No. 46002-5-II

THE COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

GUADALUPE SOLIS-DIAZ, JR.,

Appellant.

Appeal from the Superior Court of Washington for Lewis County

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Respondent's Brief

JONATHAN L. MEYER
Lewis County Prosecuting Attorney

By: _____
SARA I. BEIGH, WSBA No. 35564
Senior Deputy Prosecuting Attorney

Lewis County Prosecutor's Office
345 W. Main Street, 2nd Floor
Chehalis, WA 98532-1900
(360) 740-1240

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B. Does Solis-Diaz's 1111 month sentence violate the provisions against cruel and unusual punishment found in the United States and Washington State Constitutions?

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II. STATEMENT OF THE CASE

Substantive Facts

On August 11, 2007, Jesse Dow left the Tower Tavern located in Centralia with a friend, Shenna Fisco, who drove to the Shell Station on South Tower so Mr. Dow could purchase cigarettes. CP 18.[1] While Mr. Dow was in the Shell Station and Ms. Fisco was waiting in the vehicle, a white car pulled up next to Ms. Fisco's car. CP 18, 52. Mr. Dow exited the Shell Station and displayed some apprehension upon seeing the white car. CP 52. This initial concern was heightened when Solis-Diaz exited the white car and went to the trunk. CP 18, 52. It appeared to Mr. Dow and Ms. Fisco that Solis-Diaz was retrieving an item from the trunk of the car. CP 18-19, 52.

[1] The record from the first appeal is not a part of this record. The substantive facts are based upon the facts as testified to at trial but they are cited to as found in the State's sentencing memorandum and the prior opinions of this Court.

Mr. Dow and Ms. Fisco left the Shell Station and hurriedly returned to the Tower Tavern. CP 19, 53. Once at the bar, Mr. Dow instructed Ms. Fisco to get the people inside the Tavern because he was concerned Solis-Diaz had grabbed some type of weapon from the trunk of the white car. CP 19, 53. This concern was realized when the white car containing Solis-Diaz drove slowly down the street. CP 19; CP 53. As the vehicle neared the Tower Tavern, Solis-Diaz rolled his passenger window down halfway and began shooting a gun into the crowd of people gathered outside the Tower Tavern. CP 19, 53.

Solis-Diaz fired approximately seven shots at the people gathered outside of the bar. CP 19, 53. These bullets shattered windows and ricocheted off the sidewalk and the building. CP 19, 53. Fortunately, Mr. Dow's and Ms. Fisco's warnings enabled Cassandra Norskog, Doug Hoheisel, Jonathan Freeman, and Sean Thomas to escape serious injuries. CP 1-3, 19, 53. Nonetheless, the bullets came within mere feet of these victims causing each of them serious concern for their lives. CP 53.

Solis-Diaz's actions were in apparent response to Mr. Dow's disagreement with an LVL gang member. CP 21, 53. The specific LVL gang member, Josh Rhoades, attended the Defendant's trial.

CP 53. Both Mr. Dow and Ms. Fisco believed that Mr. Rhoades and/or other LVL gang members would retaliate against them for testifying at the Defendant's trial. CP 53.

Procedural History.

The State filed charges against Solis-Diaz for six counts of Assault in the First Degree, one count of Drive-By Shooting and one count of Unlawful Possession of a Firearm in the Second Degree. CP 1-4. Because Solis-Diaz was 16 years-old on August 11, 2007, RCW 13.04.030(1)(e)(v)(A) required that Solis Diaz's conduct be addressed in superior court, rather than in the juvenile court system. Prior to trial the State offered Solis-Diaz a plea deal for 180 months, plus community custody. CP 35. Solis-Diaz declined the State's plea offer. CP 35.

Solis-Diaz's case was tried to a jury who convicted him of the following offenses:

Count	Charge	Victim
I	First Degree Assault While Armed With a Firearm	Jesse Dow
II	First Degree Assault While Armed With a Firearm	Sheena Fisco
III	First Degree Assault While Armed With a Firearm	Cassandra Norskog
IV	First Degree Assault While Armed With a Firearm	Sean Thomas
V	First Degree Assault While	

Count	Charge	Victim
	Armed With a Firearm	Doug Hoheisel
VI	First Degree Assault While Armed With a Firearm	Jonathan Freeman
VII	Drive-by Shooting	
VIII	Unlawful Possession of a Firearm in the Second Degree	

CP 1-4, 6, 22, 35, 54. At the sentencing hearing the State requested high end of the standard range for each count. CP 36. There was no pre-sentence report. CP 36. Solis-Diaz's trial counsel requested a low end of the standard range but did not ask for an exceptional sentence below the standard range. CP 36.

