NO. 46002-5-II

COURT OF APPEALS OF THE STATE OF WASHINGTON,

DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

GUADALUPE SOLIS-DIAZ, JR.,

Appellant.

REPLY BRIEF OF APPELLANT

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ARGUMENT

I. JUDGE HUNT DID NOT EXERCISE DISCRETION AND DETERMINE WHETHER OR NOT AN EXCEPTIONAL SENTENCE SHOULD BE IMPOSED UNDER THE FACTS OF THIS CASE.

In Part (A)(2)(b) in the Brief of Respondent the state argues as follows:

> Judge Hunt considered the other mitigating facts thoroughly before concluding none of the remaining suggested circumstances were substantial and compelling reasons to sentence Solis-Diaz below the standard range.

Brief of Respondent, page 11.

The state reiterated this claim in part (B)(4) of its brief wherein it made the following claim:

> [The trial court] conducted an individualized analysis of Solis-Diaz's Circumstances, which is all that is required under *Miller*.

Brief of Respondent, page 23.

The state pointed this court to pages 49 through 53 of the report of the proceedings to support its claim that Judge Hunt appropriately "went through each mitigating factor" with the exception of the multiple offense policy and "found none of the mitigating factors to be substantial and compelling." Brief of Respondent, pages 11-12. The state further claimed that the trial court "considered all of the material presented" and "actually read the 180 page sentencing memorandum and supporting materials prior to the

sentencing hearing." Brief of Respondent, page 23. In so arguing the state pointed the court to pages 19, 41-42, 45, 49 and 53 from the transcript of the sentencing hearing. *Id.*

While the state referred to a number of pages in the report of proceedings, it did not quote any of Judge Hunt's words and with good reason. A review of Judge Hunt's actual statements reveals that he did not apply the facts of this particular case to determine whether or not they constituted the mitigating circumstances recognized by the Supreme Court. That would have properly constituted an exercise of discretion. Rather, what Judge Hunt did was reject the possibility that any juvenile's youth and impaired capacity to appreciate the wrongfulness of his conduct could ever constitute mitigating factors. That was not an exercise of discretion as the state claims. Rather, it is a refusal to exercise discretion. The following gives a number quotes from Judge Hunt's ruling demonstrating his refusal to consider and apply the facts of this case to the law regarding the mitigating factors as recognized in and required by the decisions of the United States Supreme Court in *Miller v. Alabama*,[1] *Graham v. Florida*,[2] and *Roper v.*

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[1]576 U.S. —, 132 S. Ct. 2455, 183 L. Ed. 2d 407 (2012)

[2]560 U.S. 48, 130 S. Ct. 2011, 176 L.Ed. 2d 825 (2010)

Simmons[3].

At the beginning of his ruling Judge Hunt stated:

> In summary, the legislative intent is clear, and under the Sentencing Reform Act, punishment and accountability are the primary foci of sentencing, and serious violent crimes will be punished severely, particularly if there are multiple counts. Older teenagers will be treated as adults. And, finally, if you commit serious violent offenses while armed with a firearm, you'll receive a severe sentence.

RP 41.

Judge Hunt's statements here that "older teenagers will be treated as adults" and that "if you commit serious violent offenses while armed with a firearm, you'll receive a severe sentence" stand as a rejection of the United States Supreme Court's holding in *Miller*, *Graham* and *Roper* which "requires that a court consider that children are constitutionally different from adults for purposes of sentencing," and that since "juveniles have diminished culpability and greater prospects for reform" they are thus "less deserving of the most severe punishments.'" *Miller v. Alabama*, 132 S. Ct. at 2464 (quoting *Graham v. Florida*, 560 U.S. at 68.) Judge Hunt's refusal to consider this class of mitigating facts is not an exercise of discretion. Rather it is a refusal to exercise discretion.

