SC#93279-4

NO. 46002-5-II

COURT OF APPEALS OF THE STATE OF WASHINGTON,

DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

GUADALUPE SOLIS-DIAZ,

Petitioner.

PETITION FOR REVIEW

John A. Hays, No. 16654
Attorney for Appellant

1402 Broadway
Suite 103
Longview, WA 98632
(360) 423-3084

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

Federal Cases

State Cases

Statutes and Court Rules

Other Authorities

A. *IDENTITY OF PETITIONER*

Guadalupe Solis-Diaz asks this court to accept review of the decision designated in Part B of this motion.

B. *DECISION*

Petitioner seeks review of that part of the published decision of the Court of Appeals denying appellant's request that the original trial judge be disqualified from presiding over the new sentencing hearing ordered by the Court of Appeals. A copy of the Court of Appeals decision is attached.

C. *ISSUES PRESENTED FOR REVIEW*

> Should a trial judge be disqualified from presiding over a new sentencing hearing when the argument for recusal is made for the first time on appeal and when (1) the trial judge hearing will be called upon to exercise discretion regarding the very issues that triggered the appeal, (2) the trial judge has previously expressed an opinion on the merits of the case, or (3) when the trial judge has demonstrated that he has otherwise prejudged the case?

D. *STATEMENT OF THE CASE*

On December 17, 2007, Judge Hunt of the Lewis County Superior Court sentenced then 17-year-old Guadalupe Solis-Diaz to 92.6 years in prison upon his convictions for six counts of first degree assault, one count of drive-by shooting and one count of unlawful possession of a firearm. CP 6-15. The Lewis County Prosecutor charged all of these offenses out of a single incident in which Mr. Solis-Diaz stepped from a car and shot six or seven times toward a group of people standing outside a bar. CP 1-5. He did not

injure anyone although he did break a window. CP 52-62.

After an unsuccessful direct appeal, Mr. Solis–Diaz brought a personal restraint petition arguing that (1) his sentence violated his right to be free from cruel and unusual punishment, and (2) his trial attorney was ineffective based upon his failure to seek a sentence below the standard range. CP 32-47. By unpublished opinion filed in 2012, Division II of the Court of Appeals vacated the defendant's sentence on the ineffective assistance argument without addressing the Eighth Amendment claim. *Id.* The court then remanded for a new sentencing hearing. *Id.* Specifically, the Court of Appeals found that Mr. Solis-Diaz's original trial attorney had been ineffective based upon his failure to research or advocate for an exceptional sentence downward and for his failure to notify Judge Hunt that the defendant had been automatically declined to the adult court. *Id.*

In spite of the Court of Appeals ruling, Judge Hunt imposed an identical 92.6 years in prison at the second sentencing, finding, in essence, that the Court of Appeals had been wrong in its decision to grant a new sentencing hearing. CP 256-267. In support of his ruling Judge Hunt began by criticizing the Court of Appeals' finding that the trial attorney had been ineffective. RP 34-35. Judge Hunt stated:

> First, however, I have some comments to make about the findings that Mr. Underwood was ineffective. The leading reason seems to be that Mr Underwood failed to notify me that the defendant had not been declined, with a judge finding that such an action was in the best interests of the

defendant or the community. Mr. Underwood referred to the procedure as auto-declined, and that supposedly misled me into thinking that a judge had made such a finding.

Such a conclusion is an insult to all the trial judges in this state. To postulate that a judge would be so ignorant, lazy or stupid as to not know or inquire at some point why this 17-year-old was in adult court is incredible to me. It presupposes that judge didn't review the file or was so behind in the law not to know anything about the automatic adult jurisdiction in this state.

RP 34-35 (emphasis added).

Apart from finding the Court of Appeals decision an "insult" and a claim that he as the trial judge was "ignorant, lazy or stupid," Judge Hunt went on to note his personal interest in refusing to consider the criteria the Court of Appeals used to support its decision to remand for resentencing. RP 35. Judge Hunt stated the following on this issue:

In my case it's particularly insulting as Mr. Underwood well understood my background which consists of 17 years in prosecution, nine years in private practice emphasizing criminal defense, and at the time three years on the bench. Not only that, but during my time in the prosecutor's office, I was very active in the prosecuting attorney's juvenile justice committee, for a time with the author of the opinion that sent this case back here, and as the elected prosecutor, I was the chair of that committee.

