

No. 93038-4

FILED

AUG 14 2013

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

31227-5-III

COURT OF APPEALS

DIVISION III

OF THE STATE OF WASHINGTON

IN RE THE PERSONAL RESTRAINT OF

ALEKSANDR PAVLIK

RESPONSE TO PERSONAL RESTRAINT PETITION

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I. AUTHORITY FOR RESTRAINT OF PETITIONER

The defendant/petitioner is currently incarcerated at Washington State Penitentiary following his conviction in Spokane County Superior Court on one count of First Degree Assault with enhancement. Attach. A.

II. STATEMENT OF THE CASE

The facts of this case as found by this court are available at *State v. Pavlik*, 165 Wn. App. 645, 268 P.3d 986 (2011) (published in part).

III. STATEMENT OF DISPUTED FACTS

Except as set forth above, respondent denies all other allegations made by petitioner.

IV. ISSUES PRESENTED

- (A) Defense Admission of Hearsay.
- (B) Ineffective Assistance of Counsel.
- (C) Newly Discovered Witness.
- (D) Conflict of Interest.
- (E) "Background" Information on State's Witnesses.
- (F) Bench Conferences.
- (G) Jury Instructions.
- (H) Ineffective Assistance of Counsel.

V. ARGUMENT

A. ADMISSION OF DEFENSE HEARSAY.

Several rules govern consideration of a PRP to ensure that it is not a substitute for appeal. It is well settled that a personal restraint petition is a civil matter. *In re Personal Restraint of Lord*, 123 Wn.2d 737, 739 n.2, 870 P.2d 964, cert. denied, 513 U.S. 849, 115 S. Ct. 146, 130 L. Ed. 2d 86 (1994).

“Because a PRP involves collateral review, we held in *In re Personal Restraint of Hews*, 99 Wn.2d 80, 89, 660 P.2d 263 (1983), the petitioner has the burden of establishing the claimed error more likely than not caused actual prejudice. The ‘more likely than not’ standard is equivalent to preponderance of the evidence.” *In re Personal Restraint of Gentry*, 137 Wn.2d 378, 409, 972 P.2d 1250 (1999).

The petitioner must demonstrate by a preponderance of the evidence that the constitutional error caused him actual and substantial prejudice. *In re St. Pierre*, 118 Wn.2d 321, 328, 823 P.2d 492 (1992). If the petitioner does not demonstrate actual prejudice his or her petition will be dismissed. *In re Grisby*, 121 Wn.2d 419, 423, 853 P.2d 901 (1993).

A PRP alleging constitutional error must meet the heavy burden of demonstrating “actual and substantial prejudice” in order to obtain relief. *In re Haverty*, 101 Wn.2d 498, 504, 681 P.2d 835 (1984); *In re Hews*, 99 Wn.2d 80,

86, 660 P.2d 263 (1983); *In re Hagler*, 97 Wn.2d 818, 650 P.2d 1103 (1982); *In re Rice*, 118 Wn.2d 876, 884, 828 P.2d 1086, *cert. denied*, 113 S. Ct. 421 (1992).

Allegations unsupported by persuasive reasoning are not sufficient to meet the threshold burden of proof that is necessary to attack a judgment or sentence. *State v. Brune*, 45 Wn. App. 354, 363, 725 P.2d 454 (1986), *review denied* 110 Wn.2d 1002 (1988). The petitioner must demonstrate by a preponderance of the evidence that the constitutional error caused him actual and substantial prejudice. *In re St. Pierre*, 118 Wn.2d 321, 328, 823 P.2d 492 (1992). If the petitioner does not demonstrate actual prejudice, the petition will be dismissed. *In re Grisby*, 121 Wn.2d at 423. Actual prejudice must be proven by the petitioner even for constitutional errors that can never be considered harmless on direct appeal. *In re St. Pierre*, *supra* at 328-329. Relief will only be granted if the constitutional error had substantial and injurious effect or influence in determining the verdict. *Brecht v. Abrahamson*, 507 U.S. 619, 113 S. Ct. 1710, 123 L. Ed. 2d 353 (1993).

In contrast, an even higher standard applies when dealing with allegations of non-constitutional error. To obtain review of such an error in a PRP, defendant must show that the “claimed error constitutes a fundamental defect which inherently results in a complete miscarriage of justice.” *In re Cook*, 114 Wn.2d 802, 812, 792 P.2d 506 (1990). These restrictions on relief in a PRP exist because of significant policy considerations. “Collateral relief undermines the principles of finality of litigation, degrades the prominence of the trial, and sometimes costs

society the right to punish admitted offenders.” *In re Hagler, supra* at 824. As a PRP is no substitute for an appeal, the standards for review in a PRP are significantly higher than on appeal. Here, petitioner has not satisfied the threshold burdens of proof to sustain the claim for relief.

The petitioner argues that he should have been permitted to tell the jury that as officers arrived at the scene of the shooting, he (the petitioner) yelled various self-serving statements, along the lines of “He was punching me and I shot in self-defense.” In a pre-trial motion, the trial court prohibited any mention of the hearsay statements.