As was just mentioned, in *Miller* the United States Supreme Court

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[3]543 U. S. 551, 125 S. Ct. 1183, 161 L. Ed. 2d 1 (2005)

goes on to explain that a juvenile's increased capacity for rehabilitation is also a factor that a sentencing court must consider before imposing an effective sentence of life without the possibility of release. *Graham*, 560 U.S. at 73. In spite of this mandate Judge Hunt refused to exercise his discretion and consider this as a possible mitigating factor in this case. He stated:

> The fourth goal of rehabilitation has been expressly decided by the Legislature when enacting the Sentencing Reform Act and subsequent legislation. Accountability takes precedence over rehabilitation, and the lessened attitude toward rehabilitation was deliberate. And, again, any change in that must be addressed to the Legislature, because they have made their own choices here, and we as judges derive our sentencing authority solely from the legislature.

RP 45-46.

Once again, the refusal to analyze the facts of a case to determine the applicability of the mandated potential mitigating factor of greater rehabilitative potential is not an exercise of discretion as the state argues in its brief. Rather, it is a refusal to exercise discretion.

In *Graham*, the court also determined that life sentences without parole imposed on juvenile non-homicide offenders were disproportionate given the diminished culpability and greater opportunity for rehabilitation of juveniles and were not justified by any penological goals. *Graham*, 560 U.S. at 73. As with the other mitigating factors set out in *Miller, Graham* and

Roper , Judge Hunt also rejected consideration of this mitigating factor. This is not an exercise of discretion. It is a refusal to exercise discretion. Judge Hunt stated:

> The defense then embarks on a long evaluation of proportionality as it relates to other crimes both in Washington and other states. This issue has been laid to rest specifically by the Washington State Supreme Court in *State vs. Ritchie* at 126 Wn. 2d, a 1995 case, a case, again not surprisingly, not cited by the defense. I'm not quite sure why this controlling authority wasn't cited in the legal memoranda, but it wasn't.

RP 46.

Judge Hunt then went on to again reject the holding in *Miller*, *Graham* and *Roper* that juveniles many times have a decreased culpability. Judge Hunt stated:

> It simply defies common sense that this defendant had no idea that it was wrong to attempt to kill someone. More to the point, however, is that there must be a connection between that lack of capacity and the crime committed.
>
> As noted by the court in *State vs. Scott*, 72 Wn. App., which is affirmed by the Ritchie case, a 1993 case, quote, "Scott asserts that his youth, 17 years old at the time of the crime, limited his, quote, 'capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law,' close quote, and thus the exceptional sentence was improper. This argument borders on the absurd." Now, this is the Court of Appeals talking now. "Granted, teenagers are more impulsive than adults and lack mature judgment. However, Scott' s conduct here cannot seriously be blamed on his lack of judgment, as he contends. Premeditated murder is not a common teenage vice." And I would say neither is premeditated attempted murder, which is essentially what happened here.

RP 50.

In so holding Judge Hunt was not exercising discretion under the particular facts of this case. Rather, he was simply rejecting the holding from *Miller*, *Graham* and *Roper* that juveniles can have decreased culpability and refusing to consider this possibility in this case. Judge Hunt's refusal to consider this potential mitigating factor under the facts of this case is also illustrated by the following subsequent statement:

> The second non-statutory suggested mitigating factor is the defendant's status as a juvenile. The state has already referenced *State vs. Ha'mim*, but also *State vs. Scott* as previously indicated, and in Ha'mim, the court states, "Such a non-statutory factor must be both substantial and compelling, and the age of a young adult offender is not alone such a factor." Now, I realize that you could say, well , he's not an adult, but it's what the Legislature determined he is when the crime is one of the ones subject to the automatic jurisdiction statute.

RP 51-52.

The latter statement that "he's not an adult, but it's what the Legislature determined he is" stands as a complete refusal to exercise discretion and consider the possibility that the defendant had a reduced level of culpability based upon his youth.

