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THE COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

GUADALUPE SOLIS-DIAZ, JR.,

Appellant.

Appeal from the Superior Court of Washington for Lewis County

Respondent's Brief

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I. ISSUE

- A. Did the trial court abuse its discretion by failing to properly consider the operation of the multiple offense policy, resulting in Solis-Diaz receiving an excessive sentence?

II. STATEMENT OF THE CASE

Substantive Facts

In the early morning hours of August 11, 2007, Jesse Dow left the Tower Tavern located in Centralia with a friend, Shenna Fisco, who drove to the Shell Station so Mr. Dow could purchase cigarettes. *State v. Solis-Diaz*, 2009 Wn. App. LEXIS 2588 at 1-2 (No. 37120-1-II, 10/13/2009).¹ When Mr. Dow exited the store he saw two men seated inside a car that had pulled up and parked while Mr. Dow was inside the store. *Id.* at 2. The men got out of the vehicle and it appeared to Mr. Dow they were grabbing weapons out of the trunk of the car. *Id.*

Mr. Dow and Ms. Fisco left the Shell Station and hurriedly returned to the Tower Tavern. *Id.* Once at the bar, Mr. Dow instructed Ms. Fisco to get the people inside the tavern. *Id.* Mr. Dow said “he would stay outside and ‘take care of’ the situation.” *Id.* Mr.

¹ The verbatim report of proceedings from the trial is not a part of this record. The only verbatim report of proceedings cited to in this briefing is from the most current resentencing hearing and motion for reconsideration of that hearing. The State acknowledges the opinion cited does not meet the requirements for citing of unpublished opinions. See GR 14.1. The State is citing to Solis-Diaz’s 2009 direct appeal as it is the most concise statement of the substantive facts available. Appendix A.

Dow observed the car from the Shell Station, containing Solis-Diaz as the passenger and Juan Velasquez as the driver, drove slowly down the street. *Id.* at 2-3. As the vehicle neared the tavern, the passenger side window was rolled down halfway. *Id.* Solis-Diaz stuck a gun out of the passenger window and began shooting into the crowd of people gathered outside the tavern. *Id.* at 2-4.

Solis-Diaz fired seven shots at the people gathered outside of the tavern. *Id.* at 2-3. The bullets also struck a vehicle and a business, causing damage. CP 1. No one was injured by the gunfire and the vehicle sped away from the scene. *State v. Solis-Diaz*, 2009 Wn. App. LEXIS 2588 at 3. Solis-Diaz's actions were in apparent response to Mr. Dow's disagreement with an LVL gang member. CP 1.

Procedural History.

The State filed charges against Solis-Diaz for six counts of Assault in the First Degree, one count of Drive-By Shooting and one count of Unlawful Possession of a Firearm in the Second Degree. CP 3-7. Because Solis-Diaz was 16 years-old on August 11, 2007, RCW 13.04.030(1)(e)(v)(A) required Solis-Diaz's conduct be addressed in superior court, rather than in the juvenile court system. Prior to trial the State offered Solis-Diaz a plea deal for 180

months, plus community custody. *In re Pers. Restraint of Diaz*, 2012 Wn. App. LEXIS 2217 at 3 (No. 42064-3-II, 9/18/2012).² Solis-Diaz declined the State's plea offer. *Id.* at 4.

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

Count	Charge	Victim
I	First Degree Assault While Armed With a Firearm	Jesse Dow
II	First Degree Assault While Armed With a Firearm	Sheena Fisco
III	First Degree Assault While Armed With a Firearm	Cassandra Norskog
IV	First Degree Assault While Armed With a Firearm	Sean Thomas
V	First Degree Assault While Armed With a Firearm	Doug Hoheisel
VI	First Degree Assault While Armed With a Firearm	Jonathan Freeman
VII	Drive-by Shooting	
VIII	Unlawful Possession of a Firearm in the Second Degree	

CP 3-17; *Solis-Diaz*, 2009 Wn. App. LEXIS 2588. At the sentencing hearing the State requested high end of the standard range for each count. *In re Diaz*, 2012 Wn. App. at 5. Solis-Diaz's trial

² The State is again citing to an unpublished prior appellate decision in Solis-Diaz's case for the necessary facts in this statement. Appendix B.

counsel requested a low end of the standard range but did not ask for an exceptional sentence below the standard range. *Id.*

The trial court sentenced Solis-Diaz to 196 months on Count I, 183 months on Counts II-VI, 27 months on Count VII, and 29 months on Count VIII. CP 13. The trial court ran Counts I-VI consecutive as required by RCW 9.94A.589(1)(b) and the remaining counts concurrent. *Id.* The time imposed on Counts I-VI included the 60 month sentence enhancement for each count. *Id.* The total time imposed was 1111 months, or approximately 92.5 years. *Id.*

Solis-Diaz appealed his conviction and the Court of Appeals affirmed his convictions and sentence. *See, Solis-Diaz*, 2009 Wn. App. LEXIS 2588. Next, Solis-Diaz filed a personal restraint petition. *See, In re Diaz*, 2012 Wn. App. LEXIS 2217. This Court held Solis-Diaz's counsel was ineffective during Solis-Diaz's sentencing hearing and remanded the case for resentencing. *Id.*

Solis-Diaz was resentenced to the same 1,111 month sentence. *State v. Solis-Diaz*, 187 Wn.2d 535, 537, 387 P.3d 703 (2017). At the resentencing hearing the State asked the judge to "conduct an individualized determination of the propriety of an exceptional downward sentence" due to the recent changes in the

law regarding offender's youth. *Solis-Diaz*, 187 Wn.2d at 537. The State requested the imposition of the same 1,111 month sentence as previously imposed. *Id.* Solis-Diaz's counsel requested an exceptional downward sentence of 15 years (180 months). *Id.* The trial court explained it could not sentence to an exceptional sentence below the standard range because the consecutive sentences were required under the multiple-offense policy. *State v. Solis-Diaz*, 194 Wn. App. 129, 135, 376 P.3d 458 (2016), *reversed in part*, 187 Wn.2d 535 (2017). The sentence was appealed and this Court remanded the matter back to the trial court for failing to properly consider the operation of the multiple offense policy and Solis-Diaz youth should mitigate the sentence imposed. *Id.* at 144.

Second Resentencing Hearing

A second resentencing hearing was held for Solis-Diaz on July 10, 2018. RP 5. Solis-Diaz was represented by numerous attorneys who submitted significant mitigation materials to the court in the form of briefing, a video, and live testimony. RP 5-66; CP 32-199. Solis-Diaz's counsel presented testimony from Jesse Dow, who explained he believed Solis-Diaz had served enough time and deserved a second chance. RP 62-64.

Solis-Diaz's counsel presented testimony from Dr. Kate McLaughlin, an associate professor from the University of Washington who holds Ph.D.'s in psychology and chronic disease epidemiology, and is a licensed clinical psychologist. RP 14-15. Dr. McLaughlin's testimony focused on adolescent brain development and how adolescents are influenced by their surroundings and their peers. RP 16-43. Dr. McLaughlin 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. *Id.*

Solis-Diaz's counsel also presented testimony from Dr. Donald Roesch, a professor of psychology and director of the Mental Health Law and Policy Institute located at Simon Frazier University, in Vancouver, British Columbia. RP 45. Dr. Roesch has a Ph.D. in psychology. RP 45. Dr. Roesch's area of expertise is focused on competency and research on risk assessment. RP 46. Dr. Roesch evaluated Solis-Diaz before his prior resentencing in 2014 and evaluated Solis-Diaz again in 2018. RP 46-47. Dr. Roesch found substantial differences in the personality testing he administered to Solis-Diaz in 2014 and 2018. RP 49-50.

The State recommended Solis-Diaz serve a total sentence of 525 months, or 43.75 years. RP 70-72. The State noted this was an

over 50 percent reduction in the original sentence imposed and it recognized that children were, in fact, different. RP 72. Solis-Diaz's counsel requested credit for time served, or if that was not sufficient, 15 years. RP 78-81.

The trial court considered all of the evidence presented and commented on how much Solis-Diaz had changed over the years. RP 84-89. The trial court, after considering the factors, sentenced Solis-Diaz to an exceptional downward sentence of 30 years. RP 86-89; CP 260-72. Essentially, the trial court sentenced Solis-Diaz to five years per victim. RP 87-89.

On October 24, 2018, Solis-Diaz's counsel filed a Motion for Reconsideration of Oral Ruling. CP 224-255. At the October 29, 2018, hearing for formal entry of the judgment and sentence, the trial court considered the reconsideration motion and ultimately denied the request. RP 94-97. Solis-Diaz timely appeals the resentencing

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

III. ARGUMENT

A. THE TRIAL COURT PROPERLY CONSIDERED ALL NECESSARY MITIGATING FACTORS WHEN IT RESENTENCED SOLIS-DIAZ, USING ITS DISCRETION TO IMPOSE AN EXCEPTIONAL DOWNWARD SENTENCE OF 360 MONTHS.

