

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

IN RE THE PERSONAL RESTRAINT
PETITION OF:

SKYLAR NIKOLAS BEAR NEMETZ,

Petitioner.

NO. 53971-3-II

STATE'S RESPONSE TO PERSONAL
RESTRAINT PETITION

I. ISSUES PERTAINING TO PERSONAL RESTRAINT PETITION

A. Should this Court dismiss the personal restraint petition where the Petitioner has not shown a fundamental defect resulting in a complete miscarriage of justice where the trial court properly exercised its discretion after considering and denying the Petitioner's request for an exceptional sentence downward based on youth?

B. If this Court remands for resentencing, should this Court deny the Petitioner's request to reassign the case to a different sentencing judge where the Petitioner has failed to show the judge's actual or potential bias or that his impartiality might reasonably be questioned?

II. STATUS OF PETITIONER

Petitioner, Skylar Nemetz, is restrained pursuant to a judgment and sentence entered in Pierce County Superior Court Cause No. 14-1-04212-6. Appendix (App.) 58-73. He is

currently serving a sentence for manslaughter in the first degree with a firearm enhancement. App. 60-61, 64.

III. FACTS AND PROCEDURAL HISTORY

A. Procedural History

On October 22, 2014, the State charged Nemetz with murder in the first degree with a firearm enhancement for intentionally shooting his wife in the back of the head and killing her. App. 1-5.¹ A jury convicted Nemetz of the lesser included crime of manslaughter in the first degree with a firearm sentencing enhancement. App. 34-38, 60. On March 25, 2016, the trial court sentenced Nemetz to the high end of the standard range, 102 months, plus an additional 60 months for the firearm enhancement. App. 61, 64. The total confinement imposed was 162 months. App. 64.

Nemetz timely appealed. *See* App. 74. On appeal, he challenged the firearm sentencing enhancement and the trial court's failure to award him credit for time served on electronic home monitoring (EHM). *State v. Nemetz*, 3 Wn. App. 2d 1014, 2018 WL 1733463 at *1 (Wash. Ct. App. April 10, 2018). On April 10, 2018, the Court issued an unpublished decision affirming the trial court's imposition of the firearm sentencing enhancement. *Id.* The Court reversed the sentence only to the extent that it failed to give him credit for time served on EHM and remanded to the trial court to award that credit. *Id.*

On May 18, 2018, the trial court corrected the judgment and sentence to give Nemetz credit for time served on EHM, consistent with the Court of Appeals' opinion. App. 72-73. The Supreme Court denied Nemetz's petition for review. *State v. Nemetz*, 191 Wn.2d 1007, 424 P.3d 1219 (2018). On September 11, 2018, the Court issued the mandate terminating review of Nemetz's direct appeal. App. 75-97.

¹ A corrected information was filed on December 31, 2015. App. 6-7.

B. Sentencing Hearing

The jury found Nemetz guilty of manslaughter in the first degree. App. 36. Nemetz was twenty years old when he recklessly caused the death of his wife. *See* App. 1, 6, 36. Prior to sentencing, Nemetz submitted briefing requesting an exceptional sentence below the standard range based on his youth at the time of the crime. App. 39-44, 54-57. Nemetz cited both statutory authority and caselaw in support of his argument that the court should impose an exceptional sentence below the standard range based on Nemetz's youth. App. 42-43, 56-57. Relying on *State v. O'Dell*, 183 Wn.2d 680, 358 P.3d 359 (2015), he argued that youthfulness can support an exceptional sentence below the standard range for an adult felony defendant, and that the sentencing court must exercise its discretion to decide when that is. App. 42-43. Nemetz also cited the United States Supreme Court decisions that reference the psychological and neurological studies showing that the parts of the brain involved in behavior control continue to develop well into a person's twenties. App. 43 (citing *Roper v. Simmons*, 543 U.S. 551, 125 S. Ct. 1183, 161 L.Ed.2d 1 (2005); *Graham v. Florida*, 560 U.S. 48, 130 S. Ct. 2011, 176 L.Ed.2d 825 (2010); *Miller v. Alabama*, 567 U.S. 460, 132 S. Ct. 2455, 183 L.Ed.2d 407 (2012)).

Relying on *O'Dell*, Nemetz argued that these studies reveal "fundamental differences between adolescent and mature brains in the areas of risk and consequence assessment, impulse control, tendency toward antisocial behaviors, and susceptibility to peer pressure." App. 43 (quoting *O'Dell*, 183 Wn.2d at 692). Nemetz noted that a sentencing court's failure to meaningfully consider youthfulness as a mitigating factor is an abuse of discretion. App. 43 (citing *O'Dell*, 183 Wn.2d at 697). He further argued that "reckless behavior is the very hallmark of youth" and that the jury's verdict finding reckless conduct as opposed to

intentional murder “argues strongly in favor of Mr. Nemetz’s youth as a mitigating factor.” App. 43.

Nemetz requested that the trial court impose an exceptional sentence below the standard range based on Nemetz’s youthful age at the time of the crime and “the obvious impact it had on his behavior.” App. 44. Specifically, Nemetz argued that the evidence and testimony at trial established his marked immaturity in various matters, including his misuse of alcohol, an impression of invincibility, and his careless handling of the firearm—all of which, he argued, are factors commonly associated with youth. App. 57. He argued that the trial court should consider these and other factors of Nemetz’s youth and immaturity and impose an exceptional sentence below the standard range. App. 57. The State argued against an exceptional sentence downward and asked the court to impose a standard range sentence at the high end of the standard range. App. 46-47, 53; 03/25/16 RP 13-15.

At the sentencing hearing, Nemetz relied on his sentencing briefs regarding his request for an exceptional sentence downward based on youth. 03/25/16 RP 2. Nemetz informed the court that he was not requesting oral argument on the issue as he believed his briefing was sufficient to address the issue. 03/25/16 RP 2. He asked the trial court to issue a ruling based on the briefing. 03/25/16 RP 3.

The trial court advised the parties that it had read the briefing submitted by the parties. 03/25/16 RP 2-3. The trial court considered Nemetz’s request for an exceptional sentence downward based on youth and concluded that such a sentence was not appropriate. 03/25/16 RP 3-4. The court determined that there was no basis for an exceptional sentence:

First of all, all of the issues raised regarding sentencing by the defense are worthwhile, and I treated them as such. Of the two, the one I had less difficulty with was the defense speaking of an exceptional sentence. I do not find there is a basis for an exceptional sentence in this matter. The defendant’s range will be within the standard -- is within the standard range. I don’t find there is a basis for an exceptional sentence downward as the defense requested in this matter.

03/25/16 RP 3-4. After the court issued its ruling denying Nemetz's request for an exceptional sentence downward based on youth, the court explicitly asked Nemetz if he wanted to be heard "in greater detail" since the parties were relying only on the briefing filed on this issue. 03/25/16 RP 4. Nemetz responded, "No, your honor." *Id.*

After indicating its intent to impose a standard range sentence, the trial court heard argument from the parties regarding the length of the sentence that should be imposed within the standard range. 3/25/16 RP 3-23. The court considered approximately 70 letters from friends, family, and citizens, which were submitted in support of both Nemetz and the victim. 03/25/16 RP 23-24. The court explained that because the jury convicted Nemetz of manslaughter as opposed to murder, the requisite mental state in terms of his culpability is "recklessness." *See* 03/25/16 RP 24-25. For sentencing purposes, the court explained that it is necessary to look at Nemetz's conduct with a focus on the nature and extent of the recklessness. 03/25/16 RP 25-26.

The trial court explained that "certain facts in this case are without debate." 03/25/16 RP 26. The court noted that Nemetz held a weapon with a round in the chamber and "there's no question it was pointed at the back of [his wife's] head, and Skylar Nemetz pulled the trigger of that weapon." *Id.* But the court also noted that "[w]hether it was aimed at his wife is no longer before the Court." *Id.* The court noted that only Nemetz knows what happened that day, but with due respect to the defense theory and advocacy in this case, "this was not the accident that Mr. Nemetz testified it was." *Id.*

The court then explained that it was tasked with measuring "the nature and extent of recklessness" for purposes of sentencing. *Id.* The court noted Nemetz's familiarity with firearms since an early age and his strong interest in guns, which included owning thirteen firearms and having more than three hundred photographs of weapons on his cell phone. 03/25/16 RP 26-27. The court also noted Nemetz's expert training on the handling of guns,

which included training in safety principles for handling weapons. 03/25/16 RP 27. The court indicated that Nemetz's expertise involving weapons shows the degree of recklessness of his conduct. 03/25/16 RP 27-30. The court imposed the high end of the standard range, 102 months, plus the firearm enhancement of 60 months, for a total of 162 months incarceration. 03/25/16 RP 30; App. 61, 64.

C. Current Personal Restraint Petition

On September 10, 2019, Nemetz timely filed this personal restraint petition (PRP).² Nemetz argues that the trial court failed to meaningfully consider whether his young age was a mitigating factor justifying an exceptional sentence and that he is entitled to a new sentencing hearing before a different judge. PRP at 2-3, 11. But the trial court considered all the mitigating evidence presented by Nemetz in support of his request for an exceptional sentence downward based on youth and properly exercised its discretion to deny his request. There was no error. Nemetz has not met his burden of showing prejudice, and this Court should dismiss his petition as frivolous.

IV. ARGUMENT

A. Legal standards in a Personal Restraint Petition.

Personal restraint procedure has its origins in the State's habeas corpus remedy, which is guaranteed by article 4, section 4 of the State constitution. *In re Pers. Restraint of Hagler*, 97 Wn.2d 818, 823, 650 P.2d 1103 (1982). Fundamental to the nature of habeas corpus relief is the principle that the writ will not serve as a substitute for appeal. *Id.* "A personal restraint petition, like a petition for a writ of habeas corpus, is not a substitute for an appeal." *Id.* at 824. Appellate review of these petitions is constrained, and relief gained through collateral challenges is "extraordinary." *In re Fero*, 190 Wn.2d 1, 14, 409 P.3d 214 (2018). "Collateral relief undermines the principles of finality of litigation, degrades the

² To the State's knowledge, this is Nemetz's first PRP.

prominence of the trial, and sometimes costs society the right to punish admitted offenders.” *Hagler*, 97 Wn.2d at 824 (citing *Engle v. Isaac*, 456 U.S. 107, 102 S. Ct. 1558, 71 L. Ed. 2d 783 (1982)). These costs are significant and require that collateral relief be limited in state as well as federal courts. *Hagler*, 97 Wn.2d at 824.

In a PRP, the burden of proof shifts to the petitioner. *In re Pers. Restraint of Cook*, 114 Wn.2d 802, 814, 792 P.2d 506 (1990); *Hews v. Evans*, 99 Wn.2d 80, 88-89, 660 P.2d 263 (1983) (petitioner in a PRP has the burden of establishing that, more likely than not, he was actually prejudiced by the claimed error). And the petitioner must make a heightened showing of prejudice. *Fero*, 190 Wn.2d at 15. In a collateral action, the burden is on the petitioner to prove that any constitutional errors resulted in “actual and substantial prejudice.” *In re Pers. Restraint of Mercer*, 108 Wn.2d 714, 718-21, 741 P.2d 559 (1987). Mere assertions are inadequate to demonstrate actual prejudice. *Hagler*, 97 Wn.2d at 825. Courts do not apply the standard of whether the State proved the constitutional error was harmless beyond a reasonable doubt. *Mercer*, 108 Wn.2d at 719; *Hagler*, 97 Wn.2d at 825-26. Rather, the burden is shifted to the petitioner to show that any error was not harmless; in other words—that the error was prejudicial. *Hagler*, 97 Wn.2d at 826. Thus, in order to prevail in a collateral attack, a petitioner must show that more likely than not he was prejudiced by the error. *Id.*

When collateral relief is based on alleged non-constitutional errors, the required preliminary showing is stricter than the “actual prejudice” standard. *Cook*, 114 Wn.2d at 811. The petitioner must show that the alleged error constitutes “a fundamental defect which inherently results in a complete miscarriage of justice.” *Id.* Thus, in order to obtain relief with respect to either constitutional or non-constitutional claims, the petitioner must show that he was actually and substantially prejudiced by the error. *In re Pers. Restraint of Lord*, 123 Wn.2d 296, 303, 868 P.2d 835 (1994).

Reviewing courts have three options in evaluating issues raised in a PRP: (1) dismiss the petition if the petitioner fails to meet the threshold burden of showing actual prejudice; (2) remand for a hearing on the merits or a reference hearing if the petitioner makes a prima facie showing of prejudice, but the merits cannot be determined solely from the record; or (3) grant the petition if the court is convinced the petitioner has proven actual prejudicial error. *See In re Pers. Restraint of Rice*, 118 Wn.2d 876, 885, 828 P.2d 1086 (1992). Regardless of whether a challenge is based on constitutional or non-constitutional error, the petitioner must support his petition with facts or evidence supporting his claims of unlawful restraint and not rely solely on conclusory allegations. *Cook*, 114 Wn.2d at 813-14.

A personal restraint petitioner is required to provide “the facts upon which the claim of unlawful restraint of petitioner is based and the evidence available to support the factual allegations[.]” RAP 16.7(a)(2); *In re Pers. Restraint of Williams*, 111 Wn.2d 353, 364-65, 759 P.2d 436 (1988); *see Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 809, 828 P.2d 549 (1992) (arguments unsupported by any reference to the record or citation of authority will not be considered). Bald assertions and conclusory allegations are insufficient to command judicial consideration in a PRP. *Rice*, 118 Wn.2d at 886. Bare assertions unsupported by citation of authority, references to the record, or persuasive reasoning cannot sustain a petitioner’s burden of showing prejudicial error. *In re Brennan*, 117 Wn. App. 797, 802, 72 P.3d 182 (2003).

A frivolous PRP should be dismissed. RAP 16.11(b). A PRP is frivolous “where it fails to present an arguable basis for collateral relief either in law or in fact, given the constraints of the personal restraint petition vehicle.” *In re Khan*, 184 Wn.2d 679, 686-87, 363 P.3d 577 (2015).

B. The trial court properly exercised its discretion where it considered and denied Nemetz's request for an exceptional sentence downward based on youth.

The trial court properly exercised its discretion by considering Nemetz's request for an exceptional sentence downward based on youth and determining that there was no basis for such a sentence. Nemetz's argument that "the trial court failed to acknowledge that youthfulness could be a mitigating factor" is not supported by the record. *See* PRP at 4. The trial court considered Nemetz's request for an exceptional sentence based on youth and denied his request. The law requires no more. The trial court sentenced Nemetz to the high end of the standard range. This was a proper exercise of the court's discretion. There was no error, and Nemetz has not shown any fundamental defect that results in a complete miscarriage of justice. This Court should deny his PRP.

1. The trial court did not abuse its discretion by sentencing Nemetz within the standard range.

A trial court does not abuse its discretion as a matter of law by sentencing a defendant within the sentencing range set by the Legislature. *State v. Williams*, 149 Wn.2d 143, 146, 65 P.3d 1214 (2003). Generally, a sentence within the standard range is not subject to appellate review. RCW 9.94A.585(1); *Williams*, 149 Wn.2d at 146. A trial court's decision regarding the length of a sentence within the standard range is not appealable because "as a matter of law there can be no abuse of discretion[.]" *State v. Ammons*, 105 Wn.2d 175, 183, 713 P.2d 719, 718 P.2d 796 (1986). This accords with the traditional notion that, outside of narrow constitutional or statutory limitations, a sentencing judge's discretion remains largely unfettered. *State v. Mail*, 121 Wn.2d 707, 710, 854 P.2d 1042 (1993).

A defendant may appeal a standard range sentence only if the trial court violated the constitution or failed to comply with the procedural requirements of the Sentencing Reform Act (SRA). *State v. Osman*, 157 Wn.2d 474, 481-82, 139 P.3d 334 (2006). But an appeal is

statutorily barred where a trial court follows the correct procedures in sentencing a defendant to a standard range sentence. *Mail*, 121 Wn.2d at 714. In order for a “procedural” appeal to be allowed under *Ammons*, the defendant must show that the sentencing court had a duty to follow some specific procedure required by the SRA and failed to do so. *Mail*, 121 Wn.2d at 712. Nemetz has failed to make such a showing. Here, the trial court followed the correct procedures in sentencing Nemetz to a standard range sentence. The trial court considered Nemetz’s request for an exceptional sentence downward based on the mitigating qualities of youth and denied his request. 03/25/16 RP 2-4. The court then imposed a standard range sentence at the high end of the standard range. 03/25/16 RP 3-4, 30; App. 61, 64. This was a proper exercise of the court’s discretion that is neither appealable nor subject to collateral attack in a PRP.

2. The trial court fully considered Nemetz’s request for an exceptional sentence downward based on youth in accordance with the law.

After reviewing and considering Nemetz’s materials in support of an exceptional sentence based on youth, the trial court denied his request. The trial court neither refused to consider an exceptional sentence, nor incorrectly believed it was prohibited from exercising discretion to impose an exceptional sentence downward based on youth. The trial court’s ruling was a proper exercise of its discretion.

A trial court may impose a sentence outside the standard sentence range if it finds “substantial and compelling reasons justifying an exceptional sentence.” RCW 9.94A.535. Mitigating circumstances justifying a sentence below the standard range must be established by a preponderance of the evidence. RCW 9.94A.535(1). One such mitigating circumstance is if the “defendant’s capacity to appreciate the wrongfulness of his or her conduct, or to

conform his or her conduct to the requirements of the law, was significantly impaired.” RCW 9.94A.535(1)(e).

Although every defendant is entitled to ask the court for an exceptional sentence downward and to have the court consider the request, no defendant is entitled to such a sentence. *State v. Grayson*, 154 Wn.2d 333, 342, 111 P.3d 1183 (2005); *see State v. McFarland*, 189 Wn.2d 47, 56, 399 P.3d 1106 (2017) (when a court is called on to make a discretionary sentencing decision, it must meaningfully consider the request in accordance with the applicable law).

A trial court abuses its discretion when “it refuses categorically to impose an exceptional sentence below the standard range under any circumstances.” *Grayson*, 154 Wn.2d at 342. A trial court also abuses its discretion if it incorrectly believes it is prohibited from exercising its discretion. *O’Dell*, 183 Wn.2d at 696-97. But a trial court that has considered the facts and concluded that there is no factual or legal basis for an exceptional sentence has exercised its discretion, and the defendant cannot appeal that ruling. *State v. Garcia-Martinez*, 88 Wn. App. 322, 330-31, 944 P.2d 1104 (1997); *State v. McGill*, 112 Wn. App. 95, 100, 47 P.3d 173 (2002).

Washington law recognizes that a defendant’s youth may amount to a substantial and compelling reason to mitigate a sentence if it significantly impairs his capacity to appreciate the wrongfulness of his conduct or conform his conduct to the law. *See e.g. O’Dell*, 183 Wn.2d at 696. But age is not a per se mitigating factor automatically entitling every youthful defendant to a mitigated exceptional sentence. *Id.* at 695. Relying on several United States Supreme Court decisions citing studies establishing a link between youth and decreased

criminal culpability,³ the Washington Supreme Court noted that “age may well mitigate a defendant’s culpability, even if that defendant is over the age of 18.” *O’Dell*, 183 Wn.2d at 695. In *Roper*, *Graham*, and *Miller*, the Court recognized that the neurological differences between adolescent and mature brains make young offenders, in general, less culpable for their crimes. *O’Dell*, 183 Wn.2d at 692. *O’Dell* explained that these differences *might* justify a trial court’s finding that youth diminished a defendant’s culpability. *Id.* at 693.