During that tenure, the automatic jurisdiction statute was passed with the support of the Prosecuting Attorneys Association. Since then I've made a point of calling that statute "automatic jurisdiction" and strongly discouraging the use of the phrase "auto decline" for precisely the reason faced in this case. It is ironic that it would come back to me, in fact, but it is simply ludicrous to think that I would not have known what Mr. Underwood meant when he said the defendant auto-declined.

RP 35 (emphasis added).

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

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

RP 36.

Finally, in this case Judge Hunt justified his decision to impose the same sentence upon his belief and the belief of the police that the original sentence had decreased the occurrence of gang related activity in Lewis County since the imposition of the original sentence. RP 44. Judge Hunt stated:

> 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.***
>
> ***Now, is this a coincidence? Perhaps. However, neither I nor the police think so.*** And that opinion is shared particularly with those who have connections with the gangs, and it's not hard to see why. Had this defendant been adjudicated as a juvenile, he would have received a sentence until age 21 within the Juvenile Rehabilitation Administration, less than four years following the trial. Even if he had received a sentence of 12 to 15 years, as suggested in a couple of places by the defense, that time is acceptable to adults who encourage juveniles to do their bidding, but not a sentence of this length.
>
> The end result is that it did deter and has deterred similar conduct. Whether it deters bar fights or something of that nature or whatever an aggravated assault is, that I can't say, but that was not the message nor the community to whom the message was intended.

RP 43-44 (emphasis added).

Following Judge Hunt's decision to reimpose the original 92.6 years prison sentence, Mr. Solis-Diaz again sought appellate review. CP 268-269. In this new appeal Mr. Solis-Diaz argued that he was entitled to a third sentencing hearing before a different judge because (1) Judge Hunt had erred when he found that he had no authority under the sentencing reform act to even consider a sentence below the standard range, (2) Judge Hunt had imposed a sentence that violated the defendant's right under the Eighth Amendment to be free from cruel and unusual punishment, and (3) that Judge Hunt should be disqualified from presiding over a new sentencing hearing because a reasonably prudent, disinterested observer would not conclude that

the defendant could obtained a fair, impartial and neutral sentencing hearing in front of Judge Hunt. CP 268-269.

By published opinion entered May 17, 2015, Division II of the Court of Appeals ordered a new sentencing hearing on the first argument, refrained from ruling on the Eighth Amendment issue, and denied the defendant's request for a new sentencing judge. *State v. Solis-Diaz*, No. 46002-5-II, 2016 WL 2866398, at 2 (Wn.Ct.App. May 17, 2016). Mr. Solis-Diaz now seeks review of the Court of Appeals' refusal to disqualify Judge Hunt from what will now be a third sentencing hearing.

E. *ARGUMENT WHY REVIEW SHOULD BE ACCEPTED*

The case at bar presents this court with two separate bases for review: (1) under RAP 13.4(b)(1) the decision of the Court of Appeals is in conflict with a decision of this court, and (2) under RAP 13.4(b)(4), this case presents a question of substantial public interest that should be determined by this court. The following sets out the arguments in support of these claims.

Under the Appearance of Fairness doctrine, a judicial proceeding is valid only if a "reasonably prudent and disinterested observer would conclude that all parties obtained a fair, impartial, and neutral hearing." *State v. Ladenburg*, 67 Wn.App. 749, 754-55, 840 P.2d 228 (1992); *State v. Bilal*, 77 Wn.App. 720, 722, 893 P.2d 674, 675 (1995). This rule derives in part from CJC 3(C)(1), which holds that "[j]udges should disqualify themselves

in a proceeding in which their impartiality might reasonably be questioned . . . ." Our courts analyze whether or not a trial judge's impartiality might reasonably be questioned under an objective test that assumes a reasonable person to know and understand all facts relevant to the case. *Sherman v. State*, 128 Wn.2d 164, 905 P.2d 355 (1995).

