NO. 46002-5-II

COURT OF APPEALS OF THE STATE OF WASHINGTON,

DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

GUADALUPE SOLIS-DIAZ, JR.,

Appellant.

BRIEF OF APPELLANT

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ASSIGNMENT OF ERROR

Assignment of Error

1. The trial court erred as a matter of law when it concluded that it lacked a legal basis upon which to grant Mr. Solis-Diaz a sentence below the standard range based on the multiple offense policy mitigating factor set forth in RCW 9.94A.535(1)(g).

2. The trial court erred as a matter of law when it considered youth as a potential mitigating factor in isolation, rather than as a factor of Mr. Solis-Diaz's impaired capacity to appreciate the consequences of his actions.

3. The imposition of an equivalent life sentence without a reasonable opportunity for parole on a 16-year-old child for a non-homicide offense violates both the Eighth Amendment prohibition on cruel and unusual punishment and the Fourteenth Amendment right to fundamental fairness.

4. The 93 year sentence the trial court imposed on Mr. Solis-Diaz violates the prohibition on inflicting cruel punishment under Washington Constitution, Article 1, § 14.

5. The trial court's interpretation of the Sentencing Reform Act (SRA) precluding consideration of personal factors is contrary to the federal constitutional requirements that courts adjust sentences for children based on their youth and related factors.

6. Under the Appearance of Fairness Doctrine this court should remand this case for resentencing before a different judge because a reasonably prudent, disinterested observer would not conclude that the defendant had obtained a fair, impartial and neutral sentencing hearing.

Issues Pertaining to Assignment of Error

1. Does the plain language of RCW 9.94A.535(1)(g) call for the imposition of sentences below the standard range when the operation of the multiple offense policy results in a clearly excessive sentence, and does a trial court's refusal to consider the imposition of a sentence below the standard range in such circumstances constitute reversible error?

2. Does a trial court err if it refuses to impose a sentence below the standard range on a juvenile charged in adult court when the evidence conclusively demonstrates that a number of factors, including youth, impaired that juvenile's capacity to appreciate the consequences of his or her actions?

3. Does imposition of a 93 year determinate sentence on a 16-year-old boy who did not kill or inflict injury constitute cruel and unusual punishment prohibited by United States Constitution, Eighth Amendment?

4. Does imposition of a 93 year determinate sentence on a 16-year-old boy who did not kill or inflict injury constitute cruel and unusual punishment prohibited by Washington Constitution, Article 1, § 14?

5. Does the SRA violate the Eighth Amendment right of juveniles to the extent it is interpreted to preclude imposition of a sentence below the standard range based upon mitigating facts such as the child's age, mental and emotional development, dysfunctional home environment, lack of criminal history, and evidence of the potential for rehabilitation?

6. In a case in which a trial judge at a second sentencing hearing refuses to follow the mandate of the Court of Appeals and thereby imposes the same sentence that the Court of Appeals vacated, does the appearance of fairness doctrine require that the case be remanded to a new judge for a third sentencing hearing?

STATEMENT OF THE CASE[1]

1. Background

Guadalupe Solis-Diaz was born in Centralia, Washington, on August 14, 1990. CP 117. His mother is Native American, and his father is Mexican. *Id.* Along with his two half-sisters, Mr. Solis-Diaz was raised primarily by his mother and spent summers on the Quinault Reservation with his grandmother. *Id.* He never knew his father as a child, although since his sentencing in this matter, Mr. Solis-Diaz's father has reached out to him and offered support. *Id.*

Growing up, Mr. Solis-Diaz struggled in school and was only able to complete the tenth grade. CP 117. As early as first grade, teachers noted Mr. Solis-Diaz's problems in multiple academic areas. CP 272. By second grade, he was diagnosed as Specific Learning Disabled ("SLD") and received specialized instruction. CP 139. From the fourth grade onward, schools placed him in Individualized Education Plan ("IEP") classes, but he continued to perform below average in several disciplines, including

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[1]Professor Kimberly Ambrose of the University of Washington Law School in conjunction with law students Mariah Ferraz, Tiffinie Ma and Steven Swenson prepared the original draft of the Statement of the Case and the first two arguments in this brief. Both Mr. Solis-Diaz and appellate counsel are deeply indebted to them for their tireless efforts on behalf of Mr. Solis-Diaz. Any errors in the final brief contained in the sections they prepared can best be attributed to appellate counsel's subsequent editing.

vocabulary, reading comprehension, spelling, and math. *Id.* At the time of his last evaluation in 2007 at 16-years-old, he was shown to be below grade level in all subjects except basic reading skills. CP 140. Many of his skills were below sixth-grade level. *Id.* However, despite his difficulties in school, he worked hard and was well-liked by his teachers, many of whom remain supportive of him today. CP 117. A number of Mr. Solis-Diaz's teachers recall him as "extremely polite," a "favorite student," "one of the nicest kids around," respectful, hardworking and capable of being rehabilitated. CP 140, 142, 147, 148, 150.

Mr. Solis-Diaz's teenage years were particularly difficult for him. CP 118. At various points, he, his family, and his friends became victims of violence. *Id.* He also suffered psychological trauma associated with living with a mother with serious drug and alcohol dependence, as well as the severe trauma of living with a mother who made multiple suicide attempts. CP 118, 132. Although he was only a teenager, Mr. Solis-Diaz felt pressured to become the "man" of the house in order to protect his sisters from witnessing their mother harm herself, going so far as to hide all of the knives in the home. *Id.* Despite how frightening and confusing it was to live with his mother's drinking and the violence in his home, Mr. Solis-Diaz tried to remain brave for the sake of his siblings. *Id.*

Unfortunately, Mr. Solis-Diaz eventually became unable to handle his

troubled home life. CP 118. He became depressed and left home seeking a less-negative environment. *Id.* Mr. Solis-Diaz wound up living on the streets and staying with friends whenever possible, and when his girlfriend broke up with him around this time, he felt he had nowhere else to turn. *Id.* When older cousins and friends took him in and offered him a safe place to stay away from the streets, Mr. Solis-Diaz accepted. *Id.* However, since his cousins were gang members, he eventually joined the gang as well. *Id.* Despite this gang affiliation, Mr. Solis-Diaz had no criminal history prior to the incident at hand. *Id.* His only interactions with the juvenile justice system involved one drug paraphernalia charge and one alcohol offense, both juvenile misdemeanors which occurred shortly before this incident. *Id.*

2. Conviction and Sentencing

Mr. Solis-Diaz was charged with six counts of first degree assault, one count of drive by shooting, and one count of second degree unlawful possession of a firearm out of a single incident. CP 1-4. He was declined automatically to adult court. CP 53. At the time he had just turned 16-years-old and this was his first experience with the criminal justice system. CP 117-118. He has been in custody ever since. *Id.*

In this case the state offered Mr. Solis-Diaz a plea deal which he did not understand. CP 118. As a 17-year-old, the prospect of 15 years in prison sounded no different to him than 100 years, and that time for an incident in

which he caused no injuries. *Id.* This prospect seemed unbelievable to him. *Id.* Moreover, he lacked any experience with the adult criminal justice system and did not trust his public defender. CP 117-118. When he asked for time to consult with his family, his public defender told him he had one night to make a decision. *Id.* During that night he did not have an opportunity to seek his family's advice. CP 117.