In *O’Dell*, the defendant asked the trial court to impose an exceptional sentence downward because his youth⁴ significantly impaired his capacity to appreciate the wrongfulness of his conduct or conform his conduct to the law. *Id.* at 685. The trial court acknowledged this argument, but believed it was *prohibited* from considering youth as a mitigating factor based on *State v. Ha’mim*, 82 Wn. App. 139, 916 P.2d 971 (1996), *aff’d*, 132 Wn.2d 834, 940 P.2d 633 (1997). *O’Dell*, 183 Wn.2d at 685-86.⁵ The Court held that youth can be a mitigating factor that diminishes a defendant’s culpability and supports an exceptional sentence downward and that “a trial court *must be allowed to consider* youth as a mitigating factor when imposing a sentence on an offender like *O’Dell*, who committed his offense just a few days after he turned 18.” *O’Dell*, 183 Wn.2d at 696, 698-99 (emphasis added). Because the trial court believed it was prohibited from considering youth as a

³ *Roper v. Simmons*, 543 U.S. 551, 125 S. Ct. 1183, 161 L. Ed. 2d 1 (2005) (holding that the constitution forbids capital punishment for juvenile offenders); *Graham v. Florida*, 560 U.S. 48, 130 S. Ct. 2011, 176 L. Ed. 2d 825 (2010) (holding that the constitution prohibits a life sentence without parole for juvenile nonhomicide offenders); *Miller v. Alabama*, 567 U.S. 460, 132 S. Ct. 2455, 183 L. Ed. 2d 407 (2012) (holding that the constitution forbids a sentencing scheme mandating life without parole for juveniles).

⁴ *O’Dell* was eighteen years old when he committed the offense. *O’Dell*, 183 Wn.2d at 683.

⁵ *Ha’mim* did not bar trial courts from considering a defendant’s youth at sentencing; rather, it held only that the trial court may not impose an exceptional sentence automatically on the basis of youth absent any evidence that youth actually diminished a defendant’s culpability. See *Ha’mim*, 132 Wn.2d at 846-47; see also *O’Dell*, 183 Wn.2d at 689; *In re Pers. Restraint of Light-Roth*, 191 Wn.2d 328, 336-37, 422 P.3d 444 (2018).

mitigating factor, the Court remanded for the trial court to meaningfully consider whether youth diminished the defendant's culpability. *Id.* at 696-97.

Similarly, in *State v. Solis-Diaz*, 194 Wn. App. 129, 132-35, 376 P.3d 458 (2016), *reversed on other grounds*, 187 Wn.2d 535, 387 P.3d 703 (2017), the Court remanded the case for resentencing because the trial court erroneously believed it was prohibited from considering the defendant's request for a mitigated sentence based on youth. The Court held that the trial court abused its discretion in refusing to consider the defendant's youth as a mitigating factor at sentencing. *Id.* at 138. The appellate court directed the trial court to "fully and meaningfully consider Solis-Diaz's individual circumstances and determine whether his youth at the time he committed the offenses diminished his capacity and culpability." *Id.* at 141.⁶

Here, unlike the trial courts in *O'Dell* and *Solis-Diaz*, the trial court neither refused to consider an exceptional sentence based on Nemetz's youth, nor expressed an erroneous belief that it was prohibited from considering such a sentence. *See* 03/25/16 RP 3-4. Rather, after fully considering all of Nemetz's arguments for an exceptional sentence downward based on youth, the trial court denied his request.

At the sentencing hearing, the trial court stated that it had read all of the briefing submitted by the parties for sentencing, which included Nemetz's briefing in support of an exceptional sentence downward based on youth. *See* 03/25/16 RP 2-3. Nemetz explicitly asked the court to rule on the issue based on his briefing and informed the court that he did not want to present any oral argument as he sufficiently addressed the issue in his briefing. 03/25/16 RP 2-3. The record reflects that the trial court meaningfully considered youth as a

⁶ *Solis-Diaz* was a juvenile, age 16, at the time he committed the offenses. *Id.* at 132-33.

possible mitigating factor. The trial court noted that “all of the issues raised regarding sentencing by the defense are worthwhile, and I treated them as such.” 03/25/16 RP 3. The trial court then concluded that there was no basis for an exceptional sentence downward based on youth:

First of all, all of the issues raised regarding sentencing by the defense are worthwhile, and I treated them as such. Of the two, the one I had less difficulty with was the defense speaking of an exceptional sentence. I do not find there is a basis for an exceptional sentence in this matter. The defendant’s range will be within the standard -- is within the standard range. I don’t find there is a basis for an exceptional sentence downward as the defense requested in this matter.

03/25/16 RP 3-4.

After denying Nemetz’s request for an exceptional sentence based on youth, the trial court gave Nemetz yet another opportunity to address the court in “greater detail” since the parties relied only on the briefs filed in the matter. 03/25/16 RP 4. Nemetz informed the court that he did not want to address the matter further. *Id.* The trial court heard further argument from the parties as to the length of the sentence that should be imposed within the standard range. *See* 03/25/16 RP 3-30. The trial court considered approximately 70 letters from friends, family, and citizens, which were submitted either in support of Nemetz or the victim. 03/25/16 RP 23-24. The trial court also considered the oral statements at sentencing from both Nemetz and his mother as well as from three individuals who were closely associated with the victim. 03/25/16 RP 4-12, 18-23. The trial court then imposed a sentence at the high end of the standard range. 03/25/16 RP 30; App. 61, 64.

Thus, the trial court considered the mitigating circumstances presented by Nemetz regarding his youth and properly exercised its discretion in determining that his youthfulness did not support an exceptional sentence downward. This is all that the law requires. *See Grayson*, 154 Wn.2d at 342 (“While no defendant is entitled to an exceptional sentence

below the standard range, every defendant *is* entitled to ask the trial court to consider such a sentence and to have the alternative actually considered.”) (emphasis in original).

In *O’Dell*, the case was remanded for a new sentencing hearing because the trial court believed it was *prohibited* from considering youth “as a possible mitigating factor” in the case. *O’Dell*, 183 Wn.2d at 689. Unlike *O’Dell*, the trial court in Nemetz’s case knew it had the discretion to consider youth as a *possible* mitigating factor, but ultimately determined that an exceptional sentence was not warranted.

Nemetz argues that the trial court “failed to consider whether [Nemetz’s] youth constitutes a mitigating factor for purposes of sentencing.” PRP at 11. He further argues that the trial court “gave no indication” that it considered his youth as a mitigating factor. PRP at 10. Neither of these arguments is supported by the record.

The record clearly reflects that the trial court explicitly considered Nemetz’s request for an exceptional sentence based on youth. *See* 03/25/16 RP 3-4. Nemetz did not want to present oral argument on the issue and instead asked the trial court to issue a ruling based on his briefing. 03/25/16 RP 2-3.⁷ The trial court indicated that it had read all the briefing submitted by the parties and that it was “mindful of the authorities” at issue in the case. *See* 03/25/16 RP 2-3. The court then issued its ruling that there is no basis for an exceptional sentence downward as Nemetz requested. 03/25/16 RP 3-4. The court explicitly stated that all of the issues Nemetz raised regarding sentencing are “worthwhile” and that it “treated them as such.” 03/25/16 RP 3. The court then noted that it had “less difficulty” with Nemetz’s request for an exceptional sentence and concluded that there is no basis for an exceptional sentence downward in Nemetz’s case. 03/25/16 RP 3-4. Thus, the record does not support Nemetz’s claim that the trial court failed to consider youth as a mitigating factor.

⁷ This briefing included a two-page argument in Nemetz’s sentencing memorandum and a two-page argument in response to the State’s sentencing brief opposing the exceptional sentence downward. App. 39-57.

The trial court properly exercised its discretion to deny Nemetz's request for an exceptional sentence downward based on youth. There was no error. Accordingly, Nemetz fails to show either actual prejudice or a fundamental defect that results in a complete miscarriage of justice, and he is not entitled to collateral relief. *See In re Pers. Restraint of Meippen*, 193 Wn.2d 310, 316-17, 440 P.3d 978 (2019); *see also Cook*, 114 Wn.2d at 811.

Nemetz argues that prior to *O'Dell*, "trial courts had relied upon broad language from the appellate courts that a defendant's age could not relate to the crime, and therefore could not be a mitigating factor." PRP at 5. But our Supreme Court has recognized that trial courts have always had the ability to consider a defendant's age as a mitigating factor. *Light-Roth*, 191 Wn.2d at 336-37. *Ha'mim* did not bar trial courts from considering a defendant's youth at sentencing; rather, it held only that the trial court may not impose an exceptional sentence *automatically* on the basis of youth absent any evidence that youth actually diminished a defendant's culpability. *See Ha'mim*, 132 Wn.2d at 846-47; *O'Dell*, 183 Wn.2d at 689; *see also Light-Roth*, 191 Wn.2d at 336 (*Ha'mim* did not preclude defendants from arguing youth as a mitigating factor if they show youthfulness relates to the commission of the crime).

"RCW 9.94A.535(1)(e) has always provided the opportunity to raise youth for the purpose of requesting an exceptional sentence downward, and mitigation based on youth is within the trial court's discretion." *Light-Roth*, 191 Wn.2d at 336. In *O'Dell*, the Supreme Court reiterated that it "remains true that age is not a per se mitigating factor automatically entitling every youthful defendant to an exceptional sentence." *O'Dell*, 183 Wn.2d at 695. Thus, trial courts have always had the ability to consider a defendant's age as a basis for a mitigated sentence. Prior to sentencing, Nemetz thoroughly briefed *O'Dell* and other legal authority outlining the trial court's obligation to meaningfully consider youth as a mitigating factor. *See App. 39-44, 54-57*. Thus, the trial court was aware of its discretion to impose an

exceptional sentence based on Nemetz's youth, but declined to do so. This was a proper exercise of the court's discretion, and there was no error. This Court should deny the PRP.

C. Assuming arguendo that this Court remands for resentencing, there is no basis to reassign this case to a different judge.

There is no basis to remand this case for resentencing, and this Court should deny Nemetz's PRP as frivolous. Assuming arguendo that the case is remanded for resentencing, this Court should deny Nemetz's request to reassign a different judge. First, this Court should reject Nemetz's claim outright for failing to cite any legal authority in support of his argument. *See* PRP at 11. Bare assertions unsupported by citation of authority, references to the record, or persuasive reasoning cannot sustain a petitioner's burden of showing prejudicial error. *Brennan*, 117 Wn. App. at 802; *see also Cowiche Canyon Conservancy*, 118 Wn.2d at 809 (arguments unsupported by any reference to the record or citation of authority will not be considered). Nemetz's argument on this issue is limited to two sentences and includes no legal authority for his argument. *See* PRP at 11. However, if this Court addresses the merits of Nemetz's claim, it should reject his request for reassignment to a different sentencing judge as nothing in the record indicates the judge's impartiality might reasonably be questioned.

A defendant has the right to be tried and sentenced by an impartial court. *State v. Solis-Diaz*, 187 Wn.2d 535, 539, 387 P.3d 703 (2017). Pursuant to the appearance of fairness doctrine, a judicial proceeding is valid if a reasonably prudent, disinterested observer would conclude that the parties received a fair and impartial hearing. *Id.* at 540. The law requires not only an impartial judge, but also a judge who appears to be impartial. *Id.* The party asserting a violation of the appearance of fairness must show a judge's actual or potential bias. *Id.* The test for determining whether the judge's impartiality might reasonably be

questioned is an objective test that assumes a reasonable observer knows and understands all the relevant facts. *Id.*

Erroneous rulings generally are grounds for an appeal, not for recusal. *Id.*; see *State v. McEnroe*, 181 Wn.2d 375, 390, 333 P.3d 402 (2014) (“an error of law is certainly not evidence of bias”). Legal errors alone do not warrant reassignment. *McEnroe*, 181 Wn.2d at 390. An appellate court should remand to another judge only where a review of the record shows the judge’s impartiality might reasonably be questioned. *Solis-Diaz*, 187 Wn.2d at 540. In *Solis-Diaz*, the Court remanded to a different sentencing judge after the initial judge made several comments at sentencing that strongly suggested he was committed to imposing the same sentence regardless of any mitigation evidence presented. *Id.* at 540-41. The Court explained that the comment by the initial sentencing judge suggests he may not be amenable to considering mitigating evidence with an open mind. *Id.* at 541.

Here, nothing in the record indicates that the sentencing judge’s impartiality might reasonably be questioned. Nemetz has not shown any actual or potential bias by the sentencing judge. Nemetz’s argument that the sentencing court focused on its disagreement with the jury verdict is not supported by the record. See PRP at 10; see also 03/25/16 RP 23-31. First, the trial court issued its ruling on the exceptional sentence at the beginning of the sentencing hearing. See 03/25/16 RP 2-4. The court then gave Nemetz another opportunity to address the court in “greater detail” on the issue, but Nemetz declined. 03/25/16 RP 4. Thus, the only issue remaining at the sentencing hearing was the length of the sentence the court should impose *within the standard range*. See 03/25/16 RP 3-4. The trial court ultimately decided to impose the high end of the standard range and explained the reasons for its ruling. 3/25/16 RP 23-31.

Second, the trial court repeatedly stated throughout the sentencing hearing that the relevant mental state in terms of Nemetz's culpability is "recklessness" based on the jury's verdict of manslaughter as opposed to murder. *See* 03/25/16 RP 24-30.⁸ The court explained that because the jury convicted Nemetz of manslaughter as opposed to murder, the requisite mental state in terms of his culpability is "recklessness." 03/25/16 RP 24-25. Recognizing the different mental states for murder and manslaughter, the court noted that it "has to measure relative culpability as it relates to something called recklessness. 03/25/16 RP 24-25. The court explained in detail that the State proved "reckless" conduct and that the court must evaluate "the nature and the extent of this fairly subjective thing called recklessness." 03/25/16 RP 25. To do that, the court indicated that it should consider the individual and then "look at the individual's conduct with a focus on the nature and extent of the recklessness." 03/25/16 RP 25.

The court considered numerous factors in favor of Nemetz, including his clean record, good grades in high school, his positive behavior within his family, and his unblemished military record. 03/25/16 RP 25-26. But the court explained it must also look at the nature and extent of the recklessness. 03/25/16 RP 26. In doing that, the court noted that certain facts in the case are "without debate" and that Nemetz held a weapon with a round in the chamber and "there's no question it was pointed at the back of [his wife's] head, and Skylar Nemetz pulled the trigger of that weapon." 03/25/16 RP 26. The court then explicitly stated that "[w]hether it was aimed at his wife *is no longer before the Court.*" 03/25/16 RP 26 (emphasis added). This statement explicitly recognizes the fact that the court knew that it was *not* sentencing Nemetz for murder or any type of intentional conduct.

⁸ The jury convicted Nemetz of the lesser included crime of manslaughter in the first degree, which involves recklessly causing the death of another person. App. 19, 22, 24, 36; *see* RCW 9A.32.060. The jury did not convict Nemetz on either of the counts of murder, both of which involve the intent to cause the death of another person. App. 15, 18, 20-21, 34-35; *see* RCW 9A.32.030, RCW 9A.32.050.

The court also noted that only Nemetz knows what happened that day, but with due respect to the defense theory in the case, “this was not the accident that Mr. Nemetz testified it was.” 03/25/16 RP 26. But the court then reiterated that it was tasked with measuring “the nature and extent of recklessness” for purposes of sentencing. *See* 03/25/16 RP 26. The court noted Nemetz’s familiarity with firearms since an early age and his strong interest in guns, which included owning thirteen firearms and having more than three hundred photographs of weapons on his cell phone. 03/25/16 RP 26-27. The court also noted in detail Nemetz’s expert training on the handling of guns, which included training in safety principles for handling weapons. 03/25/16 RP 27-28. The court concluded that Nemetz’s level of expertise with weapons shows the degree of recklessness of his conduct. 03/25/16 RP 27-30. Given his expertise in weapons, the court informed Nemetz that it “just can’t think of anything that can extenuate or can mitigate the level of recklessness given your skills on that day, I can’t.” 03/25/16 RP 30. The court then imposed a sentence at the high end of the standard range. 03/25/16 RP 30; App. 61, 64. Thus, the record does not support Nemetz’s implication that the trial court issued a sentence based on its belief that this was an intentional murder. The trial court repeatedly acknowledged that any sentence imposed must take into account the “recklessness” of Nemetz’s conduct. Nemetz has not shown any actual or potential bias by the judge that would justify reassignment.

V. CONCLUSION

Based on the foregoing reasons, this Court should dismiss the PRP as frivolous.

DATED: October 24, 2019.

MARY E. ROBNETT
Pierce County Prosecuting Attorney



Kristie Barham
Deputy Prosecuting Attorney
WSB #32764

Certificate of Service:

The undersigned certifies that on this day she delivered by E-file or U.S. mail to the attorney of record for the appellant / petitioner and appellant / petitioner c/o his/her attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington on the date below.

10-24-19

Date

A handwritten signature in black ink, appearing to read "Heaven Ka".

Signature

APPENDIX

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October 22 2014 1:02 PM

KEVIN STOCK
COUNTY CLERK

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7 SUPERIOR COURT OF WASHINGTON FOR PIERCE COUNTY

8 STATE OF WASHINGTON,

9 Plaintiff,

CAUSE NO. 14-1-04212-6

10 vs.

11 SKYLAR NIKOLAS BEAR NEMETZ,

INFORMATION

12 Defendant.

13 DOB: 7/19/1994
PCN#: 541284672

SEX: MALE
SID#: 27797913

RACE: WHITE
DOL#: UNKNOWN

14
15 COUNT I

16 I, MARK LINDQUIST, Prosecuting Attorney for Pierce County, in the name and by the authority
17 of the State of Washington, do accuse SKYLAR NIKOLAS BEAR NEMETZ of the crime of MURDER
18 IN THE FIRST DEGREE, committed as follows:

19 That SKYLAR NIKOLAS BEAR NEMETZ, in the State of Washington, on or about the 16th
20 day of October, 2014, did unlawfully and feloniously, with premeditated intent to cause the death of
21 another person, cause the death of such person or a third person, Tarrah Nemetz, a human being, on or
22 about the 17th day of October, 2014, contrary to RCW 9A.32.030(1)(a), and in the commission thereof the
23 defendant, or an accomplice, was armed with a firearm, to-wit: a rifle, that being a firearm as defined in
24 RCW 9.41.010, and invoking the provisions of RCW 9.94A.530, and adding additional time to the
presumptive sentence as provided in RCW 9.94A.533, and against the peace and dignity of the State of

INFORMATION- 1

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Office of the Prosecuting Attorney
930 Tacoma Avenue South, Room 946
Tacoma, WA 98402-2171
Main Office (253) 798-7400

1 Washington.

2 DATED this 22nd day of October, 2014.

3 LAKEWOOD POLICE DEPARTMENT
4 WA02723

MARK LINDQUIST
Pierce County Prosecuting Attorney

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By: /s/ JARED AUSSERER
JARED AUSSERER
Deputy Prosecuting Attorney
WSB#: 32719

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October 22 2014 1:03 PM

KEVIN STOCK
COUNTY CLERK

SUPERIOR COURT OF WASHINGTON FOR PIERCE COUNTY

STATE OF WASHINGTON,

Plaintiff,

CAUSE NO. 14-1-04212-6

vs.

SKYLAR NIKOLAS BEAR NEMETZ,

DECLARATION FOR DETERMINATION OF
PROBABLE CAUSE

Defendant.

JARED AUSSERER, declares under penalty of perjury:

That I am a deputy prosecuting attorney for Pierce County and I am familiar with the police report and/or investigation conducted by the LAKEWOOD POLICE DEPARTMENT, incident number 142891132;

That the police report and/or investigation provided me the following information;

That in Pierce County, Washington, on or about the 16th day of October, 2014, the defendant, SKYLAR NIKOLAS BEAR NEMETZ, did commit the crime of murder in the first degree. He learned from a co-worker that another man had purchased alcohol for his wife and became angry and ultimately shot her in the back of the head with an AR-15 rifle.