The trial court sentenced Solis-Diaz to 196 months on Count I, 183 months on Counts II-VI, 27 months on Count VII, and 29 months on Count VIII. CP 11, 36. The trial court ran Counts I-VI consecutive as required by RCW 9.94A.589(1)(b) and the remaining counts concurrent. CP 11. The time imposed on Counts I-VI included the 60 month sentence enhancement for each count. CP 11. The total time imposed was 1111 months, or approximately 92.5 years. CP 11, 36.

Solis-Diaz appealed his conviction and the Court of Appeals affirmed his convictions and sentence. CP 16-31. Next, Solis-Diaz filed a personal restraint petition. CP 32-47. This Court held that

Solis-Diaz's counsel was ineffective during Solis-Diaz's sentencing hearing and remanded the case for resentencing. CP 32-47.

Re-Sentencing Hearing.

Solis-Diaz was appointed new counsel for his re-sentencing hearing. Supp. CP NOA Quillian.[2] Mr. Quillian requested, and was granted, permission to hire an expert, Dr. Roesch, to prepare materials to assist in the re-sentencing hearing. CP 48-51. The State filed a sentencing recommendation for the re-sentencing hearing. CP 52-62. Mr. Quillian prepared a resentencing memorandum on behalf of Solis-Diaz. CP 75-255. At the re-sentencing hearing Mr. Quillian presented testimony from Dr. Roesch regarding Solis-Diaz's lessened culpability. RP 10-19. After hearing the State's recommendation, Mr. Quillian's recommendation and Solis-Diaz's statement, the trial judge found no substantial or compelling circumstances to warrant a sentence below the standard range. *See* RP. The trial judge sentenced Solis-Diaz again to 1111 months in prison. RP 34, CP 256-67. The trial court also set a review hearing, 20 years down the road, to allow Solis-Diaz the opportunity to show he has rehabilitated. Supp. CP Docket Notice.

[2] The State will be filing a supplemental Clerk's papers, which the State will cite to as, Supp. CP.

The State will supplement the facts as necessary throughout its argument below.

III. ARGUMENT

A. WHILE THE STATE CONCEDES THAT THE TRIAL JUDGE APPLIED THE WRONG LEGAL STANDARD TO THE MULITPLE OFFENSE POLICY, THE TRIAL JUDGE DID NOT ABUSE HIS DISCRETION WHEN DETERMINING THE REMAINING MITIGATING FACTORS SUBMITTED TO THE TRIAL COURT BY SOLIS-DIAZ.

Solis-Diaz argues the trial judge, Judge Hunt, abused his discretion when he ruled that, (1) he did not have the discretion to apply the multiple offense policy mitigating factor to serious violent offenses and (2) he did not have the authority under SRA to consider Solis-Diaz's age alone or as a component of Solis Diaz's ability to appreciate right from wrong, as mitigating factors. Brief of Appellant 11. Judge Hunt carefully weighed the mitigating factors argued by Solis-Diaz's attorney at the resentencing hearing. While Judge Hunt correctly applied the law as it stood at the time, the applicable legal standard for the multiple offense policy was incorrect, and therefore Judge Hunt technically abused his discretion in regards to the request for a mitigated sentence under that theory. Judge Hunt did not abuse his discretion regarding the remaining three mitigating circumstances argued by Solis-Diaz at

resentencing and this Court should remand for re-sentencing solely for consideration of the multiple offense policy.

1. Standard Of Review.

An appellate court will review a standard range sentence if the trial court has rendered its sentence by relying on an impermissible ground for denying an exceptional sentence below the standard range or when the trial court has refused to exercise its discretion. *State v. McGill*, 112 Wn. App. 95, 99-100, 47 P.3d 173 (2002).

2. Solis-Diaz May Appeal The Trial Judge's Ruling Denying The Imposition Of An Exceptional Sentence Below The Standard Range.

A sentence within the standard range is generally not appealable. RCW 9.94A.585(1). Although a defendant is entitled to request at sentencing that the trial judge consider a sentence below the standard range, the defendant is not entitled to have such a sentence implemented. *State v. Grayson*, 154 Wn.2d 333, 342, 111 P.3d 1183 (2005). Remand for resentencing is appropriate if the reviewing court is not "confident that the trial court would impose the same sentence when it considers only valid factors." *McGill*, 112 Wn. App. at 100. Illegal or erroneous sentences may be challenged for the first time on appeal. *State v. Ross*, 152 Wn.2d

220, 229, 95 P.3d 1225 (2004) (citations omitted). The remedy for an erroneous sentence is remand for resentencing. *Id.*

In *McGill* the trial court erroneously believed it did not have the discretion to give an exceptional sentence below the standard range. *McGill*, 112 Wn. App. at 98-99. The trial court stated the sentence did not seem justified and that McGill had made tremendous efforts while in custody and had the support of his friends and family, all which could have been considered in an exceptional sentence below the standard range. Because of the trial court's comments the appellate court held that it could not "say that the sentencing court would have imposed the same sentence had it known an exceptional sentence was an option." *Id.* at 100-01.

