Court of King's Bench of Alberta

Citation: R v Starrett, 2022 ABKB 613

Date: 20220913
Docket: 191479732Q1
Registry: Edmonton

Between:

His Majesty the King

Crown

- and -

Damien Christopher Starrett

Offender

Restriction on Publication

Identification Ban – See the *Criminal Code*, section 486.5.

By Court Order dated March 21, 2022: (1) Information that could identify the five-year-old daughter of the Offender shall not be published, broadcast, or transmitted in any way. Identifying information includes any specific personal, demographical, or geographical information. (2) No person shall publish, broadcast, or transmit in any way the contents of the publication ban application or the evidence, information, or submissions at the hearing of the application.

This Court Order does not apply to the publication of identifying information that relates to the Offender or the deceased child victim.

NOTE: Identifying information has been removed from this judgment to comply with the ban so that it may be published.

Reasons for Sentence
of the
Honourable Justice John T. Henderson

I. Introduction

[1] Mr. Starrett was convicted of manslaughter pursuant to s 234 of the *Criminal Code of Canada*, RSC 1985, c C-46 (the *Criminal Code*) in connection with the death of his one-year-old son, Ares. He was also convicted of common assault pursuant to s 266 of the *Criminal Code* in connection with his then five-year-old daughter.

[2] These are the reasons for the sentence that I impose in relation to the offences.

II. Circumstances of the Offence

[3] The circumstances of the offences are as described ***R v Starrett***, 2022 ABQB 442 that was delivered on June 29, 2022. I will not repeat what is described in those reasons, other than the following: the violence Mr. Starrett inflicted on Ares was profound. He punched, kicked, and stomped this very vulnerable child in the head and facial areas multiple times. The attack resulted in right and left-sided skull fractures, fractures at the base of the skull, and extensive bruising to the face and scalp. One portion of the skull became displaced and was forced across and beneath the skull on the right side of the head. The displaced skull bone sheared off a portion of the right side of the brain. Within a few minutes, the child died due to blunt cranial trauma.

[4] The assault on Mr. Starrett's daughter occurred at or near the same time as the attack on Ares. During the assault Mr. Starrett struck his daughter in the side of the head with a closed fist on at least two occasions. This resulted in bruising and bleeding to the side of the head and facial areas.

III. Circumstances of the Offender

[5] The evidence tendered at trial and on this sentencing hearing provides good insight into the personal circumstances of Mr. Starrett. This evidence comes from several sources.

[6] When Mr. Starrett testified at trial, he provided detailed information regarding his background, schooling, health history, employment background and his personal circumstances generally. In addition, a forensic psychologist, Dr. Ennis, also testified at trial regarding the results of his psychological testing of Mr. Starrett. The results of the psychological testing are also described in the report Dr. Ennis prepared and which was marked as a trial exhibit. I also have the benefit of a report prepared pursuant to ***R v Gladue***, [1999] 1 SCR 688 (***Gladue***) (the ***Gladue*** Report) that provides additional detail focusing on Mr. Starrett's background as an Indigenous Person.

A. Biographical Information

[7] Mr. Starrett was born in Edmonton on February 10, 1989. He was therefore 30 years old at the time of the offence. He is now 33 years old. Mr. Starrett is an Indigenous man with an affiliation with the Horse Lake First Nation in Alberta.

B. Family

[8] From his birth to age 18 months Mr. Starrett was raised by his mother. Mr. Starrett's mother was plagued with drug and alcohol abuse issues, and she died of HIV when Mr. Starrett was 13 years old.

[9] Due to his mother's drug and alcohol issues, when Mr. Starrett was 18 months old, he was placed in the care of Robert and Helga Hessie in Fort Saskatchewan, Alberta. Mr. Starrett's mother had lived with Mr. and Mrs. Hessie when she was a teenager. Mr. and Mrs. Hessie raised Mr. Starrett and his brother as part of their family. Mr. Starrett referred to Mr. and Mrs. Hessie as his grandparents, although they were not his biological grandparents.

[10] Mr. Starrett testified that he had a "good upbringing" and a "fairly normal life" with Mr. and Mrs. Hessie. He acknowledges the care and love that they provided to him. While growing up, Mr. Starrett participated in numerous sports and was a skilled athlete. Mr. Starrett travelled with an elite sports team and participated in the Alberta Winter Games. Mr. Starrett continues to have a good relationship with Mr. and Mrs. Hessie and has resided with them as part of the residence and house arrest provisions of his release order.

[11] Despite having the support of Mr. and Mrs. Hessie and despite the good upbringing and normal life they provided, Mr. Starrett had a sense of sadness when growing up because he believed that he had been abandoned by his mother.

[12] Mr. Starrett's father was never part of his life as a youth. Mr. Starrett saw his father once when he was in Grade 2. Their next meeting was when his father lived with Mr. and Mrs. Hessie for approximately 18 months when Mr. Starrett was 22 years old. He has not seen his father since then, although they have spoken by telephone on one occasion since the offence date.

[13] Mr. Starrett's older brother was also placed with Mr. and Mrs. Hessie. As a result, Mr. Starrett had the benefit of growing up with at least one family member. However, Mr. Starrett has five other siblings with whom he has had only minimal contact.

[14] Mr. Starrett never got to know the families of his biological parents, apart from a maternal aunt, Roxanne.

[15] Mr. and Mrs. Hessie are not Indigenous persons. As a result, despite the loving care they provided within their home, Mr. Starrett was denied the opportunity to experience his Indigenous culture or traditions.

C. Education and Employment

[16] Mr. Starrett struggled in school, particularly in math. After failing Grade 1, Mr. Starrett took one year of school at the Glenrose Hospital in Edmonton, where his learning difficulties were assessed. Records from the Glenrose Hospital reveal concerns with Attention Deficit Hyperactivity Disorder (ADHD) and Fetal Alcohol Spectrum Disorder (FASD).

[17] Mr. Starrett did not graduate from high school, having fallen a few credits short. He entered the workforce in his teens and became a general labourer. In his early 20s he transitioned into work as a carpenter and a framer.

D. Addiction Issues

[18] Mr. Starrett has had a longstanding history of illicit drug use and addictions.

[19] Mr. Starrett first began using marijuana at age 15 and continued its use until the time of the offences 15 years later.

[20] Mr. Starrett also had a serious alcohol problem that began with "binge drinking" at age 17. Fortunately, Mr. Starrett was able to overcome his alcohol issues. By November 2019, he consumed alcohol only occasionally.

[21] Mr. Starrett also experienced serious difficulties with cocaine. He first began using cocaine at age 20 and it quickly turned into an addiction. In an attempt to address the addiction, Mr. Starrett attended a 90-day residential treatment program at Poundmaker Lodge Residential Treatment Centre. Unfortunately, he was not successful in completing the program, and discharged himself after only 30 days. Mr. Starrett testified that his cocaine addiction continued until the birth of his first child in 2014, after which Mr. Starrett stopped using cocaine completely.