On October 16, 2014, at approximately 1800 hours, South Sound 911 began receiving calls of a shooting at the Beaumont Grand Apartments at 8509 82nd St. SW, #301. There were conflicting reports about what had transpired. When officers arrived Skylar Nemetz walked out of the building and towards them. He had blood on his shirt, and he was taken into custody.

When officers entered Mr. Nemetz's apartment they found his wife, Tarrah Nemetz, sitting in a chair, facing a computer, with her head slumped forward and a pool of blood below her chair. She appeared to have suffered a gunshot wound to the head, and was pronounced dead.

While clearing the residence, officers observed an AR-15 rifle in the closet and a .223 shell casing near the entrance to the room where Tarrah Nemetz was found. Mr. Nemetz insisted on telling the officers on scene his story. In his first version of what happened, he stated that he had just returned home from field training, and that he left his rifle with his wife for protection when he is gone. He reported that he took out the magazine and grabbed the rifle and shook it, in an effort to make the rifle safe. He demonstrated holding the rifle at approximately 45 degrees and said, "I just shook it and it shot her." Mr. Nemetz began to make sounds as if he was crying, but the officer noted that he had no tears coming out.

Officers contacted several witnesses at the scene. Witnesses reported hearing a gun shot and seeing Mr. Nemetz going in and out of his apartment on at least three occasions. Mr. Nemetz told one of the witnesses that Mrs. Nemetz shot her self while cleaning a rifle. Mr.

DECLARATION FOR DETERMINATION
OF PROBABLE CAUSE -1

Office of the Prosecuting Attorney
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1 Nemetz made no effort to call 911. Another witness heard the toilet from Mr. Nemetz's
apartment flush two times after the shot was fired.

2 Mr. Nemetz was transported to the station where he gave a second statement detailing the
3 events leading to his wife being shot in the head. At this point he provided a second version of
4 how he shot his wife. He reported that he left the AR 15 rifle out for her protection while he was
5 deployed, and that the rifle was unloaded and the magazine was away from the rifle. Once
6 home, Mrs. Nemetz asked him to put the rifle away. He said that he picked up the rifle and for
some reason turned the selector switch from safe to fire before removing the magazine. He said
he then placed the butt of the rifle against his thigh and the rifle fired a single round that struck
Mrs. Nemetz. He was unsure why the rifle fired and why he put the selector switch from safe to
fire.

7 Mr. Nemetz then described his familiarity with firearms. He said that he had been around
8 firearms since he was 11 years old. He received additional training in the military. He said he
9 was aware how to properly clear a rifle and described the appropriate manner to do so, which
10 included a visual inspection of the chamber to ensure a round was not in the chamber. He gave
no explanation as to why he did not clear the weapon as he had been trained.

11 Detectives challenged Mr. Nemetz's versions, specifically stating that firearms don't
12 typically fire without the trigger being pulled. Mr. Nemetz then stated that his finger may have
13 been on the trigger when the AR 15 fired. He then provided a third version of how he shot his
wife in the back of the head.

14 Mr. Nemetz said he picked up the AR 15, turned the selector switch from safe to fire, and
15 possibly shouldered the rifle and pulled the trigger. He stated that he did all of this while the
16 rifle was pointed at the back of his wife's head. He provided no reason why he did this and said
17 that it was a stupid thing to do. He reported that he was about 5 feet away from his wife and
18 began yelling, "I killed my wife."

19 Mr. Nemetz told detectives that after shooting his wife he knocked the magazine under
20 the bed and threw the AR 15 into the closet. He said that he then flushed a bottle of cinnamon
21 whiskey down the toilet. When asked why he took the time to do all of these things instead of
22 offer aid to his wife or call 911, Mr. Nemetz was unable to provide a reason. No bottle of
23 whiskey was recovered from the apartment.

24 Mr. Nemetz insisted that he and his wife were happy and had not argued prior to the
shooting. According to one of Mr. Nemetz's co-workers, he saw Mr. Nemetz and Mrs. Nemetz
about 2 hours prior to the shooting. Mr. Nemetz thanked his co-worker for getting liquor for him
and Mrs. Nemetz while he was gone. The co-worker told Mr. Nemetz that another man bought
the liquor for her. The co-worker told detectives that Mr. Nemetz was furious and visually upset.
The same co-worker visited Mr. Nemetz after he was booked into the Pierce County Jail. He
told detectives that Mr. Nemetz gave varying versions of how his wife was shot. According to
the co-worker, Mr. Nemetz said the magazine was attached to the rifle when he shot his wife.

Medical examiner describes the manner of death as a single gun shot wound to the head.
The round entered through the back of her head and exited through her left eye. The round

1 struck the computer screen once it exited her head.

2 I DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF
3 WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

4 DATED: October 22, 2014
5 PLACE: TACOMA, WA

6 /s/ JARED AUSSERER
7 JARED AUSSERER, WSB# 32719

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DECLARATION FOR DETERMINATION
OF PROBABLE CAUSE -3

Office of the Prosecuting Attorney
930 Tacoma Avenue South, Room 946
Tacoma, WA 98402-2171
Main Office (253) 798-7400

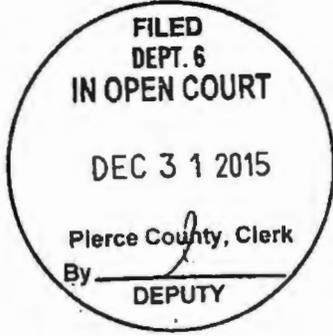
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SUPERIOR COURT OF WASHINGTON FOR PIERCE COUNTY

STATE OF WASHINGTON,

Plaintiff,

CAUSE NO. 14-1-04212-6

vs.

SKYLAR NIKOLAS BEAR NEMETZ,

CORRECTED INFORMATION

Defendant.

DOB: 7/19/1994
PCN#: 541284672

SEX: MALE
SID#: 27797913

RACE: WHITE
DOL#: UNKNOWN

COUNT I

I, MARK LINDQUIST, Prosecuting Attorney for Pierce County, in the name and by the authority of the State of Washington, do accuse SKYLAR NIKOLAS BEAR NEMETZ of the crime of MURDER IN THE FIRST DEGREE, committed as follows:

That SKYLAR NIKOLAS BEAR NEMETZ, in the State of Washington, on or about the 16th day of October, 2014, did unlawfully and feloniously, with premeditated intent to cause the death of another person, cause the death of such person or a third person, Tarrah Danielle Nemetz, a human being, on or about the 16th day of October, 2014, contrary to RCW 9A.32.030(1)(a), and in the commission thereof the defendant, or an accomplice, was armed with a firearm, to-wit: a rifle, that being a firearm as defined in RCW 9.41.010, and invoking the provisions of RCW 9.94A.530, and adding additional time to the presumptive sentence as provided in RCW 9.94A.533, and against the peace and dignity of the State of

CORRECTED INFORMATION- 1

ORIGINAL

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Office of the Prosecuting Attorney
930 Tacoma Avenue South, Room 946
Tacoma, WA 98402-2171
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Washington.

DATED this 22nd day of October, 2014.

LAKWOOD POLICE DEPARTMENT
WA02723

MARK LINDQUIST
Pierce County Prosecuting Attorney

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By:

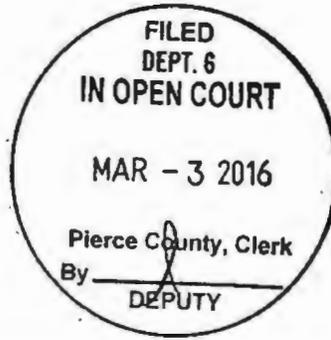


JARED AUSSERER
Deputy Prosecuting Attorney
WSB#: 32719

0055



14-1-04212-6 4647E420 CTINJY 03-04-16



11043

IN THE SUPERIOR COURT OF WASHINGTON, COUNTY OF PIERCE

3/7/2016

STATE OF WASHINGTON,

Plaintiff,

vs.

NEMETZ, SKYLAR NIKOLAS BEAR,

Defendant.

CAUSE NO. 14-1-04212-6

COURT'S INSTRUCTIONS TO THE JURY

DATED THIS 23 day of February, 2016.

Judge Jack Nevin
JUDGE JACK NEVIN

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INSTRUCTION NO. 1

It is your duty to decide the facts in this case based upon the evidence presented to you during this trial. It also is your duty to accept the law from my instructions, regardless of what you personally believe the law is or what you personally think it should be. You must apply the law from my instructions to the facts that you decide have been proved, and in this way decide the case.

Keep in mind that a charge is only an accusation. The filing of a charge is not evidence that the charge is true. Your decisions as jurors must be made solely upon the evidence presented during these proceedings.

The evidence that you are to consider during your deliberations consists of the testimony that you have heard from witnesses, stipulations, and the exhibits that I have admitted, during the trial. If evidence was not admitted or was stricken from the record, then you are not to consider it in reaching your verdict.

Exhibits may have been marked by the judicial assistant and given a number, but they do not go with you to the jury room during your deliberations unless they have been admitted into evidence. The exhibits that have been admitted will be available to you in the jury room.

One of my duties has been to rule on the admissibility of evidence. Do not be concerned during your deliberations about the reasons for my rulings on the evidence. If I have ruled that any evidence is inadmissible, or if I have asked you to disregard any evidence, then you must not discuss that evidence during your deliberations or consider it in reaching your verdict. Do not speculate whether the evidence would have favored one party or the other.

In order to decide whether any proposition has been proved, you must consider all of the evidence that I have admitted that relates to the proposition. Each party is entitled to the benefit of all of the evidence, whether or not that party introduced it.

You are the sole judges of the credibility of each witness. You are also the sole judges of the value or weight to be given to the testimony of each witness. In considering a witness's testimony, you may consider these things: the opportunity of the witness to observe or know the things he or she testifies about; the ability of the witness to observe accurately; the quality of a witness's memory while testifying; the manner of the witness while testifying; any personal interest that the witness might have in the outcome or the issues; any bias or prejudice that the witness may have shown; the reasonableness of the witness's statements in the context of all of the other evidence; and any other factors that affect your evaluation or belief of a witness or your evaluation of his or her testimony.

The lawyers' remarks, statements, and arguments are intended to help you understand the evidence and apply the law. It is important, however, for you to remember that the lawyers' statements are not evidence. The evidence is the testimony and the exhibits. The law is contained in my instructions to you. You must disregard any remark, statement, or argument that is not supported by the evidence or the law in my instructions.

You may have heard objections made by the lawyers during trial. Each party has the right to object to questions asked by another lawyer, and may have a duty to do so. These objections should not influence you. Do not make any assumptions or draw any conclusions based on a lawyer's objections.

Our state constitution prohibits a trial judge from making a comment on the evidence. It would be improper for me to express, by words or conduct, my personal opinion about the value

of testimony or other evidence. I have not intentionally done this. If it appeared to you that I have indicated my personal opinion in any way, either during trial or in giving these instructions, you must disregard this entirely.

You have nothing whatever to do with any punishment that may be imposed in case of a violation of the law. You may not consider the fact that punishment may follow conviction except insofar as it may tend to make you careful.

The order of these instructions has no significance as to their relative importance. They are all important. In closing arguments, the lawyers may properly discuss specific instructions. During your deliberations, you must consider the instructions as a whole.

As jurors, you are officers of this court. You must not let your emotions overcome your rational thought process. You must reach your decision based on the facts proved to you and on the law given to you, not on sympathy, prejudice, or personal preference. To assure that all parties receive a fair trial, you must act impartially with an earnest desire to reach a proper verdict.

INSTRUCTION NO. 2

The evidence that has been presented to you may be either direct or circumstantial. The term "direct evidence" refers to evidence that is given by a witness who has directly perceived something at issue in this case. The term "circumstantial evidence" refers to evidence from which, based on your common sense and experience, you may reasonably infer something that is at issue in this case.

The law does not distinguish between direct and circumstantial evidence in terms of their weight or value in finding the facts in this case. One is not necessarily more or less valuable than the other.

INSTRUCTION NO. 3

The defendant has entered a plea of not guilty. That plea puts in issue every element of the crime charged. The State is the plaintiff and has the burden of proving each element of the crime beyond a reasonable doubt. The defendant has no burden of proving that a reasonable doubt exists as to these elements.

A defendant is presumed innocent. This presumption continues throughout the entire trial unless during your deliberations you find it has been overcome by the evidence beyond a reasonable doubt.

A reasonable doubt is one for which a reason exists and may arise from the evidence or lack of evidence. It is such a doubt as would exist in the mind of a reasonable person after fully, fairly, and carefully considering all of the evidence or lack of evidence. If, from such consideration, you have an abiding belief in the truth of the charge, you are satisfied beyond a reasonable doubt.

INSTRUCTION NO. 4

A witness who has special training, education, or experience may be allowed to express an opinion in addition to giving testimony as to facts.

You are not, however, required to accept his or her opinion. To determine the credibility and weight to be given to this type of evidence, you may consider, among other things, the education, training, experience, knowledge, and ability of the witness. You may also consider the reasons given for the opinion and the sources of his or her information, as well as considering the factors already given to you for evaluating the testimony of any other witness.

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3/7/2016

INSTRUCTION NO. 5

A person commits the crime of murder in the first degree when, with a premeditated intent to cause the death of another person, he or she causes the death of such person.

INSTRUCTION NO. 6

Premeditated means thought over beforehand. When a person, after any deliberation, forms an intent to take human life, the killing may follow immediately after the formation of the settled purpose and it will still be premeditated. Premeditation must involve more than a moment in point of time. The law requires some time, however long or short, in which a design to kill is deliberately formed.

INSTRUCTION NO. 7

A person acts with intent or intentionally when acting with the objective or purpose to accomplish a result that constitutes a crime.

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3/7/2016

INSTRUCTION NO. 8

To convict the defendant of the crime of murder in the first degree as charged in Count I, each of the following elements of the crime must be proved beyond a reasonable doubt:

(1) That on or about the 16th day of October, 2014, the defendant acted with intent to cause the death of Tarrah Danielle Nemetz;

(2) That the intent to cause the death was premeditated;

(3) That Tarrah Danielle Nemetz died as a result of the defendant's acts; and

(4) That any of these acts occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all of the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

INSTRUCTION NO. 9

The defendant is charged in Count I with murder in the first degree. If, after full and careful deliberation on this charge, you are not satisfied beyond a reasonable doubt that the defendant is guilty, then you will consider whether the defendant is guilty of the lesser crimes of murder in the second degree and/or manslaughter in the first degree and/or manslaughter in the second degree.

When a crime has been proved against a person, and there exists a reasonable doubt as to which of two or more degrees or crimes that person is guilty, he or she shall be convicted only of the lowest degree or crime.

INSTRUCTION NO. 10

A person commits the crime of murder in the second degree when with intent to cause the death of another person but without premeditation, he or she causes the death of such person.

INSTRUCTION NO. 11

To convict the defendant of the first lesser included crime of murder in the second degree, each of the following elements of the crime must be proved beyond a reasonable doubt:

- (1) That on or about the 16th day of October, 2014, the defendant acted with intent to cause the death of Tarrah Danielle Nemetz;
- (2) That Tarrah Danielle Nemetz died as a result of defendant's acts; and
- (3) That any of these acts occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all of the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

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INSTRUCTION NO. 12

A person commits the crime of manslaughter in the first degree when he or she recklessly causes the death of another person.

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INSTRUCTION NO. 13

A person is reckless or acts recklessly when he or she knows of and disregards a substantial risk that a death may occur and this disregard is a gross deviation from conduct that a reasonable person would exercise in the same situation.

When recklessness as to a particular result or fact is required to establish an element of a crime, the element is also established if a person acts intentionally as to that result or fact.

INSTRUCTION NO. 14

To convict the defendant of the second lesser included crime of manslaughter in the first degree, each of the following elements of the crime must be proved beyond a reasonable doubt:

(1) That on or about the 16th day of October, 2014, the defendant engaged in reckless conduct;

(2) That Tarrah Danielle Nemetz died as a result of defendant's reckless acts; and

(3) That any of these acts occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all of the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

INSTRUCTION NO. 15

A person commits the crime of manslaughter in the second degree when, with criminal negligence, he or she causes the death of another person.

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INSTRUCTION NO. 16

A person is criminally negligent or acts with criminal negligence when he or she fails to be aware of a substantial risk that a death may occur and this failure constitutes a gross deviation from the standard of care that a reasonable person would exercise in the same situation.

When criminal negligence as to a particular result or fact is required to establish an element of a crime, the element is also established if a person acts intentionally or recklessly as to that result or fact.

INSTRUCTION NO. 18

To convict the defendant of the third lesser included crime of manslaughter in the second degree as charged in the count I, each of the following elements of the crime must be proved beyond a reasonable doubt:

- (1) That on or about 16th day of October, 2014, the defendant engaged in conduct of criminal negligence;
- (2) That Tarrah Danielle Nemetz died as a result of defendant's negligent acts; and
- (3) That any of these acts occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all of the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

INSTRUCTION NO. 19

As jurors, you have a duty to discuss the case with one another and to deliberate in an effort to reach a unanimous verdict. Each of you must decide the case for yourself, but only after you consider the evidence impartially with your fellow jurors. During your deliberations, you should not hesitate to re-examine your own views and to change your opinion based upon further review of the evidence and these instructions. You should not, however, surrender your honest belief about the value or significance of evidence solely because of the opinions of your fellow jurors. Nor should you change your mind just for the purpose of reaching a verdict.

INSTRUCTION NO. 20

When you begin deliberating, you should first select a presiding juror. The presiding juror's duty is to see that you discuss the issues in this case in an orderly and reasonable manner, that you discuss each issue submitted for your decision fully and fairly, and that each one of you has a chance to be heard on every question before you.

During your deliberations, you may discuss any notes that you have taken during the trial, if you wish. You have been allowed to take notes to assist you in remembering clearly, not to substitute for your memory or the memories or notes of other jurors. Do not assume, however, that your notes are more or less accurate than your memory.

You will need to rely on your notes and memory as to the testimony presented in this case. Testimony will rarely, if ever, be repeated for you during your deliberations.

If, after carefully reviewing the evidence and instructions, you feel a need to ask the court a legal or procedural question that you have been unable to answer, write the question out simply and clearly. In your question, do not state how the jury has voted. The presiding juror should sign and date the question and give it to the judicial assistant. I will confer with the lawyers to determine what response, if any, can be given.

You will be given the exhibits admitted in evidence, these instructions, and Verdict Forms, A, B, C and D. Some exhibits and visual aids may have been used in court but will not go with you to the jury room. The exhibits that have been admitted into evidence will be available to you in the jury room.

When completing the verdict forms, you will first consider the crime of murder in the first degree as charged. If you unanimously agree on a verdict, you must fill in the blank

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provided in verdict form A the words "not guilty" or the word "guilty," according to the decision you reach. If you cannot agree on a verdict, do not fill in the blank provided in Verdict Form A.

If you find the defendant guilty on Verdict Form A, do not use Verdict Form B, C or D. If you find the defendant not guilty of the crime of murder in the first degree, or if after full and careful consideration of the evidence you cannot agree on that crime, you will consider the lesser crime of murder in the second degree. If you unanimously agree on a verdict, you must fill in the blank provided in Verdict Form B the words "not guilty" or the word "guilty", according to the decision you reach. If you cannot agree on a verdict, do not fill in the blank provided in Verdict Form B.

If you find the defendant guilty on Verdict Form B, do not use Verdict Form C or D. If you find the defendant not guilty of the crime of murder in the second degree, or if after full and careful consideration of the evidence you cannot agree on that crime, you will consider the lesser crime of manslaughter in the first degree. If you unanimously agree on a verdict, you must fill in the blank provided in Verdict Form C the words "not guilty" or the word "guilty," according to the decision you reach. If you cannot agree on a verdict, do not fill in the blank provided in Verdict Form C.

