

No. 42064-3-II

THE COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION TWO

In re Personal Restraint of:
GUADALUPE SOLIS-DIAZ, JR.,
Petitioner.

**Respondent's Consolidated Answer
to Two Amicus Curiae Briefs**

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I. INTRODUCTION

The American Civil Liberties Union of Washington (ACLU), the Washington Defender Association, the Fred T. Korematsu Center for Law and Equality, the Latina/o Bar Association of Washington, and the Loren Miller Bar Association have submitted two amicus curiae briefs in this case. These five organizations contend that the sentence imposed upon Soliz Diaz for his eight crimes violates the Eighth Amendment rule announced by the United States Supreme Court in *Graham v. Florida*, __ U.S. __, 130 S. Ct. 2011, 2021, 176 L.Ed.2d 825 (2010).¹ Since the arguments presented in both briefs are similar, the State will file this single responsive brief.

II. STATEMENT OF FACTS

On August 11, 2007, Jesse Dow left the Centralia, Washington, Tower Tavern with a friend. 1RP 42-43.² Mr. Dow

¹ When citing to *Graham v. Florida* the State will use the Supreme Court Reporter cite for its pinpoint citations and short form cites due to the unavailability of United States Reports pinpoint cites.

² There are five volumes from the jury trial. Volume I (November 28, 2007) will be cited as 1RP; Volume II (November 29, 2007) – 2RP; Volume III (November 30, 2007) – 3RP; Volume IV (December 3, 2007) 4RP; Volume V (December 6 and 7, 2007) – 5RP. The sentencing hearing (December 17, 2007) will be referred to as SRP.

and his friend, Shenna Fisco, drove to the Shell Station on South Tower so that Mr. Dow could purchase cigarettes. 1RP 42-43, 93-94. While Mr. Dow was in the Shell Station and Ms. Fisco was waiting in the vehicle, a white car pulled up next to Ms. Fisco's car. 1RP 94.

Mr. Dow exited the Shell Station and displayed some apprehension upon seeing the white car. 1RP 94-95. This initial concern was heightened when the petitioner, Solis Diaz, exited the white car and went to the trunk. 1RP 46, 96-97. From their vantage point, Mr. Dow and Ms. Fisco believed that Solis Diaz was retrieving something from the trunk. 1RP 46, 95.

Mr. Dow and Ms. Fisco hurriedly left the Shell Station and returned to the Tower Tavern. 1RP 46, 95. Once there, Mr. Dow instructed Ms. Fisco to get the people inside the Tavern because he was concerned Solis Diaz had grabbed some type of weapon from the trunk of the white car. 1RP 46, 95-96.

This concern was realized when the white car containing Solis Diaz drove slowly down the street. 1RP 55-57. As the vehicle neared the Tower Tavern, Solis Diaz rolled his passenger

window down halfway and began shooting a gun into the crowd of people gathered outside the Tower Tavern. 1RP 55-57.

Solis Diaz fired between five and eight bullets at the gathered people. 2RP 80-83. These bullets shattered windows and ricocheted off the sidewalk and the building. 2RP 80-83. Fortunately, Mr. Dow's and Ms. Fisco's warnings enabled Cassandra Norskog, Doug Hoheisel, Jonathan Freeman, and Sean Thomas to escape serious injuries. Nonetheless, the bullets came within mere feet of these victims causing each of them serious concern for their lives. *See, e.g.*, 1RP 100; 2RP 4, 61-65, 82, 86, 99, 134, 141.

Solis Diaz's actions were in apparent response to Mr Dow's disagreement with an LVL gang member. 1RP 48-52. The specific LVL gang member, Josh Rhodes, attended Solis Diaz's trial. 1RP 48-50. Both Mr. Dow and Ms. Fisco believed that Mr. Rhodes and/or other LVL gang members would retaliate against them for testifying at Solis Diaz's trial. 1RP 63, 100.