The trial court's final statement also illustrates its rejection of the Supreme Court's ruling from *Graham*, *Miller* and *Roper* that the Eighth Amendment mandates consideration of the possibility of reduced culpability

and increased rehabilitative potential as mitigating circumstances when sentencing juveniles to effective life sentences. Judge Hunt stated:

> In summary, this sentence was exactly what the Legislature intended for crimes such as this. They had plenty of opportunity to change it after the *Mulholland* case came out and did not. It is up to the Legislature to make changes to the SRA to effectuate what the defense desires. None of the suggested mitigating factors recommended by the defense are legally sufficient.
>
> So to return to the inquiry that started this from the Court of Appeals, my answer is no, I would not have given a mitigated sentence had I known about the information that Mr. Underwood supposedly failed to give me and apparently I didn't recognize on my own. I already knew it, and I imposed the sentence I did being fully informed of the legal consequences of doing so. So that's my ruling.

RP 53.

As this statement illustrates, Judge Hunt did not exercise his discretion and determine that under the individualized facts of the case at bar the mitigating factors outlined in *Graham*, *Miller* and *Roper* did not justify a sentence below the standard range. Rather, he simply rejected consideration of the mitigating factors recognized in *Graham*, *Miller* and *Roper*. Contrary to the state's assertion, this was not the exercise of discretion.

II. THE DECISIONS IN *GRAHAM, MILLER* AND *ROPER* APPLY TO JUVENILE SENTENCES IMPOSED AT THE SAME TIME FOR MULTIPLE OFFENSES ARISING FROM A SINGLE CRIMINAL ACT.

In its brief the state argues that the decision in *Miller v. Alabama*, does not apply in this case because Mr. Solis-Diza was convicted of multiple offenses. The state claimed as follows on this issue:

> The fact that *Solis-Diza* is not serving a single lengthy sentence for a single conviction (as were the juvenile offenders in *Miller v. Alabama*), but six separate sentences for six separate convictions for crimes against six different victims, cannot be overlooked when considering whether the sum total of the sentences violates the Eighth Amendment.

Brief of Respondent, page 17.

In a recent decision, the Wyoming Supreme Court rejected a similar argument, reasoning that when a juvenile faces aggregate sentences with the practical effect ofimposing lifetime incarceration, "the teachings of the Roper/Graham/Miller trilogy require sentencing courts to provide an individualized sentencing hearing to weigh the factors for determining a juvenile's 'diminished culpability and greater prospects for reform.'" *Bear Cloud v. State*, 334 P.3d 132, 141-142 (Wyo. 2014) (quoting *Miller*, 132 S.Ct. at 2460). The court explained that it would not "ignore the reality" that a lengthy aggregate sentence has the effect of mandating that a juvenile die in prison without regard for whether a judge or jury would have thought his

youth and its attendant circumstances made a lesser sentence more appropriate. *Bear Cloud v. State*, at 142.

In applying *Miller* to consecutive sentences, the Wyoming Court adopted the reasoning of the Indiana Supreme Court which had held, "we will 'focus on the forest – the aggregate sentence – rather than the trees – consecutive or concurrent, number of counts, or length of the sentence on any individual count.'" *Bear Cloud v. State*, at 142 (quoting *Brown v. State*, 10 N.E.3d 1, 8 (Ind. 2014)). The court also found "persuasive" the holding of the Iowa Supreme Court, which held that a fixed term of years sentence does not provide the constitutionally mandated "meaningful opportunity for release" even when imposed based on minimum consecutive terms. *Bear Cloud v. State*, at 142 (quoting *State v. Null*, 836 N.W.2d 41, 71 (Iowa 2013)).

Considering the actuarial life expectancy of a person incarcerated as a juvenile, a youth "who will likely die in prison is entitled to the Eighth Amendment's presumption 'that children are constitutionally different from adults for sentencing purposes,' and that they 'have diminished culpability and greater prospects for reform.'" *State v. Null*, 836 N.W.2d at 71 (quoting Miller, 132 S.Ct. at 2458, 2464). In sum, "[a] juvenile offender sentenced to a lengthy aggregate sentence "should not be worse off than an offender

sentenced to life in prison without parole." *Bear Cloud*, 334 P.3d at 142 (quoting *State v. Null*, 836 N.W.2d at 72).[4] These decisions illustrate the fallacy of the State's contention that there are no Eighth Amendment implications to imposing a sentence that mandates Mr. Solis-Diaz's imprisonment for the rest of his life simply because that result derived from stacking sentences for separate offenses committed at the same time and place in the course of a single incident literally spanning a few seconds of time.

