No. 93279-4

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

(Court of Appeals No. 46002-5-II)

STATE OF WASHINGTON,

Respondent,

vs.

GUADALUPE SOLIS-DIAZ,

Appellant.

RESPONSE TO PETITION FOR REVIEW

On review from the Court of Appeals, Division Two,
And the Superior Court of Lewis County

JONATHAN MEYER
Lewis County Prosecuting Attorney

By: _____
Senior Deputy Prosecuting Attorney
WSBA No. 35564

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

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Washington Cases

Washington Statutes

Constitutional Provisions

Other Rules or Authorities

A. COURT OF APPEALS DECISION

The Petitioner, Guadalupe Solis-Diaz, seeks review of the published opinion in *State v. Guadalupe Solis-Diaz,* Court of Appeals, Division II, cause number 46002-5-II, filed May 17, 2016, attached for the Court's convenience as Appendix A.

B. COUNTERSTATEMENT OF THE ISSUES:

1. Did the Court of Appeals error when it declined to disqualify Judge Hunt from further proceedings in this case?

C. STATEMENT OF FACTS

On August 11, 2007 Solis-Diaz hunted down Jesse Dow in downtown Centralia. CP 18-19, 52-53. Solis-Diaz followed Mr. Dow back to the Tower Tavern, rolled down the passenger window and began shooting his gun into a crowd of people gathered outside the tavern. *Id.* The bullets shattered windows and ricocheted off the sidewalk and building. CP 19, 53. Fortunately the people outside escaped injury. CP 1-3, 19, 53.

Solis-Diaz's actions were in apparent response to Mr. Dow's disagreement with an LVL gang member. CP 21, 53. The specific LVL gang member, Josh Rhoades, attended Solis-Diaz's trial. CP 53. Mr. Dow and Sheena Fisco, another victim, believed that Mr.

Rhoades and/or other LVL gang members would retaliate against them for testifying at the Defendant's trial. CP 53.

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

Solis-Diaz was convicted as charged. CP 1-4, 6, 22, 35, 54. The State requested high end of the standard range for each count. CP 36. Solis-Diaz's trial counsel asked for low end of the standard range, but did not ask the trial court to impose any type of mitigated exceptional sentence below the standard range. CP 36. Solis-Diaz was sentenced to a combined 1111 months, or 92.5 years. CP 11, 36.

Solis-Diaz appealed his conviction and sentence, which was affirmed. CP 16-31. Solis-Diaz next filed a personal restraint petition. CP 32-47. Division Two found Solis-Diaz's trial counsel ineffective

during the sentencing hearing and remanded the case back to the trial court for resentencing. CP 32-47.

Solis-Diaz was appointed new counsel, who secured an expert and filed a resentencing memorandum. CP 48-51, 75-255. At the resentencing hearing there was also testimony presented from Dr. Roesch regarding Solis-Diaz's lessened culpability. RP 10-19. The State also filed a resentencing memorandum. CP 52-62. After hearing the recommendations Judge Hunt sentenced Solis-Diaz to the same sentence he had originally received, 1111 months in prison. RP 34, CP 256-67.

D. ARGUMENT WHY REVIEW SHOULD NOT BE ACCEPTED

The Court should not accept review in this case. There is not a conflict between the decision in this case and a decision in this Court, nor is this an issue of substantial public interest. RAP 13.4(b)(1),(4). The Court of Appeals followed this Court's reasoning in *State v. McEnroe,* 181 Wn.2d 375, 333 P.3d 402 (2014).

E. ARGUMENT.

The Court of Appeals followed this Court's holding and reasoning in *State v. McEnroe*, properly applying it to Solis-Diaz's case. Contrary to Solis-Diaz's assertion, there is no conflict between Division Two's decision in his case and this Court's decision in

McEnroe. Simply because Solis-Diaz is dissatisfied with Judge Hunt is not sufficient to have Judge Hunt removed by a higher court. As the State argued at the Court of Appeals, nothing is preventing Solis-Diaz from asking Judge Hunt to disqualify himself. Further, although outside the record, Judge Hunt retires at the end of this year, 2016, which Solis-Diaz's counsel is well aware of, and the State will not be asking to have Judge Hunt return to Lewis County to continue to hear this matter.

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

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

a proceeding if the judge's impartiality may reasonably be questioned or they are biased against a party. CJC 2.11(A); *Swenson*, 158 Wn. App. at 818.

