No. 52599-2-II

98605-3

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

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STATE OF WASHINGTON

V.

GUADALUPE SOLIS DIAZ

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# PETITION FOR REVIEW

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**Cases**

A. Identity of Petitioner

Guadalupe Solis-Diaz, Jr. asks this Court to accept review of the Court of Appeals decision terminating review designated in Part B of this Petition.

B. Court of Appeals Decision

The Court of Appeals affirmed Mr. Solis-Diaz' Judgment and Sentence on May 5, 2020. A copy of the decision is attached in the Appendix as pages A-1 to A-12.

C. Issues Presented for Review

1. Was the Court of Appeals refusal to conduct proportionality review pursuant to *State v. Ritchie, infra* in conflict with this Court's proportionality jurisprudence for juvenile offenders in *State v. Bennett, infra*?
2. Should this Court accept review as an issue of substantial public interest whether proportionality review should be allowed when reviewing the sentences of juvenile offenders?

D. Statement of the Case

This is the second time Mr. Solis-Diaz comes before this Court seeking a sentence commensurate with his co-defendant and similarly situated juveniles who commit violent offenses that do not result in death or injury to others. *State v. Solis-Diaz*, 187 Wn.2d 535, 387 P.3d 703

(2017). In his first Petition for Review, this Court reversed Mr. Solis-Diaz' 1111 month sentence and ordered he be resentenced by a different judge. On remand, although the judge did reduce his sentence, the thirty year sentence that was imposed remains excessive and disproportionate to similarly situated juvenile offenders. This Court should again grant review.

In 2007, 16-year-old Guadalupe Solis-Diaz shot a firearm from a moving vehicle towards a building. CP, 1. The intended target of the shooting was Jesse Dow, someone with whom Mr. Solis-Diaz had an earlier altercation. CP, 1. Although five additional bystanders, including Sean Thomas and Cassandra Norskog, were standing in the vicinity of the shooting, no one was hurt and there was only minimal damage to the building and a nearby vehicle. CP, 1. Mr. Solis-Diaz had no prior criminal history. CP, 9. Mr. Solis-Diaz was convicted by a jury of six counts first degree assault while armed with a firearm, one count of drive-by shooting, and one count of unlawful possession of a firearm in the second degree. CP, 8. The State's theory for the unlawful possession of a firearm in the second degree count was based solely on his age, being under 18 at the time. CP, 4.

The driver of the car involved in the drive-by shooting was Juan Velasquez. CP, 33-34. Mr. Valesquez, who was 21 years old at the time,

was originally charged with the same offenses as Mr. Solis-Diaz, but eventually pleaded guilty to one count of first degree assault, three counts of third degree assault, and bail jumping and received a sentence of 151 months, or 12-1/2 years. CP, 34.

At sentencing, the Court ran the six first-degree assault convictions consecutive and sentenced him to 1111 months, over 92 years, an effective life sentence even for a teenager. CP, 13. In 2012, the Court of Appeals found Mr. Solis-Diaz did not receive effective assistance of counsel at sentencing and ordered a new sentencing hearing. *In re Diaz*, 170 Wn.App. 1039 (2012). On remand, the same judge reimposed the same 1111 months. CP, 22. As noted earlier, this Court reversed the sentence a second time and ordered a new sentencing hearing in front of a different judge. *State v. Solis-Diaz*, 187 Wn.2d 535, 387 P.3d 703 (2017).

On July 10, 2018, the Court convened for the purpose of the third sentencing hearing. The Court imposed 360 months, or thirty years. CP, 265. Mr. Solis-Diaz appeals from this sentence. CP, 273.

At the third sentencing hearing, the Court heard extensive testimony about youthful offenders in general and Mr. Solis-Diaz specifically. CP, 32, et seq. Mr. Solis-Diaz grew up in a household with an alcoholic mother who suffered from severe depression. CP, 55. Mr. Solis-Diaz and his sisters, despite their attempts to hide the knives in the

house to prevent their mother from getting access to them, observed their mother cut herself in at least six or seven suicide attempts. CP, 55. As a teenager, he turned frequently to alcohol and drugs. CP, 56. He describes himself during that period as "just mad," someone whose "temper was high." CP, 56. He turned to gangs as a result, joining the Little Valley Lokotes. CP, 56. Mr. Solis-Diaz struggled in school, starting as early as first grade, and was placed into special education. CP, 57. Starting in middle school, he was frequently absent or truant, and got into frequent fights when he was in attendance. CP, 57. His last completed grade was ninth grade. CP, 57.

