwell and Steven
4 Rockwell.

5 I did receive and read a sentencing memorandum
6 from the defense, along with an amended sentencing
7 memorandum and a mitigation report and exhibits which
8 the Court also read.

9 Mr. Sheeran.

10 MR. SHEERAN: Thank you, Your Honor.

11 As the Court has indicated in its colloquy with
12 the defendant, the State is recommending the high end of
13 the standard range, 374 months in Department of
14 Corrections on Count I with an additional 60 month
15 Firearm Sentence Enhancement to be served consecutively
16 and flat time; Count II, 41 months with an additional 60
17 months flat time with a Firearm Sentence Enhancement;
18 Count III, 12 months with an additional 18 months with a
19 Firearm Sentence Enhancement; and Count IV, six months.

20 State's total recommendation is 512 months in
21 Department of Corrections, with 36 months community
22 custody on Count I, 18 months community custody on
23 Count II, no contact with the victim's family,
24 restitution by later order of the Court. The parties
25 have agreed October 7 will be the date. Legal financial

1 obligations of \$500 crime victim penalty assessment,
2 \$200 court costs, \$100 DNA fee, \$500 Department of
3 Assigned Counsel recoupment.

4 Your Honor, the State's recommending the high
5 end of the standard range. I think the victim impact
6 statements the Court has had an opportunity to read will
7 speak more eloquently and forcefully to the reasons for
8 that than I could.

9 I will simply state that the defendant
10 committed a premeditated murder, killing a woman whose
11 only crime was to protect her daughter. There is no
12 reason to think that anything short of the high end is
13 appropriate. I'll leave it at that.

14 THE COURT: Mr. DeCosta.

15 MR. DECOSTA: The defense is asking you to
16 sentence Austin to a total of 419 months, which is
17 almost 35 years. I believe that is an appropriate
18 sentence. Your Honor, the comments that I am making
19 this afternoon, they are in no way intended to sound as
20 an excuse or to be an excuse. I only hope to offer up
21 information to the Court to help Your Honor fashion an
22 appropriate sentence.

23 Your Honor, I went up and met with Austin
24 shortly after he was arrested. In going in to see him,
25 he's in 3 South. He has never been in jail before. He

1 is dressed in orange and belly chains. They pull him
2 out of his cell and he comes in. It is though, you
3 know, he has no sort of idea of the gravity of his
4 situation or the harm that he has just inflicted on this
5 family in the taking of another life. I was just struck
6 by his detachment.

7 However, over time -- and I spent a lot of time
8 with Austin, as did Ms. Austring, as did Mr. Bone, as
9 did Mr. Talney -- he came to realize what it is that he
10 had done. I can tell you when we discussed his conduct
11 on that day, he becomes very emotional. As a matter of
12 fact, he's told me if he could switch places with
13 Ms. Ryan, he would. He is deeply remorseful for what it
14 is that he has done. I realize these words are going to
15 sound very hollow to most everybody in this courtroom.
16 He is profoundly sorry and he would like to apologize.

17 Your Honor, I did file a sentencing memorandum.
18 The point I was trying to make is that Austin suffers
19 from mental health issues. He is DD. It has been well
20 documented. You have the exhibits attached to the
21 mitigation package that establish that to a fair thee
22 well.

23 Your Honor, he wrote a letter to his
24 grandfather. He wanted it read at his grandfather's
25 funeral who was near and dear to him. That, too, is who

1 Austin is. You read it. It was a heartfelt letter.
2 There is good in Austin. He is all of 20 years old.
3 Now he celebrated his 20th birthday in the jail. He is
4 worth having some kind of a life.

5 Your Honor, what the State is asking for is
6 tantamount to a life sentence. Your Honor has been
7 doing this long enough to know, as both a prosecutor and
8 a judge, a life sentence, that's what we hand out for
9 aggravated murderers. I appreciate the fact that the
10 victim in this case worked with folks in this building
11 from the legal community, from our world so to speak.
12 Every murder has a victim. Each one is equally as
13 sympathetic. The fact she worked in the building, I
14 don't think should be taken into account. She worked in
15 our community.

16 With regard to proportionality, Your Honor, I
17 looked at some grids coming up here. Homicide by Abuse
18 with four points is 281 months to 374 months. To my
19 thinking, one of the most heinous crimes you can commit,
20 along with Murder in the First Degree. Heinous crime.
21 Terrible act. Proportionality.

22 I was at a sentencing hearing last week with a
23 client of mine who stabbed his girlfriend 35 times. He
24 was sentenced to 200 months with the weapon enhancement.

25 Your Honor, this is a terrible case. These

1 facts are absolutely terrible. I think proportionality
2 requires that you consider him with regard to not so
3 much who the victim is, but what it is that he has done.
4 By the way, Your Honor, the only thing he could do at
5 this point, he's done. He's taken complete
6 responsibility for what it is that he has done. He was
7 eager to plead out to the original Information. The
8 State wanted to add an extra charge, for good reason. I
9 understand that. He stepped up and pled as charged to
10 everything.

11 Your Honor, this is not a life sentence case.
12 This is a case that I think cries out for the low end.
13 That is not leniency. That is proportionate to what
14 other folks in this building get when they get sentenced
15 for these kinds of crimes.