The issues raised by the petitioner in this PRP were addressed in the direct appeal. This court found the proposed statements to be “harmless error.” The petitioner sought reconsideration of the issue and was denied. The petitioner’s request to the Washington State Supreme Court seeking review was denied.

The decision whether to admit or refuse evidence is within the sound discretion of the trial court and will not be reversed in the absence of manifest abuse. *State v. Laureano*, 101 Wn.2d 745, 764, 682 P.2d 889 (1984).

There can be no doubt that the contested statements were being offered to prove the truth of the matter asserted, *i.e.* that the petitioner shot in self-defense. There would be no other reason to admit the contested statements. The petitioner has presented no caselaw that indicates that a defendant can yell his defenses out of a car window after shooting an unarmed man.

B. INEFFECTIVE ASSISTANCE OF COUNSEL.

The petitioner faults his defense counsel for failing to pursue certain questions of Mr. Leenders. The questions included asking Mr. Leenders about a statement that he was afraid of police because of a potential carjacking charge and other statements made by Mr. Leenders.

The trial court sustained the prosecution's objections to the petitioner's questions. RP 329-330. The petitioner faults defense counsel for not continuing to ask questions along those lines but not in a leading fashion. The petitioner has no evidence that the trial court would have allowed the somewhat unseemly questions even if the questions were phrased in the proper fashion. Simply because a defense counsel may want to use a certain response does not mean the trial court will automatically permit such.

C. RECENTLY FOUND WITNESS.

The petitioner claims that he has found an additional witness that would weigh on the question of credibility in the issue of whether the two bicyclists were in the park before the petitioner arrived or if the bicyclists arrived after the petitioner.

At best, the testimony from the newly discovered witness would be impeaching. A newly discovered witness that meets the other criteria for admission or a new trial will still not meet the requirements for a new trial if his testimony is merely cumulative or impeaching.

Since the “newly discovered” evidence would probably not have changed the outcome of the trial, could have been discovered before trial, and was both cumulative and impeaching, the trial court did not abuse its discretion in denying the motion for a new trial. Each new trial inevitably leaves new avenues for investigating the facts anew. Hardly a case can be supposed but what, by diligent search, some additional evidence will be found that would, if offered at trial, have been admissible on one theory or another. The mere existence of such evidence does not alone justify the granting of a new trial. *State v. Williams*, 96 Wn.2d 215, 224, 634 P.2d 868 (1981).

The new witness, Mr. McKeon, proffered by the petitioner after trial, would have been a “critical” witness according to the petitioner. PRP page 41. The only claim for the value of the witness is the petitioner’s claim that the witness was valuable. Much has to be taken on faith in the petitioner’s arguments. For example, the petitioner claims that Mr. McKeon was a “neutral witness.” Apparently, the petitioner thought other witnesses were lying and biased. Brief of appellant page 41. The obvious question from the State’s perspective is whether or not the newly discovered witness was truly “neutral” or was this witness influenced in some way unknown to the State.

The petitioner, once again, attacks the competence of his trial attorney, claiming that she did not exercise due diligence in attempting to obtain the presence

of Mr. McKeon. As with so many statements in this PRP, this is simply the bald assertion of the petitioner.

D. CONFLICT OF INTEREST.

The petitioner claims that there was a conflict of interest within the public defender's office regarding his case. Interestingly, considering this case was over a year old, this PRP is the first time this claim has surfaced.

The petitioner claims that Mr. Doug Boe represented Mr. Leenders as well as the petitioner. This is incorrect. It is true that other attorneys from the Spokane Public Attorney's Office represented Mr. Leenders and the petitioner. However, Mr. Boe is the Public Defender in charge of assigning cases to various attorneys within his office. Rarely does Mr. Boe work actual cases. The petitioner throws out the fact that Doug Boe spoke with him prior to the case being assigned to Ms. Nordtvedt. At no point, can the petitioner point to instances where Mr. Boe represented him at trial. Further, the petitioner cannot show that his attorney, Ms. Nordtvedt, represented Mr. Leenders.

Interestingly, the petitioner claims that Ms. Nordtvedt agreed not to bring up Mr. Leenders' VUCSA conviction at trial. The support for this assertion appears to be missing. The petitioner makes some bizarre claims that Mr. Leenders was under the "control" of the prosecutors and subject to arrest and incarceration when he did not pay his legal financial obligations. The prosecutor's office has no "control" of

witnesses. It is true that like any convicted person with outstanding LFOs, the convicted person is required to make payments towards those LFOs. The entire first part of this assignment of error is based on flagrant speculation and misrepresented facts.

The Sixth Amendment to the United States Constitution guarantees a criminal defendant effective assistance of counsel, free from any conflict of interest in the case. *Wood v. Georgia*, 450 U.S. 261, 271, 101 S. Ct 1097, 67 L. Ed. 2d 220 (1981); *see also State v. Dhaliwal*, 150 Wn.2d 559, 566, 79 P.3d 432 (2003). A conflict of interest exists if a defense attorney owes duties to a party whose interests are adverse to those of the defendant. *State v. White*, 80 Wn. App. 406, 411-12, 907 P.2d 310 (1995), *review denied*, 129 Wn.2d 1012 (1996). In addition, the Washington Rules of Professional Conduct prohibit an attorney from representing a client if the attorney's duties will be directly adverse to another client or materially limit the attorney's representation. *See* RPC 1.7(a).