If you find the defendant guilty on Verdict Form C, do not use Verdict Form D. If you find the defendant not guilty of the crime of manslaughter in the first degree, or if after full and careful consideration of the evidence you cannot agree on that crime, you will consider the lesser crime of manslaughter in the second degree. If you unanimously agree on a verdict, you must fill in the blank provided in Verdict Form D the words "not "guilty" or the word "guilty," according to the decision you reach. If you cannot agree on a verdict, do not fill in the blank provided in Verdict Form D.

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Because this is a criminal case, each of you must agree for you to return a verdict. When all of you have so agreed, fill in the proper form of verdict or verdicts to express your decision. The presiding juror must sign the verdict form and notify the judicial assistant. The judicial assistant will bring you into court to declare your verdict.

INSTRUCTION NO. 21

You will also be given a special verdict form. If you find the defendant not guilty do not use the special verdict form. If you find the defendant guilty of murder in the first degree, murder in the second degree, manslaughter in the first degree or manslaughter in the second degree, you will then use the special verdict form and fill in the blank with the answer "yes" or "no" according to the decision you reach. In order to answer the special verdict form "yes," you must unanimously be satisfied beyond a reasonable doubt that "yes" is the correct answer. If you unanimously agree that the answer to the question is "no," you must fill in the blank with the answer "no." If after full and fair consideration of the evidence you are not in agreement as to the answer, then do not fill in the blank for the question.

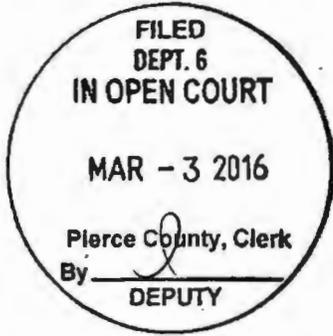
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INSTRUCTION NO. 22

For purposes of a special verdict, the State must prove beyond a reasonable doubt that the defendant was armed with a firearm at the time of the commission of the crime.

A "firearm" is a weapon or device from which a projectile may be fired by an explosive such as gunpowder.

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3/7/2016

SUPERIOR COURT OF WASHINGTON FOR PIERCE COUNTY

STATE OF WASHINGTON,
Plaintiff,

CAUSE NO. 14-1-04212-6

vs.

SKYLAR NIKOLAS BEAR NEMETZ,
Defendant.

VERDICT FORM A
Count I - Murder in the First Degree

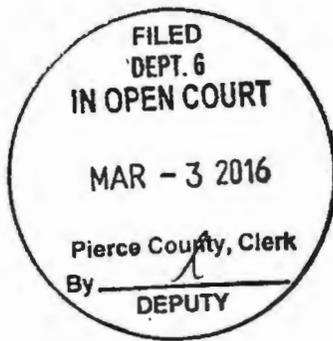
We, the jury, find the defendant _____ (Not Guilty or Guilty) of the
crime of murder in the first degree as charged in Count I.

PRESIDING JUROR

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14-1-04212-6 46478450 VRD 03-04-16



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3/7/2016

SUPERIOR COURT OF WASHINGTON FOR PIERCE COUNTY

STATE OF WASHINGTON,
Plaintiff,
vs.
SKYLAR NIKOLAS BEAR NEMETZ,
Defendant.

CAUSE NO. 14-1-04212-6

VERDICT FORM B
First Lesser Included Crime in Count I
- Murder in the Second Degree

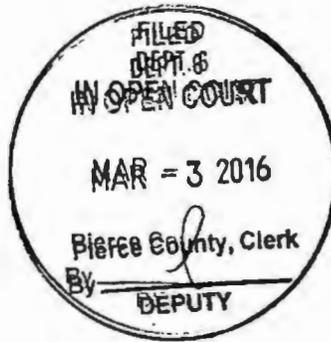
We, the jury, having found the defendant not guilty of the crime of murder in the first degree as charged in Count I, or being unable to unanimously agree as to that charge, find the defendant _____ (Not Guilty or Guilty) of the first lesser included crime of murder in the second degree.

PRESIDING JUROR

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3/7/2016



SUPERIOR COURT OF WASHINGTON FOR PIERCE COUNTY

STATE OF WASHINGTON,
Plaintiff,
vs.
SKYLAR NIKOLAS BEAR NEMETZ,
Defendant.

CAUSE NO. 14-1-04212-6

VERDICT FORM C
Second Lesser Included Crime of Count
I – Manslaughter in the First Degree

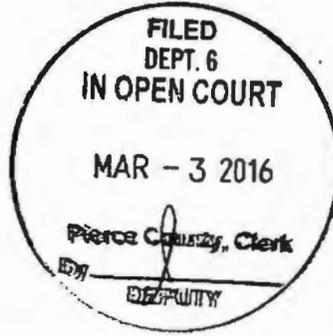
We, the jury, having found the defendant not guilty of the first lesser included crime of murder in the second degree as charged in Count I, or being unable to unanimously agree as to that charge, find the defendant Guilty (Not Guilty or Guilty) of the second lesser included crime of manslaughter in the first degree.

PRESIDING JUROR

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14-1-04212-6 4647E476 VRD 03-04-16



3/7/2016 11:043

SUPERIOR COURT OF WASHINGTON FOR PIERCE COUNTY

STATE OF WASHINGTON,
Plaintiff,
vs.
SKYLAR NIKOLAS BEAR NEMETZ,
Defendant.

CAUSE NO. 14-1-04212-6

VERDICT FORM D
Third Lesser Included Crime of Count I
- Manslaughter in the Second Degree

We, the jury, having found the defendant not guilty of the second lesser included crime of manslaughter in the first degree as charged in Count I, or being unable to unanimously agree as to that charge, find the defendant _____ (Not Guilty or Guilty) of the third lesser included crime of manslaughter in the second degree.

PRESIDING JUROR

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3/7/2016

SUPERIOR COURT OF WASHINGTON FOR PIERCE COUNTY

STATE OF WASHINGTON,
Plaintiff,
vs.
SKYLAR NIKOLAS BEAR NEMETZ,
Defendant.

CAUSE NO. 14-1-04212-6

SPECIAL VERDICT FORM
Count I

We, the jury, return a special verdict by answering as follows:

QUESTIONS: Was the defendant armed with a firearm at the time of the commission of the crime in Count I (murder in the first degree, murder in the second degree, manslaughter in the first degree or manslaughter in the second degree)?

ANSWER: Yes (Write "yes" if unanimous agreement that this is the correct answer)

3/3/2016
DATE

[Signature]
PRESIDING JUROR

The answer section above has been intentionally left blank.

DATE

PRESIDING JUROR

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COUNTY CLERK
NO: 14-1-04212-6

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

STATE OF WASHINGTON

Plaintiff,

No. 14-1-04212-6

vs.

SENTENCING BRIEF

SKYLAR NEMETZ

Defendant,

**TO: THE CLERK OF THE COURT
AND TO: THE PROSECUTING ATTORNEY**

COMES NOW the above-named Defendant, by and through his attorney of record,
MICHAEL AUSTIN STEWART, and

I. STATEMENT OF FACTS AND PROCEDURAL POSTURE

Skylar Nemetz, the defendant herein, was born on July 19, 1994. On October 16, 2014,
when the events leading to this conviction took place, Mr. Nemetz was 20 years and four months
old.

On October 22, 2014, the State charged the defendant herein with the crime of Murder in
the First Degree. Mr. Nemetz was taken into police custody on October 17, 2014, and was
released to Electronic Home Monitoring (EHM) on or about October 31, 2014.

SENTENCING BRIEF

Page 1 of 6

0039

MICHAEL AUSTIN STEWART
1105 Tacoma Avenue South
Tacoma, Washington 98402
T: (253) 383-5346 F: (253) 572-6662
StewartLawTacoma@gmail.com

1 On February 3, 2015, the Washington State legislature began considering EHB 1943,
2 which was later signed into law by the Governor on May 18, 2016, and became effective on July
3 24, 2015. This law amended the laws of the State of Washington regarding pretrial electronic
4 home monitoring of people charged with felony offenses, including RCW 9.94A.505, regarding
5 credit for time served. The law added §7, which denies credit for time served on EHM for
6 people convicted of certain offenses.

7 This matter went to jury trial beginning on January 4, 2016, and concluded on March 3,
8 2016, when the jury returned a verdict of guilty on the lesser included offense of Manslaughter
9 in the First Degree, and a “yes” answer on the special verdict form, which asked whether the
10 defendant was armed with a firearm during the commission of the crime. Manslaughter in the
11 First Degree is an offense to which the new §7 of RCW 9.94A.505 applies.

12 II. STATEMENT OF THE ISSUES

- 13 1. Should the Court grant credit for pretrial time served on EHM?
- 14 2. Should the Court consider the defendant’s youth as a factor to grant an
15 exceptional sentence below the standard range?

16 III. BRIEF ANSWERS

- 17 1. Yes. Mr. Nemetz began his EHM time several months before the legislature
18 even began debating the amendment, and eight months before the final
19 version of the law became effective.
- 20 2. Yes. Mr. Nemetz’s youth at the time of the commission of the crime is a
21 relevant factor in considering a downward departure from the standard
22 sentencing range.

23 IV. MEMORANDUM OF LAW

- 24 1. **The Court should grant credit for time served on Electronic Home Monitoring,
25 because the law changed long after Mr. Nemetz began serving that time.**

26 The Constitution of the United States prohibits the states from passing *ex post facto* laws.
27 U.S. Const. Art. I, §10. Similarly, the Washington Constitution also contains this prohibition.

1 Const. Art. I, § 23. "The ex post facto clauses of the federal and state constitutions forbid the
2 State from... increase[ing] the quantum of punishment annexed to the crime when it was
3 committed." *State v. Calhoun*, 163 Wn. App. 153, 165, 257 P.3d 693 (2011) (quoting *State v.*
4 *Ward*, 123 Wn.2d 488, 496, 869 P.2d 1062 (1994) (internal quotations and citations omitted)).
5 "A law violates the ex post facto clauses if it (1) is substantive, as opposed to merely procedural;
6 (2) is retrospective; and (3) disadvantages the person affected by it." *Id.*

7 In *Calhoun*, the defendant challenged a change in the Sentencing Reform Act regarding
8 the admission of evidence of prior offenses. The court, noting that the change affected "only
9 when the State can present this evidence," held that the amendment was merely procedural. *Id.*
10 (emphasis in the original). "Substantive amendments change either the elements of the offense,
11 the severity of the punishment, or what evidence can be used to prove the offense." *Id.* at 164.

12 As applicable here, the Washington legislature enacted, and the Governor signed into
13 law, a bill that amended the Sentencing Reform Act (SRA)¹. The bill, EHB 1943, passed both
14 houses of the state legislature on April 24, 2015, and was signed by the Governor on May 18,
15 2015. It took effect on July 24, 2015. The bill amended several statutes, including RCW
16 9.94A.505. The amendment to that statute added a new subsection which prohibited the courts
17 from granting credit for pretrial time served on EHM when a person is convicted of, *inter alia*, a
18 violent offense. Manslaughter in the First Degree is designated as a violent offense. RCW
19 9.94A.030(55)(iii).
20

21 The change to the law is substantive, because to deny Mr. Nemetz credit for time served
22 on EHM would change the severity of the punishment the law, and this Court, will impose upon
23 him. To date, he has served roughly sixteen and a half months on EHM, all with the expectation
24 that he would receive credit for that time. Denial of credit for time served would effectively add
25

26 ¹ The SRA is codified at RCW 9.94A.

1 all of that time, plus whatever effect it may have on “good time” calculations, to the sentence
2 imposed by this Court, thus changing the severity of his punishment. For these same reasons,
3 this change disadvantages the defendant. Finally, the change is retrospective, because its
4 application would impact decisions made by a criminal defendant long before the change was
5 even contemplated by the legislature.

6 Accordingly, this Court should hold that RCW 9.94A.505(7) must be inapplicable as to
7 Mr. Nemetz, and grant him credit for the time he has served on EHM.

8
9 **2. The Court should grant a downward departure from the standard sentencing
range in consideration of Mr. Nemetz’s youth at the time of the offense.**

10 The Sentencing Reform Act sets forth standard ranges for felony offenses depending
11 primarily upon the classification of the offense, and the defendant’s offender score. RCW
12 9.94A. The legislature also provided for circumstances under which departures from the
13 standard ranges are appropriate. RCW 9.94A.533. That statute authorizes downward departures
14 from the standard range when the sentencing court “finds that mitigating circumstances are
15 established by a preponderance of the evidence,” and provided a few illustrative examples of the
16 same. RCW 9.94A.533(1). Among those examples is when “[t]he defendant’s capacity to
17 appreciate the wrongfulness of his or her conduct, or to conform his or her conduct to the
18 requirements of the law, was significantly impaired.” RCW 9.94A.533(1)(e). A defendant’s
19 youth is an aspect to consider when evaluating this mitigating factor. *State v. O’Dell*, 183
20 Wn.2d 680, 358 P.3d 359 (2015).
21

22 In *O’Dell*, the defendant was convicted of second degree rape of a child, which stemmed
23 from events occurring just ten days after his eighteenth birthday. The Court held that “a
24 defendant’s youthfulness can support an exceptional sentence below the standard range
25 applicable to an adult felony defendant, and that the sentencing court must exercise its discretion

1 to decide when that is.” *Id.* at 699 (abrogating *State v. Ha’ mim*, 132 Wn.2d 834, 940 P.2d 633
2 (1997)). The Court based its holding primarily upon the U.S. Supreme Court’s holdings in
3 *Roper v. Simmons*, 543 U.S. 551, 569–70, 125 S.Ct. 1183, 161 L.Ed.2d 1 (2005), *Graham v.*
4 *Florida*, 560 U.S. 48, 130 S.Ct. 2011, 176 L.Ed.2d 825 (2010), and *Miller v. Alabama*, 567 U.S.
5 ___, 132 S.Ct. 2455, 1583 L.Ed.2d 407 (2012), and the particular “psychological and
6 neurological studies showing the at the parts of the brain involved in behavior control continue
7 to develop well into a person’s 20s.” *Id.* at 691 (internal quotations and citations omitted).
8 “These studies reveal fundamental differences between adolescent and mature brains in the areas
9 of risk and consequence assessment, impulse control, tendency toward antisocial behaviors, and
10 susceptibility to peer pressure.” *Id.* at 692. The Court also held that a sentencing court’s failure
11 to meaningfully consider youthfulness as a mitigating factor “is itself an abuse of discretion,” *id.*
12 at 697 (citing *State v. Grayson*, 154 Wn.2d 333, 342, 111 P.3d 1183 (2005)), and that lay
13 testimony is sufficient to establish the defendant’s youthful characteristics to the preponderance
14 of the evidence standard.

15
16 The *O’Dell* Court noted that “rape is not a common teenage vice that can be blamed on a
17 lack of judgment.” *Id.* at fn 6 (quoting *Ha’ mim*, 132 Wn.2d at 847). Contrariwise here, reckless
18 behavior is the very hallmark of youth. It is frequently said of young people, particularly young
19 adults, that they think of themselves as “immortal,” and have no regard for the potential
20 consequences of their actions. The fact that the jury found reckless conduct, rather than
21 intentional (much less premeditated, as charged by the State) argues strongly in favor of Mr.
22 Nemetz’s youth as a mitigating factor.

V. CONCLUSION

1
2 For the reasons stated above, this Honorable Court should grant Mr. Nemetz credit for
3 time served for all of his EHM time, and grant a downward departure from the standard
4 sentencing range due to his age, and the obvious impact it had on his behavior, which led to the
5 commission of this offense.

6 Respectfully submitted this 15th day of March, 2016.

7
8 By: MAS
9 Michael Austin Stewart. WSBA# 23981
10 Attorney for Mr. Nemetz
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SUPERIOR COURT OF WASHINGTON FOR PIERCE COUNTY

STATE OF WASHINGTON,

Plaintiff,

CAUSE NO. 14-1-04212-6

vs.

SKYLAR NIKOLAS BEAR NEMETZ,

STATE'S SENTENCING
MEMORANDUM

Defendant.

I. IDENTITY OF THE PARTIES

Comes now the State of Washington, represented by Deputy Prosecuting Attorney Gregory L. Greer and submits the following brief in support of the State's sentencing recommendation.

II. RELEVANT PROCEDURAL HISTORY

On October 22, 2014, the defendant was charged with one count of murder in the first degree.

As a condition of release under CrR 3.2, the defendant was permitted by the court to be released from jail on a bond, and if posted, to be placed on electric home monitoring (EHM). The defendant posted the bail amount and was on EHM from October 31, 2014 until the date of his conviction, March 3, 2016.

On January 4, 2016, a jury trial commenced and on March 3, 2016, after seven days of deliberations, the jury returned a verdict of guilty on a lesser included charge of manslaughter in the first degree.

1 Sentencing is set for March 25, 2016.

2 III. STANDARD SENTENCE RANGE

3 Count I – Manslaughter in the First Degree – 78 - 102 months plus 60 months for the firearm
4 sentence enhancement; therefore total range is 138 - 162 (offender score 0).

5 IV. EXCEPTIONAL SENTENCE ISSUE

6 The defendant claims, under RCW 9.94A.535(1)(e), that his client should receive a sentence
7 below the standard range because his “capacity to appreciate the wrongfulness of his conduct, or
8 to conform his or her conduct to the requirements of law, was significantly impaired.” The
9 defendant cites State v. O’Dell, 183 Wn.2d 680 (2015), in support of his argument. The
10 defendant points out that the O’Dell court relied factors considered in such Supreme Court cases
11 as Miller v. Alabama, 132 S.Ct. 2455 (2012) wherein they discuss “psychological and
12 neurological studies showing that parts of the brain involved in behavior control continue to
13 develop well into a person’s 20s.”

14
15 The defendant does not discuss the two part test the O’Dell court identifies. The factors
16 making up the two part test were established in State v. Ha’ mim, 132 Wn.2d 840, 940 P.2d 633
17 (1997). First, a factor cannot support the imposition of an exception sentence if the legislature
18 necessarily considered that factor when it established the standard sentence range. (not
19 applicable here). Second, in order to justify an exceptional sentence, a factor must be
20 “sufficiently substantial and compelling to distinguish the crime in question from others in the
21 same category.” *Id.*

22 In O’Dell, the defendant was barely over 18 years old and had sexual intercourse with a girl
23 who he claimed to believe was much older than her true age of 12 years old. The court declined
24 to consider an exceptional sentence downward based on RCW 9.94A.535(1)(e), erroneously
25

1 believing it could not consider the defendant's "youthfulness," as the defendant was over 18.

2 The case was remanded for resentencing and it is unknown what the court did at that hearing.

3 In the present case, the only factual statement made by the defendant in support of his request
4 for an exceptional sentence downward is "[t]he fact that the jury found reckless conduct, rather
5 than intentional (much less premeditated, as charged by the State) argues strongly in favor of Mr.
6 Nemetz's youth as a mitigating factor." There is no discussion as to the relationship between the
7 defendant's youth and how that factored into his conduct. The defense merely implies that if a
8 defendant is in his early twenties and commits manslaughter, he is eligible for an exceptional
9 sentence downward.

10 In the present case, age or youthfulness had no impact on the crime. The defendant was a
11 twenty year old member of the United States Army who was married and living with his wife in
12 an apartment in Lakewood, Washington. Further, the facts established the defendant was
13 intimately familiar with firearm to the point of obsession.

14
15 V. LAW AND ARGUMENT REGARDING PRETRIAL RELEASE

16 RCW 9.94A.505, as amended, should be applied to the defendant's sentence. A
17 procedural amendment was enacted in July, 2015 and specifically prohibits offenders
18 convicted of violent offenses from receiving EHM credit, as stated below:

19 (7) The sentencing court shall not give the offender credit for any time the
20 offender was required to comply with an electronic monitoring program prior to
sentencing if the offender was convicted of one of the following offenses:

21 (a) A violent offense;

22 ...