[22] Mr. Starrett also had a significant addition to opioids. He started using Tylenol 3 medication stolen from his grandmother in attempt to relieve his back pain and overcome insomnia. He transitioned to purchasing non-prescribed Percocet from a drug dealer. By 2019, Mr. Starrett was purchasing substantial quantities of Percocet, partially for his own use and partially for the purpose of resale. By mid-2019, he was purchasing 100 Percocet tablets per week. He was reselling approximately 30 tablets per week, leaving 70 tablets per week for his own use.

[23] In the summer of 2019, Mr. Starrett stopped using Percocet and sought medical treatment for his opioid addiction issue. Unfortunately, Mr. Starrett did not follow through with any treatment program. Instead, he turned to heroin.

[24] For a period of several weeks from late September 2019 to early November 2019 Mr. Starrett was using heroin. When he discontinued the heroin approximately two weeks prior to Ares' death, he sought out Percocet to attempt to relieve the heroin withdrawal symptoms. This provided some relief but several hours prior to Ares' death, Mr. Starrett ran out of his Percocet supply. Thus, at the time of Ares' death, Mr. Starrett was experiencing significant heroin withdrawal symptoms.

E. Medical Issues

[25] Mr. Starrett developed chronic back pain following a series of work-related and sports injuries. This back pain plagued him at least until the date of the offences.

[26] Mr. Starrett also has a history of insomnia for which he sought treatment and received a variety of different medications. Mr. Starrett's insomnia issues coincided with his termination of cocaine use. As a result, Mr. Starrett attributes the insomnia, at least in part, to his abuse of cocaine. The insomnia continued at least until the date of the offences but by the time of trial the insomnia issues had resolved.

[27] Mr. Starrett has ongoing anger and rage issues that were confirmed through testing by Dr. Ennis. Specifically, he is prone to explosive, emotionally dysregulated behaviour and to explosive outbursts when his unaddressed anger overwhelms him. He had an explosive outburst of anger towards his common-law spouse on the same day as the offences.

F. Other Stressors

[28] In the days and weeks leading up to Ares' death, Mr. Starrett also suffered from several additional life stressors. Mr. Starrett and his family were experiencing serious financial pressures, in part because Mr. Starrett had not been working regularly. Mr. Starrett was also facing pressure to quit smoking, a habit that he had previously been unsuccessful in breaking.

G. Criminal Record

[29] Mr. Starrett's criminal record is short and fairly dated. His criminal record begins in 2011 and ends in January 2013. It is a short record consisting of relatively minor offences and does not demonstrate a history of committing serious offences. The only violence on Mr. Starrett's criminal record is an entry in 2012 for common assault for which he received a $1,500 fine. None of Mr. Starrett's convictions resulted in custodial sentences apart from a failure to comply with probation for which he received a sentence of time served. The rest of Mr. Starrett's convictions resulted in sentences of fines or probation.

IV. Sentencing Range for Manslaughter

[30] The sentencing options for the offence of manslaughter are very wide. The sentences can be as low as a period of probation to as high as a life sentence.

[31] In ***R v Vader***, 2019 ABCA 488, the Offender was sentenced to the maximum sentence of life imprisonment after being found guilty of two counts of manslaughter. The Offender had killed an elderly couple with a firearm while stealing their motorhome. The Court of Appeal upheld the sentence, noting several other cases where life sentences for manslaughter had been imposed (see para 22).

[32] At the other end of the spectrum, in ***R v Valiquette***, (1990), 60 CCC (3d) 325 (QCCA) the Offender was initially sentenced to 10 years imprisonment after pleading guilty to manslaughter. The Offender was in a state of severe depression and psychosis when she killed her child, after which she attempted to take her own life. The Offender had been a victim of incest and physical abuse as a child and was married to a violent and abusive man. The Offender believed that she was saving her child from a life of abuse and harm. The Court of Appeal set aside the period of imprisonment and substituted a suspended sentence with probation for three years. The Offender was required to reside at a psychiatric facility for the duration of the suspended sentence.

[33] The wide range of sentences is because the circumstances of the offence, when considered objectively can range from near accident to near murder. Moreover, the circumstances of the offenders can vary greatly.

V. Positions of the Parties

[34] The Crown seeks a sentence of 9 to 10 years in custody.

[35] The Defence seeks a notional sentence of four years in custody, but argues that the actual sentence should be reduced to account for the following:

1) State misconduct while Mr. Starrett was in custody at the Edmonton Remand Centre (ERC);
2) Harsh conditions that Mr. Starrett suffered while in custody at ERC;
3) The vigilantism that Mr. Starrett was the subject of after his release from ERC;
4) Restrictive conditions while Mr. Starrett was subject to the terms of a release order granted on April 9, 2020 and in effect until June 29, 2022.

[36] Both parties agree that Mr. Starrett is entitled to credit for the time that he spent in custody at ERC prior to his release in April 2020 and after he was taken into custody following the guilty verdict.

VI. Principles of Sentencing

A. Objectives of Sentencing

[37] Pursuant to s 718 of the *Criminal Code*:

> **718** The fundamental purpose of sentencing is to protect society and to contribute, along with crime prevention initiatives, to respect for the law and the maintenance of a just, peaceful and safe society by imposing just sanctions that have one or more of the following objectives:
>
> **a)** to denounce unlawful conduct and the harm done to victims or to the community that is caused by the unlawful conduct;
> **b)** to deter the offender and other persons from committing offences;
> **c)** to separate offenders from society, where necessary;
> **d)** to assist in rehabilitating offender;
> **e)** to provide reparations for harm done to victims or to the community; and
> **f)** to promote a sense of responsibility in offenders, and acknowledgement of the harm done to victims or to the community.

[38] In this case, both victims were under the age of 18 years. As such, I must give primary consideration to the objectives of denunciation and deterrence. This is a requirement pursuant to s 718.01 of the *Criminal Code* and the common law as outlined in ***R v LaBerge***, 1995 ABCA 196 (***LaBerge***) at paras 30 – 32, and ***R v Nickel***, 2012 ABCA 158 (***Nickel***) at paras 20 and 31. This does not mean that other sentencing objectives should be ignored, but the primary sentencing objective must be denunciation and deterrence.

B. Proportionality

[39] The fundamental principle of sentencing requires that the sentence be proportionate to the gravity of the offence and the degree of responsibility of the offender: s 718.1 of the *Criminal Code*.

[40] "Gravity of the offence" is a concept which is directed to what the offender did wrong and includes the harm or likely harm to both the victim and to society and its values.

[41] In this case the harm to both the victim and to society and its values is at the highest possible level. Actions that result in the death of an infant at the hands of a parent are, by definition, catastrophic harm to the victim. The victim impact statements show the profound harm that the offences have had on Ares' mother, sister (who was also a victim), and other family members. As such, the gravity of the offence is very high.

[42] "Degree of responsibility of the offender" focuses on the moral blameworthiness of the offender and the extent to which the offender actually intended the consequences of his actions.

[43] In assessing Mr. Starrett's degree of responsibility, it is necessary to consider any specific aspects of Mr. Starrett's conduct or background that tend to increase or decrease his personal responsibility for the offence.

C. *LaBerge* Analysis

[44] Mr. Starrett's moral blameworthiness must be assessed in accordance with the Court of Appeal's directions in ***LaBerge*** and ***Nickel***.