The State's reliance on the decision in *Lockyer v. Andrade*, 538 U.S. 63, 123 S. Ct. 1166, 155 L. Ed. 2d 144 (2003), is similarly misplaced because that involved an adult sentencing issue, not a juvenile sentencing issue. The decisions in *Miller*, *Graham* and *Roper* stake out a different test for the constitutionality of punishment imposed upon a juvenile offender. *See Miller*, 132 S.Ct. at 2467-69. The rationale that juveniles are as a class less criminally culpable than adults and more susceptible to rehabilitation than adults places the juvenile offender's sentence in a different category than adults for Eighth Amendment purposes.

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[4]Other courts holding that *Miller* and *Graham* apply to lengthy or aggregate sentences under the Eighth Amendment include *Fuller v. State*, 9 N.E.3d 653, 657-58 (Ind.2014); *People v. Caballero*, 55 Cal.4th 262, 145 Cal. Rptr.3d 286, 282 P.3d 291, 295 (2012); and *Moore v. Biter*, 725 F.3d 1184, 1193-94 (9th Cir.2013).

In *Lockyer* the court address the constitutionality of consecutive sentences imposed upon an adult with a lengthy adult criminal history who was convicted for two offenses committed on different days; that defendant received two terms of 25 years to life. Its procedural posture was as a *habeas* petition, so relief was only available if there was clearly established law as dictated by Supreme Court precedent. *Lockyer* at 71. This case not only predated *Miller*, *Graham* and *Roper*, but its reasoning is contrary to their holdings that a juvenile's age is a significant factor relevant in assessing the constitutionality of punishment imposed. It is true that in *Lockyer* the court held in dicta that "the age of the persons sentenced" is not a material distinction under the Eighth Amendment. *Lockyer*, 538 U.S. at 74 n.l. The decisions in *Miller*, *Graham* and *Roper* have now conclusively rejected this dicta.

The consecutive sentence imposed in *Lockyer* also involved separate and distinct robberies that occurred weeks apart. In that case the Court emphasized that the sentence was not imposed for the same set of operative facts and therefore there was a different analysis required for an Eighth Amendment challenge. By contrast, in the case at bar the sentences imposed arose from a single incident literally spanning a few seconds of time. Thus, the decision in *Lockyer* is inapplicable to the facts in the case at bar.

III. RCW 9.94A.730(3) DOES NOT COMPLY WITH THE REQUIREMENTS OF *GRAHAM, MILLER* AND *ROPER* BEFORE SENTENCING JUVENILES TO TERMS OF LIFE IMPRISONMENT.

In its brief the state argues that the decision in *Miller v. Alabama*, does not preclude the sentence in this case because the defendant may request release after 20 years total confinement under RCW 9.94A.730, commonly known as the "Miller fix." *See* Brief of Respondent, page 20. As the following explains, the argument is in error because this statute does not meet the requirements of *Miller*, *Graham*, and *Roper*.

The first section of RCW 9.94A.730 states as follows:

> (1) Notwithstanding any other provision of this chapter, any person convicted of one or more crimes committed prior to the person's eighteenth birthday may petition the indeterminate sentence review board for early release after serving no less than twenty years of total confinement, provided the person has not been convicted for any crime committed subsequent to the person's eighteenth birthday, the person has not committed a disqualifying serious infraction as defined by the department in the twelve months prior to filing the petition for early release, and the current sentence was not imposed under RCW 10.95.030 or 9.94A.507.

RCW 9.94A.730(1).