1 The *ex post facto* clause of the United States and Washington Constitutions does not
2 prohibit the court from applying RCW 9.94A.505(7) to the defendant even though he began
3 EHM in October, 2014, before RCW 9.94A.505(7) became law.

4 The procedure for determining whether a law violates *ex post facto* clauses was discussed
5 in State v. Schmidt, 143 Wn.2d 658, 672, 23 P.3d 462 (2001) in relevant part, as follows:

6 The *ex post facto* clauses of the United States Constitution and the
7 Washington Constitution prohibit enactment of any law which . . . increases the
8 quantum of punishment after the offense was committed. The purpose of the
9 constitutional prohibitions against *ex post facto* laws is to assure that persons have
10 fair warning of conduct which will result in criminal penalties and of the
11 punishment the State may impose on violators of its laws. The test to determine
12 whether a law violates the *ex post facto* clause is whether the law (1) is
13 substantive [or] merely procedural; . . .

14 The mark of an *ex post facto* law is the imposition of what can fairly be
15 designated as punishment for past acts. If the restriction of the individual comes
16 about as a relevant incident to a regulation of a present situation, the law is not *ex*
17 *post facto*. . . .

18 The State Supreme Court subsequently made it clear that pretrial EHM is not punishment.

19 State v. Harris, 171 Wn.2d 455, 467, (2011), identified a two-part test to determine whether a
20 government action is punitive. The first step is to look to the express or implied intent of the
21 government action. Id. at 365, 945 P.2d 700. If its intent is not punitive, then the analysis turns
22 on whether the action's effect nevertheless is so punitive as to negate that intent. Id. citing State
23 v. Catlett, 133 Wn.2d 355, 366, 945 P.2d 700 (1997).

24 In analyzing the first part of the two-part test as specifically related to whether EHM itself is
25 punitive in nature, Harris addressed the purpose of CrR 3.2 in detail, and determined:

CrR 3.2 does not describe bail or other conditions of pretrial release as
punitive measures. The rule creates a presumption that a court will release a
defendant on personal recognizance after his preliminary hearing or appearance.
CrR 3.2(a). If the court determines that personal recognizance will not assure the
defendant's appearance at future court proceedings or if there is a likely danger
the defendant will commit a violent crime, seek to intimidate witnesses, or
"otherwise unlawfully interfere with the administration of justice," then the court

1 will impose bail or conditions of release. CrR 3.2(a)(1)-(2). CrR 3.2 requires the
2 court to impose the least restrictive conditions, necessarily including:

3 (1) Place the accused in the custody of a designated person or
4 organization agreeing to supervise the accused;

5 (2) Place restrictions on the travel, association, or place of abode of
6 the accused during the period of release;

7 ...
8 (6) Require the accused to return to custody during specified hours or
9 to be placed on electronic monitoring, if available; or

10 (7) Impose any condition **other than detention** deemed reasonably
11 necessary to assure appearance as required. (emphasis added).

12 The language of CrR 3.2 does not indicate these pretrial release conditions
13 are punitive.

14 The history of CrR 3.2, a rule originally drafted to overhaul the monetary
15 bail system, confirms that conditions of pretrial release were not intended to be
16 punitive. Rather, comments to the original rule demonstrate that the drafters
17 intended pretrial release to alleviate some of the burdens imposed upon an
18 accused individual awaiting trial in jail. The comments observe that a defendant
19 in pretrial detention "is severely handicapped in his defense preparation" and "is
20 often unable to retain his job and support his family, and is made to suffer the
21 public stigma of incarceration even though he may later be found not guilty."
22 CRIMINAL RULES TASK FORCE, WASHINGTON PROPOSED RULES OF
23 CRIMINAL PROCEDURE Rule 3.2, cmt. at 22 (West Publ'g Co. 1971). CrR 3.2
24 was meant to alleviate these burdens.

25 Id. at 467-468.

Harris went on to point out the following issues related to EHM specifically:

As a condition of pretrial or presentencing release, EHM addresses these
concerns and furthers the intent of the original pretrial release rule because a
defendant on EHM may visit his attorney and continue to go to a job. State v.
Perrett, 86 Wn. App. 312, 318-19, 936 P.2d 426 (1997). A 2002 amendment to
CrR 3.2 added electronic monitoring as a possible condition of pretrial release.
The minority and justice committee proposed the amendments to address reports
that court rules governing pretrial release "may discriminate against persons who
are economically disadvantaged." Proposed amendment to CrR 3.2, 145 Wash.2d
Proposed-67 (Official Advance Sheet No. 4, Jan. 8 2002). The purpose of the
amendment's restructuring of CrR 3.2 (and its counterpart CrRLJ 3.2) was
to separate out the three broad issues a judge is directed to consider
for pretrial release; that is, whether there is a likely danger that the
accused will seek to intimidate witnesses or otherwise interfere
with the administration of justice. Id. at Proposed-68. These
comments demonstrate that the purpose of pretrial release
conditions, including EHM, is not punishment.

1 Finally, the Harris court identified that EHM is not equivalent to incarceration for
2 purposes of the speedy trial rule because the conditions of release “essentially eliminate the
3 hardships associated with incarceration.” Perrett, 86 Wn. App. at 318. The defendant in Perrett
4 was allowed to visit his attorney to help prepare his defense and to do personal errands on those
5 trips. Id. at 318-19. The defendant, though confined to his home because he was unemployed,
6 was free to live largely as he had before he was charged, and he “suffered neither the stigma nor
7 the discomfort of jail while on EHM.” Id.

8
9 From the above, it is evident that pretrial EHM does not have a punitive purpose or
10 function. Pretrial release is intended to alleviate some of the burdens imposed upon an
11 accused awaiting trial in jail. EHM addresses that concern by enabling a defendant to visit his
12 attorney, continue working and largely living in the community as he had before being
13 charged. It also serves the non-punitive purpose of ensuring reappearances and protecting the
14 community from future harm. In other words, EHM regulates the defendant’s conduct while
15 at the same time not punishing him. Pretrial release on EHM does nothing to alter the
16 elements of the offense, the severity of the punishment, or the evidence that can be used to
17 prove the offense.

18
19 The second part of the Harris two-part test involves an analysis of whether the effect of
20 imposing presentencing EHM is so punitive as to overcome the intent that it not be punitive.

21 Determining whether a state has imposed a punishment can be “extremely difficult and
22 elusive of solution.” Harris, at 470, citing Kennedy v. Mendoza-Martinez, 372 U.S. 144, 168
23 S.Ct. 554, 9 L.Ed.2d 644 (1963). That a government action has a deterrent effect does not
24 automatically render the action punitive. Id. citing State v. McClendon, 131 Wn.2d 853, 866,
25 935 P.2d 1334 (Nor is an action punitive because the defendant perceives it to be so). Id.

1 When determining whether a defendant is constitutionally entitled to credit for
2 presentencing time spent subject to restrictive conditions, the court has recognized a clear
3 distinction between jail time and non-jail time. Harris at 471, citing In re. Personal Restraint
4 of Knapp, 102 Wn.2d 466, 471, 687 P.2d 1145 (1984).

5 The Harris court then stated:

6 In contrast, principles of equal protection and double jeopardy demand that all
7 defendants receive credit for time spent in incarceration prior to sentencing.
8 Rainier v. Smith, 83 Wn.2d 342, 351-52, 517 P.2d 949 (1974). Time in
9 incarceration includes mandatory time spent in a state mental hospital. See
10 Knapp, 102 Wn.2d at 475, 687 P.2d 1145 (“[L]ike confinement in a prison or jail,
11 a person committed to a mental hospital pursuant to a valid criminal conviction is
subject to massive curtailment of liberty.”) But see, Makal v. Arizona, 544 F.2d
1030, 1035 (9th Cir. 1976) (holding time spent in a state mental hospital was not
intended as “punishment for the commission of a crime” and, thus was not
confinement and did not require credit.)

12 Thus, for purposes of requiring credit for non-jail time, our case law reveals a
13 constitutional distinction between liberty restrictions equal to time spent in jail or
14 prison, see Knapp, 102 Wn.2d at 475, 687 P.2d 1145, and less substantial liberty
15 curtailments. see also United States v. Woods, 888 F.2d 653, 655 (10th Cir. 1989)
(holding a defendant is entitled to credit for time spent in custody only when the
custody imposed both a severe restriction of liberty and the punishment of
incarceration).

16 Because EHM is not punitive in purpose or effect, loss of credit for it therefore cannot
17 logically increase the severity of punishment assigned to the offense of conviction when
18 committed.

19 The 2015 amendment is not being retrospectively applied to the defendant, because the
20 “precipitating event” is the imposition of the defendant’s sentence, not the commission of the
21 underlying crime, or decision to release him to EHM.

22 Generally, statutes, particularly criminal statutes, operate prospectively to give fair
23 warning that a violation carries specific consequences. State v. Pillatos, 159 Wn.2d 459, 470,
24 150 P.3d 1130 (2007) see In re. Estate of Burns, 131 Wn.2d 104, 110, 928 P.2d 1094 (1997).

1 But if the changes to the statute do not alter the consequences of the crime then there is likely no
2 relevant lack of notice. Accord In re. Personal Restraint of Mota, 114 Wn.2d 465, 788 P.2d 538
3 (1990).

4 Pillatos goes on to conclude:

5 On a practical level, we consider a statute to be retroactive if the “triggering
6 event” for its application happened before the effective date of the statute. State
7 v. Belgarde, 119 Wn.2d 711, 722, 837 P.2d 599 (1992) (citing Aetna Life Ins. Co.
8 v. Wash. Life & Disability Ins. Guar. Ass’n, 83 Wn.2d 523, 535, 520 P.2d 162
9 (1974)). A statute is not retroactive merely because it applies to conduct that
10 predated its effective date. Instead, “[a] statute operates prospectively when the
11 precipitating event for operation of the statute occurs after enactment, even when
12 the precipitating event originated in a situation existing prior to enactment.”
13 Burns, 131 Wn.2d at 110-11, 928 P.2d 1094 (emphasis added). The act clearly
14 contemplates that either the entry of the plea or the trial is the precipitating event.

15 Thus, a statute is not retroactive merely because it applies to conduct that predated its
16 effective date or upsets expectations. Rather, the court must ask whether the new provision
17 attaches new legal consequences to events completed before its enactment.

18 Since pretrial EHM is not a legal consequence (punishment) for violating the offense for
19 which it was granted, application of an amendment to that statute at a later date (sentencing) is
20 not a retrospective change. See Pillatos, 159 Wn.2d at 470-71. It is a rule that determines how
21 EHM time will be calculated, making it analogous to the increased offender score calculations
22 already found to be beyond the reach of the *ex post facto* clause. The potential punishment – the
23 maximum penalties for committing the offense of conviction – have not changed. “It is well
24 established the mere risk an offender could receive a higher sentence under new procedures do
25 not violate the *ex post facto* clause. Pillatos, at 475. And in the present case, the defendant will
not receive a higher sentence under the procedural amendment, RCW 9.94A.505(7), because his
pretrial EHM was not punishment.

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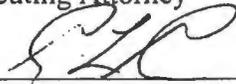
VI. STATE'S RECOMMENDATION:

The State is asking this court to sentence the defendant to the high end of the standard range, 162 months, without EHM credit.

The rest of the State's recommendation is standard and includes: \$500 CVPA, \$200 court costs, \$100 DNA fee, and restitution. There is an 36 month community custody requirement because manslaughter in the first degree is a serious violent offense under RCW 9.94A.030(45).

RESPECTFULLY SUBMITTED this 23rd day of March, 2016.

MARK LINDQUIST
Prosecuting Attorney

By: 

Gregory L. Greer
Deputy Prosecuting Attorney
WSB # 22936

glg

March 25 2016 12:28 PM

KEVIN STOCK
COUNTY CLERK
NO: 14-1-04212-6

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

STATE OF WASHINGTON	Plaintiff,	No. 14-1-04212-6
vs.		RESPONSE TO STATE'S SENTENCING BRIEF
SKYLAR NEMETZ	Defendant,	

**TO: THE CLERK OF THE COURT
AND TO: THE PROSECUTING ATTORNEY**

COMES NOW the above named Defendant, by and through his attorney of record,
MICHAEL AUSTIN STEWART, and submits this response to the State's Sentencing Brief.

I. STATEMENT OF FACTS AND PROCEDURAL POSTURE

The Statement of Facts set forth in the Defense's Sentencing Brief, submitted to this
Court on March 15, 2016, is hereby incorporated by reference as if fully set forth herein

II. STATEMENT OF THE ISSUES

1. Should the Court grant credit for pretrial time served on EHM?
2. Should the Court consider the defendant's youth as a factor to grant an exceptional sentence below the standard range?

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III. BRIEF ANSWERS

1. Yes. Denial of credit for pretrial time served on EHM has the effect of increasing the quantum of punishment imposed on the defendant.
2. Yes. Mr. Nemetz's youth at the time of the commission of the crime is a relevant factor in considering a downward departure from the standard sentencing range.

IV. MEMORANDUM OF LAW

1. **The Court should grant credit for time served on Electronic Home Monitoring, because not to would significantly increase the amount of time served by the Defendant.**

The State's reliance on CrR 3.2 is inapposite, because the Defense does not contend that EHM is or was an inappropriate condition of release. The matter before this Court focuses strictly upon whether the 2015 amendment to RCW 9.94A.505 should apply retroactively in this case. The salient analysis is whether the action's effect is to increase the quantum of punishment. See *State v. Calhoun*, 163 Wn. App. 153, 165, 257 P.3d 693 (2011) (quoting *State v. Ward*, 123 Wn.2d 488, 496, 869 P.2d 1062 (1994); *State v. Harris*, 171 Wn.2d 455, 256 P.3d 328 (2011)).

Here, as previously argued, the denial of credit for pretrial EHM time served would effectively increase the quantum of punishment. Mr. Nemetz has been confined by the Court since October 17, 2014, when he was booked into jail on the original charge, and then released to EHM on or about October 31, 2014. Prior to the amendment to the RCW, he would have received credit for the time served on EHM. Denying all credit for that time would negate approximately 16 months of the time he has served. Because the Department of Corrections calculates "good time" credit as approximately 1/3 of the sentence (except when otherwise prohibited by statute, such as time served on a firearms enhancement), this translates to

1 approximately 24 months of the sentence that this Court will impose. The effect of denying that
2 credit would therefore effectively increase Mr. Nemetz's sentence by approximately 24 months.

3 This is not an insignificant or *de minimis* impact. Even if the Court enters a sentence
4 within the standard range of 78-102 months (exclusive of the firearms enhancement), the
5 decision to deny the requested credit would effectively increase the sentence to 102-126 months
6 on this conviction.

7 Accordingly, this Court should hold that RCW 9.94A.505(7) must be inapplicable as to
8 Mr. Nemetz, and grant him credit for the time he has served on EHM. In the alternative, the
9 Court should grant credit for time served on EHM until the effective date of the amendment to
10 the aforementioned RCW.

11 **2. The Court should grant a downward departure from the standard sentencing**
12 **range in consideration of Mr. Nemetz's youth at the time of the offense.**

13 As the State points out, "in order to justify an exceptional sentence, a factor must be
14 sufficiently substantial and compelling to distinguish the crime in question from others in the
15 same category." State's Sentencing Brief, p 2 (quoting *State v. Ha'mim*, 132 Wn.2d 840, 940
16 P.2d 633 (1997) (internal quotation marks omitted). The State alleges, however, that the
17 Defendant's "youthfulness had no impact on the crime." *Id.* at p 3.

18 As noted throughout the *O'Dell* decision, more thoroughly discussed in the Defense's
19 original Sentencing Brief, "psychological and neurological studies showing that the parts of the
20 brain involved in behavior control continue to develop well into a person's 20s," and "[t]hese
21 studies reveal fundamental differences between adolescent and mature brains in the areas of risk
22 and consequence assessment, impulse control, tendency toward antisocial behaviors, and
23 susceptibility to peer pressure." *State v. O'Dell*, 183 Wn.2d 680, 691-92, 358 P.3d 359 (2015)
24 (internal quotations and citations omitted).
25

1 Although Mr. Nemetz's life did present some of the trappings of maturity (e.g. a member
2 of the US armed forces, married, living in his own apartment), many other facts elicited at trial
3 argue otherwise. Evidence and testimony established a marked immaturity in such matters as
4 prioritizing and handling finances, misuse of alcohol, and an impression of "invincibility" –
5 commonly associated with youth – as demonstrated by his careless handling of the firearm that
6 led to this case to begin with.

7 For these reasons, this Court should consider these and other factors arguing for Mr.
8 Nemetz's youth and relative immaturity when compared with older adults, and enter an
9 exceptional sentence below the standard range.

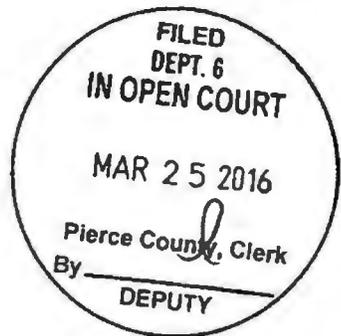
10 **V. CONCLUSION**

11 For the reasons stated above, this Honorable Court should grant Mr. Nemetz credit for
12 time served for all of his EHM time, and grant a downward departure from the standard
13 sentencing range due to his age, and the obvious impact it had on his behavior, which led to the
14 commission of this offense.

15 Respectfully submitted this 25th day of March, 2016.

16
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18 By: 
19 Michael Austin Stewart. WSBA# 23981
20 Attorney for Mr. Nemetz
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SUPERIOR COURT OF WASHINGTON FOR PIERCE COUNTY

STATE OF WASHINGTON,

vs.
SKYLAR NIKOLAS BEAR NEMETZ,

Plaintiff,

Defendant

CAUSE NO: 14-1-04212-6

WARRANT OF COMMITMENT
1) County Jail
2) Dept. of Corrections
3) Other Custody

MAR 28 2016

THE STATE OF WASHINGTON TO THE DIRECTOR OF ADULT DETENTION OF PIERCE COUNTY:

WHEREAS, Judgment has been pronounced against the defendant in the Superior Court of the State of Washington for the County of Pierce, that the defendant be punished as specified in the Judgment and Sentence/Order Modifying/Revoking Probation/Community Supervision, a full and correct copy of which is attached hereto

- [] 1. YOU, THE DIRECTOR, ARE COMMANDED to receive the defendant for classification, confinement and placement as ordered in the Judgment and Sentence. (Sentence of confinement in Pierce County Jail).
- 2. YOU, THE DIRECTOR, ARE COMMANDED to take and deliver the defendant to the proper officers of the Department of Corrections; and

YOU, THE PROPER OFFICERS OF THE DEPARTMENT OF CORRECTIONS, ARE COMMANDED to receive the defendant for classification, confinement and placement as ordered in the Judgment and Sentence. (Sentence of confinement in Department of Corrections custody).

[] 3. YOU, THE DIRECTOR, ARE COMMANDED to receive the defendant for classification, confinement and placement as ordered in the Judgment and Sentence. (Sentence of confinement or placement not covered by Sections 1 and 2 above).