"The appearance of fairness doctrine is 'directed at the evil of a biased or potentially interested judge or quasi-judicial decision maker.'" *Swenson*, 158 Wn. App. at 818, *citing State v. Post*, 118 Wn.2d 596, 618-19, 826 P.2d 172 (1992). Under the objective standard, "a judicial proceeding is valid only if a reasonably prudent, disinterested observer would conclude that the parties received a fair, impartial and neutral hearing." *Gamble*, 168 Wn.2d at 187 (internal quotations and citations omitted). Allegedly improper or biased comments are considered in context. *See, e.g.*, *Gamble,* 168 Wn.2d at 188; *In re Dependency of O.J.*, 88 Wn. App. 690, 697, 947 P.2d 252 (1997). A defendant who has reason to believe a judge is biased and impartial must affirmatively act if they wish to pursue a claim for violation of the appearance of fairness doctrine. *Swenson*, 158 Wn. App. at 818. A defendant cannot simply wait until he or she has an adverse ruling to move for disqualification of a judge if that defendant has reason to believe the judge should be disqualified. *Id.*

A party who is seeking a judge's removal from a case must generally file a motion requesting recusal in the trial court. *McEnroe*,

181 Wn.2d at 386. "The recusal rule itself is based on the assumption that the challenged judge gets to evaluate the stated grounds for recusal in the first instance." *McEnroe*, 181 Wn.2d at 386. A party may ask to have a judge removed for the first time on appeal. *Id.* at 387.

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

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

Solis-Diaz takes snippets of Judge Hunts comments during the resentencing hearing, mostly those that are directed towards Division Two, and argues that these, coupled with the fact that Judge Hunt imposed the same sentence show Judge Hunt must be removed from the case by a higher court. Yet, Division Two in its opinion hit the nail squarely on the head when evaluating Judge Hunt's comments during the resentencing hearing, stating,

> Solis-Diaz argues that Judge Hunt's remarks indicate a general refusal to accept the mandate of this court. However, none of Judge Hunt's comments indicated that he would not accept or follow our mandate following this appeal. Instead, his comments

> expressed personal umbrage towards this court for its reasoning in ordering the previous resentencing. Whether or not these comments were inappropriate, we do not hold that require disqualification on remand.

Appendix A, page 12. Division Two went on to state, that while some of the comments, read in isolation may seem to indicate Judge Hunt had prejudged Solis-Diaz's case, when read in context that was not the case. Appendix A, 13. Judge Hunt was expressing how he was constrained by his reading of the case law. *Id.*

Judge Hunt took great pains at the re-sentencing hearing to explain his actions from the previous sentencing hearing and to also explain to this Court why he felt the opinion authored in Solis-Diaz's personal restraint petition was insulting to trial judges. RP 34-52. But frustration with Division Two does not mean Judge Hunt failed to be impartial.

Judge Hunt pointed out that he knew Solis-Diaz was an auto-adult jurisdiction case and to assume otherwise was insulting. RP 34-35. Judge Hunt also noted, for Division Two's benefit, that the local Department of Corrections office refuses to do pre-sentence investigations unless they are mandated by statute and there is no such mandate in a case like Solis-Diaz's. RP 35-36. Judge Hunt also made a record regarding how Mr. Underwood understood what his audience, the trial judge, knew what would and would not likely be

persuasive. RP 36-37. Finally, to make it clear he understood that he could have, if he had so chosen to, handed down an exceptional sentence below the standard range at the time of Solis-Diaz's original sentencing, Judge Hunt stated, "[d]espite the clear legislative intent, I know I could, and I knew I could at the time of the original sentence, under some circumstances declare an exceptional sentence below the standard range." RP 42. This sentence in particular is what Division Two was remarking upon in its opinion. That now, fully aware of all the reasons under which Judge Hunt may, can, and should consider an exceptional sentence below the standard range, as explained in the opinion from Division Two, there is nothing contained within the record that would indicate Judge Hunt will not follow the Court's remand order or give Solis-Diaz a fair and impartial hearing.

Because, despite his irritation at Division Two, Judge Hunt considered all of the material submitted by Solis-Diaz's attorney, listened to the testimony of Solis-Diaz's expert, heard Solis-Diaz's attorney's argument regarding sentencing, and listened to Solis-Diaz before making his ruling. *See* RP. Simply disagreeing with the recommendations, and explaining in depth why, does not render Judge Hunt bias and unable to impartially follow the Court's

instructions on remand. Further, one hearing, where Judge Hunt resentenced Solis-Diaz does not make for "repeatedly and forcefully expressed an opinion on the merits of the defendant's request for a mitigated sentence." See Petition for Review, 14.