This statute creates a *de facto* parole system for any defendant sentenced to more than 20 years for crimes committed as a juvenile. At the 20 year mark that defendant may petition for a hearing before the Indeterminate Sentencing Review Board (ISRB) unless one of the following conditions applies: (1) the defendant has been convicted for any crime

committed subsequent to his or her 18th birthday, (2) the defendant has not committed a disqualifying serious infraction as defined by the department in the twelve months prior to filing the petition for early release, and (3) the current sentence was not imposed under RCW 10.95.030 or 9.94A.507. The criteria the ISRB is to use for determining whether or not to release the defendant is set out in section three of the statute, which states:

> (3) No later than one hundred eighty days from receipt of the petition for early release, the department shall conduct, and the offender shall participate in, an examination of the person, incorporating methodologies that are recognized by experts in the prediction of dangerousness, and including a prediction of the probability that the person will engage in future criminal behavior if released on conditions to be set by the board. The board may consider a person's failure to participate in an evaluation under this subsection in determining whether to release the person. The board shall order the person released under such affirmative and other conditions as the board determines appropriate, unless the board determines by a preponderance of the evidence that, despite such conditions, it is more likely than not that the person will commit new criminal law violations if released. The board shall give public safety considerations the highest priority when making all discretionary decisions regarding the ability for release and conditions of release.

RCW 9.94A.730(3).

As a careful reading of this statute reveals, the ISRB is free to deny a defendant conditional release if "the board determines by a preponderance of the evidence that . . . it is more likely than not that the person will commit new criminal law violations if released." The statute does not provide any limitation to term "new criminal law violations." Thus, if the ISRB believed

it more likely than not that a defendant would commit the crime of disorderly conduct or negligent driving or any other minor offense the ISRB would be required under the statute to deny release.

By contrast, under the Eighth Amendment as interpreted in *Graham, Miller* and *Roper*, a trial court may not impose a life sentence on a juvenile unless it first evaluates the juvenile defendant's individual circumstances in order to determine and impose a sentence proportional to that particular defendant's relative culpability. *Miller*, 132 S.Ct. at 2468. In so acting the court may not simply define culpability by the defendant's participation in the offense. Rather, the court must consider the following criteria: (1) "chronological age and its hallmark features – among them, immaturity, impetuosity, and failure to appreciate risks and consequences;" (2) family and home environment; (3) the circumstances of the crime, including extent of participation and the effects of peer or familial pressure; (4) whether "incompetencies associated with youth" impaired his ability to navigate the criminal justice system; and (5) the possibility of rehabilitation. *Miller*, 132 S.Ct. at 2468. Simply put, *Miller* requires the sentencing judge to treat children differently from adults for sentencing purposes and precludes imposition of life sentences without a finding of the absence of those mitigating factors unique to youth. *Miller*, 132 S.Ct. at 2469.

A comparison between the requirements under the Eighth Amendment as explained in *Graham, Miller* and *Roper* and the requirements of RCW 9.94A.730 reveals that the statute fails to even superficially address the requirements under the Eighth Amendment before imposing a sentence of life imprisonment on a juvenile offender. Under the Eighth Amendment as explained in *Graham, Miller* and *Roper* the court, ***at the time of sentencing***, must consider the mitigating circumstances unique to juvenile offenders and then impose a sentence proportional to the application of those factors. Under the statute the court is free to ignore all the requirements of the Eighth Amendment as explained in *Graham, Miller* and *Roper* by simply offering a juvenile defendant the "possibility" of release after 20 years without any reference to the criteria mandated under the Eighth Amendment. Thus, RCW 9.94A.730 does not meet the requirements of the Eighth Amendment as explained in *Graham, Miller* and *Roper.*

The state's argument that RCW 9.94A.730 somehow meets the requirements of the Eighth Amendment as explained in *Graham, Miller* and *Roper* also suffers from another defect. That defect is the statute's requirement that every juvenile subject to the provisions in the statute must serve 20 years in prison before first being considered for release regardless of that defendant's individual relative culpability. In making this argument

it should be noted that the court in *Graham, Miller* and *Roper* did not categorically preclude very lengthy sentences following the commission of serious offenses by juveniles. Were a trial court to properly consider a defendant's relative maturity, culpability and rehabilitative potential and find that the particular defendant had the relative maturity, culpability and rehabilitative potential of an adult, then the court could well impose a lengthy prison sentence.