By direction of the Honorable

Dated: March 25, 2016

Jack Nevin

JUDGE

KEVIN STOCK

JACK NEVIN

CLERK

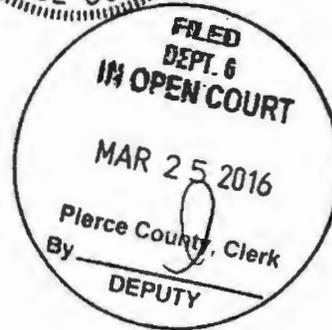
Melissa Jones

DEPUTY CLERK

CERTIFIED COPY DELIVERED TO SHERIFF

MAR 28 2016

Date By Melissa Jones Deputy



STATE OF WASHINGTON

ss:

County of Pierce

I, Kevin Stock, Clerk of the above entitled Court, do hereby certify that this foregoing instrument is a true and correct copy of the original now on file in my office. IN WITNESS WHEREOF, I hereunto set my hand and the Seal of Said Court this _____ day of _____.

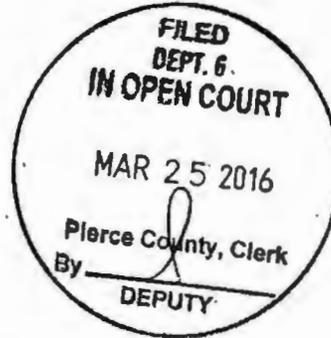
KEVIN STOCK, Clerk

By: _____ Deputy

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SUPERIOR COURT OF WASHINGTON FOR PIERCE COUNTY

STATE OF WASHINGTON,

Plaintiff,

CAUSE NO. 14-1-04212-6

MAR 28 2016

vs.

SKYLAR NIKOLAS HEAR NEMETZ

Defendant.

JUDGMENT AND SENTENCE (J/S)

- Prison
- RCW 9.94A.712/9.94A.507 Prison Confinement
- Jail One Year or Less
- First-Time Offender
- Special Sexual Offender Sentencing Alternative
- Special Drug Offender Sentencing Alternative
- Alternative to Confinement (ATC)
- Clerk's Action Required, para 4.5 (SDOSA), 4.7 and 4.8 (SSOSA) 4.15.2, 5.3, 5.6 and 5.8
- Juvenile Decline Mandatory Discretionary

SID: 27797913
DOB: 07/19/1994

I HEARING

1.1 A sentencing hearing was held and the defendant, the defendant's lawyer and the (deputy) prosecuting attorney were present.

II FINDINGS

There being no reason why judgment should not be pronounced, the court FINDS:

2.1 CURRENT OFFENSE(S): The defendant was found guilty on 03/03/2016 by [] plea [X] jury-verdict [] bench trial of:

COUNT	CRIME	RCW	ENHANCEMENT TYPE*	DATE OF CRIME	INCIDENT NO.
I	MANSLAUGHTER IN THE FIRST DEGREE WITH A FIREARM (D&A-FASE)	9A.32.060(1)(a)	FASE	10/16/2014	Lakewood Police Incident #142891132

* (F) Firearm, (D) Other deadly weapons, (V) VUCSA in a protected zone, (VH) Veh. Horn, See RCW 46.61.520, (JP) Juvenile present, (SM) Sexual Motivation, (SCF) Sexual Conduct with a Child for a Fee. See RCW 9.94A.533(8). (If the crime is a drug offense, include the type of drug in the second column.)

as charged in the Corrected Information

JUDGMENT AND SENTENCE (JS)
(Felony) (7/2007) Page 1 of 11

16-9-02581-2
0060

11423 0026 3/29/2016

- A special verdict/finding for use of firearm was returned on Count(s) IRCW 9.94A.602, 9.94A.533.
- Current offenses encompassing the same criminal conduct and counting as one crime in determining the offender score are (RCW 9.94A.589):
- Other current convictions listed under different cause numbers used in calculating the offender score are (list offense and cause number):

2.2 CRIMINAL HISTORY (RCW 9.94A.525):

NONE KNOWN OR CLAIMED

2.3 SENTENCING DATA:

COUNT NO.	OFFENDER SCORE	SERIOUSNESS LEVEL	STANDARD RANGE (not including enhancements)	PLUS ENHANCEMENTS	TOTAL STANDARD RANGE (including enhancements)	MAXIMUM TERM
I	0	XI	78 mos. to 102 mos.	60 mos.	138 mos. to 162 mos.	LIFE

2.4 EXCEPTIONAL SENTENCE. Substantial and compelling reasons exist which justify an exceptional sentence:

within below the standard range for Count(s) _____.

above the standard range for Count(s) _____.

The defendant and state stipulate that justice is best served by imposition of the exceptional sentence above the standard range and the court finds the exceptional sentence furthers and is consistent with the interests of justice and the purposes of the sentencing reform act.

Aggravating factors were stipulated by the defendant, found by the court after the defendant waived jury trial, found by jury by special interrogatory.

Findings of fact and conclusions of law are attached in Appendix 2.4. Jury's special interrogatory is attached. The Prosecuting Attorney did did not recommend a similar sentence.

2.5 ABILITY TO PAY LEGAL FINANCIAL OBLIGATIONS. The court has considered the total amount owing, the defendant's past, present and future ability to pay legal financial obligations, including the defendant's financial resources and the likelihood that the defendant's status will change. The court finds that the defendant has the ability or likely future ability to pay the legal financial obligations imposed herein. RCW 9.94A.753.

The following extraordinary circumstances exist that make restitution inappropriate (RCW 9.94A.753):

The following extraordinary circumstances exist that make payment of nonmandatory legal financial obligations inappropriate:

2.6 FELONY FIREARM OFFENDER REGISTRATION. The defendant committed a felony firearm offense as defined in RCW 9.41.010.

The court considered the following factors:

the defendant's criminal history.

whether the defendant has previously been found not guilty by reason of insanity of any offense in this state or elsewhere.

evidence of the defendant's propensity for violence that would likely endanger persons.

JUDGMENT AND SENTENCE (JS)

(Felony) (7/2007) Page 2 of 11

[] other: _____

[] The court decided the defendant [] should [] should not register as a felony firearm offender.

III JUDGMENT

3.1 The defendant is GUILTY of the Counts and Charges listed in Paragraph 2.1.

3.2 [] The court DISMISSES Counts _____ [] The defendant is found NOT GUILTY of Counts _____

IV. SENTENCE AND ORDER

IT IS ORDERED:

4.1 Defendant shall pay to the Clerk of this Court: (Pierce County Clerk, 930 Tacoma Ave #110, Tacoma WA 98402)

JASS CODE

RTNRJN	\$ _____	Restitution to: _____
	\$ _____	Restitution to: _____
	(Name and Address--address may be withheld and provided confidentially to Clerk's Office).	
PCV	\$ 500.00	Crime Victim assessment
DNA	\$ 100.00	DNA Database Fee
PUB	\$ _____	Court-Appointed Attorney Fees and Defense Costs
FRC	\$ 200.00	Criminal Filing Fee
FCM	\$ _____	Fine
WFR	\$ _____	Witness Costs
JFR	\$ _____	Jury Fee

OTHER LEGAL FINANCIAL OBLIGATIONS (specify below)

\$ _____ Other Costs for: _____

\$ _____ Other Costs for: _____

\$ 800⁰⁰ TOTAL

[X] The above total does not include all restitution which may be set by later order of the court. An agreed restitution order may be entered. RCW 9.94A.753. A restitution hearing:

[X] shall be set by the prosecutor.

[] is scheduled for _____

[] RESTITUTION. Order Attached

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[X] Restitution ordered above shall be paid jointly and severally with:

NAME of other defendant	CAUSE NUMBER	(Victim name)	(Amount-\$)
RJN			

[] The Department of Corrections (DOC) or clerk of the court shall immediately issue a Notice of Payroll Deduction. RCW 9.94A.7602, RCW 9.94A.760(8).

[X] All payments shall be made in accordance with the policies of the clerk, commencing immediately, unless the court specifically sets forth the rate herein: Not less than \$ Per CCO per month commencing Per CCO. RCW 9.94.760. If the court does not set the rate herein, the defendant shall report to the clerk's office within 24 hours of the entry of the judgment and sentence to set up a payment plan.

The defendant shall report to the clerk of the court or as directed by the clerk of the court to provide financial and other information as requested. RCW 9.94A.760(7)(b)

[] COSTS OF INCARCERATION. In addition to other costs imposed herein, the court finds that the defendant has or is likely to have the means to pay the costs of incarceration, and the defendant is ordered to pay such costs at the statutory rate. RCW 10.01.160.

COLLECTION COSTS The defendant shall pay the costs of services to collect unpaid legal financial obligations per contract or statute. RCW 36.18.190, 9.94A.780 and 19.16.500.

INTEREST The financial obligations imposed in this judgment shall bear interest from the date of the judgment until payment in full, at the rate applicable to civil judgments. RCW 10.82.090

COSTS ON APPEAL An award of costs on appeal against the defendant may be added to the total legal financial obligations. RCW 10.73.160.

4.1b ELECTRONIC MONITORING REIMBURSEMENT. The defendant is ordered to reimburse _____ (name of electronic monitoring agency) at _____ for the cost of pretrial electronic monitoring in the amount of \$ _____.

4.2 [X] DNA TESTING. The defendant shall have a blood/biological sample drawn for purposes of DNA identification analysis and the defendant shall fully cooperate in the testing. The appropriate agency, the county or DOC, shall be responsible for obtaining the sample prior to the defendant's release from confinement. RCW 43.43.754.

[] HIV TESTING. The Health Department or designee shall test and counsel the defendant for HIV as soon as possible and the defendant shall fully cooperate in the testing. RCW 70.24.340.

4.3 NO CONTACT
The defendant shall not have contact with Victim's family including, but not limited to, personal, verbal, telephonic, written or contact through a third party for life years (not to exceed the maximum statutory sentence).

[] Domestic Violence No-Contact Order, Antiharassment No-Contact Order, or Sexual Assault Protection Order is filed with this Judgment and Sentence.

4.4 OTHER: Property may have been taken into custody in conjunction with this case. Property may be returned to the rightful owner. Any claim for return of such property must be made within 90 days. After 90 days, if you do not make a claim, property may be disposed of according to law.

Empty rectangular box for notes or details regarding property return.

4.4a Property may have been taken into custody in conjunction with this case. Property may be returned to the rightful owner. Any claim for return of such property must be made within 90 days unless forfeited by agreement in which case no claim may be made. After 90 days, if you do not make a claim, property may be disposed of according to law.

4.4b BOND IS HEREBY EXONERATED

4.5 CONFINEMENT OVER ONE YEAR. The defendant is sentenced as follows:

(a) CONFINEMENT. RCW 9.94A.589. Defendant is sentenced to the following term of total confinement in the custody of the Department of Corrections (DOC):

102 months on Count I _____ months on Count _____
_____ months on Count _____ months on Count _____
_____ months on Count _____ months on Count _____

A special finding/verdict having been entered as indicated in Section 2.1, the defendant is sentenced to the following additional term of total confinement in the custody of the Department of Corrections:

60 months on Count No I _____ months on Count No _____
_____ months on Count No _____ months on Count No _____
_____ months on Count No _____ months on Count No _____

Sentence enhancements in Counts _ shall run
[] concurrent [] consecutive to each other.
Sentence enhancements in Counts I shall be served
 flat time [] subject to earned good time credit

A Actual number of months of total confinement ordered is: 162 months

(Add mandatory firearm, deadly weapons, and sexual motivation enhancement time to run consecutively to other counts, see Section 2.3, Sentencing Data, above).

[] The confinement time on Count(s) _____ contain(s) a mandatory minimum term of _____.

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CONSECUTIVE/CONCURRENT SENTENCES. RCW 9.94A.589. All counts shall be served concurrently, except for the portion of those counts for which there is a special finding of a firearm, other deadly weapon, sexual motivation, VUCSA in a protected zone, or manufacture of methamphetamine with juvenile present as set forth above at Section 2.3, and except for the following counts which shall be served consecutively: _____

The sentence herein shall run consecutively to all felony sentences in other cause numbers imposed prior to the commission of the crime(s) being sentenced. The sentence herein shall run concurrently with felony sentences in other cause numbers imposed after the commission of the crime(s) being sentenced except for the following cause numbers. RCW 9.94A.589: _____

Confinement shall commence immediately unless otherwise set forth here: _____

4.6 (c) The defendant shall receive credit for time served prior to sentencing if that confinement was solely under this cause number. RCW 9.94A.505. The time served shall be computed by the jail unless the credit for time served prior to sentencing is specifically set forth by the court: 37 days credit

4.6 [] COMMUNITY PLACEMENT (pre 7/1/00 offenses) is ordered as follows:

Count _____ for _____ months;

Count _____ for _____ months;

Count _____ for _____ months;

[X] COMMUNITY CUSTODY (To determine which offenses are eligible for or required for community custody see RCW 9.94A.701)

The defendant shall be on community custody for:

Count(s) I 36 months for Serious Violent Offenses

Count(s) _____ 18 months for Violent Offenses

Count(s) _____ 12 months (for crimes against a person, drug offenses, or offenses involving the unlawful possession of a firearm by a street gang member or associate)

Note: combined term of confinement and community custody for any particular offense cannot exceed the statutory maximum. RCW 9.94A.701.

(B) While on community placement or community custody, the defendant shall: (1) report to and be available for contact with the assigned community corrections officer as directed; (2) work at DOC-approved education, employment and/or community restitution (service); (3) notify DOC of any change in defendant's address or employment; (4) not consume controlled substances except pursuant to lawfully issued prescriptions; (5) not unlawfully possess controlled substances while in community custody; (6) not own, use, or possess firearms or ammunition; (7) pay supervision fees as determined by DOC; (8) perform affirmative acts as required by DOC to confirm compliance with the orders of the court; (9) abide by any additional conditions imposed by DOC under RCW 9.94A.704 and .706 and (10) for sex offenses, submit to electronic monitoring if imposed by DOC. The defendant's residence location and living arrangements are subject to the prior approval of DOC while in community placement or community custody.

Community custody for sex offenders not sentenced under RCW 9.94A.712 may be extended for up to the statutory maximum term of the sentence. Violation of community custody imposed for a sex offense may result in additional confinement.

JUDGMENT AND SENTENCE (JS)

(Felony) (7/2007) Page 6 of 11

0031
11423
13/29/2016

The court orders that during the period of supervision the defendant shall:

consume no alcohol.

have no contact with: _____

remain within outside of a specified geographical boundary, to wit: _____

not serve in any paid or volunteer capacity where he or she has control or supervision of minors under 13 years of age

participate in the following crime-related treatment or counseling services: _____

undergo an evaluation for treatment for domestic violence substance abuse

mental health anger management and fully comply with all recommended treatment.

comply with the following crime-related prohibitions: _____

Other conditions: _____

For sentences imposed under RCW 9.94A.702, other conditions, including electronic monitoring, may be imposed during community custody by the Indeterminate Sentence Review Board, or in an emergency by DOC. Emergency conditions imposed by DOC shall not remain in effect longer than seven working days.

Court Ordered Treatment: If any court orders mental health or chemical dependency treatment, the defendant must notify DOC and the defendant must release treatment information to DOC for the duration of incarceration and supervision. RCW 9.94A.562.

PROVIDED: That under no circumstances shall the total term of confinement plus the term of community custody actually served exceed the statutory maximum for each offense

4.7 WORK ETHIC CAMP. RCW 9.94A.690, RCW 72.09.410. The court finds that the defendant is eligible and is likely to qualify for work ethic camp and the court recommends that the defendant serve the sentence at a work ethic camp. Upon completion of work ethic camp, the defendant shall be released on community custody for any remaining time of total confinement, subject to the conditions below. Violation of the conditions of community custody may result in a return to total confinement for the balance of the defendant's remaining time of total confinement. The conditions of community custody are stated above in Section 4.6.

4.8 OFF LIMITS ORDER (known drug trafficker) RCW 10.66.020. The following areas are off limits to the defendant while under the supervision of the County Jail or Department of Corrections: _____

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DONE in Open Court and in the presence of the defendant this date: March 25, 2016

JUDGE Jack Nevin
Print name Jack Nevin **JACK NEVIN**

[Signature]
Deputy Prosecuting Attorney
Print name: Jared Auscener
WSB # 32719

[Signature]
Attorney for Defendant
Print name: Michael Stewart
WSB # 23981

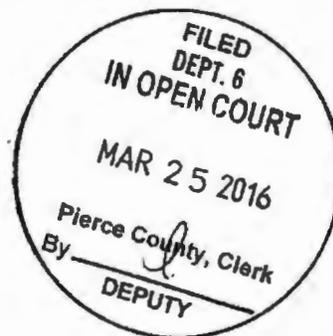
[Signature]
Defendant
Print name: Skylar Norrstr

Voting Rights Statement: I acknowledge that I have lost my right to vote because of this felony conviction. If I am registered to vote, my voter registration will be cancelled.

My right to vote is provisionally restored as long as I am not under the authority of DOC (not serving a sentence of confinement in the custody of DOC and not subject to community custody as defined in RCW 9.94A.030). I must re-register before voting. The provisional right to vote may be revoked if I fail to comply with all the terms of my legal financial obligations or an agreement for the payment of legal financial obligations.

My right to vote may be permanently restored by one of the following for each felony conviction: a) a certificate of discharge issued by the sentencing court, RCW 9.94A.637; b) a court order issued by the sentencing court restoring the right, RCW 9.92.066; c) a final order of discharge issued by the indeterminate sentence review board, RCW 9.96.050; or d) a certificate of restoration issued by the governor, RCW 9.96.020. Voting before the right is restored is a class C felony, RCW 29A.84.660. Registering to vote before the right is restored is a class C felony, RCW 29A.84.140.

Defendant's signature: [Signature]



APPENDIX "F"

The defendant having been sentenced to the Department of Corrections for a:

- sex offense
- serious violent offense
- assault in the second degree
- any crime where the defendant or an accomplice was armed with a deadly weapon
- any felony under 69.50 and 69.52

The offender shall report to and be available for contact with the assigned community corrections officer as directed:

The offender shall work at Department of Corrections approved education, employment, and/or community service,

The offender shall not consume controlled substances except pursuant to lawfully issued prescriptions:

An offender in community custody shall not unlawfully possess controlled substances,

The offender shall pay community placement fees as determined by DOC:

The residence location and living arrangements are subject to the prior approval of the department of corrections during the period of community placement.

The offender shall submit to affirmative acts necessary to monitor compliance with court orders as required by DOC.

The Court may also order any of the following special conditions:

(I) The offender shall remain within, or outside of, a specified geographical boundary: _____

(II) The offender shall not have direct or indirect contact with the victim of the crime or a specified class of individuals: Per CCO & judgment & sentence

(III) The offender shall participate in crime-related treatment or counseling services, Per CCO

(IV) The offender shall not consume alcohol; _____

(V) The residence location and living arrangements of a sex offender shall be subject to the prior approval of the department of corrections; or

(VI) The offender shall comply with any crime-related prohibitions. Per CCO

(VII) Other: _____

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IDENTIFICATION OF DEFENDANT

SID No 27797913
(If no SID take fingerprint card for State Patrol)

Date of Birth 07/19/1994

FBI No 49387RG8

Local ID No 20142912012

PCN No 541563890

Other

Alias name, SSN, DOB: NONE KNOWN NOR CLAIMED

Race:		Ethnicity:		Sex:	
<input type="checkbox"/>	Asian/Pacific Islander	<input type="checkbox"/>	Black/African-American	<input checked="" type="checkbox"/>	Caucasian
<input type="checkbox"/>	Native American	<input type="checkbox"/>	Other: :	<input checked="" type="checkbox"/>	Non-Hispanic
				<input checked="" type="checkbox"/>	Male
				<input type="checkbox"/>	Female

FINGERPRINTS

POOR QUALITY ORIGINAL

Left four fingers taken simultaneously

Left Thumb



Right Thumb

Right four fingers taken simultaneously



I attest that I saw the same defendant who appeared in court on this document affix his or her fingerprints and signature thereto. Clerk of the Court, Deputy Clerk, _____ Dated: _____

DEFENDANT'S SIGNATURE: *[Handwritten Signature]*

DEFENDANT'S ADDRESS: _____

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3/29/2016

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5/22/2018



SUPERIOR COURT OF WASHINGTON FOR PIERCE COUNTY

STATE OF WASHINGTON,

Plaintiff,

CAUSE NO. 14-1-04212-6

vs.