Solis-Diaz argues the trial court imposed a clearly excessive sentence when it imposed 360 months. Brief of Appellant 5-9. The trial court properly considered Solis-Diaz's mitigation argument and all materials presented to the court by Solis-Diaz. The trial court used its discretion to impose a sentence 62.5 years less than Solis-Diaz's prior 92.5 year sentence. This Court should hold the trial court did not abuse its discretion when the trial court properly considered and applied the mitigating factors presented when it imposed Solis-Diaz's sentence. Further, this Court should hold the sentence is not clearly excessive and affirm the trial court's sentence.

1. Standard Of Review.

An exceptional sentence is reviewed by the court by addressing the following three questions under the indicated standards of review: (1) Are the reasons supported by the evidence in the record? *State v. Borg*, 145 Wn.2d 329, 336, 36 P.3d 546 (2001). This is reviewed under a clearly erroneous standard. *Borg*,

145 Wn.2d at 336. (2) Do the reasons justify a departure from the standard range? *Id.* This is reviewed de novo. *Id.* (3) Finally, this court reviews under an abuse of discretion standard if the sentence is clearly excessive or too lenient. *Id.* It is an abuse of discretion when the trial court bases its decision on untenable reasons or grounds or the decision is manifestly unreasonable. *State v. C.J.*, 148 Wn.2d 672, 686, 63 P.3d 765 (2003).

2. The Trial Court's Imposition Of A 360 Month Sentence Was Not Excessive After It Properly Considered All Mitigating Factors Before It Imposed An Exceptional Sentence Below The Standard Range.

The Supreme Court gave a blueprint of what a sentencing court must do when it has a juvenile offender being sentenced. *State v. Houston-Sconiers*, 188 Wn.2d 1, 21, 391 P.3d 409 (2017). First, youthfulness is considered by the age of the person at the time of the crime, not the time of conviction or sentencing. *Houston-Sconiers*, 188 Wn.2d at 420. Second, the trial court must use its discretion and must consider the mitigating circumstances as related to the defendant's youth. *Id.* at 421. These circumstances, include, "age and its 'hallmark features,' such as the juvenile's 'immaturity, impetuosity, and failure to appreciate risks and consequences.'" *Id.*, citing *Miller v. Alabama*, 567 U.S. 460, 432 S.

Ct. 2455, 2468, 183 L. Ed. 2d 407 (2012). The trial court is also required to consider other factors: the extent of the juvenile's partition 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. *Id.* The trial court "must consider how youth impacted any legal defense, along with any factors suggesting that the child might be successfully rehabilitated." *Id.*

Solis-Diaz simply argues his sentence is clearly excessive and cites to the SRA. Brief of Appellant at 5-6, *citing* RCW 9.94A.535(1)(g).³ Solis-Diaz's argument is apparently premised upon the trial court's alleged failure to mitigate his sentence down to a number Solis-Diaz believes is adequate, and the cause of this error is the trial court's operation of the multiple offense policy set forth in RCW 9.94A.589. Solis-Diaz may not agree with the number the trial court arrived at, 360 months, but the trial court did not fail to adequately mitigate Solis-Diaz's sentence in regards to the multiple

³ Solis-Diaz argues his sentence is clearly excessive, citing to RCW 9.94A.535(1)(g), the multiple offense policy. Solis-Diaz, while citing to the *Miller* factors by way of *Houston-Sconiers*, does not raise an 8th Amendment or an Article 1, Section 14, cruel and unusual punishment argument regarding his alleged excessive sentence. Therefore, the State is not briefing the issue. If this Court either believes the issue has been raised or wishes briefing on the matter, the State is happy to provide a supplemental response brief on the issue.

offense policy. See RCW 9.94A.535(1)(g); RCW 9.94A.589; RP 86-89.

Solis-Diaz argues the trial court's 360 months is clearly excessive because other juvenile offenders "who actually killed someone with aggravating circumstances" have been handed down sentences between 25 and 40 years. Brief of Appellant 7.⁴ Solis-Diaz states he neither killed, nor hurt anyone, unlike these offenders. *Id.* at 8. Solis-Diaz likens his case to that of the defendants in *Houston-Sconiers*. Brief of Appellant 8. While there may be similarities, neither Zyion Houston Sconiers nor Treson Roberts fired a gun at anyone during their Halloween night escapades when they were robbing (mostly) other juveniles of candy and cell phones. *Houston-Sconiers*, 188 Wn.2d 1.

Solis-Diaz asserts Division One found a 51 year sentence for a sixteen year old convicted of one count of murder and two counts of attempted murder, "arguably" excessive." Brief of Appellant, citing *State v. Ronquillo*, 190 Wn. App. 765, 783, 361 P.3d 779 (2015). Solis-Diaz overemphasizes the Court's use of arguably

⁴ Solis-Diaz supports this argument with Appendix A, a list of 29 youthful offenders who have filed for post-conviction relief. The State has no idea where the list comes from, who compiled it, or the accuracy of the list, as there is no citation with the list. Further, this "list" was not presented to the trial court by Solis-Diaz's counsel during the resentencing hearing. See CP.

excessive and takes the statement of out context. *Ronquillo*, 190 Wn. App. at 783-85. The heading was, “Arguably, Ronquillo’s sentence was ‘clearly excessive.’” *Id.* at 783. The section of the opinion then discusses how the trial court refused to consider Ronquillo’s request for a mitigated sentence because of the appellate court decision in *State v. Graham*, 178 Wn. App. 580, 314 P.3d 1148 (2013), which held mitigation was not available for multiple serious violent felony offenses. *Id.* at 784. This is the same issue that occurred during Solis-Diaz’s prior resentencing hearing. Division One in *Ronquillo* explained sentencing judges must have discretion and should examine the purposes of the SRA, found in RCW 9.94A.010, with the *Miller* factors in mind when determining if “Ronquillo’s presumptive aggregate sentence for multiple offenses is clearly excessive[.]” *Id.* at 785.

Solis-Diaz presented a significant amount of mitigation materials to the trial court, all of which the trial court took into consideration. RP 7-8. The trial court explained it had read all the materials, a volume of bench copies, and watched a mitigation video Solis-Diaz’s counsel submitted. RP 7-8. The trial court stated it was not going to confine the parties to time limits, it wanted to

hear everything both parties had to say because it was an important day. RP 8. The trial court also stressed,

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.

RP 8.

Solis-Diaz then presented testimony from two experts regarding youth, its hallmarks, how the nature of family circumstances and peer pressure affect a juvenile, the ability to rehabilitate juveniles in general, and Solis-Diaz's growth in particular. RP 14-53. One of Solis-Diaz's victims, Jesse Dow, the person targeted in the shooting, testified on Solis-Diaz's behalf and requested Solis-Diaz be released. RP 54-66. Solis-Diaz spoke to the trial court directly, apologizing to his victims and explaining how much he has grown and changed. RP 83-84.

The State's recommendation was a 586 month reduction off the original 1111 month sentence, 525 months (43.75 years). RP 70-72. Solis-Diaz's attorney recommended a 15 year sentence, although he also encouraged the trial court to consider credit for time served. RP 78-81. The trial court listened and considered all of

testimony, considered all of the evidence, and the arguments presented before rendering its decision.

The trial court noted how helpful the hearing was for the trial court. RP 84. The trial court explained the challenge was to craft a sentence for Solis-Diaz somewhere including and between, the theoretical lawful sentence he was previously given (1,111 months) and credit for time served. RP 86. 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, that would be a logical framework." RP 86. The trial court discussed how it considered the State's recommendation, a bottom range sentence, whether to run enhancement consecutive or concurrently, and the different options. RP 86-87.

The trial court then imposed its sentence, but first 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 87. The trial court then imposed a sentence, Count I: zero days, but imposed the 60 month firearm enhancement. RP 87. The remaining counts of Assault in the First Degree, Counts II-VI, each count the trial court imposed 60 months, to run consecutive, the enhancement on each of those counts to run concurrent to Count I. RP 87. The trial court imposed 27 months for Count VII and 29 months for Count VIII to run concurrent with all other counts. RP 88. The total sentence was 30 years, or 360 months. RP 87-89.

Solis-Diaz argues 30 years is excessive, he did not hurt anyone, and the intended target, Jesse Dow, testified on his behalf at Solis-Diaz's resentencing. Solis-Diaz. "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 were injured." Brief of Appellant at 8. The key part of that sentence should be five bystanders who became victims of Solis-Diaz's intentional action of firing a gun out of the window of a vehicle into a crowded sidewalk outside a bar on a summer night.

There were six victims in this case, and they all have names, Jesse Dow, Sheena Fisco, Cassandra Norskos, Sean Thomas, Doug Hoheisel, and Jonathan Freeman. CP 3-5. Solis-Diaz fired seven shots into this crowd. *Solis-Diaz*, 2009 Wn. App. LEXIS 2588

at 2-3. Solis-Diaz retrieved a firearm from the trunk of a vehicle, got back in the vehicle, rode in the vehicle as it pursued Jesse back to the bar, rolled down his window, and fired the gun seven times. *Solis-Diaz*, 2009 Wn. App. LEXIS 2588 at 1-4. These are the facts of Solis-Diaz's case. Yes, the driver, Juan Velazquez received less time pursuant to a plea deal, but he was also not the gunman.