Mr. Solis-Diaz proceeded to trial in this case and the jury convicted him on all counts. CP 6. Although he had no adult criminal record and no one was injured in the shooting, he received the highest end of the standard range for each count, with six 60 month firearm enhancements run consecutively, and the two lesser counts run concurrently. CP 6-14. This produced an actual sentence of 1,111 months (92.5 years) in prison.

Mr. Solis-Diaz eventually filed a personal restraint petition before this court arguing that his sentence should be vacated based upon (1) ineffective assistance of counsel, and (2) violation of his state and federal constitutional rights to be free from cruel and unusual punishment. CP 35-47. This court agreed with the first argument, vacated his sentence and remanded the matter to the trial court for resentencing. *Id.* Specifically, this court found that Mr. Solis-Diaz's attorney at sentencing had been ineffective for failing to research or advocate for an exceptional sentence downward and for failing to notify the court that Mr. Solis-Diaz had been automatically declined to the adult

court. *Id.* In addition, this court found that in *Roper v. Simmons*, 543 U.S. 551, 125 S.Ct. 1183 (2005), the United States Supreme Court had "strongly indicated . . . that sentencing courts should consider the circumstances attendant upon youth." CP 45.

Despite this court's ruling, the trial judge at the new sentencing hearing imposed the identical sentence. CP 256-267. The trial judge stated that for this court to have found Mr. Solis-Diaz's sentencing attorney ineffective for failing to notify the court that he had been "auto-declined" was to "postulate that a judge would be so ignorant, lazy or stupid as to not know or inquire at some point why this 17-year-old was in adult court." RP 34. In addition, while the decision vacating the original sentence criticized the original trial attorneys's failure to present character witnesses, at resentencing the trial court declared: "That sort of testimony . . . [is[totally ineffective and . . . not a sufficient basis on which to fashion a mitigated sentence in any event." RP 36.

At sentencing the trial court also refused to consider the mitigating facts related to the defendant's youth and background presented through the expert report of Dr. Ronald Roesch. RP 41. Indeed, the court ruled that this type of evidence as set out in Dr. Roesch's report "made for some interesting reading [but was ultimately] irrelevant since the law required the defendant to be treated as an adult." RP 41. The court further held that "the Legislature

intended the result obtained here" and that it would be "radical . . . to treat the SRA as advisory only and not binding on the trial court." RP 48. Moreover, the court found that despite Dr. Roesch's report and testimony, "there [was] no evidence at all to support" the position that Mr. Solis-Dias's capacity to appreciate the wrongfulness of his conduct was significantly diminished. RP 49-50. The court further mischaracterized the defendant's offenses as attempted murder. *Id.* The court opined: "It simply defies common sense that this defendant had no idea that it was wrong to attempt to kill someone." *Id.* Ultimately, the court ruled that the result in Mr. Solis-Diaz's case was exactly as the Legislature had intended and that none of the suggested mitigating factors were legally sufficient to support a sentence below the standard range.

3. Prison

After his original sentencing hearing, Mr. Solis-Diaz spent the initial part of his sentence at Green Hill School, a facility operated by the Juvenile Rehabilitation Administration (JRA). CP 119. While there he worked with counselors and learned skills to cope with his difficult emotional issues. *Id.* Despite his turbulent childhood and learning disabilities he was able to make progress and identify issues in his upbringing that contributed to his gang involvement and take steps to make changes. CP 144-45. When he turned 18-years-old, he was transferred to Shelton and later to Washington State

Penitentiary, where he remains today. *Id.*

Mr. Solis-Diaz is now 24-years-old has been incarcerated since he was arrested at 16-years of age. CP 117-118. He tries to keep out of trouble while in prison and has worked to better himself. CP 119. While his mother and sisters were able to visit him while he was in Green Hill, they are unable to make the lengthy trip to Walla Walla. *Id.* As of February 2014, no one had visited him in person for over six years. *Id.* Despite these hardships, he earned his GED in 2009, enrolled in a graphic design program, and currently reads self-help books to stay positive and improve himself. *Id.* He spends time writing and reflecting on how to control his emotions and stay out of trouble, what caused him to join a gang, and how he can be a better person in the future. CP 118-19. Most importantly, he recognizes the wrongfulness of his past behavior and deeply regrets his actions and the harm he has caused. CP 120. He aspires to be a better person and reassume his role as a brother and an uncle and to contribute to his community in a positive manner. CP 119-120.

ARGUMENT

I. THE TRIAL COURT ERRED WHEN IT RULED THAT THERE WAS NO LEGAL BASIS FOR GRANTING MR. SOLIS-DIAZ AN EXCEPTIONAL SENTENCE UNDER THE "MULTIPLE OFFENSE POLICY" MITIGATING FACTOR THE LEGISLATURE RECOGNIZED IN RCW 9.94A.535(1)(G).

In the case at bar the trial court ruled that there was no legal basis for granting an exceptional sentence below the standard range for three reasons: (1) the court did not have authority under the SRA to use the defendant's age and inability to appreciate the wrongfulness of his actions as mitigating facts, (2) the court did not have discretion to apply the multiple offense policy mitigating factor set forth in RCW 9.94A.535(1)(g) to serious violent offenses, and (3) the offender's youth could not be considered as evidence that the defendant's inability to appreciate the wrongfulness of his actions was impaired. As the following explains, the trial court erred in each of these rulings.

(1) Under the SRA, the Trial Court Had Discretion to Grant Mr. Solis-Diaz a Mitigated Exceptional Sentence Based on the Clearly Excessive Presumptive Sentence and His Impaired Capacity to Appreciate the Wrongfulness of his Conduct.

This Court remanded Mr. Solis-Diaz's case to the trial court for resentencing based in part on the failure of his counsel to ask for an exceptional sentence below the standard range. *In re Pers. Restraint of Diaz*, 170 Wn.App. 1039 (2012). Upon resentencing, Mr. Solis-Diaz Diaz sought

a mitigated exceptional sentence based on (1) his impaired capacity to appreciate the wrongfulness of his actions, and (2) the fact that the prior sentence was clearly excessive as a result of the multiple offense policy under RCW 9.94A.535(1)(e)&(g). At resentencing the court incorrectly denied an exceptional sentence below the standard ranges based on these factors. While it is true that "no defendant is entitled to an exceptional sentence below the standard range," the fact is that Mr. Solis-Diaz, like "every defendant is entitled to ask the trial court to consider such a sentence and to have the alternative actually considered." *State v. Grayson*, 154 Wn.2d 333, 342, 111 P.3d 1183 (2005); *State v. Martinez Garcia*, 88 Wn.App. 322, 330, 944 P.2d 1104 (1997).