Solis Diaz's conduct on August 11, 2007, resulted in his first known arrest. *See* PRP Response, Appendix A. Because he 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.³

Solis Diaz's case was tried to a jury. That jury convicted Solis Diaz 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, RCW 9A.36.011 and RCW 9.94A.533	Jonathan Freeman
VII	Drive-by Shooting, RCW 9A.36.045(1)	

³ 16-year-old Solis Diaz could not have served the standard disposition term for his offenses if his offenses had been adjudicated in the juvenile courts. See RCW 13.40.0357 (First Degree Assault is a category "A" offense with a standard range of 103 weeks to 129 weeks); RCW 13.40.193(2) (a firearm allegation carries an additional 6 months to be served consecutively to all other terms of confinement); RCW 13.40.180. (sentences for juvenile offenses shall be served consecutively with a three hundred percent "cap").

Count	Charge	Victim
VIII	Unlawful Possession of a Firearm in the Second Degree, RCW 9.41.040(2)(a)(iii)	

See PRP Response, Appendix D.

The Sentencing Reform Act (“SRA”) controlled the sentencing options that were available to the Superior Court. Because six of Solis Diaz’s offenses were classified as “serious violent offenses”, see RCW 9A.36.011; RCW 9.94A.030(45)(a)(v), special rules applied to the calculation of the standard ranges. Specifically, RCW 9.94A.589(1)(b) required that the sentence for each of the first degree assaults be determined individually, without consideration of Solis Diaz’s other serious violent offenses. These special rules resulted in the following offender scores and standard ranges:

Count	Crime	Type of Offense	Offender Score	Seriousness Level	Standard Range
I	First Degree Assault	Serious Violent	2 ⁴	XII	102-136 months
II	First Degree Assault	Serious Violent	0	XII	93-123 months
III	First Degree Assault	Serious Violent	0	XII	93-123 months
IV	First Degree Assault	Serious Violent	0	XII	93-123 months
X	First Degree Assault	Serious Violent	0	XII	93-123 months
VI	First Degree Assault	Serious Violent	0	XII	93-123 months
VII	Drive By Shooting	Violent	1 ⁵	VII	21-27 months

⁴ Pursuant to RCW 9.94A.589(1)(b), the serious violent offense with the highest seriousness level will have an offender score consisting of prior convictions and other current offenses which are not serious violent offenses. Therefore, Solis Diaz's offender score for count one is two because of the drive-by shooting and unlawful possession of a firearm in the second degree convictions.

⁵ Count seven has an offender score of one because the court found that the drive-by shooting was the same criminal conduct as the six counts of assault in the first degree as charged in counts one through six. See RCW 9.94A.589(1)(a); SRP 4-5.

Count	Crime	Type of Offense	Offender Score	Seriousness Level	Standard Range
VIII	Unlawful Possession of a Firearm in the Second Degree	Non-violent	6 ⁶	III	22-29 months

At sentencing, Solis Diaz identified no grounds for departing from the standard range. SRP 3-9. The factors Solis Diaz identified as grounds for leniency, such as his lack of prior criminal history were already factored into the standard ranges. SRP 6.

The trial court ultimately imposed a standard range sentence on each count. In addition to the “base sentence,” the mandatory firearm enhancement was added to each assault count as required by the jury’s verdict. The final sentence imposed for each of Solis Diaz’s eight crimes was as follows:

⁶ Count eight has an offender score of six because counts one through six count towards the offender score, but as stated in footnote five, count seven is the same criminal conduct as counts one through six and therefore it does not count towards the offender score for count eight. See RCW 9.94A.525; RCW 9.94A.589.

Count	Victim	Sentence Imposed
I	Jesse Dow	196 months
II	Sheena Fisco	183 months
III	Cassandra Norskog	183 months
IV	Sean Thomas	183 months
V	Doug Hoheisel	183 months
VI	Jonathan Freeman	183 months
VII		27 months
VIII		29 months

PRP Response, Appendix A. By operation of RCW 9.94A.589(1)(b) and RCW 9.94A.533(3)(e), the sentences, including the firearm enhancements, imposed for each first degree assault run consecutively to each other. The sentences for Solis Diaz's other crimes, run concurrently to the sentences imposed on the assaults. RCW 9.94A.589(1)(a).