Solis-Diaz asked for an exceptional sentence below the standard range and offered four mitigating circumstances for which the judge should impose such a sentence, (1) Solis-Diaz's capacity to appreciate the wrongfulness of his conduct was significantly diminished, (2) operation of the multiple offense of the SRA results in a presumptive sentence that is clearly excessive in light of the purpose of the SRA, (3) the sentence was clearly excessive, and (4) Solis-Diaz's status as a juvenile. RP 28-30, 49-52; CP 106-11. All mitigating circumstances were rejected by Judge Hunt. RP 49-

53. Solis-Diaz argues to this Court that Judge Hunt used the wrong legal standard when considering the multiple offense policy. Solis-Diaz also alleges Judge Hunt incorrectly refused to consider Solis-Diaz's youth as a possible mitigating factor when considering his ability to appreciate the wrongfulness of his actions, thereby abusing his discretion.

a. The State concedes Judge Hunt used the wrong legal standard when determining whether he could use the multiple offense policy as a mitigating factor in Solis-Diaz's case.

It is an abuse of discretion when the trial court bases its decision on untenable reasons or grounds or the decision is manifestly unreasonable. *State v. C.J.*, 148 Wn.2d 672, 686, 63 P.3d 765 (2003). "A decision is based on untenable grounds or for untenable reasons if it rests on facts unsupported by the record or was reached by applying the wrong legal standard." *State v. Rohrich*, 149 Wn.2d 647, 656, 71 P.3d 638 (2003) (internal quotations and citations omitted).

Judge Hunt declined to grant the exceptional sentence downward based upon the operation of the multiple offense policy based upon his reading of Division III's holding in *State v. Graham,*

178 Wn. App. 580, 589-91, 314 P.3d 1148 (2013).[3] The Court of Appeals decision held that the multiple offense policy was not available for crimes that were classified as serious violent offenses. *Graham I*, 178 Wn. App. at 590. Judge Hunt stated:

> The second statutory factor proposed by the defense is the operation of the multiple offense policy of the Sentencing Reform Act, RCW 9.94A.589, resulting in a presumptive sentence that is clearly excessive in light of the purpose of this chapter as expressed in RCW 9.94A.010. The defense properly notes that the recent case of State vs. Graham has held that this statutory factor does not apply to sentences for serious violent offenses.
>
> The defense then suggests that I either essentially ignore this binding precedent by binding it is wrong or advisory or engage in an analysis that does not make sense to me. And I am not inclined to do either.

RP 50-51. Judge Hunt was correct, at the time, *Graham I* was binding upon him. The Court of Appeals decision used the incorrect legal standard, and therefore, even though Judge Hunt based his decision on the legal precedent known to him at the time, the Washington State Supreme Court later ruled that this interpretation of the multiple offense policy is incorrect. *State v. Graham*, 181 Wn.2d 878, 883-85, 337 P.3d 319 (2014).[4] Therefore, the State reluctantly concedes that Solis-Diaz must be able to once again

[3] The State will refer to *State v. Graham*, 178 Wn. App. 580 as *Graham I*.
[4] The State will refer to *State v. Graham*, 181 Wn.2d 878 as *Graham II*.

present this mitigating factor for consideration in his request for an exceptional sentence below the standard range. Solis-Diaz's matter should be remanded solely to determine if the multiple offense policy supports an exceptional sentence below the standard range.

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

The trial judge considered the materials presented by Solis-Diaz's attorney in support of a mitigated sentence below the standard range. RP 19, 41-52. Included in these materials were Dr. Roesch's report and testimony, the sentencing memorandum and supporting materials presented by Solis-Diaz's attorney. RP 9-19, 41-52; CP 75-255, 270-84. Included in the supporting materials were declarations from Solis-Diaz's family, friends, educator's and counselors. CP 75-255. The materials also included information about other offenders and their sentences. CP 75-255.

Solis-Diaz mischaracterizes the trial judge's obvious frustration with this Court as not understanding he had the ability to do a downward departure from the standard range or refusing to depart from the standard range. Brief of Appellant 16-22. The trial judge went through each mitigating factor and, with the exception of

the multiple offense policy, found none of the mitigating factors to be substantial and compelling reason for a downward departure from the standard range. RP 49-53. Solis-Diaz may disagree and believe his youth, which he argues contributed to his ability to appreciate the wrongfulness of his actions, but this disagreement does not make Judge Hunt's decision an abuse of discretion.