Generally speaking, a defendant should bring a motion to recuse before the trial judge for whom the defendant is seeking recusal. *State v. Chamberlin*, 161 Wn.2d 30, 162 P.3d 389 (2007). However, a defendant is permitted to bring a motion for reassignment for the first time on appeal when the issue raised before the appellate court is also the argued basis for the reassignment request. Thus, an appellant may seek reassignment in cases in which (1) the trial judge will, on remand, be called upon to exercise discretion regarding the very issue that triggered the appeal, (2) the trial judge has expressed an opinion on the merits of the case, or (3) the trial judge has demonstrated that he or she has otherwise prejudged the issue. *State v. McEnroe*, 181 Wn. 2d 375, 333 P.3d 402 (2014).

In *State v. McEnroe*, *supra*, this court addressed a prosecutor's claim made for the first time on appeal that the trial judge should be disqualified. In this case the state had charged two defendants with aggravated first degree murder and filed a notice of intent to seek a sentence of death for each. After more than five years of pretrial proceedings, the trial court ruled that the

state's original death penalty notices were deficient because they failed to alleged that absence of "mitigating circumstance to merit leniency" under RCW 10.95.060(4). The court based this ruling upon its belief that under *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000), and its progeny, the absence of mitigating circumstances was an essential element required to obtain a death sentence.

Based upon this ruling, the court informed the parties that it would entertain a defense motion to dismiss the death penalty notices if the state did not amend to include the absence of mitigating circumstances language the court believed mandatory. Following entry of this order the state sought and obtained discretionary review seeking reversal of the order and disqualification of the trial judge.

On review, this court reversed the trial judge's order, finding that the absence of mitigating circumstances was not an essential element that had to be alleged in a death penalty notice. The court then went on to address the state's argument that the trial judge should be disqualified. In addressing this issue the court first set out the following standard:

> A party may sometimes seek reassignment for the first time on appeal, as the State did here. But that is generally done where the issue raised on appeal is also the basis for the reassignment request. Thus, reassignment 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. This remedy has limited availability:

> even where a trial judge has expressed a strong opinion as to the matter appealed, reassignment is generally not available as an appellate remedy if the appellate court's decision effectively limits the trial court's discretion on remand.

State v. McEnroe, 181 Wn.2d at 387.

In setting out these rules, the court noted that the state's motion to recuse was "based on the trial judge's conduct of more than six years of pretrial proceedings, its treatment of numerous motions, its discretionary decisions on legal issues not currently before this court on their merits, and its views on several disputed, complex legal matters." *McEnroe*, 181 Wn.2d at 386. This court then held that these types of claims do not qualify as an exception to the general rule prohibiting recusal when made for the first time on appeal. This court held:

> This case does not involve any exception to the rule that a motion to recuse is generally the proper way to seek a new trial judge. Of the State's seven asserted grounds for reassignment, six are entirely unrelated to the *Alleyne/Apprendi* issue raised in this appeal and none proves that Judge Ramsdell has prejudged the merits of this case or the propriety of any particular sentence.

State v. McEnroe, 181 Wash. 2d at 387-388.

The case at bar stands in stark contrast to the state's arguments for recusal in *McEnroe*. In *McEnroe* the arguments for recusal were unrelated to judge's ruling then before the appellate court. By contrast, in the case at bar, the arguments for recusal were directly related to the issues decided by the Court of Appeals. Specifically, the argument for recusal centers on Judge

Hunt's repeated refusal to consider a sentence below the standard range whether or not he had the authority to impose it. It is true that he ruled that he did not have the authority to impose a sentence below the standard range in spite of the Court of Appeals order on remand specifically directing him to consider a mitigated sentence. However, Judge Hunt's ruling went beyond his belief that he had no authority to impose a sentence below the standard range. Rather, he specifically stated that he would not have imposed such a sentence under any circumstances. On this issue he stated:

> So to return to the inquiry that started this from the Court of Appeals, my answer is no, I would not have given a mitigated sentence had I known about the information that Mr. Underwood supposedly failed to give me and apparently I didn't recognize on my own. I already knew it, and I imposed the sentence I did being fully informed of the legal consequences of doing so. So that's my ruling.

RP 53.