16 The article I attached to my sentencing
17 memorandum talks about the chronological age and how in
18 the couple factors in Miller talk about the immaturity,
19 impetuosity, and inability to appreciate the risks and
20 consequences. I suggest to Your Honor he was clueless.
21 I was wondering if he thought that somehow Ms. Ryan was
22 going to be all right when I first met him.

23 He has since come to understand that he has
24 taken a life, and he has committed one of the most
25 heinous crimes in society. He will pay for that.

1 Just a couple of highlights in the mitigation
2 package. You read about his childhood. I know you
3 absorbed everything, as you do. He had a terrible time
4 of it. He was in foster care. He had an abusive
5 biological father. I looked at his biological father's
6 criminal history. He had scores and scores of charges
7 for domestic violence, many of which occurred in the
8 house while Austin was there. He was abusive towards
9 Austin physically. Eventually CPS came and took him out
10 of the home. While Austin's brother got to go live with
11 the grandparents, Austin was left in foster care. As I
12 have already mentioned, Austin loved his grandfather
13 dearly. That hurt him deeply.

14 There is reasons, Your Honor, to go ahead and
15 do what the State is asking. I appreciate that.
16 However, I think the appropriate sentence in this case,
17 Your Honor, is the sentence that we have asked for. It
18 is almost 35 years. I think it is proportionate to what
19 other folks get when they commit these kinds of crimes.

20 Your Honor, also, in looking at some of these
21 exhibits, I was going through them. When he was a kid,
22 when he had some structure, when he had some people who
23 cared about him, it is the IEP notes that come back and
24 say, "Austin does a good job on his weekly spelling test
25 when he has somebody around him to provide him with some

1 shelter," which the adults in his life really never did.

2 Your Honor, there is reasons to think he is
3 going to mature, and he has already shown me a
4 tremendous amount of maturity and understanding about
5 the gravity of what it is he has done. He is profoundly
6 sorry. I would ask that you not impose a life sentence,
7 that you impose a low end sentence. I think it is what
8 makes sense in this case.

9 With regard to the letters, Your Honor, I don't
10 know, I couldn't print the letters. I didn't have an
11 opportunity to read them. I know Your Honor has. I
12 know Your Honor is acquainted with the Real Facts
13 Doctrine. I don't know what else is in the letters. I
14 would ask Your Honor if the facts haven't been pled or
15 proven that you disregard those.

16 I appreciate you hearing me out, Your Honor.
17 Thank you.

18 THE COURT: You have the right to speak to the
19 Court at the time of sentencing. Is there anything
20 you'd like to tell me before I impose sentence in this
21 matter?

22 THE DEFENDANT: I want to say I'm sorry for
23 what I did. It is hard to see what I did. I am super
24 sorry to the family and to everybody who had to take
25 their time to work on this. I am very sorry. I take

1 full responsibility for what I did. That is it,
2 Your Honor.

3 THE COURT: Mr. DeCosta is right about one
4 thing, you did step up and take responsibility and pled
5 guilty to all the crimes that were charged in the
6 original Information and one more count that the State
7 added. You didn't have to do that. You could have
8 required there be a trial. That would not have been a
9 good thing for you to sit through or victims, friends,
10 family to sit through. You have the right to do that.
11 You chose not to.

12 You also know the evidence better than I do,
13 because I don't know what the evidence is in this case.
14 That may have been your best option, your best hope.

15 I didn't know Ms. Ryan. I understand she
16 worked in District Court, worked in the same building.
17 To my knowledge, I never met her. I didn't know her.
18 The letters I read, she had a lot of people that cared
19 an awful lot about her. You, in many ways, are a
20 parent's worst nightmare and became her family and
21 friends' worst nightmare. The involvement with the
22 daughter, being told not to have a relationship and then
23 basically wait for her and kill her, go into the house
24 and end up killing the dog as well.

25 I appreciate the materials Mr. DeCosta gave to

1 me. I did read them. I am familiar with the Miller
2 case. The Miller case talks about juveniles. There is
3 an argument made here that the defendant should be
4 treated as a juvenile, looked at as a juvenile because
5 of his history and his development.

6 You had a lot of bad things that happened in
7 your life. I see people every day that have had
8 childhood experiences as bad or worse than yours who are
9 able to pull themselves up out of that and become
10 productive members of society, don't engage in this kind
11 of behavior or anything close to this kind of behavior.

12 As I said, you are a parent's worst nightmare.
13 In looking at what I think is the appropriate sentence
14 and where to go in this standard range, I think the high
15 end is appropriate. It is a case that just defies
16 explanation.

17 I am going to sentence you on Count I to 374
18 months in Department of Corrections, Count II to 41
19 months in Department of Corrections, Count III to 12
20 months, Count IV to six months. There is a 60 month
21 Firearm Sentencing Enhancement on Counts I and II, 18
22 months on Count III. Those, by law, run consecutive to
23 each other and to the 374 months on Count I. The total
24 is 512 months in Department of Corrections. You are
25 entitled to any credit for time served.