Solis-Diaz at his resentencing hearing asked the trial judge to consider the statutory mitigating factor set forth in RCW 9.94A.535(1)(e), "[t]he defendant's capacity to appreciate the wrongfulness of his or her conduct, or to conform his or her conduct to the requirement of the law, was significantly impaired." *See* RP 29; CP 106-07. Solis-Diaz also separately asked the trial judge to consider youth alone as a factor. RP 29; CP 110. Solis-Diaz now argues in his appellate brief that Judge Hunt used the wrong legal standard when determining youth, because youth was not to be seen in a vacuum but in conjunction with RCW 9.94.A.535(1)(e).

Judge Hunt did consider youth as it related to whether Solis-Diaz's youth contributed to his inability to appreciate the wrongfulness of his actions and found this argument unpersuasive. RP 29, 50; CP 106-07. Judge Hunt also looked at Solis-Diaz's status as a juvenile, a non-statutory mitigating factor, individually,

as requested by Solis-Diaz's attorney, and ruled it was not appropriate in and of itself to give an exceptional downward sentence solely because Solis-Diaz was under 18 years of age when he committed the assaults. RP 29, 51-52; CP 110.

In considering whether Solis-Diaz's capacity to appreciate the wrongfulness of his conduct was diminished Judge Hunt stated there was no evidence to support this assertion. RP 49. Judge Hunt explained there must be some sort of connection between the lack of capacity and the crime committed. RP 50. Judge Hunt clearly stated he was not persuaded by Dr. Roesch's report or testimony. RP 41-42. He noted, "[t]here's nothing in this report that would convince me to pronounce a sentence that is less than one-sixth of the sentence I did pronounce." RP 42. Judge Hunt went on to state:

> Furthermore, as the state has pointed out, he never read the police reports, never interviewed the victims of this crime and relied overwhelmingly on self-serving statements of the defendant, his family and teachers from years ago. This-one-sided approach seriously undercuts the credibility of that report.

RP 42. While the judge did equate Solis-Diaz's actions to attempted murder, a crime he was not charged with, it cannot be denied that Solis-Diaz retrieved a gun from the trunk of car, followed his intended target, Jesse Dow, and shot at Mr. Dow approximately seven times. RP 50; CP 18-19, 52-53. It was, in part, the deliberate

actions and premeditation shown by Solis-Diaz's conduct on the night of the shooting which led Judge Hunt to the conclusion that Solis-Diaz was not suffering from a lack of capacity to understand the wrongfulness of his actions. RP 49-50. Judge Hunt properly considered the evidence presented for the statutory mitigating factor, capacity to appreciate the wrongfulness of his actions was significantly impaired, as set forth in RCW 9.94A.535(1)(e). Judge Hunt was not swayed by Solis-Diaz's argument and found there was no evidence to support the argument, this is not an abuse of discretion.

Judge Hunt also considered youth, or Solis-Diaz's status as a juvenile, in a vacuum, because that was another alternative mitigating circumstance presented by Solis-Diaz. RP 51-52. To now argue this was an improper way to consider this mitigating factor is disingenuous. Judge Hunt did the analysis, considering youth in conjunction with RCW 9.94A.535(1)(e) as requested. Solis-Diaz seems to confuse the trial judge's finding that he finds "there are no substantial and compelling reasons to deviate from the standard range" as an abuse of discretion simply because Judge Hunt did not find Solis-Diaz's argument persuasive. *See* RP 37. The trial judge is not required to agree with Solis-Diaz, he is only required to

consider the mitigating factors presented to determine if he finds substantial and compelling reasons to give an exceptional sentence below the standard range. Judge Hunt considered all the evidence and arguments presented by Solis-Diaz and issued a ruling that was not in his favor. RP 19, 34-53. Judge Hunt clearly used his discretion in determining the appropriate sentence was high end of the standard range, not a mitigated exceptional sentence below the standard range. Solis-Diaz's sentence should be affirmed.

B. SOLIS DIAZ'S 1111 MONTH SENTENCE DOES NOT VIOLATE THE FEDERAL OR STATE CONSTITUTIONAL BAN ON CRUEL AND UNUSUAL PUNISHMENT.

Solis-Diaz argues that his 1111 month sentence violates the United States and Washington State Constitutional bans on cruel and unusual punishments. Brief of Appellant 23. Solis-Diaz's sentence is constitutional and does not violate either the United States or Washington State's prohibitions on cruel and unusual punishment.

1. Standard Of Review.

Constitutional issues are questions of law and are reviewed de novo. *State v. Gresham*, 173 Wn.2d 405, 419, 269 P.3d 207 (2012).