Division Two reversed Solis-Diaz's sentence on two bases, (1) that the trial court refused to consider whether a mitigated sentence was warranted due to a clearly excessive operation of the multiple offense policy, and (2) the trial court failing to consider whether youth diminished Solis-Diaz's culpability under this Court's decision in *State v. O'Dell,* 183 Wn.2d 680, 358 P.3d 359 (2015). The multiple offense policy case, *State v. Graham*, 181 Wn.2d 878, 337 P.3d 319 (2014), was decided by this Court after Solis-Diaz's resentencing hearing. Similarly, *O'Dell* was also decided after Solis-Diaz's resentencing hearing. *O'Dell*, 183 Wn.2d 680. Division Two gives a detailed road map to the resentencing court regarding the nature of the inquiry on resentencing. Appendix A, 8-11. The directives of the court could not be clearer. There were no such directives on the original remand.

While it is true the judge resentencing this case will be asked to use his or her discretion to consider a request for a mitigated sentence below the standard range in regards to the multiple offense

policy and whether youth diminished Solis-Diaz's culpability, which are in part issues that triggered this very appeal, that does not automatically justify Judge Hunt being removed from the case. Even when a judge has been shown to have a strong opinion on an issue, removal is a limited remedy. *McEnroe*, 181 Wn.2d at 407-08. Division Two noted that Judge Hunt had not had an opportunity to analyze whether Solis-Diaz should receive a mitigated sentence in light of this Court's decision in *O'Dell*. Appendix A, 13, Division Two also noted that Judge Hunt was following controlling case law at the time when he refused to consider a mitigated sentence in light of the multiple offense policy. *Id.* Division Two's decision is not in conflict with this Court. Therefore, pursuant to RCW 13.4(b)(1), this Court should not accept review.

Solis-Diaz also invites this Court to take his case so it can use the unique facts as an exempt to all about when it is appropriate to remove a judge at the appellate review level. Solis-Diaz argues that this example is what makes the case of substantial public importance. The State asks this Court to reject this invitation. This Court has made it clear the factors for which should be considered for removal of a judge at the appellate level rather than at the trial court level. *See McEnroe*, 181 Wn.2d at 387-89. The issue Solis-

Diaz raises in regards to removal of a judge do not rise to the level of substantial public interest. This Court should decline review.

F. CONCLUSION

The State respectfully requests this Court not accept review of the sole issue Solis-Diaz raises in his petition for review. If this Court were to accept review, the State would respectfully request an opportunity to submit supplemental briefing.

RESPECTFULLY submitted this 12th day of October, 2016.

JONATHAN MEYER
Lewis County Prosecuting Attorney

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

Appendix A

Published Opinion, COA No. 46002-5-II

Filed
Washington State
Court of Appeals
Division Two

May 17, 2016

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. GUADALUPE SOLIS-DIAZ, Appellant.	No. 46002-5-II PUBLISHED OPINION

BJORGEN, C.J — Guadalupe Solis-Diaz, tried and sentenced as an adult for crimes committed while a juvenile, appeals his sentence of 1,111 months (92.6 years) in prison on six counts of first degree assault with firearm enhancements, one count of drive-by shooting, and one count of unlawful possession of a firearm. Solis-Diaz argues, and the State concedes, that the sentencing court erred by refusing to consider whether application of the multiple offense policy warranted an exceptional downward sentence. He also argues that the trial court erred by refusing to consider his youth as a mitigating factor and by imposing a 1,111-month prison term on a juvenile offender in violation of constitutional prohibitions on cruel and unusual punishment. Finally, Solis-Diaz asks us to disqualify the sentencing judge from hearing the case

if we remand for resentencing, arguing that the judge's statements at the previous sentencing hearing created the appearance of bias.

We agree with Solis-Diaz that the sentencing court erred by failing to consider an exceptional sentence below the standard range in mitigation of consecutive sentences imposed under the multiple offense policy. We also hold that the sentencing court erred by failing to consider Solis-Diaz's age as a basis for a sentence below the standard range. Accordingly, we vacate Solis-Diaz's sentence and remand for resentencing. On remand, the sentencing court must conduct a meaningful, individualized inquiry into whether Solis-Diaz's youth should mitigate his sentence. Because we remand on other grounds, we do not consider whether Solis-Diaz's sentence violates the constitutional prohibitions on cruel and unusual punishment. We decline to mandate the sentencing judge's disqualification, but we acknowledge that Solis-Diaz is free to move for disqualification on remand.