By the same token, were the court to conclude that a defendant had an extraordinarily low level of maturity and culpability and an extremely high level of rehabilitative potential, then the court would have discretion to impose a sentence well below the 20 year requirement under the statute. However, RCW 9.94A.730, absolutely precludes such a result because it requires a minimum of 20 years of imprisonment prior to even consideration for relief.

Finally, under *Graham, Miller* and *Roper* the Eighth Amendment requires that the trial court at the time of sentencing exercise its discretion when applying the facts of that particular case before it to the recognized mitigating factors. It does not allow a parole board to take the place of the judge for the exercise of that discretion. Thus, the statute also fails to meet

the requirements of Eighth Amendment as set out in *Graham, Miller* and *Roper*.

In making this argument it should be recognized that RCW 9.94A.730, which derives from Laws of 2014, ch. 130, § 10, is only part of the "Miller fix." It applies exclusively to juveniles sentenced as adults to more than 20 years in prison for offenses other than aggravated first degree murder. In Laws of 2014, ch. 130, § 11, another part of the "Miller fix," the legislature amended RCW 10.95 to address those cases in which juveniles are currently serving sentences of life in prison without the possibility of release upon conviction for aggravated first degree murder.

In *In re McNeil*, 181 Wn. 2d 582, 334 P.3d 548, 552 (2014), the court addressed the issue whether or not section 11 of the "Miller fix" vitiated the right to post-conviction relief under *Graham, Miller* and *Roper* for juveniles serving life without release for aggravated first degree murder. Under section 11, juveniles serving life without release for aggravated first degree murder are entitled to new sentencing hearings at which the *Graham, Miller* and *Roper* mitigating factors must be considered. In *McNeil* the state argued that section 11 thereby provided an adequate remedy sufficient to deny the defendant's the right to post-conviction relief. The court agreed, holding as follows:

> The Miller fix directs trial courts to make new sentencing decisions to replace the old ones, and it certainly does not provide that the old

> sentencing decisions are presumed valid. In fact, the Miller fix indicates that noncompliance with Miller is *per se* prejudicial because all juvenile offenders whose sentences are inconsistent with Miller are automatically entitled to resentencing. Laws of 2014, ch. 130, § 11(1).

In re McNeil, 181 Wn. 2d at 589-90.

It would indeed be a curious result if this court were to interpret *Graham, Miller* and *Roper* to require resentencing for juveniles given life sentences for aggravated murder as allowed for in the "Miller fix" but not require resentencing for juveniles given effective life sentences for lesser offenses.

IV. THE TRIAL COURT'S DECISION TO SET A REVIEW HEARING AFTER 20 YEARS DOES NOT COMPLY WITH THE REQUIREMENTS OF *GRAHAM, MILLER* AND *ROPER* BEFORE SENTENCING JUVENILES TO TERMS OF LIFE IMPRISONMENT.

In its brief the state argued that since "[t]he trial court set a review hearing" to allow the defendant "to present evidence to show he has rehabilitated while in prison" that the sentencing complies with the requirements of the Eighth Amendment as explained in *Graham, Miller* and *Roper*. See *Brief of Respondent*, page 21. The state does not elucidate on why this conclusion follows. As the following explains, the trial court had no authority under Washington Statute to set such a hearing.

Under Washington law there are two methods by which a defendant may obtain post-conviction relief from a sentence. The first is through a

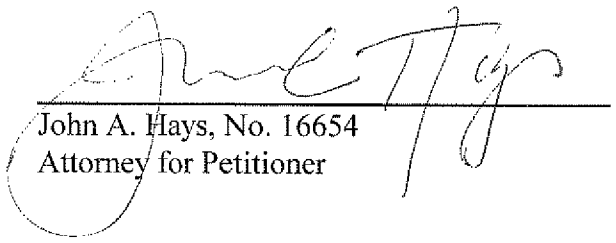
Motion for Relief from Judgment under CrR 7.8(b) and the second is through a Personal Restrain Petition under RAP 16. These rules do not contemplate or allow a trial court at the time of sentencing to set a review in 20 years. Neither does the sentencing reform act under RCW 9.94A grant a trial court this authority. Finally, while RCW 9.94A.730 does at least contemplate the possibility of a hearing after 20 years, that hearing is in front of the ISRB, not the trial court. Thus, the fact that the trial court set a hearing in 20 years in no way saves the trial court's sentencing decision from the requirements of the Eighth Amendment as explained in *Graham, Miller* and *Roper*.