1 As far as community custody, 36 months on
2 Count I, 18 months on Count II.

3 The legal financial obligations, you are not in
4 a position to be able to pay anything other than the
5 mandatory minimums based on the length of this sentence,
6 \$500 crime victim penalty assessment, \$200 in court
7 costs, \$100 DNA sample fee, mandatory DNA testing. You
8 will have to register as a firearm offender. You are to
9 have no contact with any members of the Ryan family.
10 Restitution will be set by later order of the court. My
11 understanding is you have a hearing set for October 7th.
12 We will address it at that time.

13 Does your client wish to be present at the
14 restitution hearing?

15 MR. DECOSTA: We discussed that. He does not
16 wish to be present. Thank you.

17 THE COURT: Do you wish to have me read the
18 advice of right to appeal to your client?

19 MR. DECOSTA: It might be best, Your Honor.

20 THE COURT: Judgment and sentence having been
21 entered, you are now advised you have the right to
22 appeal your conviction. If you have entered a guilty
23 plea, you have waived your right to raise certain issues
24 as discussed in your guilty plea statement. In an
25 appeal, you have a right to appeal any sentence that is

1 outside the standard sentencing range. You also have a
2 right to appeal rulings on other post-conviction motions
3 as listed in the Rules of Appellate Procedure 2.2.
4 Unless a notice of appeal is filed with the clerk of the
5 court within 30 days from the entry of judgment, or the
6 order appealed from, you have irrevocably waived your
7 right of appeal. The clerk of the superior court will,
8 if requested by you, file a notice of appeal on your
9 behalf.

10 If you cannot afford the cost of an appeal, you
11 have the right to have a lawyer appointed to represent
12 you on appeal and have such parts of the trial record as
13 are necessary for review of errors assigned, transcribed
14 for you, both at public expense.

15 Regarding the foregoing advice of right to
16 appeal, do you understand the rights?

17 THE DEFENDANT: Yes, Your Honor.

18 THE COURT: You have signed this form as well?

19 THE DEFENDANT: Yes, Your Honor.

20 THE COURT: I signed the Judgment and Sentence
21 and Warrant of Commitment in the presence of defendant.
22 I also signed the scheduling order setting the
23 restitution hearing for October 7th at 1:30 in this
24 courtroom. Anything we need to address?

25 MR. DECOSTA: Nothing from defense. Thank you,

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Your Honor.

(Recess taken.)

CERTIFICATE

CERTIFICATE RE: STATE OF WASHINGTON v. AUSTIN MOORES NELSON

SUPERIOR COURT CAUSE NO. 16-1-00282-1

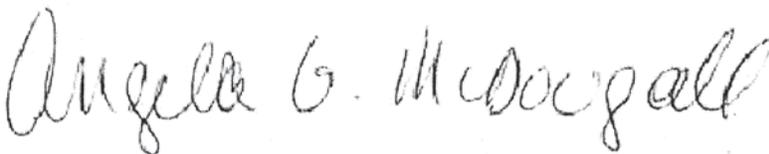
STATE OF WASHINGTON

COUNTY OF PIERCE

I, Angela McDougall, Official Shorthand Reporter in and for the County of Pierce, State of Washington, do hereby certify that the foregoing proceedings were reported by me on said date(s) and reduced to computer-aided transcript form.

I further certify that the foregoing transcript of proceedings is a full, true and correct transcript of my machine shorthand notes of the aforementioned matter.

Dated this 21st day of August, 2017.



Angela McDougall, CSR, RMR

Certificate

State v Nelson - September 9, 2016

Appendix B

**Austin Moores-Nelson
Mitigation Report Summary**

Moores-Nelson
Page 1 of 7

SUMMARY

Austin Moores- Nelson did not have a chance for a normal life from the day he was conceived due to his mother's use of Methamphetamines. Further compounding the challenges, Austin had to endure growing up were, lack of parental protection; neglect; abuse; domestic violence; physical and emotional developmental delays that made him different from his peers; and a chaotic unpredictable life style. Austin's trauma was further compounded by feelings of abandonment when he was placed in foster care, knowing that his older brother got to live with grandparents whom Austin loved and revered. Austin was very close with his grandfather who died very recently. Austin considered his grandfather Nelson to be a protector who he much admired. Austin wrote a letter to his grandfather that reflects the love and adoration he felt (Exhibit # 4).

MITIGATING FACTORS

- Parental drug use during and after pregnancy
- Domestic violence
- Child abuse
- Disrupted childhood
- PTSD
- Episodic mood disorder
- Physical and emotional delays due to maternal drug use
- Feelings of abandonment

STATE
47 yrs
life sentence

PERSONAL AND SOCIAL HISTORY

Austin Moores-Nelson was born 9/4/96 to Tamara Jean Nelson and David Allen Moores, both of whom used and sold methamphetamine (MA). Per Pierce County LYNX, Moores has a lengthy criminal history that includes selling and distributing drugs, assault and burglary. David and Tamara Moores both used and sold MA during Tamara's pregnancy and the years following Austin's birth.