See Dhaliwal, 150 Wn.2d at 571 (*citing Mickens v. Taylor*, 535 U.S. 162, 172 n.5, 122 S. Ct. 1237, 152 L. Ed. 2d 291 (2002)). Although a defendant need not demonstrate that the outcome of the trial would have been different but for the conflict, the "mere theoretical division of loyalties" is insufficient to establish a Sixth Amendment violation. *Mickens*, 535 U.S. at 171, *see also State v. Fualaau*, 155 Wn. App. 347, 362, 228 P.3d 771 (2010). A conflict adversely affects counsel's performance if " 'some plausible alternative defense strategy or tactic might have

been pursued but was not and that the alternative defense was inherently in conflict with or not undertaken due to the attorney's other loyalties or interests.' ” *State v. Regan*, 143 Wn. App. 419, 428, 177 P.3d 783 (internal quotation marks omitted) (quoting *United States v. Stantini*, 85 F.3d 9, 16 (2d Cir. 1996)), review denied, 165 Wn.2d 1012 (2008).

E. BACKGROUND INFORMATION ON WITNESSES.

The petitioner's basis for complaint in this “ground” is that, according to the defendant, the State did not provide background information in the possession of the police. Thus, the defense argues, the State violated its *Brady* obligations.

The State is not permitted under the provisions of RCW 10.9 to release information other than conviction data. The defendant does not claim that any convictions were not released. The data being produced by the defendant in this PRP is not data that the State could have released under any conditions as it was not conviction data. The State cannot force the Spokane Police Department to release any data other than convictions. *State v. Cardenas*, 146 Wn.2d 400, 47 P.3d 127, reconsideration denied, corrected by 57 P.3d 1156 (2002), cert. denied, 538 U.S. 912, 123 S. Ct. 1495 (2003); *State v. Kilgore*, 107 Wn. App. 160, 26 P.3d 308, review granted, 145 Wn.2d 1032, 41 P.3d 485, *aff'd*, 147 Wn.2d 288, 53 P.3d 974 (2001).

The State did not violate its obligations under *Brady v. Maryland*, 372 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963).

Further, it is not enough to wander around in the constitutional morass created by the defendant in hopes of finding a violation on the part of the State. Not only does the defendant need to show a violation, the defendant needs to show how the missing data would be exculpatory. Among other points, the defendant needs to show that the alleged unrevealed data would be admissible at trial. The State maintains that the defendant is simply casting into the constitutional seas. The material submitted by the defendant in his PRP would not be admitted under ER 608, ER 609 and therefore completely irrelevant to this trial.

The defendant tacks on an ineffective assistance of counsel claim against Ms. Nordtvedt, stating the trial attorney's proper position that only prior convictions under ER 609 showed her lack of competence. Actually, as noted previously, the State agrees with Ms. Nordtvedt that the trial court would only admit *convictions* under ER 609. The defense counsel was correct, not ineffective.

F. BENCH CONFERENCES.

It is noted that the Court in *Sublett* adopted a two-part test consisting of "experience" and "logic" to apply to bench conferences and sidebars. *State v. Sublett*, 176 Wn.2d 58, 72-73, 292 P.3d 715 (2012). The purpose of the test is to determine whether a particular procedure was an improper closure of the

courtroom. The “experience prong,” asks “whether the place and process have historically been open to the press and general public.” *Press–Enterprise Co. v. Superior Court*, 478 U.S. 1, 8-10, 106 S. Ct. 2735, 92 L. Ed. 2d 1 (1986) (Press II). The “logic prong” tests “whether public access plays a significant positive role in the functioning of the particular process in question.” *Id.*

Before the public trial right attaches, *both* the “experience” and “logic” test prongs must be answered in the affirmative. If either of the prongs is not met, the public trial right does not arise. As was noted by the Court in *Sublett*, it is not uncommon for a trial court to discuss jury instructions in-chambers with counsel. Such in-chambers discussions are not cloaked in the public trial rights. In this case, there is no need to address the “logic prong” as the “experience prong” so clearly fails. As mentioned before, *both* tests must be affirmatively met or no public trial rights attach.

The petitioner argues that his trial counsel did not object to side-bar conferences and Mr. Wasson, the petitioner’s first appellate counsel, also failed to raise issues regarding these bench conferences. The petitioner now claims that the bench side-bar conferences were conducted without the trial court conducting tests related to *Bone-Club* prior to conducting side-bars.

The petitioner might have taken notice from the supposed failure of two prior attorneys and a trial judge. The law of the State of Washington has not accepted the premises presented by the petitioner on appeal. As noted above, the

Washington State Supreme Court has refused to accept the “side-bar” argument. The two part test put forth in *Sublett*, applies here. *Sublett, supra* at 83. The State submits that there is no attorney, (who has conducted a trial), that can make a straight-faced argument that side-bar conferences are unusual. There were many in this case. Further, the State submits that side-bars have traditionally been closed to the public. In fact, the general reason for having side-bars is to prevent the public from hearing what is discussed at the side-bar.