The trial court explained its reasoning for its sentence:

And I want to just -- I think the balance in the courtroom are those who were here in support of the defendant, Mr. Solis-Diaz, and the bulk of the presentation has been about Mr. Solis-Diaz. But my sentence reflects my mindfulness that there are six victims in this case, one of whom came and expressed his desires. The others were not present. But this is an equation that does not only highlight the defendant and his actions, it also highlights or takes into consideration that there are victims in this case.

RP 89.

Five years per victim of an Assault in the First Degree while using a firearm. The low end of the standard range for each count of Assault in the First Degree, with no history and an offender score of zero, would be 93 months. RCW 9.94A.510; RCW 9.94A.515; RCW 9.94A.525; RCW 9A.36.011. A firearm enhancement is five years. RCW 9.94A.533(3)(a). The multiple offense policy would generally require the Assault in the First Degree convictions to run

consecutive to each other and be scored differently. RCW 9.94A.589(b).

It would appear Solis-Diaz's argument is falsely premised on the fact the trial court ran all the Assault in the First Degree counts consecutive, therefore, the trial court must have failed to adequately mitigate the multiple offense policy and abused its discretion by imposing an excessive sentence. The trial court's sentence reflects a careful balance between acknowledging Solis-Diaz's youth, the clearly-excessive sentence that would result from the multiple offense policy of RCW 9.94A.589, and the victims. There were five people, who by no fault of their own, were in the wrong place at the wrong time and ended up being shot at by Solis-Diaz. These five people, Ms. Fisco, Ms. Norskos, Mr. Thomas, Mr. Hoheisel, and Mr. Freeman should be taken into account, in addition to Mr. Dow, who spoke on Solis-Diaz's behalf. The trial court did not abuse its discretion when it crafted its 30 year sentence, which is not clearly excessive. This Court should affirm Solis-Diaz's sentence.

IV. CONCLUSION

The trial court did not abuse its discretion when it imposed 360 months, five years for each count of Assault in the First Degree to run consecutively, on Solis-Diaz after his second resentencing hearing. The trial court carefully considered all mitigation material, including testimony presented by Solis-Diaz. The trial court took into consideration the operation of multiple offense policy, and sentenced Solis-Diaz to a consecutive sentences, not because RCW 9.94A.589(b) required the trial court to do so, but because by imposing five years on each count the trial court was able to acknowledge and impose some punishment for each of Solis-Diaz's victims. This Court should affirm the sentence.

RESPECTFULLY submitted this 26th day of June, 2019.

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Appendix A

State v. Solis-Diaz, 2009 Wn. App. LEXIS 2588,
(No. 37120-1-II, 10/13/2009)

State v. Solis-Diaz

Court of Appeals of Washington, Division Two

June 15, 2009, Oral Argument; October 13, 2009, Filed

No. 37120-1-II

Reporter

2009 Wash. App. LEXIS 2588 *

THE STATE OF WASHINGTON, *Respondent*, v. GUADALUPE SOLIS-DIAZ, JR., *Appellant*.

Notice: RULES OF THE WASHINGTON COURT OF APPEALS MAY LIMIT CITATION TO UNPUBLISHED OPINIONS. PLEASE REFER TO THE WASHINGTON RULES OF COURT.

Subsequent History: Reported at *State v. Solis-Diaz, 2009 Wash. App. LEXIS 2608 (Wash. Ct. App., Oct. 13, 2009)*

Prior History: [*1] Appeal from Lewis County Superior Court. Docket No: 07-1-00543-3. Judgment or order under review. Date filed: December 17, 2007. Judge signing: Honorable Nelson E Hunt.

Core Terms

trial court, shooting, gang, heuristic, responded, witnesses, questions, argues, gang member, courtroom, passenger, video, ineffective, motive, montage, morning, station, Tavern, night, gang affiliation, plea agreement, shooter, shots, prejudiced, tactics, admit, fired, grab, allegations, retaliation

Counsel: Counsel for Appellant(s): *George Alan Steele*, George A Steele Attorney at Law, Shelton, WA.

Counsel for Respondent(s): *Lori Ellen Smith*, Lewis Co. Prosecuting Atty. Office, Chehalis, WA.

Judges: Authored by Joel Penoyar. Concurring: Kevin Michael Korsmo, Marywave Van Deren.

Opinion by: Joel Penoyar

Opinion

¶1 Penoyar, J. — Guadalupe Solis-Diaz, Jr. appeals his convictions for six counts of first degree assault, one count of

drive by shooting, and one count of second degree unlawful possession of a firearm. Solis-Diaz argues that the trial court erred by (1) excluding expert testimony on heuristic reasoning, (2) limiting cross-examination of a witness on an unrelated plea agreement, (3) permitting the State to question a witness about who was present in the courtroom during trial, and (4) denying his motion in limine to exclude all evidence of gang affiliation. Solis-Diaz further argues that he received ineffective assistance of counsel. Because his claims are without merit, we affirm the trial court.

FACTS

¶2 Late in the evening of August 10, 2007, or early [*2] in the morning of August 11, 2007, Jesse Dow went to a Shell gasoline station in Centralia, Washington, to purchase some cigarettes. His friend, Shenna Fisco, was with him in the car. As they were about to leave the gas station, a car pulled up with two men inside. Dow recognized the driver of the car by his street name, Pollo. The men got out of the car and appeared to grab something out of the trunk of their car. Dow did not know what they were grabbing, but he “assumed they were grabbing weapons or something.” 1 Report of Proceedings (RP) at 46. At the time, Dow did not recognize the passenger in the car. 1 Fisco “freaked out” when the men appeared to grab something from the trunk of the car. 1 RP at 42. Dow calmed Fisco down and told her to drive back to the Tower Tavern, the bar they had recently left to get cigarettes.

¶3 Dow told Fisco to go inside the tavern and said that he would stay outside to “take care of” the situation. 1 RP at 46. The car that was at the Shell station approached the bar slowly with the passenger window partially rolled down. As it passed, the passenger in the car stuck a gun out the window [*3] and fired seven shots at the people standing in front of the bar. No one was injured and the car sped away.

¶4 Officer Rubin Ramirez arrived at the Tower Tavern just after the shots were fired. After receiving a description of the car—a white “Monte Carlo” type car—Ramirez searched the

¹ In court, Dow identified the passenger of the car as Solis-Diaz.

area but he could not locate the car. 3 RP at 34. Ramirez returned to the tavern where he marked and identified bullet holes and casings. On August 13, Ramirez contacted Dow with a photo montage to see if he could identify the two people involved in the shooting. Dow immediately recognized and identified "Pollo" Velasquez as the car's driver. 3 RP at 40. Dow did not identify the passenger from the montage.²

¶5 Several days later, Officer Mary Humphrey, Sergeant Patrick Fitzgerald, and Detective Carl Buster reviewed the surveillance video from the Shell station. Two of the officers recognized the passenger as Solis-Diaz. After making the initial identification, the officers [*4] contacted Solis-Diaz's probation officer, Jennifer Helm. Helm viewed the video and volunteered that the passenger was Solis-Diaz. Based on this identification, Buster created a new photo montage to show Dow and Fisco. From this photo montage, Fisco identified Solis-Diaz as the shooter.

¶6 Responding to a call for aid, Buster assisted Fitzgerald pull over a vehicle matching the description of the car used for the shooting. Solis-Diaz was not in the car, but the officers impounded and searched it. In the car, they found a recoil spring from a handgun and a newspaper clipping about the shooting. Later that day, Dow identified Solis-Diaz as the shooter from a photo montage.

¶7 Police then arrested Solis-Diaz. Buster read Solis-Diaz his *Miranda*³ warnings and then questioned him about the shooting. Solis-Diaz was "very calm" throughout the interview. 4 RP at 3. He "yawned a lot" and seemed "disinterested in being there." 4 RP at 3. Buster showed Solis-Diaz a photo from the Shell station video that showed Velasquez standing next to Solis-Diaz, who was carrying a gun. Solis-Diaz did not react to the photo. Solis-Diaz later said that he did not shoot at Dow. When asked if Fisco or the other witnesses [*5] needed to be careful for fear of retaliation for talking with the police, Solis-Diaz responded, "No, [h]ell, no, no." 4 RP at 23. Solis-Diaz did not admit to being the shooter but some of his responses to questions suggested that he was involved in some way.⁴ After the

² Fisco also identified Velasquez as the driver from a photo montage. She reluctantly identified a second man as the passenger and shooter, but at trial she testified that she never told the police that she was "100 percent sure." 2 RP at 25.