As part of his sentencing presentation, Mr. Solis-Diaz retained the services of Dr. Ronald Roesch, a licensed psychologist and professor at University of British Columbia. Dr. Roesch had the advantage of performing psychological testing on Mr. Solis-Diaz twice, once just before his 2014 sentencing and again just before his 2018 sentencing. CP, 60. In just those four years, Dr. Roesch noted Mr. Solis-Diaz demonstrated as "substantially different" with evidence of significant maturation. CP, 60. In 2018 he presented as "stable, self-confident, and relaxed," and did not show the same tendencies for "impulsive and self-destructive behaviors that were noted in the 2014 testing." In the four intervening years, he was "showing less anti-social features, more empathy, more contrition, more

respect for the rights of others, and also thinking more about the long-term consequences of decisions that he made back 10 or 11 years ago, and the decisions he's making now in terms of planning for his future." RP, 50.

The primary victim of the shooting, Jesse Dow, also testified. RP, 54. Mr. Dow testified to some personal struggles he has had with drug use, long term treatment, and prison. RP, 61-62. His conclusion was that everyone "needs that second chance in life." RP, 62. With regards to Mr. Solis-Diaz, Mr. Dow believes he had "spent long enough in" prison and he "needs an opportunity." RP, 62. Mr. Dow forgives Mr. Solis-Diaz. RP, 64.

In addition to Mr. Dow's testimony, the record also reflects Declarations from two additional victims: Sean Thomas and Cassandra Norskog. Ms. Norskog calls Mr. Solis-Diaz' original sentence "outrageous and unfair." CP, 258. She compares Mr. Solis-Diaz' sentence to the sentence imposed on James Reeder, a Lewis County man who received "37 years for raping and killing a little girl."[1] CP, 258. Ms. Norskog opines that a sentence of approximately 15 years would be

[1] James Reeder, a Centralia resident, was 25 years old when murdered his girlfriend's 2-year-old daughter. He "repeatedly raped the child and hurt her so badly that patches of skin were missing from her body and her toes, according to court documents." https://komonews.com/news/local/judge-gives-37-year-sentence-for-toddlers-murder-wishes-it-was-more

appropriate, taking into account that he was "on drugs at the time of the crime and 16 years old." CP, 259.

Mr. Thomas' Declaration is even more densely introspective and forceful than Ms. Norskog, if that is possible. He begins by saying he suffered no injury as a result of these offenses, including that it did not "emotionally damage or harm" him. CP, 256. Mr. Thomas was "very upset" by the "utter injustice" of the original sentence and continues to believe that even 30 years is "way too long a sentence." CP, 256-57. Presciently, Mr. Thomas intuits the arguments made by the child development expert witnesses who testified at Mr. Solis-Diaz' sentencing hearing, "As a 16-year-old kid, you are going to make mistakes. . . But those mistakes just can't define who you are. You just are not the same person once you are an adult. Junior just can't be the same person now, 11 years later, as he was at 16. Everybody deserves a second chance. People grow and change. I absolutely believe Junior can come back to our community, where I still live, and make a positive life for himself. Junior has done his time and deserves a second chance." CP, 257.

The Court heard extensive testimony about adolescent brain development. RP, 14. Much of this information referenced studies and papers that prompted the recent cases distinguishing adults from juveniles. *State v. Houston-Sconiers*, 188 Wn.2d 1, 391 P.3d 409 (2017); *Miller v.*

*Alabama*, 567 U.S. 460, 132 S.Ct. 2455, 183 L.Ed.2d 407 (2012); *Graham v. Florida*, 560 U.S. 48, 130 S.Ct. 2011, 176 L.Ed.2d 825 (2010); *Roper v. Simmons*, 543 U.S. 551, 125 S.Ct. 1183, 161 L.Ed.2d 1 (2005).

The Court explained its thirty year sentence follows: "I will state for the record that I've considered all the evidence that's been presented before and during today's hearing. I've looked at the *Miller* factors. I am going to impose an exceptional sentence downward. It's based on youth as a mitigating factor. It's based on the application of the *Miller* factors. It's based on the multi-offense policy of the Sentencing Reform Act. And just to be thorough, I reviewed RCW 9.94A.535, and I looked at each one of the mitigating factors to see if any of the others might apply." RP, 87. The Court imposed a sentence of 60 months each on Counts 1 through 6, to run consecutive to each other. RP, 87. The Court also imposed concurrent sentences on Counts 7 and 8 of 27 months and 29 months respectively. RP, 88. The net result was a 360 month sentence, or thirty years.

On appeal, Mr. Solis-Diaz argued that his 30 year sentence was disproportionate with similar sentences imposed on juvenile offenders. Attached to his Brief of Appellant was an Appendix that listed 29 youthful offenders who have filed for post-conviction relief. Each of these offenders was convicted of one or more counts of aggravated first degree

murder when they were between 14 or 17 years old and were sentenced to life without the possibility of parole. After *Miller* was decided, they each filed for post-conviction relief from their sentences. Although some youthful offenders are still awaiting resentencing, the Appendix shows the majority of them are receiving sentences of between 25 and 40 years. Mr. Solis-Diaz argued to the Court of Appeals that a sentence of 30 years for a shooting committed by a 16-year-old offender that resulted in no death or injury was disproportionate when compared to the 25 to 40 year sentences of similar aged offenders convicted of murder.