The second prong is the “logic prong” which asks if the public plays a significant role in the functioning of the court during the side-bar. The petitioner has not suggested that the public or press would have played a significant role in the functioning of the court.

The State submits that the reason there was no objections from either trial counsel or former appellate counsel is because there were no viable “public right/side-bar” arguments to make.

G. JURY INSTRUCTIONS.

As noted by the petitioner, issues already raised and decided on direct appeal are not reviewed again in a PRP absent a showing that the ends of justice would be served by re-examining the issue. *In re Gentry*, 137 Wn.2d at 388.

“In PRPs, we ordinarily will not review issues previously raised and resolved on direct review. In order to renew an issue rejected on its merits on appeal, the petitioner must show the ends of justice would be served by reexamining the issue.” *In re Personal Restraint Petition of Vandervlugt*, 120 Wn.2d 427, 432, 842 P.2d 950 (1992); *In re Personal Restraint Petition of Taylor*, 105 Wn.2d 683, 688, 717 P.2d 755 (1986). This burden can be met by showing an intervening change in the law “ ‘or some other justification for having failed to raise a crucial point or argument in the prior application.’ ” *Taylor*, 105 Wn.2d at 688 (*quoting Sanders v. United States*, 373 U.S. 1, 16, 83 S. Ct. 1068, 10 L. Ed. 2d 148 (1963)); *see Vandervlugt*, 120 Wn.2d at 432.

The defendant asks this court to rehear arguments on jury instructions, an issue already decided on direct appeal. The defendant cites to *In re Personal Restraint of Gentry* for authority to undertake such a rehearing. The defendant does not elaborate on the Court’s analysis in the *Gentry* case. What the Court actually stated was:

We take seriously the view that a collateral attack by PRP on a criminal conviction and sentence should not simply be reiteration of issues finally resolved at trial and direct review, but rather should raise new points of fact and law that were not or could not have been raised in the principal action, to the prejudice of the defendant. As we have noted: “To obtain relief with respect to either constitutional or nonconstitutional claims, the petitioner must show that he was actually and substantially prejudiced by the error.” *In re Personal Restraint Petition of Lord*, 123 Wn.2d 296, 303, 868 P.2d 835 (1994); *In re Personal Restraint Petition of Rice*, 118 Wn.2d 876, 886, 828 P.2d 1086 (1992); *In re Personal Restraint Petition of St.*

Pierre, 118 Wn.2d 321, 329, 823 P.2d 492 (1992); *In re Personal Restraint Petition of Cook*, 114 Wn.2d 802, 810, 792 P. 2d506 (1990); *In re Personal Restraint Petition of Hews*, 99 Wn.2d 80, 87, 660 P.2d 263 (1983).

In re Personal Restraint of Gentry, supra.

The instructions in this case were reviewed by the appellate court. The petitioner cites no authority for a re-hearing of a matter already adjudicated.

In reviewing jury instructions, the appellate court is guided by the principle that “[j]ury instructions are sufficient if they allow the parties to argue their theories of the case, do not mislead the jury and, when taken as a whole, properly inform the jury of the law to be applied.” *Hue v. Farmboy Spray Co.*, 127 Wn.2d 67, 92, 896 P.2d 682 (1995). Since this is a PRP following a direct appeal, the question becomes: why did the petitioner not raise these issues in his appeal?

H. INEFFECTIVE ASSISTANCE OF APPELLATE COUNSEL.

The petitioner claims (on multiple occasions) that his trial counsel was ineffective, and his appellate counsel was ineffective for differing reasons.

Defense counsel is strongly presumed to be effective. *State v. McDonald*, 138 Wn.2d 680, 696, 981 P.2d 443 (1999). “The burden is on a defendant alleging ineffective assistance of counsel to show deficient representation based on the record established in the proceedings below.” *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995).

To establish ineffective assistance of counsel, the defendant must meet a two-pronged test. The defendant must show: (1) that counsel's performance fell below an objective standard of performance, and (2) that the ineffective performance prejudiced the defendant. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). In examining the first prong of the test, the court makes reference to "an objective standard of reasonableness based on consideration of all of the circumstances." *State v. Thomas*, 109 Wn.2d 222, 226, 743 P.2d 816 (1987). Appellate review of counsel's performance is highly deferential and there is a strong presumption that the performance was reasonable. *State v. Bowerman*, 115 Wn.2d 794, 808, 802 P.2d 116 (1990). In order to prevail on the second prong of the test, the defendant must show that, "but for the ineffective assistance, there is a reasonable probability that the outcome would have been different." *Id.* A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Strickland*, 466 U.S. at 694. The two prongs are independent and a failure to show either of the two prongs terminates review of the other. *Thomas*, 109 Wn.2d at 226 (citing *Strickland*, 466 U.S. at 687). "If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice . . . that course should be followed." *Strickland*, 466 U.S. at 697.