³ *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

⁴ When asked by Buster if he had a message for those shot at, Solis-Diaz responded, "Sorry." 4 RP at 22. Solis-Diaz had previously commented that the people standing in front of the tavern that night were innocent, so Buster followed up by asking Solis-Diaz if he

interview, Solis-Diaz told Buster that if he gave him a couple of days, he could locate the gun.

¶8 On August 20, 2007, the State charged Solis-Diaz with six counts of first degree assault, one count of drive by shooting, and one count of second degree unlawful possession of a firearm.⁵

¶9 Over the course of a five day trial, the State [*6] produced numerous witnesses, including Dow, Fisco, Buster, Ramirez, Helm, other police officers, and numerous other people who witnessed the shooting at the Tower Tavern. Dow and Fisco positively identified Solis-Diaz as the shooter and several other witnesses discussed Solis-Diaz's connection to the LVL gang. Dow explained that the only reason he could think of for the shooting was retaliation against him for an argument he had with another LVL gang member, Josh Rhodes. Dow was not specific but could not think of any other reason why someone would shoot at him.

¶10 Solis-Diaz called several witnesses as well, including his half-sister Stephanie Dan-Lopez, who told the jury that she had been with Solis-Diaz on the night of the shooting. On cross and redirect, Dan-Lopez testified that she, Solis-Diaz and her boyfriend watched a movie together on Saturday evening, August 11. However, the shooting occurred the night before, late in the evening of August 10 or early on Saturday morning, August 11.

¶11 Solis-Diaz's mother, Elizabeth Dan, also testified on his behalf. Dan testified that she had gone out drinking on August 10 and returned home about one o'clock the next morning. She stated that Solis-Diaz [*7] was there when she got home that night and that he stayed home with her the rest of the night. On cross-examination, Dan testified that she was sure she had been out on Saturday night, which was August 11, not August 10.

¶12 Solis-Diaz called an expert witness, Robert Apgood, who testified that the video from the gas station was of "poor quality," making it difficult to identify people from facial features. 5 RP at 100. Apgood testified, however, that "if [one were] familiar with the mannerisms of an individual," such as physical posture, one could positively identify someone from the video. 5 RP at 106.

¶13 The jury convicted Solis-Diaz on all counts and the trial

wanted those people to know that "they're innocent and that you're sorry." 4 RP at 23. Solis-Diaz responded, "Yeah, for them, I know, nobody's fault." 4 RP at 23.

⁵ In violation of *RCW 9A.36.011(1)(a)*, *RCW 9A.36.045(1)*, and *RCW 9A.41.040(2)(a)(iii)*, respectively.

court sentenced him to 1,111 months in prison. Solis-Diaz now appeals.

ANALYSIS

I. EXPERT TESTIMONY

¶14 On the morning of the fifth day of trial, the State learned that in addition to discussing the video tape quality, the defense intended to have expert witness Apgood also testify about “heuristic reasoning.” 5 RP at 69. Heuristic reasoning, as explained to the trial court, is a theory that “when the brain sees something and something is missing, [the brain] automatically fills it in.” 5 RP at 69. Defense counsel confirmed that though the [*8] State had an opportunity to speak with Apgood before trial, Apgood had not filed a report, and Apgood's curriculum vitae had not been provided to the State until that morning.⁶ The trial court allowed Apgood to testify to everything except heuristic reasoning.

¶15 Solis-Diaz argues that the trial court lacked authority to exclude the heuristic reasoning testimony as a discovery violation. The State responds that, though suppression of testimony should be a last resort for discovery violations, the trial court did have authority to suppress the testimony and that it did so properly. We agree with the State.

¶16 *CrR 4.7(h)(7)(i)* permits the superior court to exclude a defense witness whose identity was not timely disclosed to the State. See *State v. Hutchinson*, 135 Wn.2d 863, 881-83, 959 P.2d 1061 (1998). Before using exclusion as a sanction for a *CrR 4.7* violation, the trial court must consider: (1) the effectiveness of less severe sanctions; (2) the impact of witness preclusion on the evidence at trial and the outcome of the case; (3) the [*9] extent to which the witness's testimony will surprise or prejudice the State; and (4) whether the violation was willful or in bad faith. *Hutchinson*, 135 Wn.2d at 882-83. We review the trial court's decision for an abuse of discretion. See *Hutchinson*, 135 Wn.2d at 882. A trial court abuses its discretion when its decision is manifestly unreasonable, based on untenable grounds, or when untenable reasons support the decision. *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971).

¶17 The trial court prohibited testimony on heuristic reasoning because Solis-Diaz had not informed the State of the nature of the expert testimony until the morning of the fifth day of trial. The trial court stated:

This is an area that is just ripe for cross examination. To say, okay, he's going to come into court one day and

⁶It appears from the record that the State tried to contact Apgood before trial, but no one answered the phone, and the State did not leave a contact number.

testify on heuristic reasoning and how it applies to several police officers . . . who view a video which allegedly has the defendant in it. It's not something we hoist off on the [S]tate and say, Okay, do what you can with it on a moment's notice. I'm not going to allow that testimony. The rest of it you can go ahead with, but the heuristic reasoning part of that, no.

....

[Y]ou [*10] didn't provide any notice of [the heuristic reasoning testimony]. I wouldn't have known that unless you had told me. How is [the State] supposed to know that? Does he just guess?

....

[I]n an expert situation if you have a report done you're supposed to disclose not only the report, if there is one done, but also the areas in which the expert is going to be testifying. You don't wait until the day of trial and either hope no one has found out about it or spring it on the [S]tate in this fashion.

5 RP 71-73.

¶18 We apply the *Hutchinson* factors. First, the trial court considered the less severe alternative of allowing the defense to provide an offer of proof but it decided that was inappropriate as it would delay the trial by one day. It does not appear that the trial court considered any other alternatives. Second, it is unclear whether the testimony would have had an impact on the case. It is possible that the testimony would have influenced the jury's reasoning. However, it is unlikely that the trial court would have permitted the testimony in any event. The trial court questioned whether the witness's theory would have passed the *Frye*⁷ test, and, even if it did, the trial court had not [*11] yet ascertained whether the witness was even qualified to testify on the subject.⁸

¶19 Next, there is no question that the trial court considered whether the testimony surprised and prejudiced the prosecution. From the record, it is clear the trial court thought the prosecution would be prejudiced if the testimony were allowed to proceed. Finally, the trial court did not make a finding that the defense concealed the testimony in bad faith, but the record shows that the trial court thought that the defense certainly should have notified the prosecution--and

⁷*Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923).

⁸The State noted at trial that it did not appear from Apgood's curriculum vitae that he “had any type of training related to [heuristic reasoning]. All his training seems to be either legal or computer based. I think this would be a mental process, so I think it is outside of his area of expertise.” 5 RP at 69.

the trial court--of its intent to offer testimony on heuristic reasoning well before the fifth day of trial.

¶20 Given that the trial court considered all four factors discussed in *Hutchinson*, and that its decision is both reasonable and based on tenable grounds, the trial court [¶12] did not abuse its discretion in excluding the testimony.

II. PLEA AGREEMENT QUESTIONING

¶21 Solis-Diaz claims that the trial court abused its discretion by not allowing him to cross examine one of the shooting witnesses, Sean Thomas, on the details of his plea bargain in another case. The State responds that because the plea bargain was on an unrelated matter, it had no effect on Solis-Diaz's case, and the trial court ruled properly. We agree with the State.

¶22 Cross examination should generally be limited to the subject matter of the direct examination and to the witness's credibility. *In re Det. of Duncan*, 142 Wn. App. 97, 107, 174 P.3d 136 (2007) (citing *ER 611(b)*). The evidence a party seeks to admit to show bias, ill will, interest, or corruption must be specific enough to be free from vagueness. *State v. Jones*, 67 Wn.2d 506, 512, 408 P.2d 247 (1965). A trial court properly excludes evidence that only vaguely tends to show bias in an indefinite or speculative way. See *Jones*, 67 Wn.2d at 512.

¶23 Solis-Diaz provided no evidence to the trial court that the plea agreement Thomas received, related to a separate crime, had any role on Thomas's willingness to testify in this case. The prosecuting [¶13] attorney argued that the plea agreement was unrelated and that no deal had been made in exchange for Thomas's testimony against Solis-Diaz.

¶24 Given the information presented to the trial court and the lack of any contrary allegations, the trial court did not abuse its discretion by prohibiting questions about the plea agreement.

III. QUESTIONS ABOUT COURTROOM SPECTATORS

¶25 During Dow's direct examination, the State asked him if certain people were in the courtroom. Solis-Diaz argues that by allowing the State to ask Dow if certain people were in the courtroom, the State led the jury to improperly infer that those individuals were connected to the defendant in a negative way. In briefing, Solis-Diaz asks whether the "evidence" of the alleged gang members["] presence in [the] courtroom was relevant, when there was no attempt to make a showing that they were connected to the shooting . . . and no attempt was made to show that the Defendant had anything to do with their being there." Appellant's Br. at 30. Further, Solis-Diaz argues that allowing the questions "violated *ER 403*

[¶14] [because] the evidence went to character and there was no attempt made to show why those people were [in the courtroom]." Appellant's Br. at 31. We affirm the trial court's ruling on the objection.