[45] An evaluation of an offender's moral blameworthiness is not limited to an assessment of only the mental state of the offender. The Court in ***LaBerge*** explains (para 8):

> ... [T]he offender's level of moral culpability will be influenced by other factors. In the case of unlawful act manslaughter, the most important of these will be what the unlawful act itself involved. The nature and quality of the unlawful act itself, the method by which it was committed and the manner in which it was committed in terms of the degree of planning and deliberation are all relevant to this inquiry.

[46] When assessing the unlawful act, the Court in ***LaBerge*** identified three broad categories (para 9):

1) Unlawful acts which are likely to put the victim at risk of, or cause, bodily injury.
2) Unlawful acts which are likely to put the victim at risk of, or cause, serious bodily injury.
3) Unlawful acts which are likely to put the victim at risk of, or cause, life-threatening injuries.

[47] In this case, both parties agree that the unlawful act of assaulting Ares fits within the second of the ***LaBerge*** categories: unlawful acts which put the victim at risk of serious bodily injury. While I accept the submissions of counsel on this point, Mr. Starrett's actions must be considered as being at the most serious end of that category.

[48] Situating the offence within the second ***LaBerge*** category does not end the analysis of Mr. Starrett's moral blameworthiness. It is still necessary to consider whether Mr. Starrett's personal characteristics and circumstances would either mitigate or aggravate his blameworthiness. In other words, the more Mr. Starrett's "intention" or "awareness" at the time of the offence approaches the point that he knew or was wilfully blind to the fact that the assault on Ares was likely to put the child at risk of serious bodily injury, the greater the degree of his moral blameworthiness.

[49] There is no evidence of any planning or deliberation on Mr. Starrett's part. He did not set out to kill Ares. Instead, Mr. Starrett became overwhelmed by a confluence of circumstances, including suffering from the effects of serious heroin withdrawal, back pain, and insomnia at the

time of the offence. Moreover, Mr. Starrett was prone to explosive outbursts and unaddressed anger issues. He acted out in an impulsive and disproportionate manner by striking out against his children.

[50] Impulsive actions giving rise to an offence will generally be considered less blameworthy than planned or repeated conduct. However, the fact that an act was committed in a spontaneous fit of anger does not automatically lead to a conclusion that no subjective intent existed in the offender's mind: ***LaBerge*** at para 20. Therefore, even though I am satisfied that Mr. Starrett's actions were impulsive and spontaneous, it is still necessary to consider what inferences can be drawn regarding Mr. Starrett's subjective intent. I must consider the kind and quality of Mr. Starrett's unlawful actions and Mr. Starrett's other circumstances to achieve a complete understanding of the surrounding circumstances.

[51] Some of the factors that must be considered in undertaking this assessment are outlined in para 23 of ***LaBerge***:

- Whether a weapon was used, and if so, what type of weapon;
- The degree of force used;
- The extent of the victim's injuries;
- The degree of violence or brutality;
- The existence of any other gratuitous violence;
- The degree of deliberation involved in the act;
- Whether there was forethought or planning;
- The extent to which the act reflected forethought of action or planning;
- The complexity of the act;
- Whether there was anything that provoked the act;
- The time taken to perpetrate the act;
- Whether there was an element of chance involved in the resulting death.

[52] In ***Nickel***, the Court emphasized the need for a sentencing judge to examine the extent to which the harm to the child was foreseeable, the risk or likelihood that the offender's conduct would give rise to the harm, and the offender's state of mind or state of awareness. While ***Nickel*** is an aggravated assault case, these principles are extended to child abuse cases generally, including manslaughter.

[53] In this case, the kind and quality of the assault on Ares did not involve a weapon, there was no complexity to the act, it involved no planning or deliberation and it happened very quickly. However, Mr. Starrett's actions constituted an extreme act of brutality. This situation involved multiple applications of very significant force to the head of a very young child. It was highly foreseeable that these actions would cause serious bodily harm. There was little element of chance involved in the serous bodily harm that resulted from the assault. Ares' death flowed directly from this serious bodily harm.

[54] In these circumstances, even though there may not have been any planning, and even though the actions were spontaneous and impulsive, the risks were foreseeable, and the only reasonable inference was that Mr. Starrett was wilfully blind to the consequences of his actions. This suggests a high level of moral blameworthiness.

D. Other Considerations

[55] There are other considerations that must also be assessed in determining the extent of Mr. Starrett's moral blameworthiness, including Mr. Starrett's psychological vulnerabilities and any factors that arise from his personal circumstances as an Indigenous person (***Gladue*** factors).

1) Psychological Vulnerabilities

[56] Mr. Starrett's psychological vulnerabilities are an important part of the background that must be considered in assessing his moral blameworthiness. All other things being equal, these psychological vulnerabilities tend to reduce the extent of his moral blameworthiness.

[57] Dr. Ennis conducted a psychological assessment of Mr. Starrett, the results of which are contained in Dr. Ennis' report (trial exhibit 36). Dr. Ennis also testified at trial and explained the results of his testing. At page 22 of his report, Dr. Ennis explained:

> Mr. Starrett is an individual who presents with a wide range of psychological vulnerabilities that make him more prone to explosive, emotionally dysregulated behaviour. He has a history of developmental and neurodevelopmental trauma that has shaped the development of his personality and his social behaviour. Mr. Starrett is someone who is hypersensitive to rejection, prone to feeling put upon and unsupported, and who correspondingly experiences feelings of resentment and hostility towards others. Mr. Starrett is uncomfortable experiencing these angry feelings and highly invested in concealing them from others, and from himself. This tendency to ignore and over control his anger at the expense of dealing with it in a more effective fashion makes him prone to substance abuse as an avoidant coping strategy, and to explosive outbursts which occur when his unaddressed anger overwhelms him. Mr. Starrett's FAS, and associated impulsivity further limit the extent to which he is able to successfully suppress his anger and other negative affect.

[58] These psychological vulnerabilities are directly related to the second important factor that must be considered in terms of Mr. Starrett's personal circumstances: Mr. Starrett's ***Gladue*** factors.

2) Proportionality and the Relationship to s 718.2(e) of the *Criminal Code*

[59] Mr. Starrett is an Indigenous person. As such, the proportionality analysis must be undertaken in the context of his Aboriginal status. As explained by the Supreme Court in ***Gladue*** at para 66:

> The background considerations regarding the distinct situation of [A]boringinal peoples in Canada encompass a wide range of unique circumstances, including, most particularly:
>
> a) The unique systemic or background factors which may have played a part in bringing the particular [A]boriginal offender before the courts; and
>
> b) The types of sentencing procedures and sanctions which may be appropriate in the circumstances for the offender because of his or her particular [A]boriginal heritage or connection.

(see also ***R v Ipeelee***, 2012 SCC 13 (***Ipeelee***) at para 59)

3) Systemic Background Factors

[60] I must take judicial notice of the history of colonialism, displacement, and residential schools and how that history continues to translate into lower educational attainment, lower incomes, higher unemployment, higher rates of substance abuse and suicide, and of course, higher levels of incarceration for Aboriginal peoples: ***Ipeelee*** at para 60. These factors provide the necessary context for understanding and evaluating Mr. Starrett's case-specific information.