Under the SRA, sentencing courts have the discretion to impose a sentence that departs from the standard sentencing range when it finds "that there are substantial and compelling reasons justifying an exceptional sentence." RCW 9.94A.390. Among the mitigating circumstances that the court may consider when imposing an exceptional sentence below the standard range are whether "the defendant's capacity to appreciate the wrongfulness of his or her conduct, or to conform his or her conduct to the requirements of the law, was significantly impaired," and whether the sentence was "clearly excessive" as a result of the multiple offense policy. RCW 9.94A.535(1)(e)&(g).

Despite this Court's holding that an exceptional sentence below the standard range was legally available and that Mr. Solis-Diaz's defense counsel was ineffective for failing to request such an exceptional sentence under RCW 9.94A.535(1)(g), at the resentencing hearing the trial court refused to consider whether the operation of the multiple offense policy resulted in a presumptive sentence that was clearly excessive in light of the purpose of RCW 9.94A.010. RP 50-51. Rather, the sentencing court simply found that Mr. Solis-Diaz's convictions for multiple serious violent offenses rendered him ineligible for a mitigated sentence under RCW 9.94A.535(1)(g). In making this ruling the trial court relied upon Division Three's decision in *State v. Graham*, 178 Wn.App. 580, 314 P.3d 1148 (2013). In that case court held that the "clearly excessive" mitigating factor did not apply when sentencing a defendant convicted of serious violent offenses. *Id.* at 583. That ruling by Division Three has now been reversed by the Washington State Supreme Court in *State v. Graham*, — Wn.2d —, 337 P.3d 319 (2014). In that case the court held:

> We hold RCW 9.94A.535(1)(g) allows an exceptional sentence for multiple current serious violent offenses scored under RCW 9.94A.589(1)(b) that is achieved by departing downward from the standard ranges for the offenses and/or by running sentences concurrently. We reverse the Court of Appeals and remand for resentencing consistent with this opinion.

State v. Graham, 337 P.3d at 323.

Thus, in the case at bar, the trial court erred when it refused as a matter of law to consider the defendant's argument that his sentence was clearly excessive based upon the application of the multiple offense policy.

In this case the sentencing court also erred when it incorrectly considered Mr. Solis-Diaz's capacity for appreciating the wrongfulness of his actions. Instead of considering Mr. Solis-Diaz's youth as a contributing factor of his impaired capacity to understand the wrongfulness of his conduct, the trial court considered Mr. Solis-Diaz's youth in isolation and held that Mr. Solis-Diaz was not eligible for an exceptional sentence downward based on his youth. RP 51. In so holding the trial court erred.

(2) The Sentencing Court Had Discretion to Apply the Multiple Offense Policy Mitigating Factor Set Forth in RCW 9.94A.535(1)(g) to Serious Violent Offenses.

The Sentencing Reform Act of 1981 permits structured discretionary sentencing "when the operation of the multiple offense policy results in a presumptive sentence that is clearly excessive in light of the purpose of this chapter." RCW 9. 94A.535(1)(g). In spite of this specific grant of authority, the trial court at resentencing in the case at bar refused to consider imposing an exceptional sentence downward based on a finding that the sentence was clearly excessive. Rather, in referring to the "clearly excessive" grounds as one of two "non-statutory mitigating factors," the trial court stated that to find a sentence clearly excessive "would be nothing less than treating the SRA

range as advisory or nonexistent." RP 51. Thus, even though (1) the legislature specifically identified clearly excessive sentences as a mitigating factor if resulting from the operation of the multiple offense policy, and (2) this Court found that Mr. Solis-Diaz's sentencing counsel was ineffective for failing to request such a sentence, yet in this case the sentencing court rejected both the legislative mandate and this court's ruling when it held that "trial courts are not to impose their own feelings on the standard range sentences, as that is what the Legislature has determined they shall be" and "[f]or me to find that, what I would be saying is I just disagree with what the Legislature has done here and that the result of correctly applying what they drafted is wrong." *Id.*

By so holding the trial court did not consider a mitigated exceptional sentence on the grounds of a clearly excessive sentence. In refusing to consider the excessive nature of Mr. Solis-Diaz's 93 year sentence imposed for a non-homicide offense committed when he was 16-years-old, the trial court unnecessarily applied Division Three's decision in *Graham*, which has since been reversed by the Washington Supreme Court. As was stated above, in *Graham*, the Supreme Court reaffirmed that RCW 9.94A.535(1)(g) applies to all multiple offenses, including serious violent offenses. As the Washington Supreme Court clarified in *Graham*, Mr. Solis-Diaz's convictions for serious violent offenses did not bar the trial court from

considering an exceptional mitigated sentence based on the clearly excessive nature of his sentence which resulted from the application of the multiple sentencing policy.

(3) The Offender's Youth Should Be Considered as Evidence That the Defendant's Capacity to Appreciate the Wrongfulness of His Actions Is Impaired.

In RCW 9.94A.535(1)(e) the legislature specifically permits an exceptional sentence downward if "[t]he defendant's capacity to appreciate the wrongfulness of his or her conduct, or to conform his or her conduct to the requirements of the law, was significantly impaired." The only cause of impairment excluded by the legislature is dependency on drugs or alcohol. *Id.* Nowhere does the legislature explicitly or implicitly exclude age as an acceptable basis for impairment. In order for the court to conclude that deviation from the standard range is warranted due to the significant impairment of a defendant's capacity, it must find proof, based upon the evidence, that the defendant's condition significantly impaired his capacity to appreciate the wrongfulness of his conduct or conform his conduct to the requirements of the law. *State v. Rogers*, 112 Wn. 2d 180, 185, 770 P. 2d 180 (1989).

In the case at bar the record supports the finding that Mr. Solis-Diaz's cognitive difficulties, coupled with his developmental level as a juvenile, impaired his ability to appreciate the wrongfulness of his conduct. CP 283.

The inability to appreciate the wrongfulness of one's conduct is one of the illustrative exceptional factors listed by the legislature and a valid consideration as a mitigating factor for aberrant behavior that relates to the crime committed and distinguishes it from other crimes of the same statutory category. *State v. Law*, 154 Wn. 2d 85, 98, 110 P. 3d 717 (2005); *State v. Statler*, 160 Wn.App. at 639, 640, 622 248 P.3d 165 (2011).

In this case the trial court cited to the decisions in *State v. Ha'mim.* 132 Wn.2d 834, 940 P.2d 633 (1997), and *State v. Scott,* 72 Wn.App. 207, 866 P.2d 1258 (1997), as grounds for excluding the use of age as a factor for determining an exceptional sentence downward. RP 50-52. In so holding the trial court misapplied the decision in *Ha'mim* in three ways. First, the ruling in *Ha'mim* excludes age as a mitigating factor only when it is the sole mitigator under consideration. *Ha'mim*, 132 Wn.2d at 846. By contrast, in this case Mr. Solis-Diaz raised two mitigating factors: (1) his impaired capacity to appreciate the wrongfulness of his conduct as a result of his age and cognitive difficulties and (2) the clearly excessive nature of the sentence imposed as a result of the multiple offense policy.