2. Solis-Diaz's Sentence Does Not Violate The Eighth Amendment's Ban On Cruel And Unusual Punishment .

The Eighth Amendment of the United States Constitution bars the government from inflicting cruel and unusual punishment. "[T]he Eighth Amendment guarantees individuals the right not to be subjected to excessive sanction." *Roper v. Simmons*, 543 U.S. 551, 560, 125 S. Ct. 1183, 161 L.Ed.2d 1 (2005). Historically the United States Supreme Court has held that proportionality of the imposed punishment was central to the analysis of the Eighth Amendment's ban on cruel and unusual punishment. *Graham v. Florida*, 560 U.S. 48, 59, 130 S. Ct. 2011, 176 L. Ed.2d 825 (2010), *citing Weems v. United States*, 217 U.S. 349, 367, 30 S Ct. 544, 54 L. Ed. 793 (1910). The proportionality analysis fell into two general classifications, (1) challenges "the length of term-of-years sentences given all the circumstances in a particular case" and (2) categorical restrictions regarding standards for the implementation of the death penalty. *Graham*, 130 S. Ct. at 2021.

"In comparing the gravity of the offense to the harshness of the penalty, courts must accord substantial deference to the legislature and its policy judgments as reflected in statutorily mandated sentences." *State v. Berger*, 212 Ariz. 473, 134 P.3d

378, 381 (2006), *cert. denied,* 549 U.S. 1252 (2007). When a person is sentenced to a term of years only in exceedingly rare cases will a reviewing court find the sentence violates the Eighth Amendment. *Ewing v. California*, 538 U.S. 11, 21-22, 123 S. Ct. 1179, 155 L. Ed.2d 108 (2003).

a. The Eighth Amendment is not implicated by separate sentences for separate crimes.

The fact that Solis-Diaz is not serving a single lengthy sentence for a single conviction (as were the juvenile offenders in *Miller v. Alabama*[5]), 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.[6]

The comparison between the gravity of the offense and the harshness of the punishment is the sentence imposed for a single offense. *United States v. Aiello*, 864 F.2d 257, 265 (2nd Cir. 1988). The fact that cumulative punishments may be imposed for distinct offenses in the same prosecution does not present an Eighth Amendment question if each individual sentence is "reasonable."

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[5] *Miller v. Alabama*, __ U.S.__, 132 S. Ct. 2455, 183 L. Ed.2d 407 (2012).

[6] The State is only referring to the six separate counts of Assault in the First Degree which were ordered to run consecutively, not the two counts (Drive By Shooting and Unlawful Possession of a Firearm) which were run concurrently.

See, e.g., Lockyer v. Andrade, 538 U.S. 63, 74 n. 1, 123 S. Ct. 1166, 155 L. Ed. 2d 144 (2003) (rejecting, in context of federal habeas review, dissent's argument that two consecutive sentences of twenty-five years to life for separate offenses were equivalent, for purposes of Eighth Amendment analysis, to one sentence of life without parole for thirty-seven-year-old defendant); *O'Neil v. Vermont*, 144 U.S. 323, 331, 36 L. Ed. 450, 12 S. Ct. 693 (1892) (quoting *O'Neil v. State*, 58 Vt. 140, 2 A. 586 (1886) ("'It would scarcely be competent for a person to assail the constitutionality of the statute prescribing a punishment for burglary, on the ground that he had committed so many burglaries that, if punishment for each were inflicted on him, he might be kept in prison for life.'"); *United States v. Beverly*, 369 F.3d 516, 537 (6th Cir.), *cert. denied*, 125 S. Ct. 122 (2004) (imposition of consecutive sentences upon a first time felon is not a violation of the Eighth Amendment where no one of the sentences is intrinsically "grossly disproportionate" to the crime of armed bank robbery); *State v. Berger*, 134 P.3d 378 (twenty consecutive ten-year sentences for child pornography does not violate the Eighth Amendment).

This rule has been applied specifically to claims that consecutive terms imposed upon a defendant for crimes committed

as a juvenile violated the Eighth Amendment. *See State v. Kasic*, 228 Ariz. 228, 265 P.3d 410 (2011) (finding that cumulative sentence of 139.75 years for juvenile non-homicide offender, based on consecutive term-of-years sentences for multiple crimes with multiple victims, did not violate Eighth Amendment); *Walle v. State*, 99 So.3d 967 (Fla. Dist. Ct. App. 2012) (consecutive sentences of 65 years for 18 offenses, consecutive to a 27-year sentence in a separate case, did not violate Eighth Amendment when imposed on juvenile non-homicide offender); *Bunch v. Smith*, 685 F.2d 546 (6th Cir. 2012) (denying habeas relief under Eighth Amendment to juvenile non-homicide offender who received separate consecutive sentences for separate crimes against the same victim totaling 89 years).