CONCLUSION

Based upon the arguments contained in this brief and the opening brief of appellant, the court should vacate the defendant's sentence and remand for a new sentencing hearing in front of a new judge.

DATED this 18th day of May, 2015.

Respectfully submitted,



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APPENDIX

RCW 9.94A.730

Early Release for Persons Convicted of One or More Crimes Committed Prior to Eighteenth Birthday – Petition to Indeterminate Sentence Review Board – Conditions – Assessment, Programming, and Services – Examination – Hearing – Supervision – Denial of Petition

(1) Notwithstanding any other provision of this chapter, any person convicted of one or more crimes committed prior to the person's eighteenth birthday may petition the indeterminate sentence review board for early release after serving no less than twenty years of total confinement, provided the person has not been convicted for any crime committed subsequent to the person's eighteenth birthday, the person has not committed a disqualifying serious infraction as defined by the department in the twelve months prior to filing the petition for early release, and the current sentence was not imposed under RCW 10.95.030 or 9.94A.507.

(2) No later than five years prior to the date the offender will be eligible to petition for release, the department shall conduct an assessment of the offender and identify programming and services that would be appropriate to prepare the offender for return to the community. To the extent possible, the department shall make programming available as identified by the assessment.

(3) No later than one hundred eighty days from receipt of the petition for early release, the department shall conduct, and the offender shall participate in, an examination of the person, incorporating methodologies that are recognized by experts in the prediction of dangerousness, and including a prediction of the probability that the person will engage in future criminal behavior if released on conditions to be set by the board. The board may consider a person's failure to participate in an evaluation under this subsection in determining whether to release the person. The board shall order the person released under such affirmative and other conditions as the board determines appropriate, unless the board determines by a preponderance of the evidence that, despite such conditions, it is more likely than not that the person will commit new criminal law violations if released. The board shall give public safety considerations the highest priority when making all discretionary decisions regarding the ability for release and conditions of release.

(4) In a hearing conducted under subsection (3) of this section, the board shall provide opportunities for victims and survivors of victims of any crimes for which the offender has been convicted to present statements as set forth in RCW 7.69.032. The procedures for victim and survivor of victim input shall be provided by rule. To facilitate victim and survivor of victim involvement, county prosecutor's offices shall ensure that any victim impact statements and known contact information for victims of record and survivors of victims are forwarded as part of the judgment and sentence.

(5) An offender released by the board is subject to the supervision of the department for a period of time to be determined by the board, up to the length of the court-imposed term of incarceration. The department shall monitor the offender's compliance with conditions of community custody imposed by the court or board and promptly report any violations to the board. Any violation of conditions of community custody established or modified by the board are subject to the provisions of RCW 9.95.425 through 9.95.440.

(6) An offender whose petition for release is denied may file a new petition for release five years from the date of denial or at an earlier date as may be set by the board.

(7) An offender released under the provisions of this section may be returned to the institution at the discretion of the board if the offender is found to have violated a condition of community custody. The offender is entitled to a hearing pursuant to RCW 9.95.435. If the board finds that the offender has committed a new violation, the board may return the offender to the institution for up to the remainder of the court-imposed term of incarceration. The offender may file a new petition for release five years from the date of return to the institution or at an earlier date as may be set by the board.

COURT OF APPEALS OF WASHINGTON, DIVISION II

STATE OF WASHINGTON, **Respondent,** **vs.** **GUADALUPE SOLIS-DIAZ,** **Appellant.**	**NO. 46002-5-II** **AFFIRMATION OF SERVICE**

The under signed states the following under penalty of perjury under the laws of Washington State. On the day below, I personally e-filed and/or placed in the United States Mail the Reply Brief of Appellant with this Affirmation of Service Attached with postage paid to the indicated parties:

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