FACTS

Solis-Diaz was 16 years old in 2007, when he participated in a gang related drive-by shooting in Centralia. He was charged with six counts of first degree assault, each with a firearm sentencing enhancement; one count of drive-by shooting; and one count of second degree unlawful possession of a firearm. He was tried as an adult pursuant to former RCW 13.04.030(1)(e)(v)(A) (2005) and former RCW 9.94A.030(46)(v) (2006). The jury found him guilty on all counts, and the trial court imposed a standard-range sentence of 1,111 months in prison. Judge Nelson Hunt presided over the original sentencing.

Solis-Diaz brought a personal restraint petition challenging his sentence in this court. In an unpublished opinion, we reversed the sentence for ineffective assistance of counsel and

remanded for resentencing. *In re Pers. Restraint of Diaz*, 170 Wn. App. 1039, 2012 WL 5348865, *1 (2012). Among the grounds for concluding that Solis-Diaz received ineffective assistance was his counsel's failure to properly inform the trial court that Solis-Diaz's case was automatically declined to adult court. *Id.* We did not decide whether a 1,111-month fixed term sentence violated the federal constitutional prohibition of cruel and unusual punishment or the state constitutional prohibition of cruel punishment.

Judge Hunt also presided over the resentencing. Solis-Diaz requested an exceptional downward sentence on grounds that the multiple offense policy of the Sentencing Reform Act of 1981[1] (SRA) operated to impose a clearly excessive sentence and that Solis-Diaz's age indicated diminished capacity to understand the wrongfulness and consequences of his actions. Judge Hunt denied the request and again imposed a standard-range sentence of 1,111 months in prison.

In making his ruling, Judge Hunt "ha[d] some comments to make about the finding that [Solis-Diaz's counsel at the original sentencing] was ineffective." Report of Proceedings (RP) at 34. He called the reasoning underlying our holding

> an insult to all the trial judges in this state. To postulate that a judge would be so ignorant, lazy or stupid as to not know or inquire at some point why this 17-year-old was in adult court is incredible to me.
>
> . . . .
>
> In my case, it's particularly insulting as [counsel] well understood my background, which consists of 17 years in prosecution, nine years in private practice, . . . and at the time three years on the bench.
>
> . . . .
>
> [I]t is simply ludicrous to think that I would not have known what [counsel] meant when he said the defendant was . . . auto-declined.

[1] Chapter 9.94A RCW.

RP at 34-35. Judge Hunt then outlined at length his reasons for imposing a sentence at the top of the standard range:

> The sentence is precisely what the Legislature intended and is frankly the only result which would withstand a legal analysis.
>
> . . . .
>
> I believe the original sentence accurately reflects what the legislative intent for this situation is, and there are no substantial and compelling reasons to deviate from the standard range.
>
> [T]he legislative intent is clear, and under the Sentencing Reform Act, punishment and accountability are the primary foci of sentencing, and serious violent offenses will be punished severely, particularly if there are multiple counts. Older teenagers will be treated as adults. And, finally, if you commit serious violent offenses while armed with a firearm, you'll receive a severe sentence.
>
> One of the purposes of sentencing is the message that is sent to others contemplating a similar offense.
>
> . . . .
>
> I don't know where the people live who made the claim that assaults in Lewis County have remained relatively steady, but for those of us who do live here, we know this. There had been many similar incidents of gang-related violence in Centralia with the use of firearms. From the day this sentence was pronounced, there have been no similar crimes in Centralia. Gang-related violence with firearms ha[ve] been virtually eliminated from Centralia.

RP at 37-44.

Judge Hunt rejected Solis-Diaz's request to impose an exceptional sentence below the standard range. He explained that under an earlier, now reversed, decision of Division Three of our court, *State v. Graham* (*Graham* I), 178 Wn. App. 580, 314 P.3d 1148 (2013), *rev'd*, 181 Wn.2d 878 (2014), he had no authority to impose an exceptional downward sentence on multiple offense policy grounds because Solis-Diaz's convictions were for serious violent offenses, as defined in the SRA. He similarly stated that he believed *State v. Ha'mim*, 132 Wn.2d 834, 847, 940 P.2d 633 (1997), and *State v. Scott*, 72 Wn. App. 207, 219, 866 P.2d 1258 (1993), *aff'd sub nom.*, *State v. Ritchie*, 126 Wn.2d 388, 894 P.2d 1308 (1995), prohibited him from considering

Solis-Diaz's youth as an indicator of diminished capacity.

