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Court of Appeals
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COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON

V.

GUADALUPE SOLIS DIAZ

BRIEF OF APPELLANT

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A. Assignment of Error

Assignment of Error

The trial court failed to adequately address the multiple offense policy, resulting in a clearly excessive sentence.

Issues Pertaining to Assignment of Error

Is a thirty year sentence clearly excessive for a youthful offender who committed his offenses when he was 16 years old and no one was killed or injured?

B. Statement of Facts

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 altercation earlier. CP, 1. Although five additional bystanders 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. He 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, this Court 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 trial court reimposed the same 1111 months. CP, 22. The Supreme 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.

At Mr. Solis-Diaz’ third sentencing hearing, the primary victim, Jesse Dow, 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.

The Court also 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 as 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 police 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. Mr. Solis-Diaz appeals. CP, 273.

C. Argument

At the third sentencing hearing, the trial court heard extensive testimony pertaining the youthful offenders and properly concluded that a mitigated exceptional sentence was warranted. Nevertheless, the 360

month sentence imposed by the Court resulted in a sentence that is clearly excessive. RCW 9.94A.535(1)(g).

Pursuant to *Miller*, the trial court was required to consider five factors: (1) mitigating circumstances related to the defendant's youth—including age and its hallmark features, such as the juvenile's immaturity, impetuosity, and failure to appreciate risks and consequences; (2) the nature of the juvenile's surrounding environment and family circumstances; (3) the extent of the juvenile's participation in the crime, (4) the way familial and peer pressures may have affected him; and (5) any factors suggesting that the child might be successfully rehabilitated. *Houston-Sconiers* at 23, citing *Miller v. Alabama*.

In *State v. Ronquillo*, 190 Wn.App. 765, 361 P.3d 779 (2015), the Court of Appeals reversed a sentence in part to allow the trial court to determine whether a 51 year sentence was clearly excessive. Like Mr. Solis-Diaz, the sixteen year old defendant had been involved in a gang-motivated drive-by shooting. Unlike Mr. Solis-Diaz, the shooting had resulted in a death. The defendant was convicted of one count of murder and two counts of attempted murder. The Court reversed the sentence primarily because the trial court had not sufficiently taken the defendant's youth into account. But then the Court addressed whether the multiple

offense policy resulted in a sentence that was “clearly excessive.” Because the Court was reversing for other reasons, it did not reach a conclusion on this issue, instead stating the 51 year sentence was “arguably” excessive. *Ronquillo* at 783. The Court held that the law permits concurrent sentences even for multiple serious violent offenses. *Ronquillo* at 783, citing *State v. Graham*, 181 Wn.2d 878, 886, 337 P.3d 319 (2014).

Attached to this Brief at Appendix A is a list of 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. In three of the cases, the trial courts reimposed life without parole sentences. Each of those cases is pending on appeal. The take away from the Appendix A is that most juvenile offenders who actually killed someone with aggravating circumstances are getting between 25 and 40 years.

The thing that distinguishes Mr. Solis-Diaz' case from the 29 offenders in Appendix A is that no one was hurt or killed. The facts presented in Mr. Solis-Diaz' case show the target of the shooting was Jesse Dow with five bystanders nearby, but none of the six victims was injured. A thirty year sentence for a youthful offender who neither killed nor injured anyone is clearly excessive.

For comparison purposes, there are not many examples of youthful offenders who received extremely long sentences that did not result in death or serious bodily injury prior to *Miller*. The one case counsel has been able to identify is 17 year old Zyion Houston-Sconiers and his co-defendant 16 year old Treson Lee Roberts, both of whom were convicted of multiple counts of first degree robbery while armed with a firearm for stealing candy from trick-or-treaters on Halloween. 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 the Supreme Court reversed and ordered new sentencing hearings. On remand, the Pierce County Superior Court imposed sentences of 100 months and 96 months respectively.

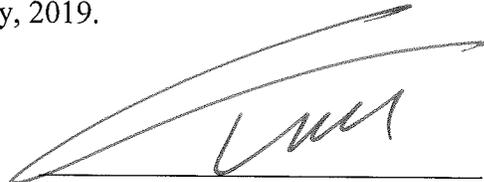
Further evidence that Mr. Solis-Diaz' sentence is clearly excessive is the fact that his co-defendant, 21 year old Juan Velasquez, received 151 months. While the fact that Mr. Velesquez accepted responsibility and pleaded guilty may justify some deviation in sentence compared to Mr. Solis-Diaz, a reduction of 209 months is unreasonable.

This Court should reverse and remand the sentence for imposition of a sentence proportionate to youthful offenders who are convicted of offenses that do not result in death or serious bodily injury.

D. Conclusion

This Court should reverse and remand for sentencing.

DATED this 1st day of May, 2019.

A handwritten signature in black ink, appearing to read 'T. Weaver', is written over a horizontal line.