While Solis-Diaz's consecutive sentences for his multiple serious violent offenses amount to a lengthy term of years, he was not sentenced to life without the possibility of parole, the only sentence *Miller* specifically prohibits. *Miller*, 132 S. Ct. at 2469. Under the analysis set out above, Solis-Diaz's sentences do not violate the Eighth Amendment prohibition against cruel and unusual punishment.

b. Solis-Diaz's sentence is not mandatory.

There is another reason why Solis-Diaz's sentence does not run afoul of *Miller*. Unlike a mandatory life sentence without possibility of release, Solis-Diaz's standard range sentence of 1111 months may be mitigated through the imposition of an exceptional sentence. Pursuant to the Washington State Supreme Court decision in *Graham II*, a sentencing court has discretion to impose an exceptional sentence below the standard range even in the case of consecutive sentences for multiple serious violent offenses, if the court finds that the cumulative sentence is clearly excessive in light of the purposes of the SRA. *Graham II*, 181 Wn.2d at 885.

c. The Legislature has remedied the problem identified in *Miller*.

Solis-Diaz's sentence is not among those prohibited by *Miller* because the Washington Legislature last year enacted statutes addressing (and arguably going beyond) the problem identified in *Miller*. Under these statutes (the *"Miller* fix"), any defendant who stands convicted of one or more crimes committed prior to his 18th birthday may petition the Indeterminate Sentence Review Board (ISRB) for early release after serving 20 years of total confinement. RCW 9.94A.730(1).

The relevant statute contains a presumption of release: "This 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." RCW 9.94A.730(3) (itallics added). Thus, Washington's sentencing scheme for juvenile offenders contains a realistic possibility of release after 20 years, and accordingly does not violate the *Miller* prohibition on mandatory life without parole sentences for such offenders.

d. The trial court set a review hearing, thereby allowing Solis-Diaz an opportunity to show he has rehabilitated.

The trial court set a review hearing to allow Solis-Diaz to present evidence to show he has rehabilitated while in prison. RP 9, 54; Supp. CP Docket Notice. This review hearing complies with the analysis set forth in *Miller* and *Graham*, requiring a meaningful opportunity for release. *Miller*, 132 S. Ct. at 2468-69; *Graham*, 560 U.S. at 82.

3. Solis-Diaz Does Not Provide A Sufficient Analysis For This Court To Determine His Article I, Section 14, Argument.

The Washington State Constitution has a prohibition against cruel punishment. Const. art. I, § 14. The Washington state Constitution states, "[e]xcessive bail shall not be required, excessive fines imposed, nor cruel punishment inflicted." Const. art. I, § 14. The Washington State Supreme Court has previously held that the prohibition against cruel punishments found in Article I, section 14 of the Washington State Constitution affords greater protection than the Eighth Amendment. *State v. Manussier*, 129 Wn.2d 652, 674, 921 P.2d 473 (1996). The Court has listed three factors to determine if a sentence is cruel under article I, section 14: (1) the nature of the offense, (2) the punishment in other jurisdictions for the same offense, and (3) punishment in Washington for other offenses. *State v. Fain*, 94 Wn.2d 387, 726-28, 617 P.2d 720 (1980).

Solis-Diaz makes a conclusory statement, "In this case a review and application of the *Fain* standards leads to the conclusion that the imposition of the standard range sentence against Mr. Solis-Diaz violated Washington Constitution, Article I, § 14." Brief of Appellant 27. There is no analysis of the *Fain* factors

and his argument is thus insufficient to support this claim. *In re Haynes*, 100 Wn. App. 366, 375-76, 996 P.2d 637 (2000).

4. TC Conducted An Individualized Analysis Of Solis-Diaz's Circumstances, Which Is All That Is Required Under *Miller*.

The trial judge considered Solis-Diaz's circumstances in relation to the sentence he ultimately imposed. Contrary to Solis-Diaz's contention, the trial court need only do an individual assessment of Solis-Diaz's circumstances, which would include his youth, when determining what an appropriate sentence is. Solis-Diaz argues that Judge Hunt failed to consider the required individualized factors as set forth in *Miller.* Brief of Appellant 28-34.

First, for Solis-Diaz to state, "the sentencing court never considered Mr. Solis-Diaz's background and mental and emotional development" is a blatant misrepresentation of the sentencing hearing. *See* RP 19, 41-42, 45, 49, 53; Brief of Appellant 31-32. The trial judge considered all of the materials presented by Solis-Diaz. RP 19. Judge Hunt actually read the 180 page sentencing memorandum and supporting materials prior to the sentencing hearing. RP 19; CP 75-255. Judge Hunt also reviewed Dr. Roesch's report prior to the hearing. RP 19; CP 270-84. In addition, Judge Hunt listened and took into account Dr. Roesch's testimony

on the matter. RP 41-42, 45. Judge Hunt may have not articulated his review and reasoning as thoroughly as Solis-Diaz would like, but that does not mean the judge did not make an individualized determination of the appropriate sentence.