Solis-Diaz appeals his sentence.

ANALYSIS

I. CONSIDERATION OF MITIGATING FACTORS: MULTIPLE OFFENSE POLICY

Solis-Diaz argues that the sentencing court erred by failing to consider as a mitigating factor the excessive nature of the standard range sentence produced by application of the SRA's multiple offense policy in this case. The State concedes that the sentencing court erred in refusing to consider this matter and we accept the concession.

We review a sentencing court's decision to deny an exceptional sentence to determine whether it failed to exercise discretion or abused its discretion by ruling on an impermissible basis. *State v. McGill*, 112 Wn. App. 95, 100, 47 P.3d 173 (2002). Where the sentencing court fails to exercise its discretion because it incorrectly believes it is not authorized to do so, it abuses its discretion. *State v. O'Dell*, 183 Wn.2d 680, 696-97, 358 P.3d 359 (2015); *see also State v. Grayson*, 154 Wn.2d 333, 342, 111 P.3d 1183 (2005) (noting that a sentencing court abuses its discretion by categorically refusing to consider an authorized and requested exceptional sentence).

Under the SRA, a sentencing court must generally sentence a defendant within the standard range. *State v. Graham* (*Graham* II), 181 Wn.2d 878, 882, 337 P.3d 319 (2014). Pursuant to the SRA's multiple offense policy, standard range sentences for multiple serious

violent offenses are to be served consecutively. RCW 9.94A.589(1)(b).[2] However, "[t]he court may impose an exceptional sentence below the standard range if it finds that mitigating circumstances are established by a preponderance of the evidence." RCW 9.94A.535(1).[3] One such mitigating circumstance exists if "[t]he operation of the multiple offense policy of RCW 9.94A.589 results in a presumptive sentence that is clearly excessive in light of the purpose of this chapter, as expressed in RCW 9.94A.010." RCW 9.94A.535(1)(g).[4] When the resulting set of consecutive sentences is so clearly excessive under the circumstances that it provides "'substantial and compelling reasons'" for an exceptional sentence below the standard range, the sentencing court may grant that exceptional sentence. *Graham* II, 181 Wn.2d at 885 (quoting RCW 9.94A.535).

The sentencing court in this case declined to consider an exceptional sentence below the standard range because it believed that the SRA's multiple offense policy could not be the basis for mitigation of resulting consecutive sentences. It based its belief on Division Three's opinion in *Graham* I. In that case, the court held that operation of the multiple offense policy to serious violent offenses was not a proper basis for an exceptional sentence. 178 Wn. App. at 590.

However, after Solis-Diaz's resentencing our Supreme Court reversed the decision in *Graham* I and clarified that "a sentencing judge may invoke .535(1)(g) to impose exceptional sentences both for multiple violent and nonviolent offenses scored under .589(1)(a) and for multiple serious violent offenses under .589(1)(b)." *Graham* II, 181 Wn.2d at 885. Therefore,

---

[2] RCW 9.94A.589 was amended in 2015. This amendment did not affect subsection (1)(b).

[3] RCW 9.94A.535 was amended in 2015. This amendment did not affect subsection (1).

[4] RCW 9.94A.535 was amended in 2015. This amendment did not affect subsection (1)(g).

even though the sentencing court based its decision not to exercise discretion on controlling case law at the time of sentencing, the fact that our Supreme Court reversed that case law and clarified the underlying statutory provisions rendered unlawful the basis for the sentencing court's decision. Therefore, we must vacate Solis-Diaz's sentence and remand for resentencing. *See O'Dell*, 183 Wn.2d at 697; *In re Pers. Restraint of Greening*, 141 Wn.2d 687, 694, 9 P.3d 206 (2000). At the new sentencing, the trial court can consider whether Solis-Diaz's sentence was clearly excessive due to operation of the multiple offense policy.

II. YOUTH AS A MITIGATING FACTOR

Our Supreme Court's recent decision in *O'Dell* provides a separate reason why the trial court erred in failing to consider an exceptional sentence downward. Like *Graham* II, *O'Dell* issued after the resentencing of Soliz-Diaz. O'Dell was convicted of rape committed just after his 18th birthday. At sentencing, the trial court ruled that it could not consider O'Dell's age as a mitigating circumstance under *Ha'mim*, 132 Wn.2d 834, and imposed a standard range sentence of 95 months. *O'Dell*, 183 Wn.2d at 683.