Second, in *Ha'Mim* the Washington Supreme Court explicitly recognized age as an element that is relevant to one of the mitigating factors outlined in RCW 9.94A.390, that factor being the defendant's inability to appreciate the wrongfulness of his actions. The court held as follows on this

issue:

> The Act does include a factor for which age could be relevant. RCW 9.94A.390 . . . includes as a mitigating factor that the defendant's capacity to appreciate the wrongfulness of his or her conduct or to conform his or her conduct to the requirements of the law was significantly impaired. There is no evidence in the record that the Defendant's capacity to appreciate the wrongfulness of his or her conduct or to conform his or her conduct to the requirements of the law was significantly impaired . . .

Ha'mim, 132 Wn.2d 834, 846.

In this case Mr. Solis-Diaz presented evidence at his sentencing hearing that, at the time of the shooting incident, his age, his personal history and his cognitive difficulties impaired his ability to appreciate the wrongfulness of his actions. CP 283. As the court recognized in *Ha'mim*, the legislature did specifically recognize youth as a mitigating factor under these circumstances. Thus, in the case at bar the trial court erred when it failed to properly consider Mr. Solis-Diaz's youth as a factor relevant to his ability to appreciate the wrongfulness of his actions rather than just considering age in isolation and rejecting it for consideration. RP 49, 52.

Third, in *Ha'mim* the court did not find that it could not consider age as a mitigating factor for juvenile offenders tried as adults. Rather, it found that it could not consider age as a mitigating factor for a person who was an adult at the time he or she committed the offense in question. *State v.*

Ha'mim, 132 Wn.2d at 836. In this case Mr. Solis-Diaz was a 16-year-old juvenile at the time of his offense, and as such, his case is distinguishable from *Ha'mim*, particularly in light of the subsequent U.S. Supreme Court cases considering a defendant's age. *See Roper v. Simmons*, 543 U. S. 551, 125 S. Ct. 1183, 161 L. Ed. 2d 1 (2005); *Graham v. Florida*, 560 U.S. 48, 130 S. Ct. 2011, 176 L.Ed. 2d 825 (2010); and *Miller v. Alabama*, 576 U.S. —, 132 S. Ct. 2455, 183 L. Ed. 2d 407 (2012).

Most significantly, both *Ha'mim* and *Scott* pre-date *Roper, Graham* and *Miller.* In *Miller v. Alabama*, the United States Supreme Court specifically recognized that juveniles have both a reduced culpability as well as greater prospects for change. The court held:

> *Roper* and *Graham* establish that children are constitutionally different from adults for purposes of sentencing. Because juveniles have diminished culpability and greater prospects for reform… 'they are less deserving of the most severe punishments.

Miller v. Alabama, 132 S. Ct. at 2464 (quoting *Graham v. Florida*, 560 U.S. at 68.)

The decision in *Scott*, *supra*, involved a juvenile who was convicted as an adult for murder in the first degree. It was decided in 1993 and in that case the court did not take into account the growing understanding of juvenile culpability as reflected in *Roper, Graham,* and *Miller.* In *Scott*, The Court of Appeals held that an exceptional sentence based Scott's capacity to

appreciate the wrongfulness of his conduct, which *Scott* argued was limited by his youth, "border[ed] on the absurd." *State v. Scott*, 72 Wn.App. 207, 218. The court stated that lack of judgment could not be blamed for his conduct as "[p]remeditated murder is not a common teenage vice." *Id.* However, recent scientific findings show that while "attempted pre-mediated murder" or "pre-mediated murder is not a typical teenage vice," a lack of reasoned judgment *is* typical to teenagers. RP 50. Since *Scott* was decided, the United States Supreme Court, the Washington Court of Appeals and the Legislature have all recognized the influence that age and brain development has on a teenager's ability to make sound judgments. *See Roper, Graham, Miller and* RCW 9.94A.540.

In *Roper,* the United States Supreme Court abolished the death penalty for youth under 18-years-old as cruel and unusual punishment. *Roper*, 543 U. S. at 575. The Court emphasized the inherent immaturity of youth and the differences between youth and adults that result from immaturity.

> Three general differences between juveniles under 18 and adults demonstrate that juvenile offenders cannot with reliability be classified among the worst offenders. First, as any parent knows and as the scientific and sociological studies respondent and his amici cite tend to confirm, "[a] lack of maturity and an underdeveloped sense of responsibility are found in youth more often than in adults and are more understandable among the young. These qualities often result in impetuous and ill - considered actions and decisions." [Johnson v. Texas, 509 U. S. 350, 367, 113 S. Ct. 2658, 125 L. Ed. 2d 290 1993)].... The second area of difference is that juveniles are more vulnerable or susceptible to negative influences and outside pressures,

> including peer pressure . . . The third broad difference is that the character of a juvenile is not as well formed as that of an adult. The personality traits of juveniles are more transitory, less fixed.... These differences render suspect any conclusion that a juvenile falls among the worst offenders. The susceptibility of juveniles to immature and irresponsible behavior means "their irresponsible conduct is not as morally reprehensible as that of an adult." [*Thompson v. Oklahoma*, 487 U. S. 815, 835, 108 S. Ct. 2687, 101 L. Ed. 2d 702 (1988) (plurality opinion)] . . . The reality that juveniles still struggle to define their identity means it is less supportable to conclude that even a heinous crime committed by a juvenile is evidence of irretrievably depraved character . . . Indeed, "[t]he relevance of youth as a mitigating factor derives from the fact that the signature qualities of youth are transient; as individuals mature, the impetuousness and recklessness that may dominate in younger years can subside." *Johnson*, 509 U. S. at 3681.

Roper, 543 U. S. at 569 -70 (some alterations to original).

After *Roper*, our legislature found that "adolescent brains, and thus adolescent intellectual and emotional capabilities, differ significantly from those of mature adults." RCW 9.94A.540, [2005 c 437 § 1.] The legislature amended the mandatory minimum terms statute to exclude juveniles tried as adults in accordance with the recognized differences between juveniles and adults. *Id.* Thus, the legislature clearly stated its intent that the differences between juveniles and mature adults are appropriate factors to take "into consideration when sentencing juveniles as adults." *Id.*

Several Washington courts have also addressed the differences between juveniles and adults when considering exceptional sentences. These courts have followed the suggestion of *Ha'Mim* and *Roper* and found that the

youth of the offender is a relevant factor in determining whether the defendant's ability to appreciate the wrongfulness of his actions is impaired. For example, in *State v. Gassman*, 160 Wn.App. 600, 248 P.3d 155 (2011), Division Three of the Court of Appeals considered the appeal of an offender who was twenty-one years old at the time of his crimes and was convicted of first degree robbery, two counts of first degree assault, and two counts of drive-by shooting. Finding the defendant's presumptive sentence of 551 months clearly excessive in light of his age and his criminal history, the court upheld the trial court's imposition of a mitigated exceptional sentence. *State v. Gassman*, 160 Wn.App. at 614.

Under these decisions the trial court in this case had discretion to grant Mr. Solis-Diaz a mitigated exceptional sentence based upon on his impaired capacity to appreciate the wrongfulness of his conduct and based upon the clearly excessive nature of the sentence of 93 years. In refusing to consider or apply these factors the trial court abused its discretion. As a result this court should vacate the defendant's sentence and remand for a new hearing in which the trial court recognizes the application of these mitigating factors.