In addition, in *McEnroe*, this court found no basis for recusal because the court's decision took discretion away from the trial court on the validity of the death penalty notice and ordered him to accept them as filed. By contrast, in the case at bar, the Court of Appeals' decision does not take discretion away from Judge Hunt on the issue decided on appeal. Rather, the decision of the Court of Appeals literally forces discretion upon the trial court, discretion which the trial court has already refused to exercise. Thus, under the decision in *McEnroe*, Mr. Solis-Diaz is entitled to a new sentencing hearing in front of a different judge because (1) the order on remand for a

new sentencing hearing requires Judge Hunt to exercise discretion regarding the very issue that triggered the current appeal, (2) Judge Hunt has repeatedly and forcefully expressed an opinion on the merits of the defendant's request for a mitigated sentence, and (3) Judge Hunt has demonstrated that he has prejudged the issues at sentencing.

The defendant has made the forgoing three arguments in conjunction, claiming the existence of all three bases for recusal argued for the first time on appeal. However, the use of the alternative conjunction "or" in the decision in *McEnroe* clarifies that these three bases are separate alternatives and each alone with justify granting recusal for the first time on appeal.

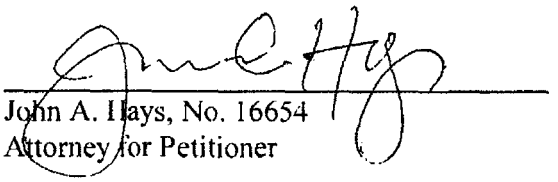
As the foregoing explains, while the Court of Appeals decision in this case cites to this court's decision in *McEnroe*, it fails to follow it. Thus, this case is ripe for review under RAP 13.4(b)(1) because it conflicts with this court's decision in *McEnroe*. In addition, while the decision in *McEnroe* cites to the applicable standard for the review of recusal arguments made for the first time on appeal, it only provides an example of what does not qualify. Thus, the case at bar provides this court with an opportunity to issue a published example of facts that do merit recusal when that request is made for the first time on appeal. As a result, this case involves an instance of substantial public interest that should be determined by this court under RAP 13.4(b)(4).

F. *CONCLUSION*

For the reasons set out in this motion, this court should accept review of this case and reverse the decision of the Court of Appeals on the issue of recusal of the trial judge.

Dated this 15th day of June, 2016.

Respectfully submitted,



John A. Hays, No. 16654
Attorney for Petitioner

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.

BJORGEN, 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.

COURT OF APPEALS OF WASHINGTON, DIVISION II

STATE OF WASHINGTON, **Respondent,** **vs.** **GUADALUPE SOLIS-DIAZ,** **Appellant.**	**NO. 46002-5-II** **AFFIRMATION OF OF SERVICE**

The under signed states the following under penalty of perjury under the laws of Washington State. On this, I personally e-filed and/or placed in the United States Mail the Brief of Appellant with this Affirmation of Service Attached with postage paid to the indicated parties:

1. Mr. Jonathan Meyer
   Lewis County Prosecuting Attorney
   345 West Main Street
   Chehalis, WA 98532
   appeals@lewiscountywa.gov

2. Guadalupe Solis-Diaz, No. 313623
   Washington State Penitentiary
   1313 North 13th Avenue
   Walla Walla, WA 99362

Dated this 15th day of June, 2016 at Longview, Washington.

Diane C. Hays

HAYS LAW OFFICE

June 15, 2016 - 3:51 PM

Transmittal Letter

Document Uploaded: 5-460025-Petition for Review.pdf

Case Name: State v. Guadalupe Solis-Diaz
Court of Appeals Case Number: 46002-5

Is this a Personal Restraint Petition? Yes ● No

The document being Filed is:

Designation of Clerk's Papers Supplemental Designation of Clerk's Papers

Statement of Arrangements

Motion: ____

Answer/Reply to Motion: ____

Brief: ____

Statement of Additional Authorities

Cost Bill

Objection to Cost Bill

Affidavit

Letter

Copy of Verbatim Report of Proceedings - No. of Volumes: ____
Hearing Date(s): _____

Personal Restraint Petition (PRP)

Response to Personal Restraint Petition

Reply to Response to Personal Restraint Petition

● Petition for Review (PRV)

Other: _____

Comments:

No Comments were entered.

Sender Name: Diane C Hays - Email: jahayslaw@comcast.net

A copy of this document has been emailed to the following addresses:

appeals@lewiscountywa.gov