Mr. Solis-Diaz also compared his case to that of 17 year old Zyion Houston-Sconiers and his co-defendant 16 year old Treson Lee Roberts, both of whom were convicted of first degree robbery while armed with a firearm for stealing candy from trick-or-treaters on Halloween. Like Mr. Solis-Diaz, although they were convicted of multiple offenses that are classified as violent offenses under the Sentencing Reform Act (SRA), their actions did not result in actual death or injury. Their standard ranges, including the firearm enhancements, were 501-543 months and 441-483 months respectively. At their original sentencing hearings, the trial court imposed mitigated exceptional sentences of 372 and 312 months respectively. Nevertheless, this Court reversed and ordered new

sentencing hearings. On remand, the Pierce County Superior Court imposed sentences of 100 months and 96 months respectively.

Finally, Mr. Solis-Diaz argued that his sentence was disproportionate and excessive when compared to his co-defendant, 21-year-old Juan Velasquez, who received a sentence of 151 months.

The Court of Appeals rejected Mr. Solis-Diaz' proportionality argument in a terse footnote. Footnote 7 reads, in its entirely, "Solis-Diaz also argues that his sentence was excessive as compared to other cases. This is a proportionality challenge of a sentence length which is not allowed. In determining whether a sentence is clearly excessive, we are prohibited from comparing the underlying sentence with other cases for proportionality. *State v. Ritchie*, 126 Wn.2d 388, 392, 894 P.2d 1308 (1995)." Mr. Solis-Diaz seeks review.

E. Argument Why Review Should Be Granted

Review by this Court is warranted when a decision of the Court of Appeals is in conflict with the decisions of this Court, is a significant question of law under the Constitution, and when the petition involves an issue of substantial public interest that should be determined by this Court. RAP 13.4(b). Mr. Solis-Diaz' case meets all of these criteria.

The Court of Appeals in this case dismissed out of hand Mr. Solis-Diaz' proportionality analysis, citing *State v. Ritchie*. In *Ritchie*, this

Court rejected proportionality review of exceptional sentences for four reasons: (1) the legislature did not create a mechanism for proportionality review when it passed the SRA; (2) the legislature's general statement in RCW 9.94A.010(1) promoting proportionality in sentences does not overcome the controlling language of the substantive provisions of the SRA; (3) former RCW 9.94A.210 (current RCW 9.94A.585) authorizes of appellate review of clearly excessive or lenient sentences without mentioning proportionality; and (4) requiring proportionality review in a state with 39 counties would place an undue burden on the appellate court. *Ritchie* at 396-97.

None of the justifications for rejecting proportionality review of adult exceptional sentences cited in *Ritchie* are present when a Court is conducting *Miller* review of a juvenile sentence. Because *Miller* review is compelled by constitutional principles, none of the statutory concerns or analysis identified by this Court in *Ritchie* apply to juvenile proportionality review. Further, because the number of juvenile offenders who have received extremely lengthy sentences is comparatively small, the burden on the courts in conducting proportionality review is minimal.

This Court has flirted with proportionality review of *Miller* re-sentencings for several years now. It is time to consummate the relationship. In *Houston-Sconiers*, this Court reversed the sentences of

two juveniles whose 372 and 312 months sentences were nearly the same as the 360 month sentence imposed on Mr. Solis-Diaz. This Court concluded that reversal of the 31 and 26 year sentences for "Halloween robberies" was required because there is "no way to avoid the Eighth Amendment requirement to treat children differently, with discretion, and with consideration of mitigating factors, in this context."

A year after *Houston-Sconiers*, this Court addressed proportionality more directly. *State v. Bassett*, 192 Wn.2d 67, 428 P.3d 343 (2018). In *Bassett*, this Court first held that Washington's cruel and unusual punishment analysis under article 1, section 14 of the Washington Constitution is broader than under the Eighth Amendment, particularly as it pertains to juvenile offenders. *State v. Gunwall*, 106 Wn.2d 54, 720 P.2d 808 (1986). This Court then looked at two standards for evaluating proportionality: the *Fain* test and the categorical bar test. The *Fain* proportionality test considers (1) the nature of the offense, (2) the legislative purpose behind the statute, (3) the punishment the defendant would have received in other jurisdictions, and (4) the punishment meted out for other offenses in the same jurisdiction. *State v. Fain*, 94 Wn.2d 387, 617 P.2d 720 (1980). The categorical bar analysis considers (1) whether there is objective indicia of a national consensus against the sentencing practice at issue and (2) the court's own independent judgment

based on the standards elaborated by controlling precedents and by the court's own understanding and interpretation of the cruel punishment provision's text, history, and purpose.