[61] ***Gladue*** factors can bear on the culpability of an offender to the extent that the factors shed light on the level of moral blameworthiness of the offender: ***Ipeelee*** at para 73. However, ***Gladue*** factors will not influence the ultimate sentence unless they actually affect the moral blameworthiness or address one of the objectives of sentencing: ***Ipeelee*** at para 83; ***R v Laboucane***, 2016 ABCA 176 (***Laboucane***) at para 63(4). There is no automatic Aboriginal sentencing discount: ***Laboucane*** at para 63(9). It is only where the ***Gladue*** factors impact an offender's moral blameworthiness that a sentence that would otherwise have been appropriate can be adjusted downward.

[62] There is no need for there to be any direct causal link between the background factors and the commission of the current offence before they can be considered as part of the proportionality analysis: ***R v Dichrow***, 2022 ABCA 282 (***Dichrow***) at para 48. Moreover, the fact that Mr. Starrett was estranged from his Aboriginal heritage or from any Aboriginal community is not a valid reason to ignore a consideration of the ***Gladue*** factors: ***Dichrow*** at para 44.

4) Application of *Gladue* Factors to the Facts

[63] The ***Gladue*** factors that have impacted Mr. Starrett are significant. When they are considered in totality, they serve to reduce Mr. Starrett's moral blameworthiness.

[64] The evidence discloses several ***Gladue*** factors that arise from Mr. Starrett's personal circumstances:

1) Mr. Starrett's family has a history of attendance at residential schools. Both maternal grandparents attended residential schools. We now fully recognize the intergenerational impact that the residential schools have had upon subsequent generations, including negative impacts with respect to substance abuse, the use of violence, and the loss of personal identity.
2) There is a history of substance abuse in Mr. Starrett's family. Mr. Starrett's mother suffered from drug and alcohol dependence. This gives rise to the concerns regarding FASD and ADHD that were discussed in Mr. Starrett's Glenrose Hospital records. Mr. Starrett also struggled with his own drug addiction issues, which are extensive.
3) Mr. Starrett's education is at the lower end. He did not finish grade 12.
4) Mr. Starrett has been disconnected from his family and culture of origin. Mr. Starrett had essentially no contact with his biological father and was removed from the care of his biological mother at age 18 months. He was raised in a non-Indigenous home by persons with whom he had no direct family ties. Mr. Starrett's feelings of abandonment arise from this placement and has resulted in a loss of connection to his Indigenous background, history, and traditions.

5) Mr. Starrett has a history of suicide attempts.

[65] It is very clear that Mr. Starrett was fully responsible for his actions that resulted in the death of Ares. However, Mr. Starrett was not responsible for the unfortunate circumstances that resulted in him being in the position he was in at the time of the assault on Ares. He was not responsible for the intergenerational impacts of residential schools that were visited upon him. He was not responsible for his mother's addiction issues and her inability to care for him. He was not responsible for his removal from his mother's care. He was not responsible for being placed in a non-Indigenous home. He was not responsible for being denied meaningful contact with his biological family and with his Indigenous culture. He was not responsible for his developmental disabilities, including the likelihood that he suffers from FASD and ADHD.

[66] All of these factors played into Mr. Starrett's development and the psychological vulnerabilities that were described by Dr. Ennis. As a result, these ***Gladue*** factors did have an impact on Mr. Starrett as a person and serve to reduce his moral blameworthiness.

[67] Because the ***Gladue*** factors and the psychological vulnerabilities impact Mr. Starrett's moral blameworthiness, the practical effect will be to reduce his sentence from that which would notionally be given to someone coming before the Court without being saddled with these factors.

E. Conclusions on the *LaBerge* Analysis

[68] The gravity of this offence was extreme.

[69] The ***LaBerge*** proportionality analysis in relation to moral blameworthiness is complex and involves numerous permutations and combinations: ***LaBerge*** at para 11. Mr. Starrett's circumstances illustrate that complexity.

[70] Despite the offence being an impulsive and spontaneous assault without any planning, the nature of the force used was extreme and the results were foreseeable. This suggests a high level of moral blameworthiness.

[71] However, in determining the fit and proper sentence I must also consider the psychological and ***Gladue*** factors that serve to reduce Mr. Starrett's moral blameworthiness. Mr. Starrett's psychological and background factors places his conduct towards the more serious end of moral blameworthiness but not at the top.

[72] Mr. Starrett's conduct is far removed from near accident and is much closer to, but does not amount to, near murder.

F. Aggravating and Mitigating Factors: s 718.2(a) of the *Criminal Code*

[73] In arriving at a fit and proper sentence I am required to consider all aggravating and mitigating circumstances.

[74] The mitigating factors include the following:

- Almost immediately after the assaults, Mr. Starrett began to seek help for Ares. This help included a call to 911 and to Ares' mother.
- Mr. Starrett actively participated in providing assistance to Ares through resuscitation efforts.

- Even though Mr. Starrett does not accept responsibility for his actions, he is nevertheless extremely remorseful for the consequences of his actions. The genuineness of this remorse was demonstrated while making his address to the Court at the conclusion of the sentencing submissions.

[75] The aggravating factors include the following:

- The victims were Mr. Starrett's biological children. This is a statutorily aggravating factor pursuant to s 718.2(a)(ii) of the *Criminal Code* – the offender abused a member of his immediate family.
- Mr. Starrett held a position of trust in relation to the victims. This is a statutorily aggravating factor pursuant to s 718.2(a)(iii) of the *Criminal Code* – the offender abused a position of trust in relation to the victim.
- The children were both under the age of 18. This is a statutorily aggravating factor pursuant to s. 718.2(a)(ii.1) of the *Criminal Code* – the offender abused a person under the age of 18.
- The attacks were unprovoked and inflicted on two defenseless children who, by reason of age were not able to escape.
- The attacks involved multiple strikes to both children.
- Mr. Starrett's five-year-old daughter, in addition to being assaulted herself, witnessed the assault on her brother and is aware that this assault resulted in his death.

[76] These are all factors that must be blended into the totality of the circumstances when determining a fit and proper sentence

G. Parity: s.718.2(b) of the *Criminal Code*

[77] The sentence imposed on Mr. Starrett should be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances: s 718.2(b) of the *Criminal Code.*

[78] The Defence and the Crown have provided me with numerous cases that provide examples of sentences that have been imposed for manslaughter where the victim was a child. It is important to remember that the circumstances of each case are unique and none of the cases have direct applicability. However, the cases do provide illustrations of how other courts have applied the principles of sentencing in somewhat similar circumstances. The actual sentences imposed in the cases cited by counsel should not be taken as any more than that – they are illustrations.

1) Cases In Common

[79] Both the Crown and Defence rely on the cases of ***LaBerge*** and ***Nickel***.

[80] ***Nickel*** is an aggravated assault case, so the sentence of three years jail is not directly applicable to the sentence that I must impose. It was cited primarily for the instruction it provides in relation to the assessment of moral blameworthiness in relation to offences against children.