II. THE TRIAL COURT'S IMPOSITION OF A 93 YEAR SENTENCE UPON A 16-YEAR-OLD WITH NO CRIMINAL HISTORY WHOSE OFFENSES CAUSED NO INJURY CONSTITUTED CRUEL AND UNUSUAL PUNISHMENT PROHIBITED BY OUR STATE AND FEDERAL CONSTITUTIONS.

Washington Constitution, Article 1, § 14, prohibits the imposition of "cruel" punishment while the United States Constitution, Eighth Amendment, prohibits the imposition of "cruel and unusual" punishment. As the following argument explains, the trial court's imposition of an effective sentence of life without the possibility of release on a 16-year-old for crimes committed out of a single event that did not cause any injury violated both of these provisions.

(1) Ninety-two years in Prison Is a De Facto Life Sentence Without the Possibility of Parole, Which Violates the Eighth Amendment Prohibition Against Cruel and Unusual Punishment When Imposed on a 16-Year-Old Non-homicide Offender.

In *Graham v. Florida*, *supra*, the United States Supreme Court held that the Eighth Amendment categorically prohibits the imposition of a life without parole sentence on a juvenile offender who did not commit murder. 560 U.S. at 62-67. As the court noted, to be sentenced to die in prison is "the second most severe penalty permitted by law." *Id.* at 69 (quoting *Harmelin v. Michigan*, 501 U.S. 957, 1001, 111 S. Ct. 2680, 115 L.Ed.2d 836 (1991)). The court based this decision on the fact that children have a diminished culpability and greater prospects for reform, which means that "they are less

deserving of the most severe punishments." *Graham v. Florida*, 560 U.S. at 68. In its decision the court specifically distinguished non-homicide offenses from murder, stating the following:

> There is a line "between homicide and other serious violent offenses against the individual." Serious nonhomicide crimes "may be devastating in their harm ... but 'in terms of moral depravity and of the injury to the person and to the public,' ... they cannot be compared to murder in their 'severity and irrevocability.' This is because "[l]ife is over for the victim of the murderer," but for the victim of even a very serious non-homicide crime, "life ... is not over and normally is not beyond repair." Although an offense like robbery or rape is "a serious crime deserving serious punishment," those crimes differ from homicide crimes in a moral sense.
>
> It follows that, when compared to an adult murderer, a juvenile offender who did not kill or intend to kill has a twice diminished moral culpability.

Graham v. Florida, 560 U.S. at 69 (citations omitted).

A term of years standard range sentence that goes beyond an offender's life expectancy is constitutionally equivalent to a life sentence without the opportunity for release. In *Graham v. Florida* the Court recognized that the name of the sentence alone does not determine its severity. *See Graham*, 560 U.S. at 70 ("A 16–year–old and a 75–year–old each sentenced to life without parole receive the same punishment in name only."); *cf. Harmelin*, 501 U.S. at 996, 111 S. Ct. 2680 ("In some cases ... there will be negligible difference between life without parole and other sentences of imprisonment"). *Graham's* "reasoning implicates any

life-without-parole sentence for a juvenile, even as its categorical bar relates only to non-homicide offenses." *Miller*, 132 S.Ct. at 2458.

Other jurisdictions have explicitly extended Graham's categorical bar to de facto life sentences. In *People v. Nunez*, 195 Cal.App. 4th 414, 418, 125 Cal.Rptr.3d 616, *review granted*, 255 P.3d 951, 128 Cal.Rptr.3d274 (2011), the court held: "We perceive no sound basis to distinguish *Graham's* reasoning where a term of years beyond a juvenile's life expectancy is tantamount to [a life without possibility of parole] term." The court also stated, "Graham invalidated *de facto* sentences of life without possibility of parole as a sentencing option for juveniles who do not kill." *Id.*; *see also Moore v. Biter*, 725 F.3d 1184 (9th Cir. 2013) (254 year sentence is indistinguishable from a life without parole sentence and prohibited by *Graham*); *People v. Rainier*, —— P.3d ——, 2013 WL 1490107 (Colo.App.2013) (112 year sentence is a *de facto* life sentence prohibited by *Graham*); *People v. Caballero*, 55 Cal.4th 262, 145 Cal.Rptr.3d 286, 282 P.3d 291, 296 (2012) (110 year-to-life-sentence for a non-homicide offense was the functional equivalent of a life without parole sentence and prohibited by *Graham*).

In the case before this court the range of 927 to 1,111 months sentences Mr. Solis-Diaz to die in prison and is a *de facto* life sentence. The average life expectancy for men who are not in prison is 76 years, and prison

accelerates the negative consequences of aging.[2] Even at the low end of the sentencing range, 927 months, Mr. Solis-Diaz would never be released, unless he lived to be over 93 years old.

Furthermore, Mr. Solis-Diaz has no opportunity for release, because Washington does not have a parole system. However, even were parole re-instituted in Washington, it would not cure the unconstitutionality of the defendant's current sentence. Parole eligibility is an act of "grace;" it does not cure an unconstitutionally cruel punishment. *State v. Fain*, 94 Wn.2d 387, 394-95, 617 P.2d 720 (1980). The constitutional analysis of a life sentence does not change depending on whether the possibility of parole exists. *State v. Fain*, 94 Wn.2d at 395. Thus, in the case at bar the defendant's standard range sentence of 927 to 1,111 months, and the imposition of a sentence within that range, is a *de facto* life sentence and constitutes cruel and unusual punishment prohibited under the United States Constitution, Eighth Amendment. As a result, this court should vacate the defendant's sentence and remand for a new sentencing hearing.

(2) A Standard Range Sentence of 927 to 1,111 Months Violates Article 1, Section 14 of the Washington Constitution When Imposed on a Juvenile Non-homicide Offender.

The Washington Constitution provides greater protection against cruel

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[2]See http://www.who.int/countries/usa/en/ (last viewed Dec. 18, 2014).

and unusual punishment than the Eighth Amendment. *State v. Manussier*, 129 Wn.2d 652, 674, 921 P.2d 473 (1996). Like the Eighth Amendment, Article 1, section 14 prohibits sentences that are cruel and grossly disproportionate to the crime committed. *State v. Whitfield*, 132 Wn. App. 878, 901, 134 P.3d 1203 (2006), *review denied*, 159 Wn.2d 1012 (2007). In *Graham*, the United States Supreme Court determined that life sentences without parole imposed on juvenile non-homicide offenders are disproportionate with the diminished culpability and greater opportunity for rehabilitation of juveniles and are not justified by any penological goals. *Graham*, 560 U.S. at 73. Thus, the greater protections found in Washington Constitution, Article 1, § 14 also prohibit such a sentence.

To determine whether a sentence is grossly disproportionate, Washington courts consider four factors recognized in *State v. Fain*, *supra*. They are: (1) the nature of the crime, (2) the legislative purpose behind the sentence, (3) the sentence the defendant would receive for the same crime in other jurisdictions, and (4) the sentence the defendant would receive for other similar crimes in Washington. *Whitfield*, 132 Wn. App at 91 (citing *State v. Fain*, *supra*).