Moores abused both Tamara and Austin during Austin's earliest years. Law Enforcement was involved in several of the incidents (Records requested -See interview with Tamara Rockwell). Tamara admits to using MA prior to and during her pregnancy with Austin (See interview with T Nelson). **

*** Children prenatally exposed to MA frequently experience sleep disturbances and altered behavior problems probably because MA mimics neurotransmitters in the brain (Chandler 2010). By one-year, children exposed to MA prenatally have been shown to exhibit poorer fine motor performance, which is associated with their visual perceptual and spatial skills, something that can affect future*

C's FAMILY - ABSENT
THROUSLIVES OUT OF RESPECT

1 *visual perceptual processing, making it more difficult for these children to carry*
2 *out coordinated movements, such as bicycle riding and other physically*
3 *demanding activities (Smith et al, 2010).*

4 *Dr. Rizwan Shah from Ohio, found signs of irritability that may last for years in*
5 *babies exposed to MA starting as early as three to four weeks old. Despite their*
6 *need for nutrition and calories they eat poorly. Once these babies become school-*
7 *aged children, they are more likely to be hyperactive or to have attention deficit*
8 *hyperactivity disorder (ADHD), learning disabilities, and unprovoked fits of*
9 *anger. (Shah et al 2010, Risch, 2008)*

10 *The longer term effects of MA on children birth to 14 years old was examined in a*
11 *Swedish study which disclosed a positive association between 8-year-olds*
12 *displays of aggressive behavior and social adjustment issues, and the amount and*
13 *duration of methamphetamine exposure in utero (Wouldes et al 2004).*

14 ***Austin's mother Tamara estimates she used a gram of MA a week during her***
15 ***pregnancy (See interview with T Rockwell)***

16 ***Researchers believe behavioral problems associated with prenatal drug exposure are***
17 ***intensified by the children's' high stress postnatal environments typical of the drug***
18 ***addict's life style. (Wouldes et al 2004.)***

19 ***Other studies have found that children who remain in the care of addicted parents are***
20 ***more likely to display behavioral and emotional disturbances than those whose parents***
21 ***quit abusing the drug (Rish 2008)***

22 Austin was subjected to the transient and chaotic life style typical of most drug addicts.
23 He was neglected, abused and witnessed violent outbursts between his parents. When
24 Austin was still being bottle fed, his father David got angry and jammed a baby bottle so
25 hard into Austin's mouth it caused bleeding (**See interviews with Tamara Rockwell**
26 **and Jean Nelson**). Following the birth of Austin's brother Davie, Austin walked by his
27 newborn brother who began crying. David Sr. blamed Austin for making the baby cry
28 and threw Austin against a wall (**See interview with Jean Nelson and Tamara**
Rockwell). Austin's mother hid the abuse she and Austin endured. Parents who are
meant to love and protect their children were Austin's worst abusers. (See interview with
Tamara Rockwell and Jean Nelson). Austin has memories of some of the violence.

Child Protective Services (CPS) became involved with Austin due to the violence in his
home. When Austin was two years old, he was placed in foster care which was traumatic
for Austin and made even more heart breaking because Austin's older brother was living
with their maternal grandparents who Austin loved and he couldn't understand why he
too couldn't live with them (**Interview with CPS Social worker Peterson; Jean Nelson,**
CPS Records requested but not yet received).

Moores- Nelson – Summary mitigation

Page 3 of 7

1 In 2000, CPS social worker Shella Peterson became involved with Austin and his mother.
2 Peterson reports that Tamara would frequently fail to keep her scheduled visits with
3 Austin which was very traumatic for him. According to Peterson, Austin was his younger
4 brother Davie's protector during their time in foster care. Peterson states that the effect
of Austin's mother's drug use on Austin "...is still a big question" **(See interview with
former CPS worker Shella Peterson).**

5 Despite the involvement of an educated CPS worker and the known connection between
6 MA use and developmental problems, the connection between Austin's problems and his
7 mother's drug use was not explored or addressed. Austin received services but services
8 were not directed at his specific problems and needs; in utero exposure to MA; exposure
9 to domestic violence, abuse, and abandonment issues. Between foster placements, Austin
and his mother lived off and on with the Tamara's parents, the Nelsons, who tried to
provide stability. Juxtaposed with this stable lifestyle at his grandparents were episodes
of chaos living from motel to motel with a variety of different people who used drugs.

10 By 2002 Tamara was able to get clean and sober. She married Stephen Rockwell, also a
11 former drug addict. Austin and his brother were placed back in Tamara's care and things
12 went well for a short time. In 2003 Tamara and Stephen again began using MA which
13 they also began to manufacture. They were arrested and sent to prison. Austin again
went to foster care **(See interview with Tamara & Stephen Rockwell).**

14 Austin was delayed in his motor skills from birth. His speech was also delayed. He had
15 trouble concentrating and once in school, qualified for an Individualized Educational
16 Program (IEP) because of his delays and difficulty learning (See Exhibit # 1 -38). He
was put on Concerta and Ritalin.

17 By December 2006 Austin began having episodes of severe headaches and collapse
18 **(Exhibit #2 – 36 -38)** and was diagnosed with low blood pressure. He could no longer
19 go out for recess and had to have an aide accompany him to the bathroom in the event he
20 would pass out. Austin was very different from his classmates and his difference singled
him out as a target for teasing and manipulation. Austin's doctor ordered a brain MRI at
Mary Bridge Children's hospital **(See interview with Jean Nelson & Exhibit # 3 -
complete Records requested)**

21 According to his family Austin suffered a lot as a young child, did not have good friends
22 and other children took advantage of him **(See interview with Jean Nelson).**

23 Despite the fact Austin had access to services it is appalling that no one made the
24 connection between his mother's drug use, the DV history and the chaotic life style when
25 involving Austin in services. According to the scant DSHS records received as of this
26 writing Austin was diagnosed with PTSD and Episodic mood disorder, both treatable
(Exhibit # 2-13 &14). There is no evidence however that those issues have ever been
addressed.