This Court held that for juveniles serving life without parole, as was the case of Appellant Bassett, the categorical approach is preferable because it better permits the Court to take into account the adolescent brain and adolescent development and maximizes the opportunity for rehabilitation. But the Court made clear that it was not abandoning the *Fain* analysis completely. As this Court put it, "Because the categorical bar analysis allows us to consider the characteristics of youth, the crux of this categorical challenge, we adopt it in this instance. This holding does not disturb our *Fain* decision." *Bassett* at 85.

For someone like Mr. Solis-Diaz, who is serving a lengthy sentence, albeit less than life without parole, the *Fain* approach is preferable. This Court anticipated this problem in the *Bassett* decision when it opined, "Even if this court applied the *Fain* proportionality test here, we would still find that sentencing a juvenile offender to life without parole violates article 1, section 14." *Bassett* at 90. Applying the four *Fain* factors, this Court concluded that although aggravated murder is the most serious charge recognized in Washington, the *Miller* factors required the Court to look beyond the underlying facts. This Court then concluded

that, comparing his sentence to that received in other states and within this state, life without parole was a "disproportionate and cruel sentence as applied to juvenile offenders." *Bassett* at 91.

Mr. Solis-Diaz' case gives this Court an opportunity to review the important question left unanswered by *Bassett*: is proportionality review available to juvenile offenders who receive sentences of less than life without parole. The Court of Appeals footnote 7 runs counter to everything this Court said in *Bassett*. This Court's aversion to proportionality review, as expressed in *Ritchie*, does not apply to juvenile offenders.

Applying the four *Fain* factors to Mr. Solis-Diaz' case, it is clear his thirty year sentence is disproportionate. First, although first degree assault is a serious offense, it is far from the most serious offense in Washington. The SRA classifies first degree assault as a Level XII offense, compared to the Level XVI offense being reviewed in *Bassett*. Additionally, although Mr. Solis-Diaz was convicted of six counts, five of those counts were for bystanders. None of the victims, including the target of the assault, was hit by a bullet, killed, or injured. The bullet caused only minor property damage. Had the bystanders not been present,

Mr. Solis-Diaz' standard range would have been 171 to 207 months.[2] This range is consistent with Mr. Solis-Diaz' fifteen year recommendation at his sentencing hearing in 2018 and the State's plea offer in 2007. RP, 79.

Second, the *Miller* factors mitigate against the lengthy sentence imposed in this case. Mr. Solis-Diaz has the additional advantage that three of his victims, including the target of the assault, all requested that he be given a second chance and promptly released.

The third and fourth *Fain* factors require this Court to compare his thirty year sentence to the punishment meted out in this and other jurisdictions. As demonstrated by the Appendix to Mr. Solis-Diaz brief in the Court of Appeals, a thirty year sentence is comparable to the 25 to 40 year sentences being given to juveniles who commit murderer, not assault free of injury. The only case Mr. Solis-Diaz has been able to identify that is roughly comparable to his case is *Houston-Sconiers*. In that case, two juvenile offenders were convicted of multiple violent offenses involving a firearm, but no one was killed or injured. This Court, while not specifically invoking proportionality review or citing the *Fain* factors, strongly implied their 31 and 26 year sentences were disproportionate and excessive. The Pierce County Superior Court took the hint from this

[22] Absent the bystanders, Mr. Solis-Diaz' offender score for one count of first degree assault and drive-by shooting would have been "2" and his standard range 111 to 147 months. Adding a firearm enhancement brings his range to 171 to 207 months.

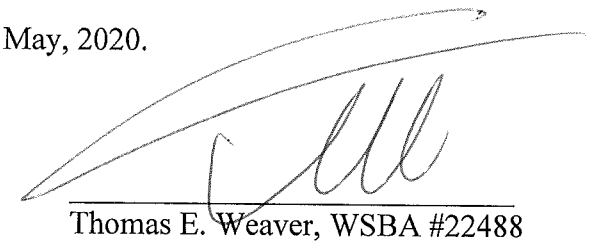
Court and resentenced them to 100 months and 96 months. Finally, there is Mr. Solis-Diaz' adult co-defendant himself, whose 151 month sentence has been undoubtedly completed by now, allowing for his release into the community.

All of the Fain factors indicate that Mr. Solis-Diaz' sentence is excessive and disproportionate. Footnote 7 of the Court of Appeals fails to acknowledge this Court's recent jurisprudence in this area. Review is warranted.