The Supreme Court disagreed, holding that

> in light of what we know today about adolescents' cognitive and emotional development, we conclude that youth may, in fact, "relate to [a defendant's] crime," [*Ha'mim*, 132 Wn.2d at 847] (quoting RCW 9.94A.340); that it is far more likely to diminish a defendant's culpability than this court implied in *Ha'mim*; and that youth can, therefore, amount to a substantial and compelling factor, in particular cases, justifying a sentence below the standard range.

O'Dell, 183 Wn.2d at 695-96. In its analysis, the court disapproved of *Scott*, 72 Wn. App. at 219, an opinion from Division One of our court indicating that youthful incapacity extends only to "common teenage vice[s]," but also affirmed that youth alone does not per se indicate such incapacity. *Id.*; *see also Ha'mim*, 132 Wn.2d at 847. The Supreme Court concluded that the trial

court abused its discretion by improperly declining to exercise that discretion to consider O'Dell's youth. *O'Dell*, 183 Wn.2d at 697. The court accordingly remanded for a new sentencing hearing, directing the trial court to consider whether youth diminished O'Dell's culpability. *Id.*

The same logic and policy that led the Supreme Court to require the consideration of the youth of a young adult offender would apply with magnified force to require the same of Solis-Diaz, who committed his crimes while a juvenile. As did the trial court in *O'Dell*, the trial court here decided that under *Ha'mim* it could not consider the defendant's youth as a mitigating factor in sentencing. As did the trial court in *O'Dell*, the trial court here abused its discretion in refusing that consideration. Our Supreme Court's analysis in *O'Dell* compels the same result: reversal of Solis-Diaz's sentence and remand for a new sentencing hearing to meaningfully consider whether youth diminished his culpability. *O'Dell*, 183 Wn.2d at 697.

III. THE NATURE OF THE INQUIRY ON RESENTENCING

We conclude above that the sentencing court erred in two ways: by failing to consider whether Solis-Diaz's sentence was clearly excessive due to operation of the multiple offense policy and by failing to meaningfully consider whether youth diminished his culpability under *O'Dell*. Our Supreme Court's analysis in *O'Dell* informs how the sentencing court is to consider Solis-Diaz's youth in making these evaluations.

The court in *O'Dell* recognized that youth might be relevant to one of the mitigating factors listed in current RCW 9.94A.535: an impairment of the defendant's "[]capacity to appreciate the wrongfulness of his conduct or [to] conform [his or her] conduct to the requirements of the law." 183 Wn.2d at 697. *O'Dell* acknowledged that the United States

Supreme Court has identified several different effects of youth on the capacity and culpability of juvenile offenders, arising in the context of constitutional prohibitions against cruel and unusual punishment. *Id.*; *see also Miller v. Alabama*, ___ U.S. ___, 132 S. Ct. 2455, 2467, 183 L. Ed. 2d 407 (2012); *Graham v. Florida*, 560 U.S. 48, 68, 130 S. Ct. 2011, 176 L. Ed. 2d 825 (2010); *Roper v. Simmons*, 543 U.S. 551, 574, 125 S. Ct. 1183, 161 L. Ed. 2d 1 (2005). Recognition of these effects stemmed from developments in the fields of psychology and neuroscience showing "'fundamental differences between juvenile and adult minds'—for example, in 'parts of the brain involved in behavior control.'" *Miller*, 132 S. Ct. at 2464 (quoting *Graham*, 530 U.S. at 89-90). The Court noted that these differences may lead to impulsive decision making, *Roper*, 543 U.S. at 569, may decrease a juvenile's ability to resist harmful influences and conform to the requirements of the law, *id.* at 571, and may make it more likely that a juvenile offender will reform his life, *Miller*, 132 S. Ct. at 2465. Our Supreme Court in *O'Dell* stated that the studies underlying *Miller*, *Roper* and *Graham* "establish a clear connection between youth and decreased moral culpability for criminal conduct." 183 Wn.2d at 695.