The Supreme Court in *Miller* held that a mandatory life without parole sentence for juvenile offenders is unconstitutional. *Miller*, 132 S. Ct. at 2469. It is only this mandatory scheme that is unconstitutional. *Id.* "[T]he Eighth Amendment forbids a sentencing scheme that mandates life in prison without possibility of parole for juvenile offenders." *Id.* Judge Hunt's individualized determination of Solis-Diaz's sentence and consideration of the *Fain* factors as well as the mitigating factors put forward by Solis-Diaz complies with *Miller*. This Court should only remand for consideration of the multiple offense policy as a mitigating factor.

C. SOLIS-DIAZ HAD NOT MADE THE REQUISITE SHOWING TO HAVE JUDGE HUNT REMOVED FROM HIS CASE.

Solis-Diaz urges this Court to remove Judge Hunt from his case upon remand for resentencing. Brief of Appellant 34-39. Solis-Diaz argues Judge Hunt has prejudged the case and he would have substantial difficulty setting aside prior erroneous beliefs and rulings on remand. Brief of Appellant 35-39. Solis-Diaz asserts that the appearance of fairness doctrine requires Judge Hunt's removal.

Id. The State respectfully disagrees with Solis-Diaz's analysis, and while Judge Hunt may have some strong feelings and beliefs in regards to Solis-Diaz's case, these beliefs and feelings do not warrant his removal.

1. Standard Of Review.

The appearance of fairness doctrine and whether a judge should be disqualified based upon if the judge's impartiality may reasonably be questioned is an objective test. *In re Swenson*, 158 Wn. App. 812, 818, 244 P.3d 959 (2010). An appearance of fairness claim will not succeed without evidence of actual or potential bias because the claim would be without merit. *Id.*

2. Judge Hunt Did Not Violate The Appearance Of Fairness Doctrine During Solis-Diaz's Resentencing Hearing.

A criminal defendant has a constitutional right to a fair trial by an impartial judge. U.S. Const. amends. VI, XIV; Const. art. I, § 22. The law requires more than just impartiality, the law requires a judge to also appear impartial. *State v. Gamble*, 168 Wn.2d 161, 187, 225 P.3d 973 (2010) (quotations and citations omitted). It is presumed that a judge acts without prejudice or bias. *Swenson*, 158 Wn. App. at 818. Judges are also required to disqualify himself or herself from a proceeding if the judge's impartiality may

reasonably be questioned or they are biased against a party. CJC 2.11(A);[7] *Swenson*, 158 Wn. App. at 818. Under the Code of Judicial Conduct:

> A judge shall disqualify himself or herself in any proceeding in which the judge's impartiality might reasonably be questioned including but not limited to the following circumstances:
>
> (1) The judge has a personal bias or prejudice concerning a party or a party's lawyers, or personal knowledge of facts that are in dispute in the proceeding.

CJC 2.11(A)(1).

"The appearance of fairness doctrine is 'directed at the evil of a biased or potentially interested judge or quasi-judicial decision maker.'" *Swenson*, 158 Wn. App. at 818, *citing State v. Post*, 118 Wn.2d 596, 618-19, 826 P.2d 172 (1992). Under the objective standard, "a judicial proceeding is valid only if a reasonably prudent, disinterested observer would conclude that the parties received a fair, impartial and neutral hearing." *Gamble*, 168 Wn.2d at 187 (internal quotations and citations omitted). Allegedly improper or biased comments are considered in context. *See, e.g.*, *Gamble,* 168 Wn.2d at 188; *In re Dependency of O.J.*, 88 Wn. App.

[7] The State is citing to the current citation under the CJC that was in effect in 2011 when the plea was taken. Much of the case law and LaChance's briefing cite to former CJC 3(D)(1).

690, 697, 947 P.2d 252 (1997). A defendant who has reason to believe a judge is biased and impartial must affirmatively act if they wish to pursue a claim for violation of the appearance of fairness doctrine. *Swenson*, 158 Wn. App. at 818. A defendant cannot simply wait until he or she has an adverse ruling to move for disqualification of a judge if that defendant has reason to believe the judge should be disqualified. *Id*.

Judge Hunt took great pains at the re-sentencing hearing to explain his actions from the previous sentencing hearing and to also explain to this Court why he felt the opinion authored in Solis-Diaz's personal restraint petition was insulting to trial judges. RP 34-52. Judge Hunt's frustration with this Court does not mean he failed to be impartial. Yes, Judge Hunt did go on a slight tirade directed towards this Court. Judge Hunt expressed his frustration that this Court seemed to be under the impression that he would be ignorant to a number of the issues surrounding the facts and circumstances of Solis-Diaz's first sentencing hearing. RP 34-42. This did not violate the appearance of fairness doctrine.