F. Conclusion

This Court should grant review, reverse and remand for resentencing for a sentence proportionate to similarly situated juvenile offenders.

DATED this 29th day of May, 2020.



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# Appendix A

Filed
Washington State
Court of Appeals
Division Two

May 5, 2020

# IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

## DIVISION II

| | |
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| STATE OF WASHINGTON,<br><br>Respondent,<br><br>v.<br><br>GUADALUPE SOLIS-DIAZ, JR.<br><br>Appellant. | No. 52599-2-II<br><br><br><br><br><br>UNPUBLISHED OPINION |

SUTTON, J. — Guadalupe Solis-Diaz Jr. appeals his exceptional downward sentence of 360 months for a drive-by shooting that involved six uninjured victims, arguing that the court failed to consider his youthfulness and other mitigating factors. The State disagrees, arguing that the court properly considered the operation of the multiple offense policy and other mitigating factors when it sentenced him to an exceptional sentence that was more than a 50 percent reduction from his original sentence of 1,111 months. We hold that the trial court did not abuse its discretion by imposing an exceptional downward sentence of 360 months. We affirm.

## FACTS

### I. BACKGROUND[1]

At approximately midnight on August 10, 2007, 16-year-old Solis-Diaz, a passenger in a car driven by an adult male, fired seven shots into a crowd of people outside of a tavern in

[1] The facts in this section are derived from the record and from *In re Pers. Restraint of Diaz*, noted at 170 Wn. App. 1039, 2012 WL 5348865, unless otherwise cited.

Centralia. All, including the intended target of the drive-by shooting, escaped injury. Several days later, police arrested Solis-Diaz and charged him with six counts of first degree assault (Counts I-VI), one count of drive-by shooting (Count VII), and one count of second degree unlawful possession of a firearm (Count VIII), all counts included firearms enhancements. Because the six charges of first degree assault were considered serious violent offenses under former RCW 9.94A.030(40) (2006), Solis-Diaz was tried as an adult under former RCW 13.04.030(1)(e)(v)(E)(I) (2005).

Before trial, the State offered Solis-Diaz a plea agreement: 180 months confinement plus 24 to 48 months community supervision. Solis-Diaz declined the offer. At the end of a five-day trial, the jury found Solis-Diaz guilty of all eight counts as charged and, by special verdict, found that he committed the six assaults while armed with a firearm.

At sentencing, Solis-Diaz's counsel requested the low end of the standard range, but did not ask for an exceptional sentence below the standard range.[2] The State requested a high end sentence of 1,111 months. The trial court sentenced Solis-Diaz to 196 months on Count I, 183 months each on Counts II-VI, 27 months on Count VII, and 29 months on Count VIII in addition to community custody supervision. The trial court ran Counts I-VI consecutively as required by RCW 9.94A.589(1)(b)[3] and ran Counts VII and VIII concurrently. The trial court imposed a 60

[2] The total standard range (including enhancements) for each count is as follows: 162-196 months for Count I, 153-183 months for Count II, 153-183 months for Count III, 153-183 months for Count IV, 153-183 months for Count V, 153-183 months for Count VI, 21-27 months for count VII, and 22-29 months for count VIII.

[3] The legislature amended RCW 9.94A.589 in 2015. LAWS OF 2015, 2d Spec. Sess., ch., 3 § 13. Because these amendments are not relevant here, we cite to the current version of this statute.

month firearm enhancement for each count. The total time imposed was 1,111 months, or approximately 92.5 years. Solis-Diaz appealed his convictions and we affirmed his convictions and sentence. *See State v. Solis-Diaz*, noted at 152 Wn. App. 1038, 2009 WL 3261249. A mandate was issued on May 10, 2010.

On May 17, 2010, the United States Supreme Court decided *Graham v. Florida*, and held that "for a juvenile offender who did not commit homicide the Eighth Amendment forbids the sentence of life without parole" and if a court "imposes a sentence of life it must provide him or her with some realistic opportunity to obtain release before the end of that term." 560 U.S. 48,130 S. Ct. 2011, 2030, 2034, 176 L. Ed. 2d 825 (2010). In light of *Graham* and the assistance Solis-Diaz received from counsel at his 2007 sentencing, Solis-Diaz filed a personal restraint petition (PRP) to challenge his sentence. *See In re Pers. Restraint of Diaz*, noted at 170 Wn. App. 1039, 2012 WL 5348865.