The effects of youth on capacity and culpability are part of a multifaceted whole. In juveniles "'[a] lack of maturity and an underdeveloped sense of responsibility . . . often result in impetuous and ill-considered actions and decisions.'" *Roper*, 543 U.S. at 569 (quoting *Johnson v. Texas*, 509 U.S. 530, 113 S. Ct. 2658, 125 L. Ed. 2d 290 (1993)). Similarly, "juveniles are more vulnerable or susceptible to negative influences and outside pressures, including peer pressure." *Id.*; *see also Thompson v. Oklahoma*, 487 U.S. 815, 835, 108 S. Ct. 2687, 101 L. Ed. 2d 702 (1988) ("Inexperience, less education, and less intelligence make the teenager less able to evaluate the consequences of his or her conduct while at the same time he or she is much more

apt to be motivated by mere emotion or peer pressure than is an adult."). Further, juveniles exhibit "vulnerability and comparative lack of control over their immediate surroundings" and therefore have "a greater claim than adults to be forgiven for failing to escape negative influences." *Roper*, 543 U.S. at 570. The "character of a juvenile is not as well formed as that of an adult," so "it is less supportable to conclude that even a heinous crime committed by a juvenile is evidence of irretrievably depraved character." *Id.* These scientific findings and their endorsement by the high courts of both the United States and Washington compel the same conclusion: a sentencing court's evaluation of a particular juvenile offender's circumstances must at least extend to an individualized assessment of each of these potential effects of youth.

In short, a sentencing court must take into account the observations underlying *Miller*, *Graham*, *Roper*, and *O'Dell* that generally show among juveniles a reduced sense of responsibility, increased impetuousness, increased susceptibility to outside pressures, including peer pressure, and a greater claim to forgiveness and time for amendment of life. *O'Dell*, 183 Wn 2d at 695-96. Against this background, the sentencing court must consider whether youth diminished Soliz-Diaz's culpability and make an individualized determination whether his "capacity to appreciate the wrongfulness of his conduct or [to] conform that conduct to the requirements of the law" was meaningfully impaired. *O'Dell*, 183 Wn.2d at 696.[5]

A sentencing court's inquiry into the individual circumstances of a particular juvenile offender should take into account that offender's level of sophistication and maturity. *See*

[5] We do not reach the extent of the trial court's duty if the defendant fails to present needed evidence.

O'Dell, 183 Wn.2d at 697. Evidence suggesting that the offender thought and acted like a juvenile may indicate that the offender's culpability was less than that necessary to justify imposition of a standard range sentence. *See id.* Similarly, evidence that the offender exhibits growing maturity and would benefit from an opportunity to rehabilitate his life may indicate that a lesser sentence will better accomplish the State's penological goals. *See id.*

Consistently with *O'Dell*, we direct the sentencing court in this case to fully and meaningfully consider Solis-Diaz's individual circumstances and determine whether his youth at the time he committed the offenses diminished his capacity and culpability. If the court determines that his youth did so diminish his capacity and culpability, it must consider whether an exceptional sentence below the standard range is justified based on youth. *O'Dell*, 183 Wn.2d at 696.

IV. DISQUALIFICATION OF JUDGE HUNT

Solis-Diaz argues that Judge Hunt should be disqualified from presiding over the resentencing proceedings. We decline to disqualify Judge Hunt, although Solis-Diaz is free to move for disqualification on remand.

Under the federal and state constitutions, a criminal defendant has the right to be tried and sentenced by an impartial court. U.S. CONST., amends. VI, XIV; WASH. CONST. art. I, § 22. Even the appearance of partiality can be grounds for disqualification of a judge. *State v. Gamble*, 168 Wn.2d 161, 187, 225 P.3d 973 (2010). "Under the appearance of fairness doctrine, a judicial proceeding is valid only if a reasonably prudent, disinterested observer would conclude that the parties received a fair, impartial and neutral hearing." *Id.* To establish grounds for

disqualification under the doctrine, a party must show actual or potential bias. *Id.* at 187-88; *State v. Lundy*, 176 Wn. App. 96, 109, 308 P.3d 755 (2013).

However, the appearance of fairness doctrine generally is not grounds for preemptive disqualification of a judge by a remanding appeals court. *State v. McEnroe*, 181 Wn.2d 375, 386, 333 P.3d 402, *remanded*, 2014 WL 10102380 (Wash. 2014). A party usually must move before the trial court to disqualify the judge to which its case has been assigned, so the judge is allowed the first opportunity to consider recusal and the parties can develop an adequate record on the issue of disqualification. *Id.* at 387. Reassignment by a remanding court is proper only where

> the trial judge will exercise discretion on remand regarding the very issue that triggered the appeal and has already been exposed to prohibited information, expressed an opinion as to the merits, or otherwise prejudged the issue.

Id. (footnotes omitted).

According to Solis-Diaz,

> Judge Hunt's extremely intemperate remarks at the sentencing hearing demonstrate that he would reasonably be expected upon remand to have substantial difficulty in putting out of his mind his previously expressed views or findings determined to be erroneous.