The petitioner misunderstands criminal law. Ms. Nordtvedt did not improperly concede witnesses' prior bad acts as claimed by the petitioner. The State submits that few courts would admit the spurious testimony of the sort proposed by

the petitioner. ER 404, 608, 609 would have largely prevented the petitioner from attempting to try the case in the fashion that appears to be the petitioner's desired style. The petitioner faults trial defense counsel for not filing a Public Records Act request. The "backgrounds" of the witnesses would, as previously explained, probably not have been permitted into questioning and a PRA request simply creates more work within the system and more costs to the petitioner.

The petitioner tries to fault his trial counsel by claiming the special verdict instruction was incorrect. The petitioner apparently does not understand the law applicable to this case. *State v. Nuñez*, 174 Wn.2d 707, 285 P.3d 21 (2012) is the latest pronouncement from the Washington State Supreme on the topic of jury instructions and special verdicts. The holding in *Nuñez* confirms that the special verdict instruction in this case was not defective.

The petitioner makes the bald claim that his self-defense claim was "strong—". That is not the conclusion of the Court of Appeals. The court concluded that the self-defense claim failed on the facts of the case not the absence of one statement. According to the court, "The self-defense case was weak, and the excluded statement did not help it."

The petitioner is a bit behind the times in arguing that his appellate counsel was ineffective for failing to challenge various bench conferences. The "bench challenge/sidebar issue has been resolved by the Supreme Court in *Sublett*. The State discusses this issue at another point in these briefs.

As if two repetitions of the petitioner's arguments were not enough, the petitioner places a section called "Argument Why Restraint is Unlawful" at page 31 of the amended personal restraint petition. This section raises challenges to bench conferences, defective jury instructions and arguments about the need for a jury unanimity instruction and defective Special Verdict Instructions.

This section of the petitioner's brief also raises again the issue of admitting "background" on Mr. Smith and Mr. Leenders. Brf. of Pet. 39. The State has answered this issue on at least two other occasions and there is no need to use resources in a repeat.

Similarly, the State has addressed the petitioner's "newly discovered witness" at another point in this and the second PRP.

VI. CONCLUSION

For the reasons stated above, the State respectfully requests that the entirety of this PRP be dismissed.

Dated this 13th day of August, 2013.

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ATTACHMENT A

COURT COSTS 200.15
 VICTIM ASSESS 500.15
 RESTITUTION 31,452.67
 FINE _____
 ATTY FEES _____
 SHERIFF COSTS _____
 METH _____
 DNA FEE 100.15
 CRIME LAB _____
 OTHER COSTS _____
\$32,252.67

FILED

MAY 27 2010

THOMAS R. FALLQUIST
SPOKANE COUNTY CLERK

SUPERIOR COURT OF WASHINGTON
COUNTY OF SPOKANE
STATE OF WASHINGTON)

Plaintiff,)

v.)

ALEKSANDR V. PAVLIK)
WM 11/09/83)

Defendant.)

SID: 021973009)

No. 08-1-01641-3

PA# 08-9-31950-0

RPT# CT II: 002-08-0143237

RCW CT II: 9A.36.011(1)(A)-F
(9.94A.602) (#05401)

FELONY JUDGMENT AND SENTENCE (FJS)
Prison

Clerk's Action Required, para 2.1, 4.1, 4.3, 5.2,
5.3, 5.5 and 5.7

Defendant Used Motor Vehicle

I. Hearing

1.1 The court conducted a sentencing hearing this date; the defendant, the defendant's lawyer and the (deputy) prosecuting attorney were present.

II. Findings

2.1 **Current Offenses:** The defendant is guilty of the following offenses, based upon
 guilty plea (date) _____ jury verdict (date) 3-26-10 bench trial (date) _____:

Count No.: II **FIRST DEGREE ASSAULT**
RCW 9A.36.011(1)(A)-F (9.94A.602) (#05401)
Date of Crime May 19, 2008
Incident No. 002-08-0143237

Class: FA (Felony-A), FB (Felony-B), FC (Felony-C)
(If the crime is a drug offense, include the type of drug.)

to the Information

10904198-2 *[Handwritten initials]*

FELONY JUDGMENT AND SENTENCE (FJS)
(Prison)(Nonsex Offender)
((RCW 9.94A.500,,505)(WPF CR 84.0400 (7/2009)

\$101 1-1-11 DOC Page 1 *J*

Additional current offenses are attached in Appendix 2.1a.

The jury returned a special verdict or the court made a special finding with regard to the following:

- The defendant used a **firearm** in the commission of the offense in Count(s) 1.
RCW 9.94A.602, 9.94A.533.
- The defendant used a **deadly weapon other than a firearm** in committing the offense in Count(s) _____. RCW 9.94A.602, 9.94A.533.
- Count _____, **Violation of the Uniform Controlled Substances Act (VUCSA)**, RCW 69.50.401 and RCW 69.50.435 took place in a school, school bus, within 1000 feet of the perimeter of a school grounds or within 1000 feet of a school bus route stop designated by the school district; or in a public park, in a public transit vehicle, or public transit stop shelter; or in, or within 1000 feet of the perimeter of a civic center designated as a drug-free zone by a local government authority, or in a public housing project designated by a local governing authority as a drug-free zone.
- The defendant committed a crime involving the manufacture of methamphetamine including its salts, isomers, and salts of isomers, **when a juvenile was present in or upon the premises of manufacture** in Count(s) _____. RCW 9.94A.605, RCW 69.50.401, RCW 69.50.440.
- Count _____ is a **criminal street gang**-related felony offense in which the defendant compensated, threatened, or solicited a **minor** in order to involve that minor in the commission of the offense. 9.94A.833.
- Count _____ is the crime of **unlawful possession of a firearm**. The defendant was a **criminal street gang** member or associate when the defendant committed the crime. RCW 9.94A.702, 9.94A._____.
- The defendant committed **vehicular homicide** **vehicular assault** proximately caused by driving a vehicle while under the influence of intoxicating liquor or drug or by operating a vehicle in a reckless manner. The offense is, therefore, deemed a violent offense. RCW 9.94A.030.
- Count _____ involves **attempting to elude** a police vehicle and during the commission of the crime the defendant endangered one or more persons other than the defendant or the pursuing law enforcement officer. RCW 9.94A.834.
- Count _____ is a felony in the commission of which the defendant used a **motor vehicle**. RCW 46.20.285.
- The defendant has a **chemical dependency** that has contributed to the offense(s). RCW 9.94A.607.
- The crime(s) charged in Count _____ involve(s) **domestic violence**. RCW **10.99.020**.
- Counts _____ encompass the same criminal conduct and count as one crime in determining the offender score (RCW 9.94A.589)
- Other current convictions listed under different cause numbers used in calculating the offender score are (list offense and cause number):**

	<i>Crime</i>	<i>Cause Number</i>	<i>Court (county & state)</i>
1.			
2.			

--	--	--	--

Additional current convictions listed under different cause numbers used in calculating the offender score are attached in Appendix 2.1b.

2.2 Criminal History: (RCW 9.94A.525):

Crime	Date of Crime	Crime Type	Adult or Juv	Place of Conviction	Sent. Date
NO PREVIOUS FELONIES					

- Additional criminal history is attached in Appendix 2.2
- The defendant committed a current offense while on community placement/community custody (adds one point to score). RCW 9.94A.525.
- The prior convictions listed as number(s) _____ above, or in appendix 2.2, are one offense for purposes of determining the offender score (RCW 9.94A.525).
- The prior convictions listed as number(s) _____ above, or in appendix 2.2, are not counted as points but as enhancements pursuant to RCW 46.61.520:

2.3 SENTENCING DATA:

CT NO	Offender Score	Seriousness Level	Standard Range <small>(not including enhancements)</small>	Plus enhancements*	Total Standard Range <small>(including enhancements)</small>	Maximum Term
II	8	XII	93-123 mo.	60 mo.	153-183 mo.	Life/\$50K

* (F) Firearm, (D) Other deadly weapons, (V) VUCSA in a protected zone, (VH) Vehicular Homicide, See RCW 46.61.520, (JP) Juvenile present, (CSG) criminal street gang involving minor, (AE) endangerment while attempting to elude.

Additional current offense sentencing data in Appendix 2.3.

For violent offenses, most serious offenses, or armed offenders, recommended **sentencing agreements or plea agreements** are attached as follows: _____

2.4 **Exceptional Sentence:** The Court finds substantial and compelling reasons that justify an exceptional sentence:
 below the standard range for Count(s) II.
 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.

within the standard range for Count(s) _____, but served consecutively to Count(s) _____.

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 defendant has the present means to pay costs of incarceration. RCW 9.94A.760.

III. Judgment

3.1 The defendant is **guilty** of the Counts and Charges listed in paragraph 2.1 and Appendix 2.1

3.2 The defendant is found NOT GUILTY of Counts I in the charging document.
 The Court **DISMISSES** Counts _____ in the charging document.

IV. Sentence And Order

IT IS ORDERED:

4.1 **Confinement.** The court sentences the defendant to total confinement as follows:

(a) **Confinement.** RCW 9.94A.589. A term of total confinement in the custody of the Department of Corrections (DOC):

125 (months) on Count No. II ;
_____ (months) on Count No. _____ ;
_____ (months) on Count No. _____ .

The confinement time on Count(s) II contain(s) a mandatory minimum term of 40 months (deadly weapon) .

The confinement time on Count II includes 60 months as enhancement for firearm deadly weapon VUCSA in a protected zone manufacture of methamphetamine with juvenile present.

Actual number of months of total confinement ordered is: 125 months.

All counts shall be served concurrently, except for the portion of those counts for which there is an enhancement as set forth in Section 2.3, and except for the following counts which shall be served consecutively: _____

The sentence herein shall run consecutively with the sentence in cause number(s) _____ but concurrently to any other felony cause not referred to in this Judgment. RCW 9.94A.589.

Confinement shall commence immediately unless otherwise set forth here: _____

- (b) **Credit for Time Served.** 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 jail shall compute time.
- (c) **Work Ethic Program.** RCW 9.94A.690, RCW 72.09.410. The court finds that the defendant is eligible and is likely to qualify for work ethic program. The court recommends that the defendant serve the sentence at a work ethic program. Upon completion of work ethic program, the defendant shall be released on community custody for any remaining time of total confinement, subject to the conditions in Section 4.2. 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 confinement.