¶26 The admission or exclusion of evidence lies within the trial court's discretion which we will not disturb absent a showing of an abuse of discretion. *State v. Rehak*, 67 Wn. App. 157, 162, 834 P.2d 651 (1992). After reviewing the record, it is unclear exactly what the State was trying to elicit by asking Dow if certain people were in the courtroom. Dow was able to identify two people but he was unable to say definitively whether they were part of the LVL gang.⁹ Further, when asked if he had seen Solis-Diaz "hanging out" with any of the men he had been asked to identify, Dow responded "No" each time. 1 RP at 51. When the State asked whether Dow knew if Solis-Diaz was associated with the LVL gang, he responded, "I don't know for sure." 1 RP at 49. If the State intended to show the jury that the men in the courtroom were gang members, or that Solis-Diaz was in a gang or associated with the men in the back of the room, it did not succeed. Dow's responses were equivocal at best. In fact, Dow's [¶15] responses to the State's questioning conform with what Solis-Diaz contends in his briefing: "There is nothing to show that [Solis-Diaz] had anything to do with the alleged gang." Appellant's Br. at 31.

¶27 Under these circumstances, it is difficult to see how Solis-Diaz was actually prejudiced. If nothing else, the jury heard information that there were people in the courtroom who may have been in a gang and who the witness had *not* seen "hanging out" with Solis-Diaz. 1 RP at 51. Because there appears to be no prejudice from the questioning, we find that the trial court did not abuse its discretion by permitting the questions.

IV. GANG AFFILIATION

¶28 Solis-Diaz next argues that the trial court erred by denying his motion in limine to suppress all evidence of Solis-Diaz's alleged LVL gang affiliation because there was no offer of proof of what the evidence would be, and thus, no way for the trial court to review that evidence taking into account *ER 403* or *ER 404(b)*. The State argues that the trial [¶16] court's ruling was proper because the gang evidence was relevant to prove Solis-Diaz's motive and intent.

¶29 We review a trial court's *ER 403* and *ER 404(b)* rulings for abuse of discretion. *State v. Russell*, 125 Wn.2d 24, 78.

⁹Specifically, when asked if these men were associated with the LVL gang, Dow responded, "[a]s far as I know. . . I mean, I have no clue why else we would be getting shot at down there." 1 RP at 51.

882 P.2d 747 (1994); State v. Campbell, 78 Wn. App. 813, 821, 901 P.2d 1050 (1995). When the motion was heard, the trial court did not ask for an offer of proof.¹⁰ The trial court stated that because the State's case theory was that the motive for the shooting was retaliation, gang evidence could be admitted as an exception under ER 404(b). The court stated that the evidence's prejudicial value was "outweighed to a substantial extent by [its] probative value." 1 RP at 13. The trial court told defense counsel that "if you want me to review it, I can do that if at a later date something changes." 1 RP at 13.

¶30 Solis-Diaz, citing Campbell, 78 Wn. App. 813, 901 P.2d 1050, acknowledges that the trial court can admit evidence of gang membership where that evidence indicates motive. As [*17] noted in State v. Boot, evidence of a defendant's gang membership may be relevant to show motive and premeditation. See 89 Wn. App. 780, 789, 950 P.2d 964 (1998). In Boot, the trial court admitted evidence of the defendant's gang affiliation as more probative than prejudicial because it showed the context in which the murder was committed and it demonstrated that the defendant had a deliberate intent to kill the victim. 89 Wn. App. at 789-90. However, evidence of gang membership lacks probative value "when it proves nothing more than a defendant's abstract beliefs." Campbell, 78 Wn. App. at 822 (citing Dawson v. Delaware, 503 U.S. 159, 164-67, 112 S. Ct. 1093, 117 L. Ed. 2d 309 (1992)).

¶31 In Campbell, the trial court permitted evidence of gang membership because "there was a nexus between gang culture, gang activity, gang affiliation, drugs, and the homicides" at issue. 78 Wn. App. at 818. We affirmed the trial court's decision to admit the evidence because the "fact that Campbell was a member of a gang and a drug dealer provided the basis for the State's theory of the case The challenged evidence clearly was highly probative of the State's theory--that Campbell was a gang member [*18] who responded with violence to challenges to his status and to invasions of his drug sales territory." Campbell, 78 Wn. App. at 821-22.

¶32 In this case, as Solis-Diaz notes, there were two possible motives put forward for the shooting: (1) "revenge for an altercation with Mr. Dow," and (2) "the temerity of Mr. Dow wearing a blue bandana." Appellant's Br. at 34. As the State points out, while it could have still "prove[d] that Solis-Diaz was the person who leaned out the car window and fired the bullets, the crime simply did not make sense without the gang connection." Resp't's Br. at 23.

¹⁰From the record, it appears that most preliminary matters were discussed, in detail, in chambers and then put onto the record once the trial began. Thus, discussion on the record of this issue is limited.

¶33 The trial court did not abuse its discretion by denying Solis-Diaz's motion in limine. Given the information that the trial court had at the time, it was not an abuse of discretion to permit the gang evidence where it was highly probative of the State's case theory and where it gave context to the crimes. The trial court left the door open for Solis-Diaz to renew his objection or to revisit the issue where the circumstances warranted.¹¹

V. [*19] INEFFECTIVE ASSISTANCE OF COUNSEL

¶34 Finally, Solis-Diaz claims that his right to effective counsel was violated when his attorney failed to "object to numerous statements containing rumor and hearsay about [Solis-Diaz's] gang involvement, speculation about motive for the shootings, and [for failing] to pin down [Solis-Diaz's] alibi" Appellant's Br. at 34. Solis-Diaz also argues that his counsel should have challenged the admission of his past criminal record.¹² We disagree.

¶35 Washington has adopted the Strickland¹³ test to determine whether a defendant had constitutionally sufficient representation. State v. Cienfuegos, 144 Wn.2d 222, 226, 25 P.3d 1011 (2001). The defendant must show both that counsel's performance was deficient and that the deficient performance prejudiced him. Cienfuegos, 144 Wn.2d at 226-27 (quoting Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)). In other words, Solis-Diaz bears the burden of showing [*20] that, but for the ineffective assistance, there is a reasonable probability that the trial outcome would have differed. Cienfuegos, 144 Wn.2d at 227 (citing Strickland, 466 U.S. at 694). The benchmark for judging ineffectiveness is whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result. Strickland, 466 U.S. at 686.

¶36 Deficient performance is not shown by matters that go to trial strategy or tactics. Cienfuegos, 144 Wn.2d at 227. Courts maintain a strong presumption that counsel's representation was effective. See State v. Brett, 126 Wn.2d 136, 198, 892 P.2d 29 (1995). Though Solis-Diaz makes general allegations

¹¹We note that Solis-Diaz's own attorney asked Fitzgerald whether his client "actively claimed gang membership." 2 RP at 185. Fitzgerald responded "Yes." 2 RP at 185.

¹²Solis-Diaz alleges ineffective representation for failure to challenge admission of his criminal record, but he does not mention this issue in the argument that follows. Accordingly, we do not review his claim on this issue.

¹³Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).

about his attorney, he makes no specific cites to the record.¹⁴ Instead he makes general assertions of error.

¶37 Solis-Diaz argues that his attorney should have objected to testimony regarding his gang involvement, because those statements contained “rumor and hearsay.” Appellant's Br. at 34. He also argues that his attorney should have objected to witnesses discussing the possible motive for the shooting, witness statements that Solis-Diaz was likely doing a “worker bee's” job, and other testimony. Appellant's Br. at 37-38. Solis-Diaz mentions these alleged errors, but he does not cite to the record. Regardless, defense counsel's decisions about whether to object are generally considered trial tactics and cannot generally be a basis for an ineffective assistance of counsel claim. *State v. Neidigh*, 78 Wn. App. 71, 77, 895 P.2d 423 (1995). Further, trial counsel's decisions concerning methods of examining witnesses are trial tactics. See *Hendrickson*, 129 Wn.2d at 77-78. In hindsight, it is easy to look back at what Solis-Diaz's trial attorney could have done differently. That does not mean that Solis-Diaz received ineffective representation.

¶38 When the claim is based on counsel's failure to challenge the admission of evidence, the defendant must [*22] show (1) an absence of legitimate strategic or tactical reasons supporting the challenged conduct, (2) that the objection to the evidence would likely have been sustained, and (3) that the result of the trial would have differed had the evidence not been admitted. *State v. Saunders*, 91 Wn. App. 575, 578, 958 P.2d 364 (1998). Solis-Diaz merely lists his grievances. Our review of the record shows that defense counsel's case theory was that, given the poor quality of the video and varying accounts of the shooting, there was reasonable doubt as to whether Solis-Diaz fired the shots. Gang membership did not affect this argument.

¶39 We affirm.

¶40 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 pursuant to RCW 2.06.040, it is so ordered.