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 1, § 14. This

conclusion follows from the facts that (1) the sentence is disproportionate to the nature of the non-homicide offenses; (2) it does not adequately serve the legislative purposes of the Sentencing Reform Act or punishment in general; (3) it far exceeds punishments for similar offenses in other jurisdictions; and (4) it grossly exceeds sentences for similar and greater offenses in this state. Thus, in this case Mr. Solis-Diaz is entitled to a new sentencing hearing during which the trial court considers the application of Washington Constitution, Article 1, § 14 and does not then inflict punishment that violates its prohibition.

(3) The Trial Court's Reliance on an Interpretation of the Sentencing Reform Act Which Barred Meaningful Consideration of Mr. Solis-Diaz's Age, Mental and Emotional Development, Dysfunctional Home Environment, Lack of Criminal History, and Potential for Rehabilitation at the Time the Crime Was Committed Violated the Eighth Amendment and Article 1, Section 14 Prohibitions Against Cruel and Unusual Punishment.

Children are constitutionally different from adults for purposes of sentencing. *Miller*, 132 S.Ct. at 2464; *Graham*, 560 U.S. at 68, 130 S.Ct. at 2011. Courts must consider evidence that mitigates against condemning a child to die behind bars. *Miller* at 2468-2469. Under *Graham* and *Miller*, age and its attributes are constitutionally imperative considerations that justify imposition of an exceptional sentence downward. "An offender's age is relevant to the Eighth Amendment, and criminal procedure laws that fail to take defendants' youthfulness into account at all would be flawed." *Miller*

at 2466; *Graham* at 76. A minor's chronological age is a "relevant mitigating factor of great weight." *Miller*, 132 S.Ct. at 2467 (quoting *Eddings v. Oklahoma*, 455 U.S. 104, 116, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982)).

In addition, the court "must" equally consider the child's "background and mental and emotional development" in assessing culpability. *Id.* These Eighth Amendment cases require individualized sentencing for juveniles facing the most serious penalties available. *Miller*, 132 S.Ct. at 2460. "[R]emoving youth from the balance" and subjecting a juvenile to the most severe penalties "contravenes Graham's (and also Roper's) foundational principle" that a judge may not impose such penalties on juveniles "as though they were not children." *Miller*, 132 S.Ct. at 2466, *Roper*, 543 U.S. at 569-74.

The *Roper*, *Graham*, and *Miller* line of cases require sentencing be based on individual characteristics of the juvenile defendant. One of the basic principles underlying the requirement for a "meaningful opportunity for release" is the fact that it is impossible even for experts to distinguish between "'the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption.'" *Miller*, 132 S.Ct. at 2469 (quoting *Roper*, 543 U.S. at 573; *Graham*, 560 U.S. at 68).

Before imposing a sentence that amounts to a life sentence, *Miller* requires sentencing courts to evaluate the juvenile's individual circumstances

and impose a sentence proportional to his culpability. *Miller*, 132 S.Ct. at 2468; *see also People v. Gutierrez*, 324 P.3d 225 (Cal. 2014) (construing requirements of *Miller*). Culpability is not defined by the defendant's participation in the offense. Instead, the relevant mitigating factors the judge must consider are: (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. *Miller* requires the sentencing judge to treat children differently from adults for sentencing purposes. *Miller*, 132 S.Ct. at 2469

During Mr. Solis-Diaz's resentencing hearing in this case, the sentencing judge never addressed the constitutional requirements of *Miller*, *Graham*, or *Roper*, in spite of the fact that the defense had provided extensive briefing on these cases and the issues raised in them. *See* CP 75-255. Indeed, the sentencing court only made one reference to *Graham v. Florida*, quoting the Court of Appeals, and then stated, "if the Court of Appeals says they cannot change the result based upon an out-of-jurisdiction precedent, then I certainly cannot either." RP 52-53. Unfortunately, the trial court's

interpretation of the Court of Appeals footnote from *In re Diaz*, 170 Wn. App. 1039, FN 6, (2012), referred to court-imposed parole, not mitigating sentencing factors. This footnote stated: "To the extent that *Graham* suggests that an opportunity for parole must be available for juvenile offenders convicted of nonhomicide offenses, only the legislature has the authority to amend the SRA to allow for such remedy, and only the executive branch can implement it." *Id.*

In this case the sentencing court never considered the constitutionally mandated mitigating factors required under *Miller*. Neither did the sentencing court conduct an individualized determination of the appropriateness of the sentence. It did not determine whether or not Mr. Solis-Diaz was irreparably corrupted or incapable of rehabilitation. It did not consider age as a mitigating factor, instead claiming that the legislature determined that "[o]lder teenagers will be treated as adults," and that while "[Mr. Solis-Diaz] is not an adult . . . it's what the Legislature determined he is when the crime is one of the ones subject to the automatic jurisdiction statute." RP 40, 52. These statements directly contravene the prohibition in *Miller* and *Roper* that a sentencing court may not impose severe penalties on juveniles "as though they were not children." *Miller* at 2466, *Roper* at 569-74.

Additionally, the sentencing court never considered Mr. Solis-Diaz's

background and mental and emotional development. The defense presented a report and the oral testimony of Dr. Ronald Roesch, which described Mr. Solis-Diaz's upbringing, background, family environment, cognitive difficulties, impulsivity, and treatment amenability. RP 9-19. The trial judge refused to consider any of these factors and instead incorrectly ruled that the report was "irrelevant since the law required the defendant to be treated as an adult." RP 41. The court misstated the circumstances of the crime and never considered whether "incompetencies associated with youth" impaired Mr. Solis-Diaz's ability to navigate the criminal justice system. The court twice conflated Mr. Solis-Diaz's actual charges with attempted murder, which was never alleged by the prosecution. RP 50; CP 1-4. The trial judge never discussed Mr. Solis-Diaz's impaired ability to navigate the criminal justice system.

Importantly, the sentencing judge never considered Mr. Solis-Diaz's potential for rehabilitation even though the evidence presented by Dr. Roesch stated that Mr. Solis-Diaz "would have been somebody that had the potential to be rehabilitated." RP 18. Rather than address Mr. Solis-Diaz's potential for rehabilitation, the judge made general statements on how the Legislature moved away from rehabilitation: "Accountability takes precedent over rehabilitation, and the lessened attitude toward rehabilitation was deliberate." RP 45.

Mr. Solis-Diaz is precisely the type of offender contemplated by the court's rulings in *Graham* and *Miller*. He was a 16-year-old learning disabled boy from a single mother household fraught with substance abuse and mental illness. CP 117-18, 139-40. He was less capable of making reasoned decisions and influenced by gang-involved peers and relatives. CP 118. His offense was impetuous – putting at risk, without injuring, six individuals in a drive-by shooting. He did not understand the criminal justice system and he did not understand a plea offer that what was nearly 80 years under the standard range he would later face after trial. CP 117-118. His response to rehabilitative services in juvenile prison was promising and his teachers described him as hard-working and respectful. CP 119. Despite the seriousness of his offense, he did not exhibit characteristics at 16-years-old that would indicate that he was beyond redemption and fit for only one end: death in prison.