Thomas E. Weaver, WSBA #22488
Attorney for Defendant/Appellant

Appendix A

JLWOP in Washington
as of October 26, 2018

First	Last	County	Superior Court Cause No.	Age at Crime	Conviction	Resentencing date	Resentencing Counsel of Record	Resentencing result	Appeal filed
Ryan	Alexander	Whatcom	02-1-00527-9	16	Agg 1st deg murd Kidnapping 1st deg		Shoshana Paige, Mamie Lackie		
David	Anderson	King	97-1-00421-3	17	Agg 1st deg murd (3 counts)		Joshua Andrews		
Brandon	Backstrom	Snohomish	97-1-01993-6	17	Agg 1st deg murd (2 counts, armed w deadly weap non-firearm)	6/27/2017	Frederic Moll, Paul Thompson	42-life	Y (state)
Alex	Baranyi	King	97-1-00343-8	17	Agg 1st deg murd (3 counts)		Mark Flora & Colleen O'Connor		
Brian	Bassett	Grays Harbor	95-1-00415-9	16	Agg 1st deg murd (3 counts)	1/30/2015	Eric Lindell	LWOP	Y
Kevin	Boot	Spokane	95-1-00310-0	17	Agg 1st deg premeditated murd	3/30/2017	Derek Reid, Anne Elgee	50-life	
Jeremiah	Bourgeois	King	92-1-06444-4	14	Agg 1st deg murd Assault 1st deg	6/20/2014	Jeffrey Ellis	25-life	
Kenneth	Comeslast	Spokane	95-1-02260-1	15	Prem 1st deg murd (2 counts) Att 1st deg murd	1/28/2016	Jill Gannon-Nagle, Nathan Poston	25-life (concurrent)	
Cristian	Delbosque	Mason	93-1-00256-4	17	Agg 1st deg murd Murd 2nd deg	11/23/2016	Robert Quillian, Neil Fox	48-life	
John Lee	Forrester	Spokane	1-25095 (1978)	17	Agg 1st deg murd	11/12/2015	Karl Reardon	38-life	
Michael	Furman	Kitsap	89-1-00304-8	17	Agg 1st deg murd	3/26/2018 (3rd day)	Kimberly Sloan, Steven Lewis	48-life	
Miguel	Gaitan	Yakima	93-1-01018-0	14	Agg 1st deg murd (4 counts)				
Jeremiah	Gilbert	Klickitat	92-1-00108-1	15	Agg 1st deg murd Murd 1st deg Assault 2nd deg Robbery 1st deg Theft 1st deg	9/21/2015: Resentencing hearing at 1:30	Christopher Lanz	280 months; 25- life (consecutive); all other counts concurrent	
Timothy	Haag	Cowlitz	94-1-00411-2	17	Agg 1st deg murd	1/19/2018	Simi Baer	46-life	
Michael	Harris	Pierce	87-1-01354-7	15	Agg 1st deg murd	8/22/2014	Jason Saunders	25-life	
Ansel	Hofstetter	Pierce	91-1-02993-0	16	Agg 1st deg murd	10/18/2013	Renee Alsept, Jeffrey Ellis	26-life	Y (state) - Div. II ruled for state. J. Ellis will seek further review.

JLWOP in Washington
as of October 26, 2018

Donald	Lambert	Grant	97-1-00415-5	14	Agg 1st deg murd	4/10/2015	Brett Hill	25-life	
William	Lembcke	Stevens	01-1-00001-7	16	Agg 1st deg murd (4 counts)		Paul Wasson		
Marvin	Leo	Pierce	98-1-03161-3	17	Agg 1st deg murd (5 counts) Assault 1st deg (5 counts)	11/16/2016: Resentencing hearing at 9:30	Mark Quigley, Mary High	40-life	
Barry	Loukaitis	Grant	96-1-00548-0	14	Agg 1st deg murd (2 counts) Murder 2nd deg Assault 1st deg Assault 2nd deg Kidnap 1st deg (16 counts)	4/19/2017	Brett Hill	189 years	
Barry	Massey	Pierce	87-1-01354-7	13	Agg 1st deg murd	6/6/2014	David Zuckerman, Maureen Devillin	25-Life	Released on parole 2/16/16
Russell	McNeil	Yakima	88-1-00428-1	17	Agg 1st deg murd Accomp to agg 1st deg murd		Ken Therrian		
Jose	Munguia	Benton	02-1-00960-7	15	Agg 1st deg murd	3/3/2015	Mitch Harrison	25-Life	N
Nga	Ngoeung	Pierce	94-1-03719-8	17	Agg 1st deg murd (2 counts) Assault 1st deg (2 counts) Taking motor vehicle	1/23/2015	James B. Feldman	LWOP	Y
John	Phet	Pierce	98-1-03162-1	16	Agg 1st deg murd (5 counts) Assault 1st deg (5 counts)	3/10/2016	Jeffrey Ellis, Renee Alsept	25-Life on each count	
Herbert	Rice	Yakima	88-1-00427-2	17	Agg 1st deg murd Accomp to agg 1st deg murd		Rick Smith		
Michael	Skay	Snohomish	95-1-01942-5	16	Agg 1st deg murd	6/1/2016	Bill Jacquette	32-life	
Sean	Stevenson	Skamania	87-1-00011-5	16	Agg 1st deg murd Murder 1st deg (2 counts)		Christopher Lanz	LWOP	Y
Vy	Thang	Spokane	98-1-00278-7	17	Agg 1st deg murd	9/23/2015	Tom Krzyminski, Matt Rabinovitch	35-Life	
Terence	Weaver	Whatcom	96-1-00123-9	16	Agg 1st deg murd Rape 1st deg		Stephen Jackson		

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