III. ARGUMENT

A. **CONSECUTIVE SENTENCES ARE TREATED DIFFERENTLY THAN SINGLE SENTENCES.**

Soliz Diaz received individual sentences for each of his eight offenses. These sentences range in length from 27 months to 196 months. PRP Response, Appendix A. Neither Solis Diaz nor

any of the amici curiae contend that these individual sentences violate the Eighth Amendment. It is only when the sentences are aggregated that a constitutional violation purportedly arises under *Graham v. Florida*, 130 S. Ct. at 2030.

Graham v. Florida, however, dealt with a sentence of life without the possibility of parole (LWOP) for a single non-homicide offense. The rule announced in *Graham v. Florida*, like other constitutional decisions applicable to the imposition of sentences, is not applicable to consecutive sentences. *Cf. Oregon v. Ice*, ___ U.S. ___, 129 S. Ct. 711, 172 L. Ed. 2d 517 (2009) (Sixth Amendment requires a jury to find facts that support an exceptional sentence for a single count, but judicial fact-finding is sufficient to support consecutive sentences); *State v. Vance*, 168 Wn.2d 754, 230 P.3d 1055 (2010) (Cites to *Ice*, stating the Sixth Amendment permits a judge to find facts to support a consecutive sentence).

The Eighth Amendment of the United States Constitution prohibits cruel and unusual punishment. “[T]he Eighth Amendment guarantees individuals the right not to be subjected to excessive sanction.” *Roper v. Simmons*, 543 U.S. 551, 560, 125 S. Ct. 1183, 161 L.Ed.2d 1 (2005). Punishments that are grossly

disproportionate to the crime, resulting in extreme sentences, are forbidden by the Eighth Amendment. *Graham v. Florida*, 130 S. Ct. at 2021 (citation omitted).

“In comparing the gravity of the offense to the harshness of the penalty, courts must accord substantial deference to the legislature and its policy judgments as reflected in statutorily mandated sentences.” *State v. Berger*, 212 Ariz. 473, 134 P.3d 378, 381 (2006), *cert. denied*, 549 U.S. 1252 (2007). When a person is sentenced to a term of years only in exceedingly rare cases will a reviewing court find the sentence violates the Eighth Amendment. *Ewing v. California*, 538 U.S. 11, 21-22, 123 S. Ct. 1179, 155 L.Ed.2d 108 (2003).

The comparison between the gravity of the offense and the harshness of the punishment is the sentence imposed for a single offense. *United States v. Aiello*, 864 F.2d 257, 265 (2nd Cir. 1988). The fact that cumulative punishments may be imposed for distinct offenses in the same prosecution does not present an Eighth Amendment question if each individual sentence is “reasonable.” *See, e.g., Lockyer v. Andrade*, 538 U.S. 63, 74 n. 1, 123 S. Ct. 1166, 155 L. Ed. 2d 144 (2003) (rejecting, in context of federal

habeas review, dissent's argument that two consecutive sentences of twenty-five years to life for separate offenses were equivalent, for purposes of Eighth Amendment analysis, to one sentence of life without parole for thirty-seven-year-old defendant); *O'Neil v. Vermont*, 144 U.S. 323, 331, 36 L. Ed. 450, 12 S. Ct. 693 (1892) (quoting *O'Neil v. State*, 58 Vt. 140, 2 A. 586 (1886) ("It would scarcely be competent for a person to assail the constitutionality of the statute prescribing a punishment for burglary, on the ground that he had committed so many burglaries that, if punishment for each were inflicted on him, he might be kept in prison for life.")); *United States v. Beverly*, 369 F.3d 516, 537 (6th Cir.), *cert. denied*, 125 S. Ct. 122 (2004) (imposition of consecutive sentences upon a first time felon is not a violation of the Eighth Amendment where no one of the sentences is intrinsically "grossly disproportionate" to the crime of armed bank robbery); *State v. Berger*, 134 P.3d 378 (twenty consecutive ten-year sentences for child pornography does not violate the Eighth Amendment).