Judge Hunt pointed out that he knew Solis-Diaz was an auto-adult jurisdiction case and to assume otherwise was insulting. RP 34-35. Judge Hunt also noted, for this Court's benefit, that the

local Department of Corrections office refuses to do pre-sentence investigations unless they are mandated by statute and there is no such mandate in a case like Solis-Diaz's. RP 35-36. Judge Hunt also made a record regarding how Mr. Underwood understood what his audience, the trial judge, knew what would and would not likely be persuasive. RP 36-37. Finally, to make it clear he understood that he could have, if he had so chosen to, handed down an exceptional sentence below the standard range at the time of Solis-Diaz's original sentencing, Judge Hunt stated, "[d]espite the clear legislative intent, I know I could, and I knew I could at the time of the original sentence, under some circumstances declare an exceptional sentence below the standard range." RP 42.

Despite his irritation at this Court, Judge Hunt considered all of the material submitted by Solis-Diaz's attorney, listened to the testimony of Solis-Diaz's expert, heard Solis-Diaz's attorney's argument regarding sentencing and listened to Solis-Diaz before making his ruling. *See* RP. Regardless of whether Solis-Diaz believes Judge Hunt made the appropriate rulings, even he cannot deny that the judge went through Solis-Diaz's sentencing memorandum and addressed all of the requested mitigating factors and the constitutional issue. RP 34-52. If, as Solis-Diaz argues,

Judge Hunt was mistaken about his ability to deal with the federal constitutional issues on this remand, this is not a violation of the appearance of fairness doctrine, it is at most a misunderstanding of this Court's prior ruling. Brief of Appellant 38-39; RP 53. Judge Hunt did not violate the appearance of fairness doctrine during Solis-Diaz's re-sentencing hearing.

3. Removal Of Judge Hunt Is Not An Appropriate Remedy.

A party who is seeking a judge's removal from a case must generally file a motion requesting recusal in the trial court. *State v. McEnroe*, 181 Wn.2d 375, 386, 333 P.3d 402 (2014). "The recusal rule itself is based on the assumption that the challenged judge gets to evaluate the stated grounds for recusal in the first instance." *McEnroe*, 181 Wn.2d at 386. A party may ask to have a judge removed for the first time on appeal. *Id.* at 387.

> [R]eassignement may be sought for the first time on appeal where, for example, the trial judge will exercise discretion on remand regarding the very issue that triggered the appeal and has already been exposed to prohibited information, expressed an opinion as to the merits, or otherwise prejudged the issue.

Id. The remedy of appellate court removal is generally not available when the decision of the appellate court "effectively limits the trial court's discretion on remand." *Id.*

In this matter, this Court will be sending Solis-Diaz's case for determination of the multiple offense policy. This determination is limited, and was not considered previously because Judge Hunt applied the legal standard as it was at the time, although it ultimately was the wrong legal standard. This will effectively limit his discretion on remand. Further, the benefits of having the judge who heard the trial, saw the witnesses testify and understand the climate for which this case was tried in cannot be denied. The fear and intimidation the State's witnesses had to deal with each day on the stand cannot be adequately translated in a reading of the transcript. This Court should not remove Judge Hunt from this case.

IV. CONCLUSION

The State concedes Solis-Diaz's case must be remanded back for resentencing, but solely on the multiple offense policy issue. Judge Hunt individually and adequately addressed the other mitigating factors and determined none of them gave compelling and substantial reason to depart from the standard range. Solis-Diaz's 1111 month sentence is constitutional. Finally, this Court should not remove Judge Hunt from Solis-Diaz's case upon remand for resentencing.

RESPECTFULLY submitted this 17th day of April, 2015.

JONATHAN L. MEYER
Lewis County Prosecuting Attorney

by:_____
SARA I. BEIGH, WSBA 35564
Attorney for Plaintiff

COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON, Respondent, vs. GUADALUPE SOLIS-DIAZ, JR., Appellant.	No. 46002-5-II DECLARATION OF SERVICE

Ms. Teri Bryant, paralegal for Sara I. Beigh, Senior Deputy Prosecuting Attorney, declares under penalty of perjury under the laws of the State of Washington that the following is true and correct: On April 9, 2015, the appellant was served with a copy of the **Respondent's Brief** by email via the COA electronic filing portal to Lisa Tubbut, attorney for appellant, at the following email address: jahayslaw@comcast.net.

DATED this 17th day of April, 2015, at Chehalis, Washington.

Teri Bryant, Paralegal
Lewis County Prosecuting Attorney Office

LEWIS COUNTY PROSECUTOR

April 17, 2015 - 3:39 PM

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