4.2 Community Custody. (To determine which offenses are eligible for or required for community custody see RCW 9.94A.701)

- (A) The defendant shall be on community custody for the longer of:
 - (1) the period of early release. RCW 9.94A.728(1)(2); or
 - (2) the period imposed by the court, as follows:
 - Count(s) II 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)

The DOC is directed that the total terms of confinement and community custody must not exceed the statutory maximum sentence of _____.
- (B) While on 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 on 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; and (9) abide by any additional conditions

imposed by DOC under RCW 9.94A.704 and .706. The defendant's residence location and living arrangements are subject to the prior approval of DOC while on community custody.

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:
No criminal law violations
- Other conditions: No dangerous weapons

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.

4.3 Legal Financial Obligations: The defendant shall pay to the clerk of this court:

JASS CODE

- PCV \$500.00 Victim Assessment RCW 7.68.035
- \$ _____ Domestic Violence Assessment RCW 10.99.080
- CRC \$200.00 Court costs, including: RCW 9.94A.760, 9.94A.505, 10.01.160, 10.46.190
 - Criminal Filing fee \$ _____ FRC
 - Witness costs \$ _____ WFR
 - Sheriff service fees \$ _____ SFR/SFS/SFW/SRF
 - Jury demand fee \$ _____ JFR
 - Extradition costs \$ _____ EXT
 - Other \$ _____
- PUB \$ _____ Fees for court appointed attorney RCW 9.94A.760
- WRF \$ _____ Court appointed defense expert and other defense costs RCW 9.94A.760
- FCM/MTH \$ _____ Fine RCW 9A.20.021; VUCSA chapter 69.50 RCW, VUCSA additional fine deferred due to indigency RCW 69.50.430
- CDF/LDI/
- FCD/NTF/
- SAB/SDI \$ _____ Drug enforcement fund of _____ RCW 9.94A.760
- MTH \$ _____ Meth/Amphetamine Cleanup Fine, \$3000. RCW 69.50.440, 69.50.401(a)(1)(ii)

\$ _____ DUI fines, fees and assessments

CLF \$ _____ Crime lab fee [] suspended due to indigency RCW 43.43.690

\$ 100 DNA collection fee RCW 43.43.7541

FVP \$ _____ Specialized forest produces RCW 76.48.140

\$ _____ Other fines or costs for: _____

RTN/RJN \$ _____ Emergency response costs (Vehicular Assault, Vehicular Homicide
Felony DUI only, \$1,000 maximum) RCW 38.52.430

RTN/RJN \$ 31,452.67 Restitution to: (see separate order)

\$ _____ Restitution to: _____

\$ _____ Restitution to: _____
(Name and Address-address may be withheld and provided confidentially to Clerk's Office)

\$ 39,452.67 TOTAL RCW 9.94A.760

- [] The above total does not include all restitution or other legal financial obligations, which may be set by later order of the court. An agreed restitution order may be entered. RCW 9.94A.753. A restitution hearing:
 - [] shall be set by the prosecutor
 - [] is scheduled for _____
- [] The defendant waives any right to be present at any restitution hearing (sign initials): _____
- [] Restitution. Schedule attached.
- [] 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)
- All payments shall be made in accordance with the policies of the clerk of the court and on a schedule established by the DOC or the clerk of the court, commencing immediately, unless the court specifically sets forth the rate here: Not less than \$ 10 per month commencing 1-01-11 RCW 9.94A.760.

The defendant SHALL report to the Spokane County Superior Court Clerk's Office immediately after sentencing if out of custody or within 48 hours after release from confinement if in custody. The defendant is required to keep an accurate address on file with the Clerk's Office and to provide financial information when requested by the Clerk's Office. The defendant is also required to make payments on the legal-financial obligations set by the court. **Failure to do any of the above will result in a warrant for your arrest.** RCW 9.94A.760(7)(b).

[] The Court orders the defendant to pay costs of incarceration at the rate of \$

_____ per day, (actual costs not to exceed \$100 per day). (JLR) RCW 9.94A.760

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

4.4 **DNA Testing.** The defendant shall have a biological sample collected for purposes of DNA identification analysis and the defendant shall fully cooperate in the testing. The appropriate agency shall be responsible for obtaining the sample prior to the defendant's release from confinement. RCW 43.43.754 **FAILURE TO REPORT FOR TESTING MAY BE CONSIDERED CONTEMPT OF COURT.**

HIV Testing. The defendant shall submit to HIV testing. RCW 70.24.340 **FAILURE TO REPORT FOR TESTING MAY BE CONSIDERED CONTEMPT OF COURT.**

The victim, based upon their request, shall be notified of the results of the HIV test whether negative or positive. (Applies only to victims of sexual offenses under RCW 9A.44.) RCW 70.24.105(7)

4.5 **No Contact:**

The Defendant shall not have contact with Gabriel Leenders (name, DOB) 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.)

The defendant is excluded or prohibit from coming within _____ (distance) of: _____ (name of protected person(s))'s home/residence work place school (other location(s)) _____, or

other location: _____, until _____ (which does not exceed the maximum statutory sentence).