Van Deren, C.J., and Korsmo, J., concur.

End of Document

¹⁴See RAP 10.3(a)(6): “The brief of the appellant or petitioner should contain . . . [t]he argument in support of the issues presented for review, together with citations to legal authority and references to relevant parts of the record.” RAP 10.4(f) states that references to the record [*21] should “designate the page and part of the record.”

Appendix B

In re Pers. Restraint of Diaz, 2012 Wn. App. LEXIS 2217,

(No. 42064-3-II, 9/18/2012)



Caution

As of: June 14, 2019 7:41 PM Z

In re Pers. Restraint of Diaz

Court of Appeals of Washington, Division Two

May 18, 2012, Oral Argument; September 18, 2012, Filed

No. 42064-3-II

Reporter

2012 Wash. App. LEXIS 2217 *

In the Matter of the Personal Restraint of GUADALUPE SOLIS DIAZ, JR., *Petitioner.*

Notice: RULES OF THE WASHINGTON COURT OF APPEALS MAY LIMIT CITATION TO UNPUBLISHED OPINIONS. PLEASE REFER TO THE WASHINGTON RULES OF COURT.

Subsequent History: Reported at *In re Pers. Restraint of Solis Diaz*, 2012 Wash. App. LEXIS 2257 (Wash. Ct. App., Sept. 18, 2012)

Prior History: [*1] Date first document (petition, etc) was filed in the Court of Appeals: 05/04/2011.

State v. Solis-Diaz, 152 Wn. App. 1038, 2009 Wash. App. LEXIS 2608 (2009)

Core Terms

sentence, trial court, juvenile, adult, ineffective, assault, shooting, convictions, offender, law law law, drive-by, maturity, counts, counsel's failure, sentencing court, first degree, downward, youth, ineffective assistance, deficient performance, juvenile offender, nonhomicide, mitigated, amici, sophistication, auto-declined, alterations, declination, deficient, emotional

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Lorraine K. Bannai, Robert Charles Boruchowitz, Seattle University School of Law, Seattle, WA; David A. Perez, Perkins Coie LLP, Seattle, WA, Amicus Curiae on behalf of Fred T. Korematsu Center for Law.

Judges: AUTHOR: Christine Quinn-Brintnall, P.J. We concur: Marywave Van Deren, J., Joel Penoyar, J.

Opinion by: Christine Quinn-Brintnall

Opinion

¶1 Quinn-Brintnall, P.J. — On December 7, 2007, a jury found Guadalupe Solis Diaz, Jr. guilty of six counts of first degree assault, one count of drive-by shooting, and one count of second degree unlawful possession of a firearm for his role in a drive-by shooting. *RCW 9A.36.011(1)(a)*, *.045(1)*; *RCW 9.41.040(2)(a)(iii)*. The trial court sentenced [*2] Solis Diaz, who was 16 years old at the time he committed the crime, to 1,111 months total confinement, a standard range sentence under the Sentencing Reform Act of 1981 (SRA), *ch. 9.94A RCW*. Solis Diaz unsuccessfully challenged only his convictions in a direct appeal to this court. *State v. Solis-Diaz*, noted at *152 Wn. App. 1038 (2009)*, *review denied*, *168 Wn.2d 1020 (2010)*. Having never challenged his sentence, and in light of the United States Supreme Court's recent decision in *Graham v. Florida*, *U.S.* , *130 S. Ct. 2011*, *176 L. Ed. 2d 825 (2010)*, Solis Diaz now brings this personal restraint petition (PRP), arguing that his sentence violates the *Eighth Amendment's* ban on cruel and unusual punishment and the ban against cruel punishment in *article I, section 14 of the Washington Constitution*. *RAP 16.4(c)(2)*, *(4)*. Solis Diaz also contends for the first time that he received ineffective assistance of counsel at sentencing. We agree with Solis Diaz that his counsel's representation during sentencing was constitutionally deficient and we remand for resentencing.

FACTS

¶2 At approximately midnight on August 10, 2007, 16-year-old Solis Diaz, a passenger in a car driven by 21-year-old

Juan [*3] “Pollo” Velasquez, fired seven shots into a crowd of people outside of the Tower Tavern in Centralia, Washington. All, including the intended target of the drive-by shooting, escaped injury. Solis-Diaz, 2009 WL 3261249, at *1, 2009 Wash. App. LEXIS 2588, at *1. Several days later, police arrested Solis Diaz who was subsequently charged with six counts of first degree assault,¹ one count of drive-by shooting, and one count of second degree unlawful possession of a firearm. Solis-Diaz, 2009 WL 3261249, at *2, 2009 Wash. App. LEXIS 2588, at *3.

¶3 Before trial, the State offered Solis Diaz a plea agreement: 180 months confinement plus 24 to 48 months community supervision.² ¶4 Solis Diaz did not accept 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.

¶4 The sentencing hearing occurred on December 17, 2007. Neither party prepared a presentencing report and Solis Diaz's counsel mistakenly told the trial court that Solis Diaz was “declined as a juvenile and tried [in superior court]” when Solis Diaz was actually “auto-declined” by operation of statute, RCW 13.04.030(1)(e)(v)(E)(I). Br. of Resp't, App. F at 6. As such, no judicial officer ever held a declination hearing pursuant to Kent v. United States, 383 U.S. 541, 86 S. Ct. 1045, 16 L. Ed. 2d 84 (1966), to consider Solis Diaz's maturity and mental development and determine whether he had the mental and emotional sophistication necessary to warrant prosecution as an [*5] adult.

¶5 The State requested that the court sentence Solis Diaz to the high end of the standard range, 1,111 months. On its own motion, the sentencing court determined that the drive-by shooting conviction encompassed the same criminal conduct as the assault convictions for purposes of sentencing. No one spoke on Solis Diaz's behalf and apart from agreeing with the sentencing court's same criminal conduct analysis and briefly arguing against the restitution recommendation, Solis Diaz's attorney's entire argument at sentencing consisted of the following:

¹Because Washington applies the transferred intent doctrine to uninjured victims, although Solis Diaz only attempted to hit one person during the shooting (a rival gang member), that intent transfers to everyone else in the crowd satisfying the mens rea for first degree assault against six separate individuals. See State v. Elmi, 166 Wn.2d 209, 207 P.3d 439 (2009).

²Velasquez pleaded guilty to one count of first degree assault and three counts of third degree assault and was sentenced to 151 months in prison. Velasquez had a previous violation of the uniform controlled substances act (VUCSA) conviction and bail jumping conviction at the time of his sentencing.

Certainly it is a tragic event. You heard all the evidence. My client still maintains his innocence, your Honor, but the jury did find him guilty. We would ask the court, your Honor, to give him the low end of the range. He is 17 years old, declined as a juvenile and tried here. He's still looking at, your Honor, almost a life sentence, quite frankly, unless something happens in the intervening years that he is serving his time. We think the low end of the range [927 months] would be more appropriate.

Br. of Resp't, App. F at 6. After noting that the sentence was legally correct, the trial court sentenced Solis Diaz to the high end of the [*6] standard range, approximately 92.5 years in prison.

¶6 Solis Diaz unsuccessfully appealed his convictions to this court, arguing that the trial court erred by “(1) excluding expert testimony on heuristic reasoning, (2) limiting cross-examination of a witness on an unrelated plea agreement, (3) permitting the State to question a witness about who was present in the courtroom during trial, and (4) denying his motion in limine to exclude all evidence of gang affiliation.” Solis-Diaz, 2009 WL 3261249, at *1, 2012 Wash. App. LEXIS 2588, at *1. Solis Diaz also argued that his attorney was ineffective for failing to “object to numerous statements containing rumor and hearsay about [Solis Diaz's] gang involvement, speculation about motive for the shootings, and [for failing] to pin down [Solis Diaz's] alibi.” Solis-Diaz, 2009 WL 3261249, at *7, 2012 Wash. App. LEXIS 2588, at *19 (2d alteration in original). We affirmed Solis Diaz's convictions and the Washington Supreme Court denied review. Solis-Diaz, 2009 WL 3261249, at *8, 2009 Wash. App. LEXIS 2588, review denied, 168 Wn.2d 1020. We issued a mandate on Solis Diaz's case on May 10, 2010.

¶7 On May 17, 2010, the United States Supreme Court decided Graham. The Court held in that decision that “for a juvenile offender who did not commit homicide [*7] the Eighth Amendment forbids the sentence of life without parole” and if a court “imposes a sentence of life it must provide [the juvenile offender] with some realistic opportunity to obtain release before the end of that term.” Graham, 130 S. Ct. at 2030, 2034. In light of the Graham decision and the assistance he received at sentencing, Solis Diaz submits this PRP pursuant to RAP 16.4(c)(2) and (4) challenging his sentence.