Br. of Appellant at 39. Solis-Diaz argues that Judge Hunt's remarks indicated a general refusal to accept the mandate of this court. However, none of Judge Hunt's comments indicated that he would not accept or follow our mandate following this appeal. Instead, his comments expressed personal umbrage toward this court for its reasoning in ordering the previous resentencing. Whether or not these comments were inappropriate, we do not hold that they require disqualification on remand.

Judge Hunt also stated that "[t]rial courts are not to impose their own feelings on the standard range sentences, as that is what the Legislature has determined they shall be." RP at 51. This view could reflect a general bias toward rejecting exceptional downward sentences. Judge Hunt further stated that

> [t]his sentence was exactly what the Legislature intended for crimes such as this. I would not have given a mitigated sentence had I known about the information that [was not presented at the original sentencing]. . . . I already knew it, and I imposed the sentence I did being fully informed of the legal consequences of doing so.

RP at 53. Read in isolation, these comments seem to indicate that Judge Hunt prejudged Solis-Diaz and determined that his convictions invariably warrant his lengthy sentence.

However, read in context, Judge Hunt seems to have been ruling that the governing case law at the time prevented him from considering the mitigating factors now at issue on appeal. He stated, for example, that "[i]n my opinion, the suggested options [for mitigation] are either unlawful or legally insufficient," RP at 48, and that "[n]one of the suggested mitigating factors recommended by the defense are legally sufficient," RP at 53. Judge Hunt, however, has not had an opportunity to analyze whether Solis-Diaz should receive an exceptional sentence in light of *O'Dell* or this opinion. Without a stronger showing of bias on the issues to be addressed on remand, we will not mandate disqualification.

As we discussed above, the sentencing court on remand must exercise its discretion regarding the possibility of an exceptional downward sentence based on mitigating factors that include the application of the multiple offense policy and consideration of Solis-Diaz's age and attendant levels of capacity and culpability. If Solis-Diaz believes that Judge Hunt cannot impartially follow our instructions and perform an individualized inquiry into the effects of

Solis-Diaz's youth, he may move for disqualification before the sentencing court. We express no opinion as to whether Judge Hunt is disqualified on that basis.

CONCLUSION

We conclude that the sentencing court erred in failing to consider whether the operation of the SRA's multiple offense policy and Solis-Diaz's youth at the time he committed the crimes should mitigate his standard range sentence and warrant an exceptional downward sentence. Therefore, we vacate Solis-Diaz's sentence and remand for resentencing proceedings consistent with this opinion. We decline to disqualify Judge Hunt from making this inquiry, but note that Solis-Diaz may move for disqualification before the sentencing court.

BRIDGE, C.J.

I concur:

MAXA, J.

Melnick, J. (concurrence) — Because the law has changed since the trial court sentenced Guadalupe Solis-Diaz, I concur that his sentence must be reversed and the matter should be remanded for a new sentencing hearing. I write solely to express my disagreement with the majority's opinion mandating what the sentencing court must consider on remand. The "Nature of the Inquiry on Resentencing" section exceeds the scope of what we have to decide, and anticipates the evidence the parties will present to the sentencing court. Majority at 8-11. The majority improperly establishes the sentencing court's scope on remand. First, the parties did not brief this issue, and we should not consider it. RAP 12.1(a). Second, because the resentencing has not occurred, the issue is not before us. If the parties do not present all of the evidence the majority opinion orders the sentencing court to consider, it cannot comply. Third, if the sentencing court fails to comply with applicable law, Solis-Diaz will once again have the right to appeal. Lastly, I have faith that the trial court will follow the law and properly consider all of the relevant evidence the parties present. And I also have faith that the parties will effectively present all of the evidence they believe will assist the court in resentencing Solis-Diaz.

Melnick, J.

SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, vs. GUADALUPE SOLIS-DIAZ, JR., Petitioner.	)))))))	NO. 93279-4 DECLARATION OF EMAILING

Ms. Teri Bryant, paralegal for Sara I. Beigh, Senior Deputy Prosecuting Attorney, declares under penalty of perjury under the laws of the State of Washington that the following is true and correct: On October 12, 2016, the Petitioner was served with a copy of the State's **Response To Petition For Review** by emailing same to John A. Hays, counsel for the Petitioner at the following email address: jahayslaw@comcast.net.

DATED this 12th day of October, 2016, at Chehalis, Washington.

Teri Bryant

Teri Bryant, Paralegal
Lewis County Prosecuting Attorney Office