1 Austin considers himself to be a protector like his grandfather who he loved and revered.
2 Austin wrote a letter following his grandfather's death that speaks to the love he felt
3 (Exhibit # 4). Austin tried to emulate his grandfather Nelson when he tried to protect his
4 younger brother in foster care. He thinks of himself as needing to step in to right wrongs
5 but he does not have the capacity to understand the implications of his actions.

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CONTACTS

The following are summaries of interviews conducted

Tamara Rockwell – mother

253-495-1588

Tamara admits to using Methamphetamine (MA) during her pregnancy and states Austin's birth father David Moores also used during their relationship. She estimates she used a gram a week; during her pregnancy except for a brief period toward the end of her second trimester but began using again at 7 months. There were many episodes of domestic violence (DV) when the police were called. Much of the DV was in Austin's presence. Austin was abused by David his dad. Tamara admits she covered it up. One time when Austin was three, David smashed Austin in the face with a bottle and the police were called. David Moores also threw Austin around when Austin was an infant. Austin was removed from her home at the age of two and placed in foster care because of the DV. She regained custody of Austin when he was three or four and removed again in 2003 because she relapsed and got arrested for manufacturing MA. She went to prison for two years but has been clean since.

Austin has been behind in his motor and speech skills and from birth. He had had problems with understanding from preschool and different medications were tried. Austin looked high and would snap all the time. By the third grade he had a dramatic drop in his blood pressure which caused him to pass out. A CT scan was done of Austin's brain at Mary Bridge in an attempt to find out the cause. Austin has continued to struggle in school. He has difficulty understanding the repercussions of his actions.

Shella Peterson - CPS worker

253 327-4267

Peterson was the social worker assigned to the Moores-Nelson children for 2-3 years during the time Austin was in foster care. Peterson's first involvement with Austin was in 2000 before Peterson became an MSW, and was working for DSHS as a case aide. Peterson provided transportation for the children's scheduled visits with Tamara.

Austin and his brother were in a Foster home off River Road. Austin struggled with impulse control issues so wound up in therapeutic day care. He had lots of acting out, and it took two years for Tamara to get her act together. During this time, there were a couple of visits where Tamara didn't show up. It was traumatic. Tamara was still using MA so the emotional connection was not good. And there was a lot of DV before Austin

Moores- Nelson – Summary mitigation

Page 5 of 7

1 and his brother were removed. Their dad went to prison when Austin was preschool age
2 Peterson has stayed in involved with the Moores-Nelson family for several years and was
involved when Tamara married Steven Rockwell. Peterson recalled that the
3 grandmother had one brother living with her and was going to school so had her hands
full and couldn't take Austin and his younger brother Davie. Eventually Tamara moved
4 in with her mom and the family dynamics with Austin and David were always
challenging. Peterson recalls there was psychological testing done on Tamara but does
5 not believe any was done for Austin.

6 Peterson states that the question was always whether or not Austin was drug impacted
7 Austin has always had a flat affect and there were concerns about memory problems.
Austin seemed not to understand cause and effect. She believes Austin had a problem
8 with ADHD and states she sees it all the time with kids who have impulse control
problems. She also recalls that Austin felt protective of his brother David while he was
9 in foster care.

10 **Stephen Rockwell (DOB 8/16/1974) – Step father**
11 **253 229-4041**

12 Rockwell states he has been in Austin's life since 2001 when Austin was five. He is now
13 married to Austin's mother Tamara. In the beginning, they all lived with the Nelson's,
Austin's maternal grandparents. Austin has been defiant; couldn't put 2 + 2 together.
14 Austin has not been able to understand why he had to be punished. The school passed
Austin from grade to grade but Austin didn't understand things. It was as if Austin took
15 things in but wasn't able to process the meaning of things. The Rockwells relapsed and
began using drugs again and were sent to prison when Austin was about six years old.
16 They finally got clean and sober but Austin has had trust issues.

17 Rockwell thinks of Austin as his son and is at a loss to know how to help Austin who has
18 always been different and unable to understand. Rockwell recalls one incident when
Austin was about nine years old when they were driving down the road and Austin
19 spotted a gate with chains across it. Austin screamed and wanted to get out, so Rockwell
pulled over and Austin went to the chained gate and climbed over. Once on the other
20 side Austin looked terribly disappointed and Rockwell asked what was going on. Austin
told Rockwell that he thought he'd be in a different world when he got over the chain and
21 was disappointed he was still there. Austin has been delusional but holds fast to his
delusions. Rockwell became aware that Austin began using marijuana when he was
22 about 14 years old and discovered Austin was using Dab or BHO, (a higher concentrate
23 of THC than is found in most cannabis)