SKYLAR NIKOLAS BEAR NEMETZ,

MOTION AND ORDER CORRECTING JUDGMENT AND SENTENCE

Defendant.

CLERKS ACTION REQUIRED

PCN: 541284672

THIS MATTER coming on regularly for hearing before the above-entitled court on the Motion of the Deputy Prosecuting Attorney for Pierce County, Washington, for an order correcting Judgment and Sentence heretofore granted the above-named defendant on March 25, 2016, pursuant to defendant's plea of guilty to the charge(s) of MANSLAUGHTER IN THE FIRST DEGREE, as follows:

1) That Page 6 of the Judgment and Sentence, 4.5 (c) reflects The time served shall be computed by the jail unless the credit for time served prior to sentencing is specifically set forth by the court: 37 days credit and should note The time served shall be computed by the jail unless the credit for time served prior to sentencing is specifically set forth by the court: 526 days credit;

2) That all other terms and conditions of the Judgment and Sentence are to remain in full force and effect as if set forth in full herein; and the court being in all things duly advised, Now, Therefore, It is hereby

ORDERED, ADJUDGED and DECREED that the Judgment and Sentence granted the defendant on March 25, 2016, be and the same is hereby corrected as follows:

1) Page 6 of the Judgment and Sentence, 4.5 (c) is corrected as follows:

a) The time served shall be computed by the jail unless the credit for time served prior to sentencing is specifically set forth by the court: 37 days credit is deleted; and

b) The time served shall be computed by the jail unless the credit for time served prior to sentencing is specifically set forth by the court: 526 days credit is inserted in its stead.

2) All other terms and conditions of the original Judgment and Sentence shall remain in full force and effect as if set forth in full herein. IT IS FURTHER

ORDERED that the Clerk of the Court shall attach a copy of this order to the judgment filed on March 25, 2016 so that any one obtaining a certified copy of the judgment will also obtain a copy of this order.

DONE IN OPEN COURT this 18th day May, 2018. NUNC PRO TUNC to March 25, 2016.

Presented by:

[Handwritten signature]

JARED AUSSERER
Deputy Prosecuting Attorney
WSB# 32719

Approved as to form and Notice
Of Presentation Waived:

Approved via email

Michael A Stewart
Attorney for Defendant
WSB# 23981

shs

Jack Nevin

JUDGE / ~~COMMISSIONER~~
JACK NEVIN



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March 28 2016 9:45 AM

KEVIN STOCK
COUNTY CLERK
NO: 14-1-04212-6

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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

IN AND FOR THE COUNTY OF PIERCE

STATE OF WASHINGTON,)	
)	
Plaintiff,)	NO. 14-1-04212-6
vs.)	
)	
SKYLAR NEMETZ,)	NOTICE OF APPEAL
)	TO COURT OF APPEALS
Defendant.)	

TO: THE STATE OF WASHINGTON and MARK LINDQUIST, Prosecuting Attorney for Pierce County.

YOU, AND EACH OF YOU, will please take notice that the above defendant seeks review by Division II of the Court of Appeals of the judgment of conviction and/or sentence rendered against him on the 25th day of March, 2016.

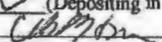
DATED this 28th day of Mar, 2016.



 Michael Austin Stewart, WSBA # 23981
 Attorney for Defendant

I, Brandon Snyder, a person over 18 years of age, served

Mark Lindquist, Prosecuting Attorney for Pierce County

a true copy of the document to which this certification is affixed, on: March 28, 2016.
 Service was made by delivery to _____ (ABC Legal Messengers Inc.); _____ (DAC Staff Person Delivery);
 (Depositing in the mails of the United States of America, properly stamped and addressed).


 Signature

September 11 2018 1:59 PM

KEVIN STOCK
COUNTY CLERK
NO: 14-1-04212-6

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON,

Respondent,

v.

SKYLAR NEMETZ,

Appellant.

No. 48788-8-II

MANDATE

Pierce County Cause No.
14-1-04212-6

Court Action Required

The State of Washington to: The Superior Court of the State of Washington
in and for Pierce County

This is to certify that the opinion of the Court of Appeals of the State of Washington, Division II, filed on April 10, 2018 became the decision terminating review of this court of the above entitled case on September 5, 2018. Accordingly, this cause is mandated to the Superior Court from which the appeal was taken for further proceedings in accordance with the attached true copy of the opinion.

Court Action Required: The sentencing court or criminal presiding judge is to place this matter on the next available motion calendar for action consistent with the opinion.



IN TESTIMONY WHEREOF, I have hereunto set
my hand and affixed the seal of said Court at
Tacoma, this 11th day of September, 2018.


Derek M. Byrne
Clerk of the Court of Appeals,
State of Washington, Div. II

CASE #: 48788-8-II
State of Washington, Respondent v. Skylar Nemetz, Appellant

Hon. Jack Nevin
Hon. Elizabeth Martin
Michael Stewart

Jodi R. Backlund
Backlund & Mistry
PO Box 6490
Olympia, WA 98507-6490
backlundmistry@gmail.com

Michelle Hyer
Pierce County Prosecutor
930 Tacoma Ave S Rm 946
Tacoma, WA 98402-2102
PCpatcecf@co.pierce.wa.us

WSP Identification & Criminal History Section
ATTN: Quality Control Unit
PO Box 42633
Olympia, WA 98504-2633

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

April 10, 2018

STATE OF WASHINGTON,

Respondent,

v.

SKYLAR NIKOLAS BEAR NEMETZ,

Appellant.

No. 48788-8-II

UNPUBLISHED OPINION

BJORGEN, J. — Skylar Nikolas Bear Nemetz mishandled a firearm that discharged and killed his wife. He was charged with first degree murder, but the jury, instead, found him guilty of first degree manslaughter. The jury also returned a special verdict on count I, unanimously agreeing that Nemetz was armed with a firearm when he committed the crime. Due to the firearm enhancement, Nemetz was sentenced to an additional five years. In addition, the sentencing court did not award Nemetz credit for time served on electronic home monitoring (EHM) because the legislature revised former RCW 9.94A.505 (2010) to preclude violent offenders from receiving credit for presentence time served on EHM.

Nemetz appeals his sentence, arguing first that there was insufficient evidence for a rational trier of fact to find that he was “armed with a firearm” within the meaning of former RCW 9.94A.533 (2013). Second, he argues the firearm and deadly weapon sentence enhancement provisions found in former RCW 9.94A.533 should not be applied to an unintentional crime such as first degree manslaughter. To support his argument, he asks us to resort to independent state constitutional grounds to conclude that article I, section 24 of the Washington Constitution is more protective than the Second Amendment to the United States Constitution. Third, Nemetz argues the 2015 amendments to former RCW 9.94A.505, which

formerly provided credit for time served on EHM, violate the federal and state ex post facto clauses as applied to him. Finally, he argues we should decline to award appellate costs.

We hold there was sufficient evidence that Nemetz was armed with a firearm, and we hold that the firearm enhancement applies to both intentional and unintentional felonies. We conclude also that the 2015 amendments to former RCW 9.94A.505 violated the state and federal ex post facto clauses in their application to Nemetz. Finally, we waive appellate costs.

Therefore, we affirm the superior court's imposition of the firearm sentencing enhancement. However, we reverse Nemetz's sentence to the extent it does not credit him for time served on EHM and remand to the superior court to provide Nemetz with credit for time served on EHM.

FACTS

On October 16, 2014, Nemetz mishandled a firearm that discharged and killed Tarrah Danielle Nemetz,¹ his wife.

Nemetz was taken into custody after the shooting. According to a statement he voluntarily provided, Nemetz bought Danielle a DPMS AR-15 rifle for her birthday and left it with her for security while he was gone on a military training operation. When he returned home from the operation, he "thought to [him]self . . . I'll go unload the rifle and I'll put it away because she doesn't need it anymore." Br. of Resp't, App'x. A, at 6.

At trial, Nemetz testified, "I went into the room to put this rifle away. I picked it up, and not paying attention to where that weapon was pointing . . . I picked up the weapon that is in a

¹ The record and briefing refer to the decedent as Danielle or Dani. Because the appellant and the decedent share the same last name, this opinion will refer to the decedent as Danielle. No disrespect intended.

state as the same way I left it, unloaded to my knowledge . . . [and] I was standing directly behind Danielle.” Verbatim Report of Proceedings (VRP) (Feb. 11, 2016) at 74. He continued,

I was trying to clear the weapon and I didn’t do it correctly, and I made a terrible mistake and the weapon went off in my hands and it struck the back of my wife and hit her in the head and she died.

VRP (Feb. 11, 2016) at 75. Nemetz told the police he must have switched the safety selector from safe to fire, but stated he did not remember doing so. He testified, stating, “I don’t recall pulling the trigger but I know the trigger had to be pulled for the weapon to go off.” *Id.* at 76.

Nemetz stated that he shot Danielle “on accident.” *Id.* at 104.

Thomas Rodriguez, Chief of Police for the town of Steilacoom, testified he “was one of the first officers” who responded to the scene. VRP (Jan. 21, 2016) at 39. Rodriguez testified that he and two officers entered Nemetz’s apartment and found a young, white female, unresponsive, sitting in a chair with her arms at her side and a large pool of blood beneath her. Rodriguez checked her pulse, but could not detect one. While he was clearing the apartment, he noticed a used shell casing on the floor, which is typically used in an AR-15 or M47 assault rifle. Rodriguez testified Nemetz was making sobbing sounds and said, “I don’t know why I can’t cry.” *Id.* at 47. Rodriguez also testified that “Nemetz . . . stated, quote, ‘It was an accident . . . I’m a bad man, I’m a bad man.’” *Id.*

Mark Holthaus, an officer on the scene, testified that when he first encountered Nemetz, he seemed “frantic,” and he had blood splatter on his shirt. VRP (Jan. 21, 2016) at 73-75. Another officer on the scene, Darrel Moore, testified that Nemetz told him “he took the rifle magazine out and then he was making it safe and for some reason he shook the rifle and it fired.” VRP (Feb. 3, 2016) at 35. “I specifically quote him saying, ‘I shook—I just shook it and it shot her.’” *Id.*

Detective Darin Sale testified that they found an “AR 15-style long gun . . . in the closet.” VRP (Jan. 25, 2016) at 94. He testified that the rifle “was in . . . fire position and the bolt was closed.” VRP (Jan. 26, 2016) at 130. Johan Schoenan, a firearms forensics examiner, testified that “there was nothing wrong with the gun,” it “functioned as it was made by the manufacturer.” VRP (Feb. 3, 2016) at 60. He testified he performed a “trigger pull analysis and that was normal for this type of gun.” *Id.* He testified he performed a “drop test” on the rifle and determined that “it [would] not fire without pulling the trigger.” *Id.* at 64-65. He determined that the rifle’s safety mechanisms were working properly. *Id.* at 62-63. Finally, Schoenan determined that the characteristics of the casing found at the scene matched characteristics of the casings obtained from test firing Nemetz’s rifle. Dr. Thomas Clark testified that he performed an autopsy on the decedent and determined the “[d]eath was due to a gunshot wound to the head.” VRP (Feb. 3, 2016) at 117. He “classified it as homicide.” *Id.*

On October 30, 2014, the superior court issued an order establishing conditions of release pending trial pursuant to CrR 3.2. On October 31, Nemetz posted the required bail amount, agreed to the conditions of release included in the order, and was thereafter placed on EHM.

On December 31, 2015, the State charged Nemetz by a corrected information with first degree murder. Nemetz’s trial began on January 21, 2016. On March 3, the jury found Nemetz not guilty of first degree murder but, instead, found him guilty of the lesser included offense of first degree manslaughter. The jury also returned a special verdict form on count I; they were in unanimous agreement that Nemetz was armed with a firearm when he committed the crime.

Nemetz was sentenced to 102 months on count I, first degree manslaughter. The court also sentenced him to an additional 60 months based on the special verdict. The total sentence

amounted to 162 months of confinement, and the court granted 37 days of credit for time served under former RCW 9.94A.505.

Nemetz appeals.

ANALYSIS

I. FIREARM ENHANCEMENT

Nemetz argues that there was insufficient evidence to prove that he was “armed with a firearm” within the meaning of former RCW 9.94A.533(3). We disagree.

A. Sufficiency of the Evidence

Evidence is sufficient to support a conviction or sentencing enhancement if, viewed in the light most favorable to the State, it permits any rational trier of fact to find the essential elements of the crime beyond a reasonable doubt. *State v. McPherson*, 186 Wn. App. 114, 117, 344 P.3d 1283 (2015). A claim of insufficiency admits the truth of the State’s evidence and all reasonable inferences that a trier of fact can draw from that evidence. *State v. Notaro*, 161 Wn. App. 654, 671, 255 P.3d 774 (2011). All reasonable inferences from the evidence must be drawn in favor of the verdict and interpreted strongly against the defendant. *Id.* Circumstantial evidence is no less reliable than direct evidence. *Id.* We must “defer to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence.” *State v. Thomas*, 150 Wn.2d 821, 874-75, 83 P.3d 970 (2004).

Former RCW 9.94A.533(3) provides, in relevant part:

The following additional times shall be added to the standard sentence range for felony crimes . . . if the offender . . . was *armed with a firearm* as defined in [former] RCW 9.41.010 [2013] and the offender is being sentenced for one of the crimes listed in this subsection as eligible for any firearm enhancements based on the classification of the completed felony crime.

(Emphasis added.) Former RCW 9.41.010(9) (2013) defines “firearm” as “a weapon or device from which a projectile or projectiles may be fired by an explosive such as gunpowder.”

Although former RCW 9.41.010 does not define the term “armed,” in *State v. Easterlin*, 159 Wn.2d 203, 205-06, 149 P.3d 366 (2006), the court developed a two-pronged approach to determine whether a defendant was “armed” within the meaning of the statute. First, “[t]he weapon must have been readily accessible and easily available.” *Id.* Second, “there must have been some connection between the defendant, the weapon, and the crime.” *Id.* Our Supreme Court has construed the term “armed” similarly in subsequent cases. *See, e.g., State v. O’Neal*, 159 Wn.2d 500, 503-04, 150 P.3d 1121 (2007) (quoting *State v. Schelin*, 147 Wn.2d 562, 575-76, 55 P.3d 632 (2002)); *State v. Brown*, 162 Wn.2d 422, 431, 173 P.3d 245 (2007).

For a firearm sentencing enhancement to apply, there must be a nexus between “the nature of the crime, the type of weapon, and the circumstances under which the weapon is found.” *Brown*, 162 Wn.2d at 431 (quoting *Schelin*, 147 Wn.2d at 570). The State may punish a defendant for using a weapon in a commission of a crime because a weapon can turn a nonviolent crime into a violent one, increasing the likelihood of death or injury. *State v. Gurske*, 155 Wn.2d 134, 138-39, 118 P.3d 333 (2005). Nevertheless, “the connection between the weapon, the defendant, and the crime is definitional, not an essential element of the crime.” *Easterlin*, 159 Wn.2d at 206. *Easterlin* held that “the connection is merely a component of what the State must prove to establish that a particular defendant was armed while committing a particular crime.” *Id.*

Nemetz argues that the State must prove that he intended to use the firearm for “offensive or defensive purposes” and that the State failed to prove that he intended to use the firearm for

those purposes. Br. of Appellant at 10. He directs us to *O'Neal*, 159 Wn.2d 500 to support his argument.

In *O'Neal*, our Supreme Court stated, “‘A defendant is ‘armed’ when he or she is within proximity of an easily and readily available deadly weapon for offensive or defensive purposes and when a nexus is established between the defendant, the weapon, and the crime.’” *O'Neal*, 159 Wn.2d at 504 (quoting *Schelin*, 147 Wn.2d at 575-76). When executing a valid search warrant, the officers in *O'Neal* found considerable evidence of drug use and manufacturing and seized more than 20 guns, including weapons from two gun safes, one locked and one unlocked, a loaded rifle in one bedroom, and a loaded semiautomatic pistol under a mattress in a different bedroom. *Id.* at 503. The court held, “The defendant does not have to be armed at the moment of arrest to be armed for purposes of the firearms enhancement.” *Id.* at 504. The State’s theory that an AR-15 leaning against a wall and the pistol under a mattress were easily accessible and readily available to protect the continuing drug production operation provided a sufficient nexus for a jury to find the defendants were armed. *Id.* at 504-05.

For two reasons, *O'Neal* does not support Nemetz’s argument that the State must prove he intended to use the rifle for offensive or defensive purposes. First, *O'Neal* involved constructive possession, while Nemetz actually possessed the rifle used to kill Danielle. Second, *O'Neal* by its terms does not require the claimed showing of intent. Instead, *O'Neal* requires that the defendant be “within proximity of an easily and readily available deadly weapon for offensive or defensive purposes.” *Id.* at 503-04. Reading this to require intent would strain its terms and would raise a contradiction with *Easterlin*, which required the firearm to be “readily accessible and easily available” for use, but which did not require intent. 159 Wn.2d at 206.

In this case, Nemetz recklessly possessed and fired the weapon. The AR-15 that killed Danielle was obviously a firearm as contemplated under former RCW 9.41.010(9). Nemetz testified that he decided to put the rifle away, picked it up, tried to clear it, and it accidentally discharged. The rifle was “readily accessible and easily available” for Nemetz’s use, which is all that is needed to meet the first prong outlined in *Easterlin*, 159 Wn.2d at 206. Further, there was a clear nexus “between the defendant, the weapon, and the crime,” which satisfies the second prong. *Id.* The record contains ample evidence from which the trier of fact could find Nemetz was armed and recklessly shot Danielle. Nemetz testified the “weapon went off in my hands.” VRP (Feb. 11, 2016) at 75. At trial, he admitted that he shot Danielle “on accident.” *Id.* at 104. His trial testimony alone is more than sufficient for the jury to find a connection between Nemetz and the weapon. Nemetz admitted to mishandling the firearm, which resulted in the crime. Accordingly, we hold Nemetz was “armed” with a firearm under former RCW 9.94A.533(3).²

Consequently, there was sufficient evidence to support the sentencing enhancement.

B. Firearm Enhancement for Unintentional Crimes

Nemetz argues that the state constitutional right to bear arms precludes the imposition of a firearm enhancement for unintentional criminal conduct. To support this argument, he asks us to resort to independent state constitutional grounds. Nemetz argues that we must undertake an analysis under *State v. Gunwall*, 106 Wn.2d 54, 720 P.2d 808 (1986), to determine whether

² The other essential elements of former RCW 9.94A.533(3) were also present. Nemetz was convicted of first degree manslaughter under RCW 9A.32.060. First degree manslaughter is a class A felony. RCW 9A.32.060(2). Former RCW 9.94A.533(3)(a) provides a sentencing enhancement of “[f]ive years for any felony defined under any law as a class A felony.” The judge sentenced him to an additional five years of confinement.

article I, section 24 of the Washington Constitution provides broader protections than the Second Amendment of the United States Constitution.³ For the following reasons, we disagree.

1. Independent State Constitutional Grounds

Constitutional issues are reviewed de novo. *State v. Jorgenson*, 179 Wn.2d 145, 150, 312 P.3d 960 (2013). The Washington Constitution states that “[t]he right of the individual citizen to bear arms in defense of himself, or the State, shall not be impaired.” WASH. CONST. art. I, § 24. The Supreme Court has held, though, that while the “right to bear firearms in his home is constitutionally protected, that right ceases when the purpose of bearing firearms is to further the commission of a crime.” *Schelin*, 147 Wn.2d at 575. In reaching this holding the court cited with approval the decision in *State v. Sabala*, 44 Wn. App. 444, 449, 723 P.2d 5 (1986), which held that “[t]he right [to bear arms] does not extend to one who is in the process of committing a crime.” Consistently with these decisions, Justice Chambers observed in his concurrence in *Gurske*, 155 Wn.2d at 151, that “the use of a weapon in the commission of a crime is not a constitutionally protected activity.”