[81] In ***LaBerge***, the Court of Appeal increased a three-year jail sentence to 4.5 years for manslaughter of a nine-month-old child. The Offender was the father of the child. The child died

after her head was struck against a cement floor by the Offender. He did so as an impulsive act when the child wriggled away from him while he was changing her diaper. The offender was charged with murder and pleaded guilty to manslaughter before trial. At para 37 the Court of Appeal concluded that the circumstances fit within the second category of objective intent – the actions of the Offender were such as to likely cause serious bodily injury.

2) Defence Cases

[82] In ***R v McConnell***, 2012 ABQB 369, the Offender was the mother of two very young boys whom she drowned in a bathtub. She was tried for second-degree murder and convicted of manslaughter. Her mental state at the time of the offences was found to be "severely compromised." She had experienced “unimaginable violations of her sexual integrity” as a child and as a youth. She was suffering from a severe depressive disorder and acute sleep disturbance. At the time of the offences, she was without emotional and financial support, and she was floridly suicidal. The Court concluded that the case was in the high range of the ***LaBerge*** moral blameworthiness ladder – there was an objective risk of life-threatening injuries. The Court imposed sentence of 6 years jail in relation to each death to be served concurrently.

[83] In ***R v SJB***, 2013 ABCA 153 (***SJB***), the Offender was pregnant with her second child and was caring for her first child who was 10 months old. She smothered the child because he would not stop crying. These events occurred in December 2004. The Offender reported the death to the authorities who concluded that it was as a case of sudden infant death syndrome. There was no criminal investigation at that time. In May 2010, the Offender attempted to kill her second child by repeatedly impeding his breathing by suffocation or strangulation. This resulted in catastrophic injuries to the child who survived, but his life expectancy was greatly diminished. When investigating the second incident police discovered a diary entry which showed that the Offender had smothered the first child five years earlier. She was charged with offences relating to both victims. The Offender pleaded guilty to manslaughter, attempted murder, and failing to provide necessaries of life. The Sentencing Judge concluded that the circumstances of the case were less serious that that in ***LaBerge*** and noted that the Offender had serious mental health issues. The Offender was sentenced to 13 years globally: 4 years for manslaughter; 8 years for attempted murder; 1 year for failing to provide necessities of life. The majority of the Court of Appeal noted that the sentence imposed was at the low end of the range but declined to intervene. The dissenter would have increased the global sentence to 18 years.

[84] In ***R v Fujii***, 2002 ABQB 805 (***Fujii***), the Offender left her two young children unattended for 10 days. Both children died slowly of starvation and dehydration. When the Offender returned home, she disposed of the youngest child’s body and kept her older child's body with her in her apartment. In sentencing the Offender, the Court found that the Offender was an immature person with very limited resources because she had been living in Canada as an illegal immigrant. She suffered post-partum depression and bi-polar disorder and had made dreadful relationship choices. The Court found that a combination of the depression and her personality disorders caused her to abandon her children and leave them to die. A global sentence of 8 years jail for the two deaths was imposed.

[85] In ***R v Coombs***, 2003 ABQB 818 (***Coombs***), a 10-week-old child died form cranial trauma caused by shaken baby syndrome at the hands of the child’s mother, the Offender. At the time of the child’s death, the Offender was 18 years old and suffering from depression. Aggravating factors were that more than one injury was inflicted, the Offender had established

problems with authority, and the Offender had attempted to blame another individual. The Crown sought a sentence of five to seven years jail. The Court noted that even though she was sentencing for manslaughter this was essentially an infanticide case. The Court concluded that this was in the second ***LaBerge*** category: unlawful acts that would likely cause serious bodily injury. The sentence imposed was 48 months jail, which was calculated as time served, followed by three years of probation.

[86] In ***R v LL***, 2021 ABQB 829, the Offender contacted 911 and reported that her five-year-old child had fallen out of bed. Paramedics arrived and found the child unconscious. The child was taken to a children's hospital where an MRI disclosed a devastating brain injury that was untreatable. The child died a few days later after being taken off life support. The Offender was convicted of manslaughter after trial. The Court concluded that a single blow caused the injury and that it had been an impulsive act, placing the circumstances within the midrange of the ***LaBerge*** moral blameworthiness scale: unlawful acts that would likely cause serious bodily injury. The Court noted significant ***Gladue*** factors and imposed a sentence of seven years jail.

3) Crown Cases

[87] In ***R v SDC***, 2013 ABCA 46 (***SDC***), the 23-year-old Offender entered into an agreement with Alberta Social Services to take care of her brother's six young children, including the five-year-old victim. The child sustained a fatal brain injury and numerous other injuries, including two rib fractures following "the intentional application of tremendous blunt force" by the Offender. The Offender pleaded guilty to manslaughter. The sentencing judge considered this to be a case "close to near murder." Numerous ***Gladue*** factors were considered to reduce the moral blameworthiness of the Offender. The Sentencing Judge imposed an effective 7.5-year jail sentence, which was reduced as a result of pre-sentence custody to two years jail plus three years of probation. The Court of Appeal dismissed the Crown sentence appeal.

[88] In ***R v Perdomo***, 2019 ABQB 768 (***Perdomo***), the Court imposed a nine-year jail sentence for manslaughter after the Offender was convicted after trial. The victim was the Offender's five-year-old grandson. The Offender was found to be the perpetrator of a final and fatal assault on his grandson, which was the culmination of numerous other assaults over approximately a 1 ½ month period. The Offender may or may not have been responsible for these other assaults. The Offender had no prior criminal record. Aggravating factors included the previous assaults on the child, the Offender's position of trust and authority, the youth and vulnerability of the deceased child, which was heightened by the fact that the child had recently immigrated from Mexico and was particularly isolated, and the failure of the Offender to seek medical attention. In mitigation, the Court considered the Offender's lack of criminal record and family support as well as his advanced age, health condition, and relatively recent immigration to Canada as contextual factors.

[89] In ***R v Crier***, 2020 ABQB 475 (***Crier***), the Court imposed a 9.5-year jail sentence for the Offender who was found guilty as a party to manslaughter after trial. The Offender and his common-law partner abandoned his 19-month-old badly beaten son at a church in April 2017. The child was either dead or dying from a traumatic brain injury at the time he was abandoned. There was also evidence of blunt force trauma to other parts of his body. Neither the Offender nor his partner sought medical assistance for the child. The Court concluded that there was insufficient evidence to find that the Offender had perpetrated the assaults upon the child that resulted in his death but was satisfied that the Offender had participated in some assaultive

behavior and was aware of other assaults. The Court concluded that the Offender's moral blameworthiness was toward the most serious end of the range but not at the top. The Offender was Indigenous and had significant ***Gladue*** factors.