Jean Nelson – maternal grandmother
253-459-2270

Jean Nelson states that Austin was 5 when he came to live with her and her husband. He had to come off Concerta and his physician, Dr. Reed, put him on different medications. Austin began having trouble with his heart

Nelson states that Austin's early life was challenging due to his mother's huge drug problem. The state placed Austin with her when he was 15 months old and he stayed for nine months but then he went back to his mother who moved around from motel to motel living with different people. Austin had multiple caretakers. He experienced terrible nightmares even at 15 months old. His vocabulary was very limited. It seemed Austin could not comprehend. One time when Austin stayed with her they drove past a motel called the Calico Cat and Austin started screaming saying "... no no don't want to go there." He remembered places he'd been and freaked out. One time as they were driving near the Puyallup bridge he nearly went insane. He had just got out of foster care and Nelson learned that the foster mother had threatened to throw Austin over the bridge when he was bad at church. He was five when this happened. Austin was fearful that mom would get in trouble and police would come and he'd go to jail. Austin would call Nelson and tell her he didn't trust his mom and dad. It took Austin a long time to sleep at his mom's house; he didn't trust anyone but Jean Nelson so would call her frequently when he was 6 & 7 years' old

As he aged Nelson noticed his comprehension was bad. He would read but not understand. Even in middle school it didn't get better and Austin told her he was not getting it and he was overwhelmed. He also did not understand repercussions. He was four and took his little brother for walk without telling anyone. When he was 10 years old, an older boy talked Austin into getting on a bus and going to skate board park. Nelson found Austin with a stranger.

Nelson knew David Moores, Austin's father who lived with the Nelson's for a while after Austin's brother was born. Austin was not quite a year old when Nelson woke up one night to find Austin screaming with blood coming out of his mouth and the baby bottle nipple covered in blood. David Moores had shoved the bottle into Austin's mouth. Tammy was too weak to stand up to David and protect Austin.

When Tamara's second child David Jr. came home from the hospital Austin went to see the baby who cried. David Moores threw Austin across the living room floor. Austin's dad was very abusive to Tamara and Austin. Nelson knew that Austin had to endure more than most kids his age. She tried to intervene and tried to get Austin into Foster care but it took months and the impact of that was devastating.

Austin was placed with a black family in Fife; church people who used corporal punishment. Nelson would meet at a gas station when they had visits and there was

1 always turmoil waiting for them. Austin always had lots of phobias and insecurities. He
2 was finally released to Nelson when he was 5 years old.

3 Nelson states that Austin was very close to her and her husband. They found Austin to be
4 a people pleaser. He never had a lot of friends because people made fun at him. Austin
5 had to have an aide at school because he passed out at school due to meds. The aide had
6 to walk him back and forth to the bathroom. He couldn't go to recess and had to sit in the
7 office at recess because the school was worried he'd pass out. Kids at Lodgemont
8 Elementary where Austin attended followed him to Middle School and then High School.
9 The kids all seemed to figured out that Austin wasn't right and used him. He never had a
10 true friend. One time Austin told Nelson that he'd stolen his brother's Pokémon cards to
11 give them to someone he wanted to be his friend.

12 Nelson also believes Austin was hurt and resentful because she had Austin's older
13 brother Donovan all his life. Austin wanted to be with the Nelsons too and was very hurt
14 and resentful that Donovan got to live with the Nelsons and he had to go to foster care. It
15 seemed to Austin that Nelson chose Donovan and not him. Austin ran away at 15 and
16 ran to Nelson's house. According to Nelson, Austin has always appeared confused
17 needy and wanting love no matter what. He was 16 when she found out he was using
18 Pot.

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28 know?". *The New Zealand Medical Journal* 117 (1206)

Exhibit # 4

1
2 Dear Pops, I love you with all my heart, I never
3 ever thought you would ever leave my life. you
4 were always there for me always protected me
5 took care ~~of~~ ^{of me}, helped me through all my struggle
6 you always had that smile that ~~made~~ made my
7 day better even when it was bad, I'm tearing up
8 right now because theres so much I havnt been
9 able to do with you like going hunting, going
10 on a cruze in the boat ~~if~~ we weren't able to get
11 in time ^{or finish the blue truck,} but I do remember every thing we
12 have done together I'll forever cherish every
13 moment we had with each other, you will always
14 be my Hero Pops you always believed in me you
15 never ever ~~gave~~ ^{gave} ~~me~~ up on me, even during
16 school when id be dumb and wake up late and always
17 asked you for a ride and you never let me down
18 I always looked up to you I always wanted to
19 follow in your foot steps Pops I wanted to be that
20 grandson that made you proud, everything I did
21 was to make you proud of me, how hard I worked
22 when I worked at the warehouse, I talked about stuff
23 like cars, boats, Atv and or just life in general you
24 entertained me with storys about ~~you~~ ^{your} your past ~~in~~
25 man I miss you Pops ~~but~~ I know you'd want me to
26 be strong and I'm trying to be but its hard, theres so
27 much we never ever ~~to~~ ^{to} ~~complete~~ got to do with each
28 other, I'll miss the camping trips, going crabing and
going ~~finish~~ fishing, working on the truck and