Apart from these more general principles, the Supreme Court held in *Jorgenson* that under article I, section 24, firearm rights are subject to regulation that is “‘reasonably necessary to protect public safety or welfare, and substantially related to legitimate ends sought.’” 179 Wn.2d at 156 (quoting *City of Seattle v. Montana*, 129 Wn.2d 583, 594, 919 P.2d 1218 (1996)). Through its at least theoretical deterrent effect, the application of the firearm enhancement to unintentional offenses meets these requirements. Thus, *Jorgenson* makes clear that application of the firearm enhancement to Nemetz’s offense does not offend article I, section 24.

³ Nemetz included a *Gunwall* analysis in his briefing.

Nemetz would use article I, section 24 to prevent application of the firearm enhancement to his conviction of manslaughter, because it is an unintentional crime. It is inescapable, though, that the enhancement was based on his use of a firearm in carrying out the crime of manslaughter. Under *Schelin, Sabala, and Gurske*, that use of a firearm is not protected by the state constitution. Even apart from these principles, the holding of *Jorgenson* would allow the firearm enhancement to be applied to unintentional offenses without violating article I, section 24. Thus, under existing case law, the firearm enhancement may be applied to unintentional conduct under article I, section 24, and we need not engage in a *Gunwall* analysis.

2. Application of Firearm Sentencing Enhancements To Unintentional Conduct

Firearm enhancements may be applied to unintentional criminal conduct. In *State v. Theilken*, 102 Wn.2d 271, 684 P.2d 709 (1984), Theilken, the victim, and a friend were all visiting at the friend's house. *Id.* at 273. Theilken had his rifle with him, and when the friend left the room a shot was fired, leaving the victim with a gunshot wound to the head. *Id.* Theilken was charged by information with the crime of first degree manslaughter. *Id.* There, as here, Theilken argued that the firearm enhancement statute was not intended to apply to "unintentional" crimes. *Id.* The court determined that the firearm enhancement statute clearly applied to "any felony" committed while armed with a firearm. *Id.* at 275. Moreover, the phrase "any felony" included all crimes designated as felonies by the legislature, regardless of the underlying requisite mental state. *Id.* at 277. Accordingly, our Supreme Court held firearm and deadly weapon sentence enhancement provisions may be applied to unintentional crimes such as first degree manslaughter. *Id.* at 276.

Although *Theilken* addressed a former version of Washington's firearm enhancement statute, the reasoning in this case can be drawn in parallel. Former RCW 9.94A.533(3) applies to

“*felony* crimes . . . if the offender . . . was armed with a firearm.” (Emphasis added.) ““Felony” means *any felony* offense under the laws of this state or any federal or out-of-state offense comparable to a felony offense under the laws of this state.” Former RCW 9A.010(6) (emphasis added). From this language, it is clear that the legislature did not intend to restrict the firearm enhancement to felonies having an intentional mental state, since some felonies require a lesser showing of recklessness or criminal negligence. *See, e.g.*, RCW 9A.32.060 (first degree manslaughter; recklessness); RCW 9A.32.070 (second degree manslaughter; criminal negligence); RCW 9A.36.031(d), (f) (third degree assault; criminal negligence).

The phrase “any felony” includes all crimes designated as felonies, regardless of the underlying requisite mental state. *Theilken*, 102 Wn.2d at 277. Thus, we conclude that the legislature intended to include both intentional and unintentional felonies when it expressly applied the firearm sentence enhancement provisions to “any felony” committed while armed with a firearm.

II. EX POST FACTO PROTECTIONS

Nemetz argues the 2015 amendments to former RCW 9.94A.505 (“2015 amendments”) violate both the state and federal ex post facto clauses as applied to him. We agree.

We review the alleged violation of federal and state ex post facto clauses de novo. *State v. Pillatos*, 159 Wn.2d 459, 469, 150 P.3d 1130 (2007).

The ex post facto clauses of the federal and state constitutions forbid the State from enacting any law which imposes punishment for an act which was not punishable when committed or increases the quantum of punishment annexed to the crime when it was committed.

State v. Ward, 123 Wn.2d 488, 496, 869 P.2d 1062 (1994).

Critical to relief under the *Ex Post Facto* Clause is not an individual’s right to less punishment, but the lack of fair notice and governmental restraint when the

legislature increases punishment beyond what was prescribed when the crime was consummated.

Weaver v. Graham, 450 U.S. 24, 30, 101 S. Ct. 960, 67 L. Ed. 2d 17 (1981). In applying the clauses, “we must determine whether the new law ‘(1) is substantive [or] merely procedural; (2) is retrospective (applies to events which occurred before its enactment); and (3) disadvantages the person affected by it.’” *Pillatos*, 159 Wn.2d at 476 (quoting *In re Pers. Restraint of Powell*, 117 Wn.2d 175, 185, 814 P.2d 635 (1991)).

The first question involves whether the statute was substantive, as opposed to merely procedural. Prior to the 2015 amendments, a sentencing court was required to credit a felony defendant’s sentence for presentence time spent in “confinement.” Former RCW 9.94A.505(6). “Confinement” included “partial confinement,” which in turn included “work release” and “home detention.” Former RCW 9.94A.030(8), (35) (2012). “Home detention” meant a program of “partial confinement” available to offenders where the offender is confined in a private residence subject to electronic surveillance. Former RCW 9.94A.030(28). Thus, courts were required to credit felony defendants’ sentences for time served on EHM because EHM was included in the definition of “home detention,” “home detention” was a program of “partial confinement,” and “partial confinement” was included in the definition of “confinement.”

Through the 2015 amendments, however, former RCW 9.94A.505 was revised, in relevant part, as follows:

- (7) The sentencing court shall not give the offender credit for any time the offender was required to comply with an electronic monitoring program prior to sentencing if the offender was convicted of one of the following offenses:
 - (a) A violent offense.

LAWS OF 2015, ch. 287 § 10. First degree manslaughter is a violent offense. Former RCW 9.94A.030(54)(a)(iii).

In *Pillatos*, our Supreme Court decided whether the 2005 amendments of the Sentencing Reform Act of 1981 (SRA)⁴ violated the savings statute⁵ or the ex post facto clauses of the state and federal constitutions. 159 Wn.2d at 474-75. Specifically, the *Pillatos* court addressed whether the 2005 SRA amendments responding to the United States Supreme Court's decision in *Blakely*⁶ applied to cases that had not yet gone to trial prior to the enactment of the amendments. *Id.* at 465. The 2005 SRA amendments gave trial courts the ability to empanel juries to find the aggravating factors necessary for exceptional sentences in sentencing proceedings. *Id.* at 468. The legislature made the amendments effective immediately. *Id.*

Our Supreme Court held that applying the 2005 SRA amendments would not violate the savings statute because the amendments were procedural not substantive. *Id.* at 472. Substantive amendments change either the elements of the offense, the severity of the punishment, or what evidence can be used to prove the offense. *See State v. Hylton*, 154 Wn. App. 945, 956, 226 P.3d 246 (2010); *see State v. Hodgson*, 108 Wn.2d 662, 669-70, 740 P.2d 848 (1987). The Supreme Court stated that because the exceptional sentence was the same before and after the 2005 SRA amendments, nothing in those amendments increased the severity of punishment; thus, the 2005 SRA amendments were procedural. *Pillatos*, 159 Wn.2d at 473.

Nemetz argues that, as applied to him, the 2015 amendments increase the severity of punishment because at sentencing he was not provided credit for presentence time on EHM. The court order establishing conditions of release confined Nemetz to Joint Base Lewis-McChord.

⁴ LAWS OF 2005, ch. 68.

⁵ RCW 10.01.040 requires defendants to be prosecuted under the law in effect at the time the crime was committed.

⁶ *Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004).

The order imposed other conditions that necessarily curtailed his liberty. Unlike in *Pillatos*,⁷ Nemetz's presentence EHM confinement could be used to calculate his credit for time served before the 2015 amendments were adopted, but not after. The 2015 amendments essentially abrogated the availability of EHM credit for violent offenders. Therefore, applying our Supreme Court's reasoning in *Pillatos*, the 2015 amendments at issue in this case are substantive because Nemetz was no longer eligible to receive credit for presentence time on EHM, which thereby increased the severity of punishment. As such, we hold the 2015 amendments are substantive in nature.

The State cites *Harris v. Charles*, 171 Wn.2d 455, 256 P.3d 328 (2011), for the proposition that presentence time on EHM is nonpunitive in nature and, therefore, cannot be substantive under ex post facto principles. Yet, *Harris* is distinguishable. Harris was convicted on his guilty plea in the municipal court of two misdemeanors and denied credit for his time on EHM. 171 Wn.2d at 459-60. The Supreme Court was asked, among other things, to determine whether allowing felons, but not misdemeanants, sentencing credit for presentence time on EHM violated equal protection principles, *Id.* at 462-66. It was also asked to determine whether denying misdemeanants' credit for presentence time on EHM violated double jeopardy principles. *Id.* at 467-73.

First, the court held the different classification of felons and misdemeanants for purposes of granting sentencing credit for time on EHM was rationally related to a legitimate governmental interest. *Id.* at 473. The court reasoned that

[r]equiring courts to grant misdemeanants credit for time on EHM would hinder the ability of sentencing judges to order jail time for misdemeanor offenses and would

⁷ In *Pillatos*, the defendant's prior convictions could be used to calculate his offender score both before and after the 2008 SRA amendments.

limit misdemeanor sentencing courts' discretion to impose sentences for rehabilitative purposes.

Id. at 473. Second, the court held that the constitutional protections against multiple punishments did not entitle the defendant credit for his presentence time on EHM. *Id.* at 473.

Harris is limited in its application by its focus on equal protection and double jeopardy and by its application to misdemeanants, not felons. The fact remains, under the previous statutory scheme, the legislature did provide felons with credit for presentence time on EHM. The legislature did not provide similar credit to misdemeanants, which was the issue in *Harris*. Nemetz had a reasonable expectation that he would receive credit for the presentence time he served on EHM. Subsequently nullifying that credit increased the quantum of punishment as applied to Nemetz, which is a substantive change.

The second question involves whether the statute operated retrospectively. On a practical level, we consider a statute to be retrospective if the precipitating or triggering event for its application occurred before the effective date of the statute. *Pillatos*, 159 Wn.2d at 471. Here, the triggering or precipitating event was Nemetz's release on EHM on October 31, 2014. The effective date of the 2015 amendments was July 24, 2015. *See* LAWS OF 2015, ch. 287 § 10. Thus, practically speaking, the 2015 amendments operated retrospectively.

However, “[a] retrospective law, in the legal sense, is one which takes away or impairs vested rights acquired in the existing laws, or creates a new obligation and imposes a new duty, or attaches a new disability, in respect to transactions or considerations already past.” *Pillatos*, 159 Wn.2d at 471 (quoting *Pape v. Dep’t of Labor & Indus.*, 43 Wn.2d 736, 740-41, 264 P.2d 241 (1953)). The Supreme Court has elaborated as follows:

“A statute does not operate retrospectively merely because it is applied in a case arising from conduct antedating the statute's enactment or upsets expectations based in prior law. Rather, the court must ask whether the new provision attaches new

legal consequences to events completed before its enactment. The conclusion that a particular rule operates retroactively comes at the end of a process of judgment concerning the nature and extent of the change in the law and the degree of connection between the operation of the new rule and a relevant past event.”

Id. (quoting *Landgraf v. USI Film Prods.*, 511 U.S. 244, 269-70, 114 S. Ct. 1483, 128 L. Ed. 2d 229 (1994) (internal citations omitted)).

Denying Nemetz presentencing EHM credit does result in new legal consequences for him: reduced credit for time served. “A change in the law that limits eligibility for reduced imprisonment violates the ex post facto clause when applied to individuals whose crimes were committed before the law’s enactment.” *In re Pers. Restraint of Smith*, 139 Wn.2d 199, 208, 986 P.2d 131 (1999) (citing *Weaver*, 450 U.S. at 31-36). The legislature adopted the 2015 amendments after Nemetz committed the crime. Therefore, the statute operated retrospectively on Nemetz.

Finally, a statute must disadvantage a defendant in order for it to violate the ex post facto clauses. *Pillatos*, 159 Wn.2d at 476 (quoting *In re Powell*, 117 Wn.2d at 185). The 2015 amendments would disadvantage defendants if they increase the potential punishment that could be imposed. *Pillatos*, 159 Wn.2d at 476. However, if a defendant had notice of the punishment at the time of the crime, he is not considered disadvantaged by the change in the law. *Id.* at 475. Because Nemetz was not on notice that his presentence EHM would not be used to calculate his time served at the time he committed the crime, the 2015 amendments to the sentencing laws disadvantaged him. The 2015 amendments challenged here essentially abrogated the availability of EHM credit for violent offenders.

The 2015 amendments were substantive, retrospective, and disadvantageous to Nemetz. Therefore, we hold that the application of the 2015 amendments at Nemetz’s sentencing hearing violated the ex post facto clauses and that the superior court erred in applying them. The court

should have applied the law in effect at the time he committed the crime and granted him sentencing credit for time on EHM.

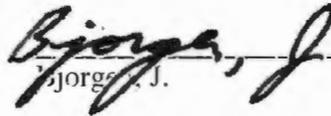
III. APPELLATE COSTS

Nemetz asks us to exercise our discretion to deny any appellate costs the State requests. The State has stated it will not seek appellate costs. Given the State's representation, we waive appellate costs.

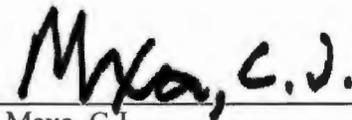
CONCLUSION

We affirm the superior court's imposition of the firearm sentencing enhancement, but we reverse Nemetz's sentence to the extent it does not credit him for time on EHM. We remand to the superior court with directions to provide Nemetz with credit for time served on EHM. We also waive appellate costs imposed against Nemetz.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.


Bjorge, J.

I concur:


Maxa, C.J.

MELNICK, J. (concur in part, dissent in part) — A trial court is not constitutionally mandated to award a defendant credit for time served on electronic home monitoring (EHM) when it is utilized as a condition of pretrial release. Therefore, a trial court must only give a defendant credit for time served on pretrial EHM if it is required by statute. I dissent because Skylar Nikolas Bear Nemetz should only receive credit for time served on pretrial EHM when the legislature authorized it.⁸ When the legislature's amended law to preclude credit for EHM took effect, Nemetz was no longer entitled to credit for pretrial EHM.

The police arrested Nemetz for murder in the first degree. On October 31, 2014, and as one condition of pretrial release pursuant to CrR 3.2, the trial court placed Nemetz on EHM. On March 3, 2016, the court revoked Nemetz's release and placed him in total confinement. On March 25, 2016, the trial court sentenced Nemetz for the crime of manslaughter in the first degree. The court gave Nemetz 37 days credit for time served and did not give him credit for time served on EHM.

While Nemetz was on pretrial EHM, the legislature changed the law relating to credit for pretrial EHM. With an effective date of July 24, 2015, the legislature added a new section to RCW 9.94A.505⁹ and disallowed credit for time served on EHM for defendants convicted of a violent offense. RCW 9.94A.505(7); LAWS OF 2015, ch. 287, § 10. The new section stated: "(7) The

⁸ I concur with the majority that the matter should be sent back to the trial court.

⁹ This statute is part of the Sentencing Reform Act of 1981 (SRA), ch. 9.94A RCW.

sentencing court shall not give the offender credit for any time the offender was required to comply with an electronic monitoring program prior to sentencing if the offender was convicted of one of the following offenses: (a) A violent offense.” RCW 9.94A.505; LAWS OF 2015, ch. 287, § 10. Both murder in the first degree and manslaughter in the first degree are serious violent and violent offenses. RCW 9.94A.030(46)(a)(i) & (iv), (55)(a)(i) & (iii).

I first part ways with the majority because it decides this case on constitutional grounds. It is well established that we should avoid deciding cases on constitutional grounds if it is not necessary to do so. *State v. Speaks*, 119 Wn.2d 204, 207, 829 P.2d 1096 (1992). It is unnecessary in this case. This case should be decided on the plain language of the applicable statute.

“If the language of a statute is unambiguous, the meaning must be derived solely from the language of the statute. Statutory language clear on its face does not require or permit judicial interpretation.” *Speaks*, 119 Wn.2d at 209 (footnote omitted). The applicable statute, RCW 9.94A.505, is clear on its face.

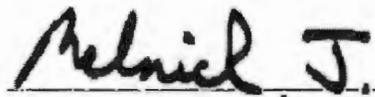
In *Speaks*, the court did not decide the constitutional issue of whether pretrial EHM required credit for time served. 119 Wn.2d at 207. Instead, the court decided that the SRA required the defendant to be given credit for pretrial EHM. *Speaks*, 119 Wn.2d at 207, 209.

Subsequently, in *Harris v. Charles*, 171 Wn.2d 455, 469, 256 P.3d 328 (2011), the Supreme Court determined that a defendant does not have to be credited with time he spent on pre-trial EHM. The court declared that, “when EHM is imposed as a condition of pretrial release pursuant to CrR 3.2 or CrRLJ 3.2, it is not intended as punishment but rather as a means of alleviating the burdens of pretrial detention and of assuring the defendant’s future appearance in court.” *Harris*, 171 Wn.2d at 469 n.10.

In *Harris*, the defendant argued he should be given credit for pretrial time served on EHM. He argued that if he had been convicted of a felony and not a misdemeanor, he would have received the credit. 171 Wn.2d at 460. The court recognized that it made sense in this context to treat misdemeanants differently from felons. *Harris*, 171 Wn.2d at 458-59. The court disallowed credit for time Harris spent on EHM prior to trial. It stated, “When determining whether a defendant is constitutionally entitled to credit for presentencing time spent subject to restrictive conditions, this court has recognized a clear distinction between jail time and nonjail time.” *Harris* 171 Wn.2d at 470. Therefore, based on *Harris*, credit for pretrial EHM is not constitutionally required.

As stated in *Harris*, “a defendant in pretrial detention ‘is severely handicapped in his defense preparation’ and ‘is often unable to retain his job and support his family, and is made to suffer the public stigma of incarceration even though he may later be found not guilty.’” *Harris*, 171 Wn.2d at 468 (quoting CRIMINAL RULES TASK FORCE, WASHINGTON PROPOSED RULES OF CRIMINAL PROCEDURE CrR 3.2 cmt. at 22 (1971)). “As a condition of pretrial or presentencing release, EHM addresses these concerns and furthers the intent of the original pretrial release rule because a defendant on EHM may visit his attorney and continue to go to a job.” *Harris*, 171 Wn.2d at 469. Pretrial EHM is not punitive. The Minority and Justice Commission proposed adding EHM as an alternative to be used with pretrial release. *Harris*, 171 Wn.2d at 469 (citing Proposed amendment to CrR 3.2, 145 Wn.2d Proposed-67 (Official Advance Sheet No. 4, Jan. 8, 2002)).

In the present case, Nemetz was not constitutionally entitled to credit for pretrial EHM. However, per the SRA, he should have received credit from the time the trial court placed him on EHM on October 31, 2014 until the legislature's amended RCW 9.94A.505(7) took effect on July 24, 2015. Because it is not constitutionally required, the majority's decision to award Nemetz credit for all the time he spent on EHM, even after July 24, 2015, is error.



Melnick, J.

PIERCE COUNTY PROSECUTING ATTORNEY

October 24, 2019 - 10:19 AM

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