We reviewed his 2007 sentencing. We noted that neither party had prepared a presentencing report and that counsel failed to properly inform the trial court that Solis-Diaz's case was automatically declined from juvenile court by operation of statute, former RCW 13.04.030(1)(e)(v)(E)(I). As a result, no judicial officer held a declination hearing to consider his maturity and mental development and determine whether he had the mental and emotional sophistication necessary to warrant prosecution as an adult. The sentencing court determined that the drive-by shooting conviction encompassed the same criminal conduct as the assault convictions. No one spoke on Solis-Diaz's behalf, other than counsel's agreement with the court's same criminal conduct analysis and request for a low end range sentence of 927 months. We held that Solis-Diaz's counsel was ineffective at sentencing, but did not grant the request for sentencing

before a different judge, and granted the PRP in part, reversed the sentence, and remanded the case for resentencing.

On remand, the State asked the court to "conduct an individualized determination of the propriety of an exceptional downward sentence," due to the recent changes in the law regarding considering youthfulness and other mitigation factors for a juvenile offender. *State v. Solis-Diaz*, 187 Wn.2d 535, 537, 387 P.3d 703 (2017). The State requested that the court impose the same 1,111 month sentence. *Solis-Diaz*, 187 Wn.2d at 537. Solis-Diaz's counsel requested an exceptional downward sentence of 180 months (15 years) based on grounds that the multiple offense policy of the Sentencing Reform Act of 1981 (SRA)[4] operated to impose a clearly excessive sentence and based on Solis-Diaz's age which indicated he had a diminished capacity to understand the wrongfulness and consequences of his actions. *State v. Solis-Diaz*, 194 Wn. App. 129, 134, 376 P.3d 458 (2016), *reversed*, 187 Wn.2d 535 (2017).

The same judge presided over the sentencing hearing and determined that it could not sentence Solis-Diaz to an exceptional sentence below the standard range because consecutive sentences were required under the multiple offense policy of the SRA. *Solis-Diaz*, 194 Wn. App. at 135. The trial court then again imposed the same 1,111 month fixed term sentence. *Solis-Diaz*, 194 Wn. App. at 133.

Solis-Diaz appealed the sentence and we remanded the matter back to the trial court, concluding that "the sentencing court erred in failing to consider whether the operation of the . . . multiple offense policy and Solis-Diaz's youth at the time he committed the crimes should mitigate

[4] Ch. 9.94A RCW.

his standard range sentence and warrant an exceptional downward sentence." *Solis-Diaz*, 194 Wn. App. at 144.

## II. THIRD SENTENCING

On July 10, 2018, a third sentencing hearing was held. The trial court stated,

> I do intend to hear everything that you want to present, but I want you to know that I have prepared for today's hearing. I've read everything that's been presented, and to the extent that that alters what you intend to put before me today, I'll leave that to your discretion.

Report of Proceedings (RP) at 8. Several attorneys represented Solis-Diaz and submitted significant mitigation materials to the court in the form of briefing, a sentencing mitigation video, live testimony, and several declarations. The witnesses who testified were: Dr. Kate McLaughlin, an adolescent brain scientist; Dr. Ronald Roesch, a professor of psychology and the director of the Mental Health Law and Policy Institute at Simon Frazier University in Vancouver, British Columbia; Jesse Dow, the intended victim of Solis-Diaz's shooting, and Solis-Diaz himself.

Dr. McLaughlin's testimony focused on adolescent brain development and how adolescents are influenced by their surroundings and their peers. She explained, in general, how adolescents differ from adults when it comes to their decision making abilities and what that looks like in real world application.

Dr. Roesch also testified. Dr. Roesch tested Solis-Diaz in 2014 and retested him in 2018. Dr. Roesch drafted a report and explained that Solis-Diaz in 2018 presented as "substantially different" with evidence of significant maturation, and was "stable, self-confident, and relaxed," and did not show the same tendencies for "impulsive and self-destructive behaviors that were noted [in] 2014." Clerk's Papers (CP) at 60. Dr. Roesch testified that Solis-Diaz was "showing less anti-

social features, more empathy, more contrition, more respect for the rights of others, and also thinking more about the long-term consequences of decisions that he made then back 10 or 11 years ago, and the decisions he's making now in terms of planning for his future." RP at 50.

Jesse Dow, the victim of Count I, testified that he believed Solis-Diaz had served enough time and deserved a second chance. Solis-Diaz addressed the court directly, apologizing to his victims and explaining how much he has grown and changed.

The State recommended that Solis-Diaz serve a total sentence of 525 months, or 43.75 years. The State noted that its recommended sentence was more than a 50 percent reduction from the original sentence of 1,111 months and the sentence recognized that children are different from adults. Solis-Diaz's counsel requested credit for time served[5] or if that was not sufficient, a 15 year sentence.

Before imposing the sentence, the court explained that he was familiar with the latest research on adolescent brain development and that there were multiple options for resentencing. He also indicated:

> I will state for the record that I've considered all of the evidence that's been presented before and during today's hearing. I've looked at the *Miller* factors. I am going to impose an exceptional sentence downward. It's based on youth as a mitigating factor. It's based on the application of the *Miller* factors. It's based on the multi-offense policy of the Sentencing Reform Act. And just to be thorough, I reviewed RCW 9.94A.535, and I looked at each one of the mitigating factors to see if any of the others might apply.