Not surprisingly, every court that has examined a claim predicated upon *Graham v. Florida* has determined that the decision does not apply when an offender is serving consecutive

sentences, each of which is for a term of less than life in prison without the possibility of parole. See *Burnett v. Missouri*, 311 S.W.3d 810 (2009); *People v. Mendez*, 188 Cal. App.4th 47, 63, 114 Cal.Rptr.3d 870 (2010) ("We disagree with Mendez that his de facto LWOP sentence should be reversed pursuant to the holding in *Graham*.").⁷

⁷ The California Court of Appeals provided relief to Mendez applying pre-*Graham* Eighth Amendment precedent. In ordering the sentence reduction, the California Court of Appeals held that the trial court erred by exercising its discretion to run the sentences consecutively, rather than concurrently based upon the trial judge's determination that Mendez was "irredeemable." *Mendez*, 188 Cal. App. 4th at 64. The California Court was also troubled by the large disparity between Mendez's sentence and that imposed upon his co-participant. *Id.* at 66 ("we cannot ignore that codefendant Ramos received a sentence nearly half as long as Mendez.") Finally, the Court indicated that the relief obtained by Mendez will not be granted in the vast majority of cases. *Id.* at 68.

In the instant case, consecutive sentences were mandatory under the Sentencing Reform Act and the Legislature's determination that mandatory sentences should be imposed to recognize each individual victim may not be sidestepped absent proof beyond a reasonable doubt that the statute is unconstitutional. *Cf. State v. Campbell*, 103 Wn.2d 1, 34-35, 691 P.2d 929 (1984), *cert. denied*, 471 U.S. 1094 (1985) (discussing the death penalty). The exact same sentence is mandated for anyone with no prior criminal history who commits six first degree assaults while armed with a firearm. Finally Solis Diaz, unlike Mendez, actually discharged his firearm at least 7 times. *Compare Mendez*, 188 Cal. App. 4th at 65 ("But Mendez did not personally inflict physical injury on any of his victims or discharge his firearm."), *with* 3RP 35-72.

In *Burnett v. State*, the Missouri Court of Appeals had to determine if a sentence imposed upon 15 year old Burnett (Movant) violated the Eighth Amendment prohibition against cruel and unusual punishment. *Burnett v. Missouri*, 311 S.W.3d 810 (2009). Burnett⁸ pleaded guilty to attempted forcible rape, first degree assault, child kidnapping and forcible sodomy. *Id.* at 811. Burnett was 13 years old when he committed the crimes and 15 years of age when he pleaded guilty. *Id.* The trial court sentenced Burnett to a 60 year sentence. *Id.* at 813. Burnett was sentenced to 20 years for the first degree assault, 20 years for the child kidnapping, 10 years for the forcible sodomy and 10 years for attempted forcible rape, all sentences were ordered to run consecutive. *Id.* The court noted that Burnett was sentenced within the standard range and standard range sentences will generally not be found to be grossly disproportionate or excessive. *Id.* at 815. In arriving at this result, the Missouri Court of Appeals stated it “owe[d] substantial deference to the legislature’s determination of proper punishment.” *Id.* The court noted that the maximum possible punishment for the

⁸Burnett is referred throughout the opinion as Movant, for clarity purposes the State will refer to him as Burnett.

Class A felonies that Burnett had pleaded guilty to was life and Burnett was sentenced rather to consecutive sentences totaling 60 years. *Id.* The court found the sentence was constitutional and affirmed. *Id.* 816-18.

Similarly to Burnett, Solis Diaz was sentenced to six consecutive sentences for six counts of assault in the first degree, committed by indiscriminately shooting a gun into a crowd of six people. See 1RP 55-57; 2RP 62, 80-83, 89-99, 141; PRP Response, Appendix A. Each sentence Solis Diaz received for each count of assault in the first degree was a standard range sentence with a firearm enhancement. RCW 9.94A.030(45)(a)(v); RCW 9.94A.510; RCW 9.94A.515; RCW 9.94A.533; RCW 9.94A.589(1)(b); RCW 9A.36.011. Solis Diaz was not sentenced to a term of LWOP, he was sentenced to six standard range sentences that due to the nature of the offenses Solis Diaz chose to commit were run consecutively pursuant to the legislature's determination that consecutive sentences for multiple serious violent offense was necessary and appropriate. RCW 9.94A.030(45)(a)(v); RCW 9.94A.411(2); RCW 9.94A.589(1)(b); RCW 9A.36.011. The Washington State legislature was clear in its

intent to punish people who choose to commit multiple, distinct and separate, most serious violent offenses differently than other offenders. See RCW 9.94A.589(1)(b); DAVID BOERNER, SENTENCING IN WASHINGTON, A LEGAL ANALYSIS OF THE SENTENCING REFORM ACT, §5.8 15 and §5.8(b) 19-20 (Butterworth Legal Publishers 1985).