The trial court was constitutionally obligated to consider and give great weight to the five mitigating factors from *Miller* in the sentencing of Mr. Solis-Diaz. As stated in this brief, the trial court's refusal to consider and apply the constitutional mandates found in Washington Constitution, Article 1, § 14 and United States Constitution, Eighth Amendment produced a sentencing hearing in which the court ignored the imperative analysis of age or its accompanying attributes as mitigating factors. The requirements of

Roper, *Graham* and *Miller* are clear that a sentencing court must consider these mitigating factors when sentencing a juvenile, and any sentencing scheme which does not is constitutionally flawed under the Eighth Amendment. *Miller* at 2466. The trial court could have interpreted the SRA to allow these mitigating considerations. The doctrine of constitutional avoidance is an interpretive tool permitting courts to construe ambiguous statutory language to avoid serious constitutional doubts. *State v. Strong*, 167 Wn.App. 206, 212-13, 272 P.3d 281 (2012), *rev. denied*, 174 Wn.2d 1018 (2012). However, to the extent that the court could not interpret the SRA to allow for such analysis, it should have upheld the state and federal constitutional mandates and held the statute unconstitutional.

Based on the argument above, this court should vacate the defendant's sentence and remand this case for a new sentencing hearing during which the trial court properly considers the factors required by the United States Supreme Court in *Miller*, which compellingly support imposition of a sentence below the standard range.

III. UNDER THE APPEARANCE OF FAIRNESS DOCTRINE THIS COURT SHOULD REMAND THIS CASE FOR RESENTENCING BEFORE A DIFFERENT JUDGE BECAUSE A REASONABLY PRUDENT, DISINTERESTED OBSERVER WOULD NOT CONCLUDE THAT THE DEFENDANT HAD OBTAINED A FAIR, IMPARTIAL AND NEUTRAL SENTENCING HEARING.

Under the Appearance of Fairness doctrine, a judicial proceeding is

valid only if a "reasonably prudent and disinterested observer would conclude that all parties obtained a fair, impartial, and neutral hearing." *State v. Ladenburg*, 67 Wn.App. 749, 754-55, 840 P.2d 228 (1992); *State v. Bilal*, 77 Wn.App. 720, 722, 893 P.2d 674, 675 (1995). This rule derives in part from section 3(C)(1) of the Code of Judicial Conduct which provides in part that "[j]udges should disqualify themselves in a proceeding in which their impartiality might reasonably be questioned . . . ." Our courts analyze whether or not a trial judge's impartiality might reasonably be questioned under an objective test that assumes a reasonable person to know and understand all facts relevant to the case. *Sherman v. State*, 128 Wn.2d 164, 905 P.2d 355 (1995). The party seeking disqualification has the burden of producing sufficient evidence demonstrating actual or potential bias; mere speculation is not enough. *In re Pers. Restraint of Haynes*, 100 Wn.App. 366, 996 P.2d 637 (2000).

Federal courts applying a similar test suggest consideration of the following three criteria when evaluating the need to remand a case before a different judge. These criteria are:

> (1) whether the original judge would reasonably be expected upon remand to have substantial difficulty in putting out of his or her mind previously expressed views or findings determined to be erroneous or based on evidence that must be rejected, (2) whether reassignment is advisable to preserve the appearance of justice, and (3) whether reassignment would entail waste and duplication out of proportion to any gain in preserving the appearance of fairness.

United Nat'l Ins. Co. V. R & D Latex Corp., 242 F.3d 1102, 118-119 (9th Cir. 2001).

A careful review of the court's statements at the resentencing hearing in this case strongly supports the conclusion that each of these criteria has been met and that this court should remand for a new sentencing hearing before a different judge. First, Judge Hunt's statements at the resentencing hearing demonstrate his overt refusal to accept the mandate of this court or to consider that there had been any error at the first sentencing hearing. These comments included his statement completely rejecting this court's decision to vacate the original sentence based upon ineffective assistance of counsel. Judge Hunt stated:

> First, however, I have some comments to make about the findings that Mr. Underwood was ineffective. The leading reason seems to be that Mr Underwood failed to notify me that the defendant had not been declined, with a judge finding that such an action was in the best interests of the defendant or the community. Mr. Underwood referred to the procedure as auto-declined, and that supposedly misled me into thinking that a judge had made such a finding.
>
> ***Such a conclusion is an insult to all the trial judges in this state. To postulate that a judge would be so ignorant, lazy or stupid*** as to not know or inquire at some point why this 17-year-old was in adult court is incredible to me. It presupposes that judge didn't review the file or was so behind in the law not to know anything about the automatic adult jurisdiction in this state.

RP 34-35 (emphasis added).

Apart from finding this court's decision vacating the original sentence

an "insult" and an accusation that he as the trial judge was "ignorant, lazy or stupid," Judge Hunt went on to note his personal interest in refusing to consider the criteria this court held he should consider at resentencing. Judge Hunt stated the following on this issue:

> ***In my case it's particularly insulting*** as Mr. Underwood well understood my background which consists of 17 years in prosecution, nine years in private practice emphasizing criminal defense, and at the time three years on the bench. Not only that, but during my time in the prosecutor's office, I was very active in the prosecuting attorney's juvenile justice committee, for a time with the author of the opinion that sent this case back here, and as the elected prosecutor, I was the chair of that committee.
>
> ***During that tenure, the automatic jurisdiction statute was passed with the support of the Prosecuting Attorneys Association.*** Since then I've made a point of calling that statute "automatic jurisdiction" and strongly discouraging the use of the phrase "auto decline" for precisely the reason faced in this case. It is ironic that it would come back to me, in fact, but it is simply ludicrous to think that I would not have know what Mr. Underwood meant when he said the defendant auto-declined.

RP 35 (emphasis added).

At this point Judge Hunt went on to state that, contrary to the ruling of this court, the defendant's original trial counsel was not ineffective for failing to present mitigating evidence or a sentencing memorandum supporting a sentence below the standard range because he (Judge Hunt) would have refused to consider such evidence then and that he was refusing to consider it now. Judge Hunt stated:

The Court also said he should have done his own presentence

> investigation or a report or memorandum, but it's hard for me to see what he would have said in that memo. As I will discuss later, there are no grounds for a mitigated sentence, and he knows that proposing a mitigated sentence on grounds that have already been found insufficient by various appellate courts is a waste of time and effort.
>
> He was also criticized for not bringing the defendant's friends and family who would have testified, as they now have in their declarations, essentially that the defendant is a good boy and has had a hard life. In my nearly 35 years of involvement with criminal law, I've never seen a defendant that didn't have someone, or lots of people, say that he or she is a good person and not really a criminal. For that reason, I often say that criminals exist only in the abstract, because at some point when you get to know him, oh, he's really not that way. That sort of testimony is totally ineffective and is not a sufficient basis on which to fashion a mitigated sentence in any event.