1

² little things in or around the house, I miss you like crazy
³ Pops I'm glad I got to see you one last time, you'll probably
⁴ up there with ~~an~~ amber ⁵ and everyone else. I'll see you someday
⁵ Pops I know you'll be waiting for me and everyone else
⁶ up there ↳ Probably fishing and
⁷ drinking a cold ^{one} ~~beer~~ watching NC's, ↳ You're my hero Pops, I love you
⁸ with all my heart I'll never forget you, Rest in Peace Pops...
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Appendix C

Memorandum

Re: Austin Moores-Nelson

Cause#: 16-1-00282-1

by Ronald M. Bone, Panel Investigator, Department of Assigned Counsel, Pierce County
June 14, 2016

Austin Moores Nelson, age 19, has been charged in Pierce County Superior Court with the homicide death of Teresa Ann Ryan, age 46, which occurred on January 18, 2016.

Attorney & Investigator meeting with Austin Moores Nelson

On June 14, 2016, Attorney Ed DeCosta and Investigator Bone met with Austin Moores Nelson at the Pierce County jail. Nelson had met separately with both DeCosta and Bone during the prior week, and the purpose of the June 14th meeting was to answer any questions Nelson may have after the meetings of last week.

Nelson was informed the 1044 pages of discovery material received to date in his case was being prepared for his review. He was encouraged to read all the material and make his own notes during his review. Paper and pen will be provided for him to use during his review.

Attorney DeCosta explained the sentencing guideline matrix, showing Nelson the matrix, as it would apply in his case if he was found guilty as he was currently charged. The state has alleged murder in the first degree, animal cruelty in the first degree and burglary in the first degree. Nelson was told that based on the investigation to date, it was likely he would be found guilty of murder in the first degree. With a "gun enhancement" charge, the "low end" of Nelson's sentencing range would be approximately 47 ½ years. Nelson had been told by Attorney DeCosta last week that the assigned deputy prosecutor had offered a 50-year sentence in exchanged for his guilty plea.

Specific details of the police investigation were discussed with Nelson, to include the findings of an analysis of his cell phone activity on the morning of January 18th, his relationship with Bailey Decker and a former girlfriend, and pending laboratory examinations. Nelson did not have any questions at that time, commenting he wanted to reviewed the discovery and then would likely have some questions.

Nelson restated, as he had during a meeting with Bone last week, that he wanted DeCosta and Bone to meet with his mother, grandmother and stepfather and outline the evidence he was facing. Nelson also wanted his family to be told that he was responsible for the incident and he was seeking their advice. He believed his family would keep any information shared with them strictly confidential.

Nelson reiterated that Decker had searched for and found the keys to her family's gun safe and told him she had. She then placed the keys in the safe, one key in the main door of the safe and

Austin Moores Nelson

a second key in a drawer within the safe. Decker encouraged Nelson to take the firearms in the safe, because she knew the guns could easily be sold for cash. Nelson had secretly spent the night with Decker in her bedroom without her parents knowing he was in the house. Decker when to school in the morning, and after her parents had left the house, Nelson took five rifles and two handguns from the safe. Decker was sending him text messages throughout the morning of the theft.

Nelson sold all the rifles he had obtained from the safe to one person. He had not asked that person if he wanted to buy a pistol, so Nelson was confused why the man had told the police Nelson had offered a handgun for sale. The man might have seen a holster on Nelson's belt when he was showing him the rifles, but Nelson did not recall ever showing the man a handgun. The holster was empty when Nelson was visiting the man who bought the rifles.

Appendix D

Appendice (A)

STATE OF WASHINGTON)

v.)

AUSTIN R. MOORES-NELSON)

AFFIDAVIT IN SUPPORT)

OF PRP)

I Austin R. Moores-Nelson, affiant, hereby depose, declare and swear to the following:

On January 17th 2016, I contacted an acquaintance to purchase Bho oil, which is marijuana - The oil, I met up with him and he sold me some clear Gel Pills that had liquid similar to what I had seen in marijuana stores. late that evening at around 10pm I took a pill, thinking id just get sleep. At 3Am I was still awake and feeling odd so I took another. By 7:30 or 8Am I was paranoid. And scared because I was hallucinating and hearing noises. Everything was brightly colored and I felt I had to get away from my home. ~~Paranoid~~ I got in my car and drove. Thinking of my ex-girlfriend and wanting to get my stuff I drove to her house. Paranoid about her neighbors who have slashed my tires before. I parked always away. As I walked the short distance to her house the hallucinations and other effects intensified. I became paranoid and wanted to get inside somewhere. I knocked on the door but there was no answer. At this point my vision was tilted and spinning. At some point I turned

At the sound of a loud noise and saw a shape coming towards me. I raised my gun and fired. I ran to the back of the house and busted in. As I entered another large shape making horribly loud and vicious sound ran at me. So I fired at it to, and fled from that place, in the time period after I was running from everything and in a total panick, it wasn't until I had been arrested and in custody that I started to come down from the drug. While in Jail I remembered hearing that the drug dealer also sold PCP. I can't believe what happened. I've never been in trouble before and never would have killed ~~somebody~~, it was not my intension to kill anyone, however I felt like a price must be paid. I believe that I mistakenly consumed PCP - Angel dust