[90] In ***R v Choy***, 2013 ABCA 334 (***Choy***), the Sentencing Judge imposed a six-year jail sentence after the Offender was found guilty of manslaughter of her three-year-old foster child. The Sentencing Judge found that while the precise mechanism of what caused the fatal injury was unknown, the child was subjected to intentional force at the hands of the Offender that resulted in fatal cranial trauma and extensive bruising over much of the child's body. There was also evidence that the child had been left in an unheated garage in the middle of winter as punishment. The Sentencing Judge concluded that on an objective assessment of the circumstances, the force administered was likely to put the child at risk of or cause serious bodily or life-threatening injuries. However, because the Sentencing Judge was not able to determine any subjective intent, she specifically rejected that the Offender's level of culpability was at the "near murder" level. The Court of Appeal overturned the six-year jail sentence and imposed a sentence of eight years jail. The Court found that the original sentence was insufficient to address denunciation and was not proportionate. The Court found that the Offender's moral blameworthiness was high, in the context of an escalating pattern of abuse, and that the injury was neither "spontaneous nor attributable to a momentary lapse ... nor did it happen in consequence of diminished intelligence" (para 11).

VII. A Fit and Proper Sentence

[91] Counsel for Mr. Starrett submits that the circumstances in ***LaBerge*** are similar to the present case because it was a single act of violence that was inflicted spontaneously and impulsively. He argues that the 4.5-year jail sentence in ***LaBerge*** is similar to the four-year jail sentences in ***SJB*** and ***Coombs***. Therefore, a sentence of four years jail would be fit and proper for Mr. Starrett.

[92] I am not able to accede to this submission. Firstly, in ***LaBerge***, the Offender pleaded guilty, which was significantly mitigating. Mr. Starrett does not benefit from the significant mitigation that would be applicable if he had pleaded guilty and avoided the trauma associated with his daughter and Ares' mother testifying. To be clear, Mr. Starrett was entitled to exercise his constitutional right to proceed to trial and will not be penalized for exercising that right. But he cannot benefit from the substantial mitigation that would have been available if he had pleaded guilty. In addition, in ***LaBerge*** there was only one application of force whereas in the present case Ares was struck multiple times. As a result, ***LaBerge*** is clearly distinguishable.

[93] In ***Coombs***, the sentencing judge sentenced the Offender as if it were analogous to an infanticide case which involves circumstances that are much different than Mr. Starrett's situation.

[94] ***SJB*** was a complex case in terms of sentencing that involved three separate offences and a global sentence, which considered totality. The majority explained that the sentence was at the low end of the range but declined to interfere with the sentence because the sentencing judge considered all of the relevant sentencing principles. In these circumstances it is difficult to simply isolate the 4-year sentence for manslaughter. As a result, ***SJB*** does not provide much support for a four-year sentence for Mr. Starrett.

[95] Counsel for Mr. Starrett posed the question: “What further principles of sentencing are achieved by more jail for Mr. Starrett?” Defence counsel answers this question as follows: “The answer is none. The time has come for rehabilitation. The time has come for mercy, kindness, and compassion.”

[96] I find that the answer to this question is best answered by quoting from ***LaBerge*** (paras 28 – 30):

> [28] Serious crimes of violence against defenceless children warrant a strong and firm response from the courts. Children are amongst the most vulnerable in our society. And in our society, parents occupy a position of trust vis a vis their children. The existence of that fiduciary relationship lies at the heart of both the parent-child relationship and the family unit. Therefore, where a parent or someone who stands in a trust relationship to a child abuses a child, that will be an aggravating factor in sentencing.... This trust relationship and children's vulnerability also explain why a parent who kills his or her child as a result of child abuse cannot generally expect to be treated more leniently on sentencing than a stranger entrusted with the care of a child. This is so despite the fact that a parent must live with the knowledge that he or she has killed their child.
>
> [29] Regrettably, statistical data indicates that children under one year of age are in a relatively high risk category compared to other children....
>
> [30] The imposition of a denunciatory sentence is designed to express society’s absolute repudiation of child abuse when it has led to death....However, a denunciatory sentence also serves another legitimate purpose by affirming and validating two of society’s core values: respect for human life and dignity and special protection for those most vulnerable to abuse – children....

[97] Ultimately, I conclude that a four-year sentence in Mr. Starrett’s case would not be proportionate and would not be fit or proper.

[98] The appellate authorities support a general sentencing range in Alberta of between eight and twelve years for "near murder" manslaughter of a child. When the child is killed by a caregiver, sentences fall at the higher end of the range: ***R v SDC***, 2013 ABCA 46 at para 47.

[99] Sentencing ranges and starting point sentences created by Appellate Courts are simply tools that assist sentencing judges in reaching proportionate sentences. Sentencing ranges help advance parity, “prevent any substantial and marked disparities” in sentencing and “reduce idiosyncratic decision-making”: ***R v Parranto***, 2021 SCC 46 (***Parranto***) at paras 4 and 20. Sentencing ranges and starting points are guidelines and not hard and fast rules. They are not binding in theory or in practice: ***Parranto*** at para 36; ***R v Friesen*** 2020 SCC 9 at para 37.

[100] The general sentencing range of eight to twelve years for “near murder” manslaughter of a child does provide guidance in reaching a proportionate sentence, but only after giving appropriate consideration to the individual circumstances of the offence and of Mr. Starrett. In this regard, and for the reasons given earlier, I have concluded that Mr. Starrett’s conduct is far removed from near accident and is much closer to, but does not amount to, near murder.

[101] Because this is not “near murder”, the sentencing range described in ***SDC*** is not strictly applicable. Furthermore, even if the sentencing range was directly applicable, the sentence for Mr. Starrett should not be at the top end of that range because his conduct was situated towards

the more serious range of moral blameworthiness but not at the top, particularly when consideration is given to the impulsive nature of the offence and the lack of any planning.

[102] In terms of parity, the sentence for Mr. Starrett should not be as high as the 9.5-year jail sentence imposed on the Offender in ***Crier***. Mr. Crier had a much higher level of moral blameworthiness than Mr. Starrett. Like Mr. Starrett, Mr. Crier was found guilty after trial. However, in ***Crier***, the assaults on the child occurred over a period of time and were not spontaneous and impulsive as was the case with Mr. Starrett. Even more significantly, Mr. Crier abandoned the child, who was either dead or dying, at a church. In contrast, Mr. Starrett took immediate steps to assist Ares by calling 911 and attempting resuscitation. In both cases, ***Gladue*** factors were significant, although likely more pronounced for Mr. Crier than for Mr. Starrett.

[103] Similarly, the Offender in ***Perdomo*** had a higher level of moral blameworthiness than did Mr. Starrett. In that case, the deceased child had been subjected to numerous assaults over a period of time. The Offender was responsible for the final fatal assault and may or may not have been responsible for some or all of the prior assaults. There was no indication that the fatal assault was impulsive in nature as it was for Mr. Starrett. Most significantly, Mr. Perdomo was not Indigenous and therefore had no ***Gladue*** factors. Thus, all other things being equal, the nine-year jail sentence imposed upon Mr. Perdomo is higher than the sentence that should be imposed upon Mr. Starrett.

[104] The Offender in ***Choy*** also had a higher level of moral blameworthiness than Mr. Starrett. In that case, the death of the child occurred following an escalating pattern of abuse, and the injury was neither "spontaneous nor attributable to a momentary lapse." Importantly, Ms. Choy was not Indigenous and therefore had no ***Gladue*** factors. Thus, all other things being equal, the sentence for Mr. Starrett should be less than the eight-year jail sentence imposed on Ms. Choy.