A separate Domestic Violence No-Contact Order or Anti-Harassment No-Contact Order is filed concurrent with this Judgment and Sentence.

4.6 **Other:** _____

4.7 **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: _____

V. Notices and Signatures

5.1 **Collateral Attack on Judgment.** If you wish to petition or move for collateral attack on this Judgment and Sentence, including but not limited to any personal restraint petition,

state habeas corpus petition, motion to vacate judgment, motion to withdraw guilty plea, motion for new trial or motion to arrest judgment, you must do so within one year of the final judgment in this matter, except as provided for in RCW 10.73.100. RCW 10.73.090

- 5.2 Length of Supervision.** If you committed your offense prior to July 1, 2000, you shall remain under the court's jurisdiction and the supervision of the Department of Corrections for a period up to ten years from the date of sentence or release from confinement, whichever is longer, to assure payment of all legal financial obligations unless the court extends the criminal judgment an additional 10 years. If you committed your offense on or after July 1, 2000, the court shall retain jurisdiction over you, for the purposes of your compliance with payment of the legal financial obligations, until you have completely satisfied your obligation, regardless of the statutory maximum for the crime. RCW 9.94A.760 and RCW 9.94A.505(5). The clerk of the court has authority to collect unpaid legal financial obligations at any time while you remain under the jurisdiction of the court for purposes of your legal financial obligations. RCW 9.94A.760(4) and RCW 9.94A.753(4).
- 5.3 Notice of Income-Withholding Action.** If the court has not ordered an immediate notice of payroll deduction in Section 4.1, you are notified that the Department of Corrections (DOC) or the clerk of the court may issue a notice of payroll deduction without notice to you if you are more than 30 days past due in monthly payments in an amount equal to or greater than the amount payable for one month. RCW 9.94A.7602. Other income-withholding action under RCW 9.94A.760 may be taken without further notice. RCW 9.94A.7606
- 5.4 Community Custody Violation.**
(a) If you are subject to a first or second violation hearing and DOC finds that you committed the violation, you may receive as a sanction up to 60 days of confinement per violation. RCW 9.94A.634.
(b) If you have not completed your maximum term of total confinement and you are subject to a third violation hearing and DOC finds that you committed the violation, DOC may return you to a state correctional facility to serve up to the remaining portion of your sentence. RCW 9.94A.714.
- 5.5 Firearms.** You may not own, use or possess any firearm unless your right to do so is restored by a superior court in Washington State, and by a federal court if required. You must immediately surrender any concealed pistol license. (The clerk of the court shall forward a copy of the defendant's driver's license, identicard, or comparable identification, to the Department of Licensing along with the date of conviction or commitment). RCW 9.41.040, 9.41.047.
- 5.6 Reserved.**
- 5.7 Motor Vehicle:** If the court found that you used a motor vehicle in the commission of the offense, then the Department of Licensing will revoke your driver's license. The clerk of the court is directed to immediately forward an Abstract of Court Record to the Department of Licensing, which must revoke your driver's license. RCW 46.20.285.

5.8 Other: Any pre-trial surety bond not previously forfeited shall be exonerated.

Done in Open Court in the presence of the defendant this 26 day of May, 2010.

JUDGE Print name: JEROME J. LEVEQUE

Rachel E. Sterett
RACHEL E. STERETT
Deputy Prosecuting Attorney
WSBA# 27141

Anna K. Nordtvedt
ANNA K. NORDTVEDT
Attorney for Defendant
WSBA# 15622

Aleksandr V. Pavlik
ALEKSANDR V. PAVLIK
Defendant

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 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 92A.84.660. Registering to vote before the right is restored is a class C felony, RCW 29A.84.140.

Defendant's signature: Alex Pavlik

I am a certified interpreter of, or the court has found me otherwise qualified to interpret, the _____ language, which the defendant understands. I translated this Judgment and Sentence for the defendant into that language.

Interpreter signature/Print name: _____

VI. Identification of the Defendant

SID No. 021973009 Date of Birth 11/09/1983
(If no SID take fingerprint card for State Patrol)
FBI No. 90186DC6 Local ID No. 0308507

PCN No.

Other

DOB 11/09/1983

Allas name

Race:

Ethnicity:

Sex:

Asian/Pacific
Islander

Black/African-
American

Caucasian

Hispanic

Male

Native American

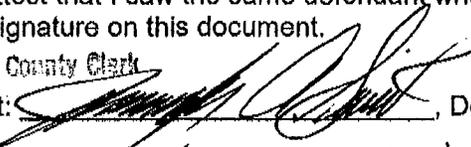
Other: _____

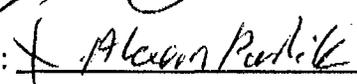
Non-
hispanic

Female

Fingerprints I attest that I saw the same defendant who appeared in Court affix his or her fingerprints and signature on this document.

THOMAS R. FALLQUIST, County Clerk

Clerk of the Court:  Deputy Clerk. Dated: 5/26/10

DEFENDANT'S SIGNATURE: 

Left 4 fingers taken simultaneously	Left Thumb	Right Thumb	Right 4 fingers taken simultaneously
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