RP at 87.

[5] Solis-Diaz was 27 years old and had served 11 years by the time of the third sentencing hearing.

The court found that Solis-Diaz had committed the charged offenses[6] as to counts I-VII, that he had used a firearm, that he was a juvenile at the time, that a juvenile's brain is different than a fully developed brain, and that this different development is a factor recognized and considered by the parties and the court. Based on its findings, the court concluded that under *Miller*, an exceptional sentence downward was appropriate and it sentenced Solis-Diaz to 360 months, or 30 years as follows: Count I, a sentence of zero days; Counts II-VI, a sentence of 60 months per count to run consecutively; Counts I-VI, a sentence of 60 months on each count for the firearm enhancements to run concurrently; Count V, a sentence of 27 months, to run concurrently; Count VIII, a sentence of 29 months to run concurrently.

The court credited Solis-Diaz for 4,093 days for time served, including 2,382 days from his 2014 judgment and sentence, plus 1,711 days until entry of the 2018 judgment and sentence. The court also imposed community custody supervision, but those are not challenged on appeal. The court entered written findings of fact, conclusions of law, and the judgment and sentence. Defense counsel filed a motion to reconsider supported by declarations from two of the victims, Sean Thomas and Cassandra Norskog. The court denied the motion.

Solis-Diaz timely appeals the judgment and sentence resulting from the third sentencing.

## ANALYSIS

Solis-Diaz argues that the trial court abused its discretion by imposing an exceptional downward sentence of 360 months, or 30 years. He argues that the sentence is clearly excessive

[6] Counts I-VI were charged as one count of assault in the first degree for each victim under RCW 9A.36.011(1)(A). Count VII was charged as a drive by shooting under RCW 9A.36.045(1) and Count VIII was charged as second degree unlawful possession of a firearm under former RCW 9.41.040(2)(a)(iii) (2005).

and the court failed to adequately consider the operation of the multiple offense policy under the SRA and other mitigating factors such as his youthfulness. The State argues the trial court properly considered the multiple offense policy and the mitigating factors, and thus, the sentence is not excessive. We hold that because the court properly considered the multiple offense policy and the mitigating factors, the trial court did not abuse its discretion by imposing an exception downward sentence of 360 months, or 30 years.

## I. LEGAL PRINCIPLES

We review the appropriateness of an exceptional sentence by answering the following three questions:

> "1. Are the reasons given by the sentencing judge supported by evidence in the record? As to this, the standard of review is clearly erroneous.
>
> 2. Do the reasons justify a departure from the standard range? This question is reviewed de novo as a matter of law.
>
> 3. Is the sentence clearly too excessive or too lenient? The standard of review on this last question is abuse of discretion."

*State v. Law*, 154 Wn.2d 85, 93, 110 P.3d 717 (2005) (quoting *State v. Ha'mim*, 132 Wn.2d 834, 840, 940 P.2d 633 (1997). Here, Solis-Diaz's appeal focuses on the third question. The trial court abuses its discretion when it bases its decision on untenable reasons or grounds or the decision is manifestly unreasonable. *State v. Solomon*, 3 Wn. App. 2d 895, 910, 419 P.3d 436 (2018).

When sentencing a juvenile offender, a court must consider the juvenile's youthfulness and other mitigation circumstances related to the juvenile's youth, to include, "age and its 'hallmark features,' such as the juvenile's 'immaturity, impetuosity, and failure to appreciate risks and consequences.'" *State v. Houston-Sconiers*, 188 Wn.2d 1, 23, 391 P.3d 409 (2017) (quoting *Miller*

*v. Alabama*, 567 U.S. 460, 132 S. Ct. 2455, 2468, 183 L. Ed. 2d 407 (2012)). The court also must consider other factors, including the extent of the juvenile's participation in the crime, what pressures may have affected the juvenile such as familial or peer, and the nature of the family circumstances and surrounding environment. *Houston-Sconiers*, 188 Wn.2d at 23. The trial court also "must consider how youth impacted any legal defense, along with any factors suggesting that the child might be successfully rehabilitated." *Houston-Sconiers*, 188 Wn.2d at 23.

## II. EXCEPTIONAL DOWNWARD SENTENCE

Solis-Diaz argues that the sentence of 360 months was clearly excessive for a 16-year-old with no criminal history who committed offenses that did not result in death or serious bodily injury when considering the multiple offense policy and other mitigating factors under *Miller*.[7] Solis-Diaz points out that Jesse Dow, the person targeted in the shooting, testified on his behalf and requested that he be immediately released because he had already served 11 years of the sentence.