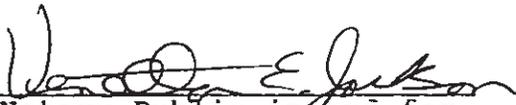
I was Appointed Ed Decosta as my Attorney from the Department of Assigned Counsel Because I have no money. He came to see me a few times always pressuring me to Plead Guilty. on August 30, 2016, He brought a Plea Deal and told me I should sign it. It was no bargain, it was basically Plea Guilty as charged. on 9/9/2016 I went to get sentenced and met with Ed. He told me to initial a bunch of SPOTS and was in a rush. I did what I was told. At Sentencing I was told to answer yes and made no further statements. A Victim impact Statement was given in court by A

Woman who was Announced as # friend and Co-Worker of the victim who was a court clerk, The Judge then said he was giving me the Maximum Allowable instead of the lower or mid range and for multiple (3) weapons Enhancements Consecutively, Ed looked At me and Said "Sorry dude" and walked away.

before I took my Plea ED Decosta had been contacting my family, Pressuring them to tell me to take a deal.

I swear under penalty of perjury of the laws of the state of Washington that the foregoing is a true and accurate statement to the best of my recollection.

Subscribed and sworn before me this 13 day of July 2017.


Notary Public in and for
the State of Washington
in the county of Walla
Walla, My commission
Expires April 1, 2021.



Appendix E

SWORN AFFIDAVIT OF AUSTIN MOORES-NELSON

RE: In re Personal Restraint of Moores-Nelson, No. 50608-4-II
Pierce County Superior Court No. 16-1-00282-1

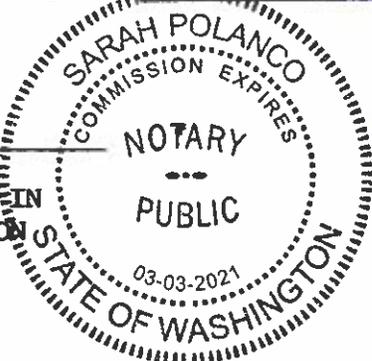
I, Austin Moores-Nelson, was represented by attorney Ed DeCosta in the above captioned cause number. On or about June 14th, 2016, I did meet with attorney Ed DeCosta and an Investigator named Ronald Bone to discuss my case, the discovery, and what defense options I had going forward. Ed DeCosta told me I would be found guilty of First Degree Murder if I went to trial. He said my low range sentence would be 47½ years and that the state had offered 50 years. I told DeCosta to tell my family that I was responsible and I tried to tell my attorney that someone had given me the drug PCP, that the memory was all a haze, that I was scared, and that I didnt go there to hurt anyone. I was only 19 and had no criminal history. I didnt want to take the deal DeCosta was making me take, but he said I would get the death penalty if found guilty because she was a court clerk. Ed DeCosta forced me to plead guilty in my case. He threatened me with the death penalty and coerced me by telling me and my family that I would be found guilty and that I had better plead guilty. But for the information from Mr. DeCosta about my minimum sentence being 47½ years under the charges, I would not have accepted the later plea offer or pleaded guilty.

I swear under penalty of perjury of the laws of the State of Washington that the foregoing is a true and accurate statement to the best of my recollection.

DATED THIS 31 day of December, 2019.


NOTARY PUBLIC IN AND FOR THE
STATE OF WASHINGTON, RESIDING IN
SNOHOMISH COUNTY. MY COMMISSION
EXPIRES

03/03/2021.




Austin R. Moores-Nelson

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO**

IN RE THE PERSONAL RESTRAINT PETITION OF)
)
)
AUSTIN MOORES-NELSON,)
)
)
Petitioner.)

NO. 50608-4-II

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 10TH DAY OF JANUARY, 2020, I CAUSED THE ORIGINAL **SUPPLEMENTAL BRIEF OF PETITIONER** TO BE FILED IN THE COURT OF APPEALS - DIVISION TWO AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

- | | | |
|--|-----|----------------------|
| <input checked="" type="checkbox"/> KRISTIE BARHAM, DPA | () | U.S. MAIL |
| [PCpatcecf@co.pierce.wa.us] | () | HAND DELIVERY |
| [kristie.barham@piercecountywa.gov] | (X) | E-SERVICE VIA PORTAL |
| PIERCE COUNTY PROSECUTOR'S OFFICE | | |
| 930 TACOMA AVENUE S, ROOM 946 | | |
| TACOMA, WA 98402-2171 | | |
|
 | | |
| <input checked="" type="checkbox"/> AUSTIN MOORES-NELSON | (X) | U.S. MAIL |
| (ADDRESS OF RECORD) | () | HAND DELIVERY |
| ON FILE WITH OUR OFFICE) | () | _____ |

SIGNED IN SEATTLE, WASHINGTON THIS 10TH DAY OF JANUARY, 2020.

X _____ 

Washington Appellate Project
701 Melbourne Tower
1511 Third Avenue
Seattle, WA 98101
☎(206) 587-2711

WASHINGTON APPELLATE PROJECT

January 10, 2020 - 4:42 PM

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Appellate Court Case Number: 50608-4
Appellate Court Case Title: Personal Restraint Petition of Austin Richard Moores Nelson
Superior Court Case Number: 16-1-00282-1

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