[105] The case of ***LL*** has several features similar to Mr. Starrett's case. In ***LL***, the death of the child arose from a single spontaneous act, as was the case with Mr. Starrett. Similarly, ***Gladue*** factors were an important consideration in the sentencing of Ms. LL, as they must be when sentencing Mr. Starrett. Ms. LL received a sentence of seven years jail.

[106] Surveying other sentencing cases is helpful but cannot be used for anything other than illustrations of how other Courts have dealt with other cases in somewhat similar circumstances. However, no two cases are ever truly alike. As a result, the sentences imposed in other cases can be only of limited value. Furthermore, while important, parity is a secondary sentencing principle: ***Parranto*** at para 10. The goal is to reach a fair, fit, and principled sentence with proportionality being the organizing principle: ***Parranto*** at para 10.

[107] For the reasons given earlier, the gravity of this offence is at the highest possible level and Mr. Starrett has a high level of moral blameworthiness, attenuated only by the psychological and ***Gladue*** factors that I have discussed. The aggravating circumstances are significant and far outweigh the mitigating factors.

[108] If it were not for the psychological and ***Gladue*** factors, I would have concluded that a nine-year jail sentence would be fit and proper. However, when I take into consideration the totality of the circumstances including the psychological and ***Gladue*** factors, I conclude that a seven-year jail sentence is fit and proper. This sentence must however be adjusted to account for state misconduct, collateral consequences, and restrictive bail conditions.

A. State Misconduct

[109] Mr. Starrett was in custody at ERC for approximately 4.5 months from the offence date until he secured release in early April 2020. On the day that Mr. Starrett was released, while waiting in a holding cell in the Arrivals and Departures Unit, Mr. Starrett was approached by one or more ERC guards who made the following comments to Mr. Starrett:

> *You are a baby killer they are letting you go. You're a piece of shit.*
>
> *Maybe I should tell the GP boys* [i.e. prisoners in the general population] *what you are in for.*
>
> *I can't believe they are letting you go. You should kill yourself.*

[110] Immediately thereafter one of the ERC guards who had said these words went to a nearby cell containing other prisoners and said to the other prisoners:

> *He's a fucking baby killer.*

[111] These constitute disparaging remarks and express or implied threats to Mr. Starrett's safety. This is grossly inappropriate conduct on the part of ERC guards who are charged with the responsibility of maintaining peace and security within ERC. These comments and actions were intended to and did have a direct and chilling effect on Mr. Starrett, thus significantly impacting Mr. Starrett.

[112] In ***R v Nasogaluak***, 2010 SCC 6, the Supreme Court made it clear that the sentencing regime in the *Criminal Code* provides sufficient flexibility to permit a Court to consider state misconduct as a factor in sentencing, provided that the misconduct relates to either the circumstances of the offence or the offender and had an impact on the offender: para 3.

[113] Misconduct by state actors can include the actions of remand center guards. In ***R v Gallant***, 2018 ABCA 314 the Offender was in custody at ERC awaiting trial when he was assaulted by two ERC guards. He suffered a broken arm as a result. The Offender had an ongoing plan to bait the guards into hurting him to gain either financial advantage or a reduction in sentence. The Offender's injury was a consequence of that plan. The Court of Appeal concluded that a reduction of sentence of 90 days was still warranted given the lack of clear explanation from the guards for the injury, and the guards' professional responsibility to resist such baiting.

[114] In this case, I am satisfied that a sentence reduction of three months is appropriate. The conduct of the ERC guards was not just unprofessional. It was a gross violation of their duty to protect all prisoners at the ERC. It is not part of their function to assault, threaten, or intimidate prisoners. Nor is it part of the function of ERC guards to incite other prisoners in a way that could potentially cause harm to other prisoners. The Court must firmly disassociate itself from this type of behaviour.

[115] The misconduct of the ERC guards had a direct impact on Mr. Starrett. The unchallenged evidence is that Mr. Starrett was in a very fragile emotional state at the time of his release from ERC in April 2020. The actions of the ERC guards added to Mr. Starrett's feelings of anxiety, worry, and upset, and Mr. Starrett was scared that he was going to be harmed.

B. Collateral Consequences

[116] The Defence argues that a series of collateral consequences suffered by Mr. Starrett should justify some adjustment of the sentence. The Defence argues that Mr. Starrett's sentence should be mitigated to account for him housed in administrative segregation while at ERC, and vigilantism during Mr. Starrett's time at ERC and while on release.

[117] The Crown concedes that some adjustment to sentence is warranted to recognize the impact that collateral consequences had on Mr. Starrett. The Crown submits that the Court should consider all of the collateral consequences globally and give Mr. Starrett additional credit of one-half day for each day spent in custody at ERC.

[118] I agree that a global approach as suggested by the Crown is appropriate. Any other approach would affect the proportionality of the sentence. Mr. Starrett has been in ERC custody for approximately 7.5 months. Considering the collateral consequences as a result of Mr. Starrett's time in administrative segregation and the incidents of vigilantism while Mr. Starrett was at ERC and on release, I reduce Mr. Starrett's sentence by four months. I will explain why I have come to this conclusion.

[119] In ***R v Suter***, 2018 SCC 34 (***Suter***), the Court explained that collateral consequences should be taken into consideration in sentencing because it permits the court to consider all relevant information regarding the offender and the offence. The relevance of collateral consequences stems, in part, from the application of the sentencing principles of individualization and parity pursuant to s. 718.2(b) of the *Criminal Code* and speak to the personal circumstances of the Offender: ***R v Pham***, 2013 SCC 15 at para 11. A collateral consequence includes any consequence that impacts the offender and arises from the commission of an offence, the conviction for an offence, or the sentence imposed for an offence: ***Suter*** at para 47. Any reduction cannot reduce the sentence to something that is not proportionate: ***Suter*** at para 56.

[120] In ***Suter***, the Supreme Court concluded that it was appropriate for the Sentencing Judge to consider the collateral consequences that Mr. Suter suffered at the hands of vigilantes in sentencing Mr. Suter. Mr. Suter was kidnapped from his home in the middle of the night by three hooded men. He was handcuffed and a canvas bag was placed over his head. His kidnappers then drove him to a secluded area, cut off his thumb with pruning shears, and left him unconscious in the snow.

[121] Mr. Starrett was in custody at ERC from the date of the offence on November 23, 2019 until his release on April 9, 2020. He was returned to custody at ERC on June 29, 2022, and has remained there until today. For almost all his time at ERC Mr. Starrett was housed in administrative segregation. This meant that he was restricted to his cell except for exercise time. For approximately three weeks in December 2019 and again beginning on July 30, 2022, Mr. Starrett was permitted two hours of exercise time per day. For the remainder of his time in custody, Mr. Starrett had only one hour of exercise time per day. For his own safety and at his request, most of Mr. Starrett's exercise time was taken alone but, also at his request, from time to time, he exercised with other prisoners.