The State recommended a 586 month downward reduction from the original 1,111 month fixed term sentence, or 525 months (43.75 years). Solis-Diaz's attorney recommended credit for time served, or if that was not sufficient, a 15 year sentence. The trial court considered all of the testimony, all of the evidence, and the arguments presented before rendering its decision. The trial court noted how helpful the hearing was and explained its challenge was to craft a sentence for Solis-Diaz somewhere between, the presumptive sentence he was previously given (1,111 months)

[7] Solis-Diaz also argues that his sentence was excessive as compared to other cases. This is a proportionality challenge of a sentence length which is not allowed. In determining whether a sentence is clearly excessive, we are prohibited from comparing the underlying sentence with other cases for proportionality. *State v. Ritchie*, 126 Wn.2d 388, 392, 894 P.2d 1308 (1995).

and the credit for time served, 11 years. The trial court stated, "I make it a point to not make a decision until I've heard everything, and that is the case today, but I did look at many ways of figuring out what would be an outcome that would make sense, [and] that would be a logical framework." RP at 86. The trial court discussed how it considered the State's recommendation, a bottom range sentence, whether to run the firearms enhancements consecutive or concurrently, and the different options for sentencing. RP 86-87.

Before imposing its sentence, the trial court explained:

> I will state for the record that I've considered all of the evidence that's been presented before and during today's hearing. I've looked at the *Miller* factors. I am going to impose an exceptional sentence downward. It's based on youth as a mitigating factor. It's based on the application of the *Miller* factors. It's based on the multi-offense policy of the Sentencing Reform Act. And just to be thorough, I reviewed RCW 9.94A.535, and I looked at each one of the mitigating factors to see if any of the others might apply.

RP at 87.

The court considered Solis-Diaz's youth and his complete lack of criminal history prior to the crime. It considered his childhood, the issues his mother had, his father not being a factor in his life, and why he turned to gangs. The court also considered his difficulties in school as a special education student and his frequent absenteeism and truancy.

Lastly, the court considered the testimony by two experts, Dr. McLaughlin and Dr. Roesch, regarding youth, its hallmarks, how the nature of family circumstances and peer pressure affect a juvenile, the ability to rehabilitate juveniles in general, and the changes in Solis-Diaz since he had committed the crime 11 years earlier. Specifically, Dr. Roesch explained in his report that Solis-Diaz in 2018 presented as "substantially different" with evidence of significant maturation, was "stable, self-confident, and relaxed," and did not show the same tendencies for "impulsive and

self-destructive behaviors that were noted in 2014." CP at 60. Dr. Roesch testified that Solis-Diaz was "showing less anti-social features, more empathy, more contrition, more respect for the rights of others, and also thinking more about the long-term consequences of decisions that he made then back 10 or 11 years ago, and the decisions he's making now in terms of planning for his future." RP at 50. Finally, Solis-Diaz spoke to the trial court directly, apologized to his victims and explained how much he has grown and changed.

The court found that Solis-Diaz committed the charged offenses, and as to counts I-VII, that he had used a firearm, he was a juvenile at the time, a juvenile's brain is different than a fully developed brain, and this development is a factor recognized and considered by the parties and the court. The court then concluded that under *Miller*, an exceptional downward sentence was appropriate and sentenced Solis-Diaz to 360 months, or 30 years, as follows: Count I, a sentence of zero days; Counts II-VI, a sentence of 60 months per count to run consecutively; Counts I-VI, a sentence of 60 months on each count for the firearm enhancements to run concurrently; Count V, a sentence of 27 months, to run concurrently; Count VIII, a sentence of 29 months to run concurrently. The court credited Solis-Diaz for 4,093 days for time served, including 2,382 days from his 2014 judgment and sentence, plus 1,711 days until entry of the 2018 judgment and sentence.

The trial court's exceptional downward sentence reflects a careful balance between acknowledging Solis-Diaz's youthfulness, the clearly excessive sentence that would result from the multiple offense policy under RCW 9.94A.589, and the six victims. Because the trial court properly considered all mitigating factors before imposing an exceptional downward sentence of

360 months, we hold that the trial court did not abuse its discretion and we affirm Solis-Diaz's sentence.

CONCLUSION

We hold that the trial court did not abuse its discretion by imposing an exceptional downward sentence of 360 months. We affirm.

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

Sutton, J.
SUTTON, J.

We concur:

, C.J.
LEE, C.J.

Worswick, J.
WORSWICK, J.

## THE LAW OFFICE OF THOMAS E. WEAVER

## May 29, 2020 - 3:03 PM

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| **Appellate Court Case Title:** | State of Washington, Respondent v Guadalupe Solis Diaz, Appellant |
| **Superior Court Case Number:** | 07-1-00543-3 |

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