RP 36.

Finally, in this case it should be noted that the defense extensively briefed the arguments that sentencing the defendant within the standard range would violate both the state and federal constitutional prohibitions against cruel and unusual punishment. In this case Judge Hunt refused to consider these arguments based upon the fact that this court remanded the case to him upon a finding of ineffective assistance of counsel and didn't rule upon the other constitutional arguments. Judge Hunt stated:

> I can tell you from personal experience if the Court of Appeals says they cannot change the result ***based upon an out-of-jurisdiction precedent***, then I certainly cannot either. That is for the Legislature and not for me.

RP 53 (emphasis added).

First, this ruling misstated the decision of this court upon remand.

Second, this ruling fails to recognize that the primary three cases upon which the defense relied before this court in the original personal restraint petition and before the trial court on resentencing were *Roper, Graham* and *Miller.* Each one is a decision of the United States Supreme Court interpreting the United States Constitution. It is hard to contemplate that a Superior Court Judge would refuse to recognize that all courts within the United States are within the jurisdiction of United States Supreme Court when it interprets provisions of the Bill of Rights that previous decisions have clarified are enforceable against the states. Its decisions under the Bill of Rights are not "out-of-jurisdiction precedents."

Judge Hunt's extremely intemperate remarks at the sentencing hearing demonstrate that he would reasonably be expected upon remand to have substantial difficulty in putting out of his mind his previously expressed views or findings determined to be erroneous. His remarks also support the conclusion that reassignment is advisable to preserve the appearance of justice. Finally, a reassignment will not entail undue waste or duplication of judicial resources out of proportion to the important goals in preserving the appearance of fairness. In light of Judge Hunt's statements, a reasonable person would question his impartiality. As a result, this court should remand this case to a different judge for a new sentencing hearing.

CONCLUSION

The trial court abused its discretion when it refused to consider mitigating factors recognized under the SRA, and when it imposed a cruel and unusual sentence in violation of Washington Constitution, Article 1, § 14 and United States Constitution, Eighth Amendment. As a result, this court should vacate the defendant's sentence and remand for resentencing before a different judge.

DATED this 19th day of December, 2014.

Respectfully submitted,

John A. Hays, No. 16654
Attorney for Appellant

APPENDIX

WASHINGTON CONSTITUTION
ARTICLE 1, § 14

Excessive bail shall not be required, excessive fines imposed, nor cruel punishment inflicted.

UNITED STATES CONSTITUTION,
EIGHTH AMENDMENT

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

RCW 9.94A.535(1)
Departures from the Guidelines

The court may impose a sentence outside the standard sentence range for an offense if it finds, considering the purpose of this chapter, that there are substantial and compelling reasons justifying an exceptional sentence. Facts supporting aggravated sentences, other than the fact of a prior conviction, shall be determined pursuant to the provisions of RCW 9.94A.537.

Whenever a sentence outside the standard sentence range is imposed, the court shall set forth the reasons for its decision in written findings of fact and conclusions of law. A sentence outside the standard sentence range shall be a determinate sentence.

If the sentencing court finds that an exceptional sentence outside the standard sentence range should be imposed, the sentence is subject to review only as provided for in RCW 9.94A.585(4).

A departure from the standards in RCW 9.94A.589 (1) and (2) governing whether sentences are to be served consecutively or concurrently is an exceptional sentence subject to the limitations in this section, and may be appealed by the offender or the state as set forth in RCW 9.94A.585 (2) through (6).

(1) Mitigating Circumstances – Court to Consider
The court may impose an exceptional sentence below the standard

range if it finds that mitigating circumstances are established by a preponderance of the evidence. The following are illustrative only and are not intended to be exclusive reasons for exceptional sentences.

(a) To a significant degree, the victim was an initiator, willing participant, aggressor, or provoker of the incident.

(b) Before detection, the defendant compensated, or made a good faith effort to compensate, the victim of the criminal conduct for any damage or injury sustained.

(c) The defendant committed the crime under duress, coercion, threat, or compulsion insufficient to constitute a complete defense but which significantly affected his or her conduct.

(d) The defendant, with no apparent predisposition to do so, was induced by others to participate in the crime.

(e) The defendant's capacity to appreciate the wrongfulness of his or her conduct, or to conform his or her conduct to the requirements of the law, was significantly impaired. Voluntary use of drugs or alcohol is excluded.

(f) The offense was principally accomplished by another person and the defendant manifested extreme caution or sincere concern for the safety or well-being of the victim.

(g) The operation of the multiple offense policy of RCW 9.94A.589 results in a presumptive sentence that is clearly excessive in light of the purpose of this chapter, as expressed in RCW 9.94A.010.

(h) The defendant or the defendant's children suffered a continuing pattern of physical or sexual abuse by the victim of the offense and the offense is a response to that abuse.

(i) The defendant was making a good faith effort to obtain or provide medical assistance for someone who is experiencing a drug-related overdose.

(j) The current offense involved domestic violence, as defined in RCW 10.99.020, and the defendant suffered a continuing pattern of coercion, control, or abuse by the victim of the offense and the offense is a response to that coercion, control, or abuse.

RCW 9.94A.540
Mandatary Minimum Terms

(1) Except to the extent provided in subsection (3) of this section, the following minimum terms of total confinement are mandatory and shall not be varied or modified under RCW 9.94A.535:

(a) An offender convicted of the crime of murder in the first degree shall be sentenced to a term of total confinement not less than twenty years.

(b) An offender convicted of the crime of assault in the first degree or assault of a child in the first degree where the offender used force or means likely to result in death or intended to kill the victim shall be sentenced to a term of total confinement not less than five years.

(c) An offender convicted of the crime of rape in the first degree shall be sentenced to a term of total confinement not less than five years.

(d) An offender convicted of the crime of sexually violent predator escape shall be sentenced to a minimum term of total confinement not less than sixty months.

(e) An offender convicted of the crime of aggravated first degree murder for a murder that was committed prior to the offender's eighteenth birthday shall be sentenced to a term of total confinement not less than twenty-five years.

(2) During such minimum terms of total confinement, no offender subject to the provisions of this section is eligible for community custody, earned release time, furlough, home detention, partial confinement, work crew, work release, or any other form of early release authorized under RCW 9.94A.728, or any other form of authorized leave of absence from the correctional facility while not in the direct custody of a corrections officer. The provisions of this subsection shall not apply: (a) In the case of an offender in need of emergency medical treatment; (b) for the purpose of commitment to an inpatient treatment facility in the case of an offender convicted of the crime of rape in the first degree; or (c) for an extraordinary medical placement when authorized under RCW 9.94A.728(3).

(3)(a) Subsection (1) (a) through (d) of this section shall not be applied in sentencing of juveniles tried as adults pursuant to RCW 13.04.030(1)(e)(i).

(b) This subsection (3) applies only to crimes committed on or after July 24, 2005.

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 this day, I personally e-filed and/or placed in the United States Mail the Brief of Appellant with this Affirmation of Service Attached with postage paid to the indicated parties:

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