[122] I am satisfied that the extent of the administrative segregation is worthy of some credit as a collateral consequence. While there is no evidence as to the psychological or physical impact the administrative segregation had on Mr. Starrett, I am prepared to infer that this time in custody

was much harsher than was experienced by other remand prisoners. I also infer that this had a negative psychological impact on Mr. Starrett, but I have no basis of determining the extent of that impact.

[123] While in custody at ERC Mr. Starrett was the subject of two incidents of "fecal bombing" where other prisoners filled a container with fecal material and sprayed it into his cell. While far less significant than the impact of Mr. Starrett's time in administrative segregation, this is also a factor that can be considered as a collateral consequence.

[124] For a period of approximately three weeks prior to Mr. Starrett's release from ERC on April 9, 2020, the conditions at ERC were impacted by COVID restrictions. This is not a factor that should be considered as a collateral consequence. Any impact that COVID restrictions had while Mr. Starrett was at ERC was short lived. The primary effect of the COVID restrictions during that time was the lockdown at ERC. This lockdown required that prisoners be restricted to their cells except for limited time for exercise. I have already considered this factor as it relates to Mr. Starrett's administrative segregation.

[125] Finally, after Mr. Starrett was released from the ERC, and for a period of time thereafter, he was subjected to vigilante protests and threats by members of the public outside of his residence. In accordance with Mr. Starrett's release conditions, he was not free to leave the residence and thus was not able to escape these protests. In ***Suter***, the Court concluded that it was appropriate to consider this type of vigilantism to a limited extent in determining a fit and proper sentence. However, in ***Suter,*** the consequences were extreme. The consequences to and impact of the protests on Mr. Starrett are simply not comparable. Nevertheless, I take them into account.

[126] For these reasons I reduce Mr. Starrett's sentence by 4 months to globally take into consideration the collateral consequences.

C. Harsh Bail Conditions

[127] Mr. Starrett was released from ERC on April 9, 2020, and subject to the terms of a release order until he returned to custody the guilty verdict on June 29, 2022.

[128] The release order made Mr. Starrett subject to house arrest with the only exceptions to be:

- One hour of exercise outside the home but no further than 500 meters of the residence with an accompanying adult (who must be within 2 meters) between 7:00 am and 10:00 pm
- Attend at RCMP detachment and at his Bail Supervisor's office
- With the permission of his Bail Supervisor, Mr. Starrett was permitted to
    - Attend lawyer appointments
    - Attend medical appointments
    - Other exceptions on an emergency basis

[129] This was a true house arrest order. Mr. Starrett was not permitted to leave the home for the purposes of work, or to shop for the necessaries of life, which are conditions routinely found in house arrest release orders. The terms of Mr. Starrett's release were very strict.

[130] House arrest provisions do not automatically result in a sentence reduction. In ***R v Olsen***, 2011 ABCA 308, the Court confirmed that pretrial house arrest conditions can be properly

considered by a sentencing judge as a mitigating factor but only when they are very onerous (para 9).

[131] In ***R v Gandour***, 2018 ABCA 238, the Court denied the Offender any credit for the strict house arrest provisions of his release order. The release order permitted the Offender to travel to and from, and remain at work, education, or vocational training. However, the Offender simply chose not to pursue any of those opportunities, preferring rather to remain sitting around the family home watching television and talking on the phone. The Court denied any credit for the house arrest provisions.

[132] In ***R v Faulkner***, 2019 ABCA 352 (***Faulkner***) the Court concluded that moderately restrictive house arrest release conditions did not warrant any reduction in sentence. In coming to this conclusion, the Court quoted from ***R v Ijam***, 2007 ONCA 597 (***Ijam***) at para 12:

> ...I do not accept the proposition that bail, even with stringent conditions, and pretrial custody are to be regarded as equivalents in every case. Put bluntly, bail is not jail ... the pith and substance of bail is liberty, whereas the essence of jail is a profound loss of liberty.

[133] In ***R v Eliasson***, 2021 ABCA 188 the Court affirmed that credit on a 1:1 basis was not warranted, notwithstanding that the house arrest release conditions were the equivalent of the terms of a conditional sentence order.

[134] On the other hand, in ***R v Newman***, 2005 ABCA 249, the Court dismissed a Crown appeal from a sentence where 1:1 credit was given for bail conditions that amounted to house arrest. The sentencing judge noted a conditional sentence order could not have contained more restrictions on the Offender's liberty.

[135] I am satisfied that the release conditions impose on Mr. Starrett were very restrictive. The onerous nature of the conditions, and the resulting restrictions on his liberty justify some credit against the sentence. However, as Courts of Appeal have noted, "bail is not jail" (***Faulkner*** at para 10; ***Ijam*** at para 12). While Mr. Starrett was not able to leave the home for work or other activities, he was able to live with his grandparents and, for a period of several months have his girlfriend live with him.

[136] When I consider all of the circumstances, particularly the restrictive nature of the release conditions, I am satisfied that Mr. Starrett's sentence should be reduced on a 0.5:1 basis for each day of his release.

[137] Mr. Starrett was on release from April 9, 2020 to June 29, 2022 or a total of 811 actual days. His sentence should be reduced by 406 days or 13.5 months.

D. Net Sentence

[138] I impose a sentence of seven years or 84 months jail on Mr. Starrett. Three months will be deducted for state misconduct. Four months will be deducted for collateral consequences and 13.5 months will be deducted for strict bail conditions. A total of 20.5 months will be deducted. This leaves an adjusted sentence of 63.5 months.

[139] Additionally, Mr. Starrett was in custody at ERC from November 23, 2019 to April 9, 2020 (138 days) and June 29, 2022 to September 13, 2022 (77 days). Mr. Starrett will receive 1.5:1 credit for those 215 days for a total deduction of 323 days which I would round to 10.7 months.

[140] Mr. Starrett's net sentence is therefore 52.8 months incarceration for the manslaughter of Ares.

[141] In relation to the assault on his daughter, I impose a sentence of 6 months incarceration to be served concurrently.

VIII. Ancillary and other Orders

[142] The Victim Surcharge pursuant to s 737 of the *Criminal Code* is waived.

[143] A mandatory order for a sample of Mr. Starrett's DNA pursuant to s 487.051 of the *Criminal Code* is granted. Mr. Starrett will provide a sample of his DNA for inclusion into the National DNA Databank forthwith.

[144] A mandatory weapons prohibition pursuant to s 109 of the *Criminal Code* is granted. That order will be in effect for 10 years for any firearm (other than prohibited or restricted firearms), crossbow, restricted weapons, ammunition, and explosive substances, and for life for any prohibited firearms, restricted firearms, prohibited weapons, and prohibited ammunition.

[145] On the application of the Crown and pursuant to s 743.21 of the *Criminal Code*, during the custodial period of his sentence, Mr. Starrett is prohibited from communicating, directly or indirectly, with his daughter who was the victim of the assault, his former common law spouse, his daughter's maternal grandmother, and Sherry Walker.

Heard on the 7th day of September 2022.
Dated at the City of Edmonton, Alberta this 13th day of September 2022.

John T. Henderson
J.C.K.B.A.

Appearances:

Scott Niblock
Sandra Christensen-Moore
for the Crown

Y Rory Ziv
for Mr. Starrett