DISCUSSION

INEFFECTIVE ASSISTANCE

¶8 Solis Diaz contends that he received ineffective assistance at sentencing because his counsel's performance fell below

objective standards of reasonableness and prevailing professional norms.³ We agree. Because Solis Diaz's counsel failed to make reasonable efforts at researching controlling authority concerning exceptional downward sentences or *advocate* for such a sentence on Solis Diaz's behalf, and because counsel misrepresented to the sentencing court that Solis Diaz was declined by the juvenile court when, in fact, no *Kent* hearing ever occurred, we hold that Solis Diaz received ineffective assistance at sentencing.

STANDARD OF REVIEW

¶9 A petitioner may request relief through a PRP when he is under unlawful restraint. *RAP 16.4(a)-(c)*. Under both the Washington and United States Constitutions, a criminal defendant is entitled to the effective assistance of counsel at critical stages in the litigation. *State v. Page*, 147 Wn. App. 849, 855, 199 P.3d 437 (2008), review denied, 166 Wn.2d 1008 (2009). To establish ineffective assistance of counsel, a defendant must show that (1) his counsel's performance was deficient and (2) the deficient performance prejudiced him. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); [*9] *State v. McFarland*, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995). If a defendant fails to satisfy either prong (deficient performance and prejudice), we need not inquire further. *State v. Hendrickson*, 129 Wn.2d 61, 78, 917 P.2d 563 (1996).⁴

³The State contends that Solis Diaz may not challenge his sentence because standard range sentences are generally [*8] not appealable and Solis Diaz failed to raise a constitutional challenge to his sentence at the trial court or during his first appeal before this court. But Solis Diaz alleges here that he received ineffective assistance of counsel at sentencing, an issue of constitutional magnitude that may be raised for the first time in a PRP. See, e.g., *In re Davis*, 151 Wn. App. 331, 337-38, 211 P.3d 1055 (2009), review denied, 168 Wn.2d 1043 (2010), abrogated on other grounds by *In re Crace*, 174 Wn.2d 835, 280 P.3d 1102 (2012). Accordingly, Solis Diaz's ineffective assistance claim is properly before us.

⁴In a recent decision, *In re Crace*, our Supreme Court concluded that, as on direct appeal, a defendant alleging ineffective assistance in a PRP need only show that there is a "reasonable probability" that defense counsel's deficient performance caused prejudice rather than the heightened "actual and substantial" prejudice standard employed in reviewing other collateral attacks. But see *In re Crace*, 280 P.3d at 1102 (Wiggins, J., concurring) ("In my view, we should wait to address the 'double prejudice' question for a case that actually raises it—a case in which a petitioner has not met the 'actual and substantial prejudice' burden but has met the prejudice standard from [*Strickland*]. If that case exists, it should be there that we resolve this issue, not a case where the petitioner has not made the showing required by *Strickland*."). Here, Solis Diaz's ineffective assistance

¶10 Counsel's performance is deficient when it falls below an objective standard of reasonableness. *State v. Stenson*, 132 Wn.2d 668, 705, 940 P.2d 1239 (1997), cert. denied, 523 U.S. 1008 (1998). We strongly presume effective assistance and the defendant bears the burden of demonstrating the absence of a strategic reason for the challenged conduct. *State v. McNeal*, 145 Wn.2d 352, 362, 37 P.3d 280 (2002). However, a defendant may rebut this presumption by proving that her attorney's representation "was unreasonable under prevailing professional norms." *In re Pers. Restraint of Davis*, 152 Wn.2d 647, 673, 101 P.3d 1 (2004) (quoting *Kimmelman v. Morrison*, 477 U.S. 365, 384, 106 S. Ct. 2574, 91 L. Ed. 2d 305 (1986)).

¶11 An attorney is not ineffective merely because he or she failed to argue novel theories of law. See, e.g., *Anderson v. United States*, 393 F.3d 749, 754 (8th Cir.) ("Counsel's failure to raise [a] novel argument does not render his performance constitutionally ineffective."), cert. denied, 546 U.S. 882 (2005). But as the *Strickland* court wrote,

[S]trategic choices made after thorough investigation of law and facts relevant to plausible options are [*11] virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation. In other words, *counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary*. In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments.

466 U.S. at 690-91 (emphasis added).

¶12 Here, Solis Diaz's trial counsel made a number of choices at sentencing that no reasonable attorney would have—choices that, viewed in the aggregate, amounted to representation that fell well below objective standards of defense advocacy dictated by professional norms.

FAILING TO APPRISE THE TRIAL COURT OF IMPORTANT FACTUAL AND PROCEDURAL CONSIDERATIONS

¶13 At sentencing, Solis Diaz's counsel failed to inform the trial court of a number of important factual and procedural considerations. Although none of these errors or omissions alone require reversal, viewing them cumulatively strongly

claim meets both the "reasonable probability" of prejudice and "actual and [*10] substantial" prejudice standard.

indicates [*12] that the actions of Solis Diaz's trial counsel at sentencing fell below objective standards of effective representation.

¶14 First, counsel mistakenly indicated to the trial court that Solis Diaz was “declined as a juvenile and tried [in superior court].” Br. of Resp't, App. F at 6. In fact, because Solis Diaz was 16 and charged with multiple counts of first degree assault (a serious violent offense as defined in former *RCW 9.94A.030(41)* (2006)), he was tried as an adult by operation of statute, sometimes referred to as “auto-declined.” *RCW 13.04.030(1)(e)(v)(E)(I)*. As such, no judicial officer ever held a declination hearing pursuant to *Kent*⁵ to consider Solis Diaz's maturity and mental development and determine whether he had the mental and emotional sophistication necessary to warrant prosecution as an adult. Instead, based solely on the nature of the charged offense and Solis Diaz's age, the auto-declination statute mandated that he be tried as an adult. *RCW 13.04.030(1)(e)(v)(E)(I)*.

¶15 Although the right to be tried in a juvenile court is not constitutional, *State v. Salavea*, 151 Wn.2d 133, 140, 86 P.3d 125 (2004), counsel's failure to alert the trial [*14] court that Solis Diaz was auto-declined is worrisome as it gave the false impression that—at some point—a judicial officer had assessed Solis Diaz's maturity. Solis Diaz was never afforded this procedural safeguard.

¶16 Second, while a presentencing report could have shed light on issues related to Solis Diaz's mental and emotional

⁵The Washington Supreme Court first adopted the *Kent* factors in *State v. Williams*, 75 Wn.2d 604, 606-07, 453 P.2d 418 (1969). The eight *Kent* factors that juvenile courts should consider in deciding whether [*13] to transfer or retain jurisdiction are

- (1) the seriousness of the alleged offense and whether the protection of the community requires declination;
- (2) whether the offense was committed in an aggressive, violent, premeditated, or willful manner;
- (3) whether the offense was against persons or only property;
- (4) the prosecutive merit of the complaint;
- (5) the desirability of trial and disposition of the entire case in one court, where the defendant's alleged accomplices are adults;
- (6) the sophistication and maturity of the juvenile;
- (7) the juvenile's criminal history;
- (8) the prospects for adequate protection of the public and rehabilitation of the juvenile through services available in the juvenile system.

State v. Furman, 122 Wn.2d 440, 447, 858 P.2d 1092 (1993). All eight of these factors need not be proven to support a declination decision but the record must demonstrate that each of the factors was considered. *State v. Holland*, 30 Wn. App. 366, 374, 635 P.2d 142 (1981), *aff'd*, 98 Wn.2d 507, 656 P.2d 1056 (1983).

sophistication, Solis Diaz's trial counsel failed to produce or request such a report for sentencing. As the American Bar Association's standards clearly state, if no presentence report is available, “defense counsel should submit to the court and the prosecutor all favorable information relevant to sentencing.” *Criminal Justice Standards, Defense Function, Standard 4-8.1 Sentencing*, AMERICAN BAR ASSOCIATION [*15] (3d ed. 1993). Here, the record reflects that Solis Diaz's counsel provided no such information and was inadequately prepared for sentencing: trial counsel even failed to argue that Solis Diaz's drive-by shooting conviction should be treated as the same criminal conduct as the assault convictions for purposes of sentencing and never argued that Solis Diaz's standard sentence range was oppressively and extraordinarily long for a juvenile nonhomicide offender.

¶17 Last, Solis Diaz's counsel also failed to call family members or other members of the community, including Solis Diaz's teachers, to testify on his behalf—yet another procedural tactic that would have apprised the trial court of the fact that Solis Diaz's emotional and mental maturity should have been considered at sentencing.

FAILING TO APPRISE THE TRIAL COURT OF IMPORTANT LEGAL CONSIDERATIONS

¶18 Most critically, when the trial court realized that application of the SRA's multiple offense policy would result in a standard range sentence of 927 to 1,111 months, Solis Diaz's counsel failed to argue that the “operation of the multiple offense policy of *RCW 9.94A.589* [resulted] in a presumptive sentence that [was] clearly excessive.” *RCW 9.94A.535(1)(g)*. [*16] Moreover, Solis Diaz's counsel failed to alert the trial court that under this statutory multiple offense policy, it had discretion to impose an exceptional sentence downward.