The legislature had a rational basis for enacting a sentencing scheme that holds a person accountable for each distinct and separate act and for each victim. See *Ewing v. California*, 538 U.S. at 22; *State v. Berger*, 134 P.3d at 382. Otherwise, in case such as Solis Diaz's, a person who commits multiple acts of violence against multiple persons would have a higher offender score, but would do less time because the sentence would run concurrently. See RCW 9.94A.589. In Solis Diaz's case that would make his maximum punishment; if just sentenced on the six counts of assault, not including counts seven and eight, without a firearm enhancement; 184 months. RCW 9.94A.510; RCW 9.94A.515; RCW 9A.36.011. This would equate to a base sentence of 15.3 years, or two and a half years per victim. Add the firearm

enhancement and you get a base sentence of seven and a half years per victim. RCW 9.94A.533(3).

The legislature necessarily realized that a person should not benefit from committing multiple violent offenses in the sentencing structure it chose to adopt. There is a rational, reasonable basis for the legislature to determine that a person who chooses to commit such crimes should be punished in a way that acknowledges each victim and/or distinct and separate violent offense. The sentencing structure adopted by the legislature advances the goals of the criminal justice system, namely providing protection to the public. See RCW 9.94A.010(4) and (7); *United States v. Beverly*, 369 F.3d at 537 (“Mandating consecutive sentences is not an unreasonable method of attempting to deter a criminal, who has already committed several offenses using a firearm, from doing so again.”).

IV. CONCLUSION

The State concedes that the sentence Solis Diaz received for his crimes is harsh. But just as the Eighth Amendment prohibits declaring a young offender to be “irredeemable”, respect for the Legislature’s role in setting the sentences for crimes precludes this

Court from letting its hope that every young offender is “redeemable” to strike down a constitutionally valid sentence.⁹

Solis Diaz holds the keys to the prison cell in his own hands. His behavior in prison and his efforts at rehabilitation can result in a reduced sentence. The State encourages Solis Diaz to earn the

⁹ The Supreme Court’s statement in *Campbell* is equally valid here, as the consecutive sentence was mandated by both the legislatively enacted Sentencing Reform Act and the Hard Time for Armed Crime initiative:

Clearly the mandate of the people of Washington, as expressed through the legislative and initiative processes, is to impose [consecutive sentences]. We, as Justices, are bound to uphold and enforce this law absent a constitutional prohibition. We must not superimpose personal morality nor utilize strained interpretations of the law to sidestep this difficult issue.

"Courts are not representative bodies. They are not designed to be a good reflex of a democratic society. Their judgment is best informed, and therefore most dependable, within narrow limits. Their essential quality is detachment, founded on independence. History teaches that the independence of the judiciary is jeopardized when courts become embroiled in the passions of the day and assume primary responsibility in choosing between competing political, economic and social pressures." *Dennis v. United States*, 341 U.S. 494, 525 (1951) (Frankfurter, J., concurring in affirmance of judgment).

(Footnote omitted.) *Gregg v. California*, 428 U.S. 153, 175, 96 S.Ct. 2909 49 L.Ed.2d 859 (1976).

Campbell, 103 Wn.2d at 34.

clemency that Washington's governors have extended to other youthful offenders.¹⁰

RESPECTFULLY submitted this 8th day of February, 2012.

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¹⁰ Susan Cummings, who was convicted for a murder committed when she was 16, had her sentence commuted by Governor Locke in 2004 after she served 20 years in prison. Gerald S. Hankerson, who was convicted for a murder committed when he was 18, had his sentence commuted by Governor Gregoire in 2009, after he has served 20 years in prison.

LEWIS COUNTY PROSECUTOR

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