¶19 Solis Diaz relies primarily on *In re Mulholland*, 161 Wn.2d 322, 166 P.3d 677 (2007). The facts of *Mulholland* are strikingly similar to the facts of Solis Diaz's case. In *Mulholland*, the defendant fired a series of shots at a home wherein six people were eating dinner. 161 Wn.2d at 324-25. Nobody was injured and after Mulholland was arrested, he was convicted of six counts of first degree assault (with attendant firearm enhancements) and one count of drive-by shooting. *Mulholland*, 161 Wn.2d at 324-25. At sentencing, Mulholland requested an exceptional downward sentence. The trial court denied the request, stating, “I don't believe there is any discretion that this court has with regard to running the sentences concurrent [sic]. I think the law requires me to run them consecutive [sic]. I don't believe there's any discretion that this court has in that regard.” *Mulholland*, 161

Wn.2d at 326 n.1 (alterations in original). The court sentenced Mulholland to 927 months.

¶20 Mulholland filed a PRP with this court, arguing [*17] that he received ineffective assistance at sentencing and that the trial court abused its discretion in failing to recognize that it had the authority to impose an exceptional sentence downward. Mulholland, 161 Wn.2d at 326-27. This court determined that the trial court “erred in determining it was without discretion to impose a mitigated exceptional sentence” but did not reach the ineffective assistance claim. Mulholland, 161 Wn.2d at 327. The State appealed that decision, arguing, inter alia, that the trial court’s failure to consider an exceptional sentence did not constitute a fundamental defect inherently resulting in a complete miscarriage of justice. Mulholland, 161 Wn.2d at 331-32. The Supreme Court disagreed, stating,

Here, the trial court sentenced Mulholland while possessed of a mistaken belief that it did not have the discretion to impose a mitigated exceptional sentence for which he may have been eligible. This error is particularly significant because the trial court made statements on the record which indicated some openness toward an exceptional sentence, expressing sympathy toward Mulholland because of his former military service. Addressing Mulholland, the trial court [*18] noted:

Mr. Mulholland, I know that this incident has impacted your family tremendously and it’s impacted you, and I can’t ignore what you gave to this country. It’s a sacrifice to serve in the military and we—that’s important and we recognize that. But when I’m looking at the counts and what the jury decided, I don’t have discretion to do anything but follow the law. I don’t have the discretion to have the sentences in my view run at the same time.

The record does not show that it was a certainty that the trial court would have imposed a mitigated exceptional sentence if it had been aware that such a sentence was an option. Nonetheless, the trial court’s remarks indicate that it was a possibility. In our view, this is sufficient to conclude that a different sentence might have been imposed had the trial court applied the law correctly. Where the appellate court “cannot say that the sentencing court would have imposed the same sentence had it known an exceptional sentence was an option,” remand is proper. State v. McGill, 112 Wn. App. 95, 100-01, 47 P.3d 173 (2002). As we said in Grayson, “[w]hile no defendant is entitled to an exceptional sentence ... , every defendant is entitled to [*19] ask the trial court to consider such a sentence and to have the

alternative actually considered.” Grayson, 154 Wn.2d at 342 (citing Garcia-Martinez, 88 Wn. App. [322,] 330, 944 P.2d 1104 [(1997)]).

Mulholland, 161 Wn.2d at 333-34 (footnote omitted) (alterations in original).

¶21 In light of Mulholland, a decision decided approximately four months before Solis Diaz was sentenced, counsel’s failure to request an exceptional downward sentence for a juvenile nonhomicide offender facing a *minimum* sentence of 927 months is questionable: defense counsel has an obligation to stay up to date on the law and inform the sentencing court of any decisions that could positively impact a client’s sentence.

¶22 In addition, counsel’s failure to call to the sentencing court’s attention the United States Supreme Court’s landmark decision in Roper v. Simmons, 543 U.S. 551, 125 S. Ct. 1183, 161 L. Ed. 2d 1 (2005), gives us pause. In Roper, the Court stated,

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 [*20] 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)]. ... It has been noted that “adolescents are overrepresented statistically in virtually every category of reckless behavior.” Arnett, Reckless Behavior in Adolescence: A Developmental Perspective, 12 DEVELOPMENTAL REV. 339 (1992). In recognition of the comparative immaturity and irresponsibility of juveniles, almost every State prohibits those under 18 years of age from voting, serving on juries, or marrying without parental consent. ...

The second area of difference is that juveniles are more vulnerable or susceptible to negative influences and outside pressures, including peer pressure. ... This is explained in part by the prevailing circumstance that juveniles have less control, or less experience with control, over their own environment. ...

The third broad difference is that the character of a juvenile is not as well formed as that [*21] 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)]. Their own vulnerability and comparative lack of control over their immediate surroundings mean juveniles have a greater claim than adults to be forgiven for failing to escape negative influences in their whole environment. ... 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. From a moral standpoint it would be misguided to equate the failings of a minor with those of an adult, for a greater possibility exists that a minor's character deficiencies will be reformed. Indeed, “[t]he relevance of youth as a mitigating factor derives from the fact that the signature qualities of youth are [*22] transient; as individuals mature, the impetuosity and recklessness that may dominate in younger years can subside.” [*Johnson*, 509 U.S. at 368].

543 U.S. at 569-70 (some alterations in original).

¶23 Although the *Roper* decision dealt specifically with the death penalty, the Court strongly indicated in that decision that sentencing courts should consider the circumstances attendant upon youth. Competent counsel would have apprised the trial court of this. Failing to argue for a statutorily contemplated exceptional sentence downward—coupled with defense counsel's failure to inform the trial court of important procedural considerations and counsel's failure to have Solis Diaz's family members, teachers, or other community members testify at sentencing rises to the level of deficient performance.

¶24 And in light of our Supreme Court's approval of *McGill*'s proposition that remand is proper when an appellate court “cannot say that the sentencing court would have imposed the same sentence had it known an exceptional sentence was an option,” *Mulholland*, 161 Wn.2d at 334 (quoting *McGill*, 112 Wn. App. at 100-01), we do not address whether there was a reasonable probability that the trial court would [*23] have granted Solis Diaz a mitigated sentence were it aware that it had the discretion to do so.

¶25 Accordingly, remand for resentencing is appropriate in

light of counsel's deficient performance.⁶

⁶We note that Solis Diaz asks us to hold that his 1,111-month sentence for recklessly firing shots into a crowd of six people standing on a public street is unconstitutional in light of the Supreme Court's recent decision in *Graham*, and to fashion a sentencing formula for juvenile offenders tried as adults in Washington State. And on Solis Diaz's behalf, amici curiae suggest that

[g]iven what we now know about youth brain development and capacity for change, as well as the Supreme Court's guidance that the opportunity [for release] be “meaningful,” Amici urge the Court to hold that *youth offenders convicted of a non-homicide offense and sentenced to a term of years longer than their age, must be given a meaningful opportunity to obtain release once they have served a term of years equivalent to their age at the time they committed the underlying offense.*

Br. of Amici Curiae on Behalf of the Fred T. Korematsu Center for Law and Equality, the Latina/o Bar Association of Washington, and the Loren [*24] Miller Bar Association, in Support of Petitioner at 16-17.

Applying the amici curiae formula here, because Solis Diaz was three days shy of his 17th birthday when he committed his offenses, he should be considered 16 years old for purposes of parole and be eligible for parole (of some kind) at age 32. But *Graham* does not suggest such a mechanistic approach and we believe it imprudent to adopt such a formula. As another appellate court has stated,

If we conclude that *Graham* does not apply to aggregate term-of-years sentences, our path is clear. If, on the other hand, under the notion that a term-of-years sentence can be a *de facto* life sentence that violates the limitations of the *Eighth Amendment*, *Graham* offers no direction whatsoever. At what number of years would the *Eighth Amendment* become implicated in the sentencing of a juvenile: twenty, thirty, forty, fifty, some lesser or greater number? Would gain time be taken into account? Could the number vary from offender to offender based on race, gender, socioeconomic class or other criteria? Does the number of crimes matter? ... Without any tools to work with, however, we can only apply *Graham* as it is written. If the Supreme Court [*25] has more in mind, it will have to say what that is.

Henry v. State, 82 So. 3d 1084, 1089 (Fla. L. Weekly D195, 2012) (footnotes omitted). See also *Bunch v. Smith*, 685 F.3d 546, 2012 WL 2608484, at *6 (6th Cir. 2012) (“Perhaps the Supreme Court, or another federal court on direct review, will decide that very lengthy, consecutive, fixed-term sentences for juvenile nonhomicide offenders violate the *Eighth Amendment*. But until the Supreme Court rules to that effect, [the defendant's] sentence does not violate clearly established federal law.”).

The legislature is the appropriate body to define crimes and fix punishments. To the extent that *Graham* suggests that an opportunity for parole must be available for juvenile offenders convicted of

¶26 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.

Van Deren and Penoyar, JJ., concur.

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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.

Sara Beigh

LEWIS COUNTY PROSECUTING ATTORNEY'S OFFICE

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