No. 42064-3-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

IN RE THE PERSONAL RESTRAINT OF GUADALUPE SOLIS DIAZ,

Guadalupe Solis Diaz,

Petitioner.

BRIEF OF *AMICI CURIAE* OF THE WASHINGTON DEFENDER ASSOCIATION AND AMERICAN CIVIL LIBERTIES UNION OF WASHINGTON

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I. INTEREST OF *AMICI CURIAE*

The Washington Defender Association ("WDA") is a statewide non-profit organization with 501(c)(3) status. WDA has more than a thousand members and is comprised of public defender agencies, indigent defenders, and those who are committed to seeing improvements in indigent defense. One of the primary purposes of WDA is to improve the administration of justice and to stimulate efforts to remedy inadequacies or injustice in substantive or procedural law. WDA and its members have previously been granted leave to file *amicus* briefs on many issues relating to criminal defense and representation of the indigent.

The American Civil Liberties Union of Washington ("ACLU") is a statewide, nonpartisan, nonprofit organization of over 19,000 members, dedicated to the principles of liberty and equality embodied in the United States Constitution and the Washington Constitution. It has been granted leave to file *amicus* briefs in numerous cases in Washington involving juvenile justice and fair sentencing issues.

II. STATEMENT OF THE CASE

The following facts are discussed in the parties' briefs and supporting documents. Guadalupe Solis Diaz Jr. mostly stayed out of trouble until tenth grade, with only two juvenile misdemeanors for drug paraphernalia and alcohol possession. Numerous witnesses confirm that

he exhibited cognitive impairments from an early age, was diagnosed as developmentally delayed in kindergarten, and functioned below sixth-grade level when he was last evaluated in tenth grade. He was a respectful student and described as a "good kid" by his teachers but experienced a "turbulent" childhood and was easily influenced by others.

When he reached age 16, Solis Diaz left home and started associating with his older cousins. The shooting incident that led to his 92-year sentenced occurred before he turned 17. Since Solis Diaz was 16 years old when the charged crime occurred in 2007, and the prosecutor chose to charge first degree assault, he was automatically declined from juvenile court and his case was prosecuted in adult court. RCW 13.04.030.

The conduct Solis Diaz was accused of involved shooting a gun out a car window in the direction of a sidewalk where a number of people were standing. The State argued he intended to assault one person in the group. In spite of the seriousness of the act, fortunately not a single person was struck in the shooting. The prosecutor offered Solis Diaz a plea bargain that would result in a 15 year prison sentence. With little time to consider the offer, Solis Diaz took the tremendous risk of rejecting the offer and proceeding to trial.

The prosecution pursued charges of six counts of first degree assault, apparently because there were six people in the vicinity of the shooting, plus charges of drive-by shooting and unlawful possession of a firearm. The prosecution added a firearm enhancement to each assault count, knowing this would result in six consecutive mandatory minimum 5-year prison terms – a total of 30 additional years under the applicable adult sentencing law. The prosecutor's charging choices also meant that a standard range sentence would consist of consecutive prison terms for each of the six first degree assault counts.

Solis Diaz was found guilty on all charges. The trial court sentenced then 17-year old Solis Diaz to the top end of the adult sentence range for each charge, with all the sentences for the six assault convictions ordered to be run consecutively, plus all six firearm enhancements also imposed consecutively on top of the consecutive assault sentences. This resulted in a sentence of 1111 months (92 years). Solis Diaz recently turned 21 and is serving his sentence at the state Penitentiary in Walla Walla. Solis Diaz's co-defendant, who was 21 years old at the time of the drive-by shooting, was sentenced to 12.5 years in prison in 2008.

III. ISSUES TO BE ADDRESSED BY *AMICI*

1. In *Graham v. Florida*, the Supreme Court held the Eighth Amendment prohibits the imposition of life sentences with no meaningful

opportunity for release upon juveniles convicted of non-homicide offenses. After 16-year-old Guadalupe Solis Diaz shot at a single person in a group of people, he was convicted of multiple counts of assault and sentenced to 92 years in prison. Does the sentence imposed upon Solis Diaz violate the Eighth Amendment?

2. Article I, section 14 of the Washington Constitution provides stronger protection against cruel punishment than the Eighth Amendment. Does the imposition of a 92-year-sentence upon a juvenile, particularly one with a history of cognitive impairment and where there are numerous other mitigating factors, for a non-homicide offense violate article I, section 14?

IV. ARGUMENT

A. SOLIS DIAZ'S *DE FACTO* LIFE SENTENCE VIOLATES THE EIGHTH AMENDMENT PURSUANT TO *GRAHAM*

As Petitioner's opening brief, p. 12-20, points out, the United States Supreme Court has held that life sentences imposed by an adult court for non-homicide crimes committed while a person was under age 18 violate the Eighth Amendment's ban on cruel and unusual punishment. *Graham v. Florida*, ___ U.S. ___, 130 S.Ct. 2011, 176 L.Ed.2d 825 (2010). The *Graham* Court recognized that "characteristics of the

offender," such as the defendant being under 18 at the time of the crime, are necessarily relevant to the constitutionality of the sentence. *Id.*

As courts in other jurisdictions have held based on *Graham*, Solis Diaz's sentence of 92 years is a *de facto* or the functional equivalent of a life sentence for a non-homicide crime, and violates the United States Constitution. In *People v. Nuñez*, 195 Cal. App. 4th 414, 418, 125 Cal.Rptr.3d 616, *review granted*, 255 P.3d 951, 128 Cal.Rptr.3d 274 (2011), the California Appeals Court stated "We perceive no sound basis to distinguish *Graham*'s reasoning where a term of years beyond the juvenile's life expectancy is tantamount to an LWOP [life without possibility of parole] term." The *Nuñez* court held in no uncertain terms: "*Graham* invalidated *de facto* sentences of [life without possibility of parole] as a sentencing option for juveniles who do not kill." *Id.* (reversing and remanding a sentence for a 14 year old defendant that would have made him eligible for release in 175 years).

In *People v. J.I.A.*, 196 Cal. App. 4th 393, 404, 127 Cal.Rptr.3d 141, *review granted*, 260 P.3d 283, 130 Cal.Rptr.3d 851 (2011) the Court again found consecutive sentences resulting in a minimum term of 56.5 years for a juvenile to be cruel and unusual under *Graham* and amended the juvenile's sentence to permit parole eligibility. The court succinctly explained why the case fell under the *Graham* standard:

> Although J.A.'s sentence is not technically an LWOP sentence, it is a *de facto* LWOP sentence because he is not *eligible* for parole until about the time he is expected to die. The trial court's sentence effectively deprives J.A. of any meaningful opportunity to obtain release regardless of his rehabilitative efforts while incarcerated.

Id. at 404.

These cases mirror the holding of an earlier California case that also invalidated a *de facto* life sentence under *Graham*. *See People v. Mendez*, 188 Cal. App. 4th 47, 67, 114 Cal.Rptr.3d 870 (2010) (overturning an 84 year sentence for carjacking, assault with a gun and numerous robbery counts, imposed on a juvenile tried as an adult, as unconstitutional under *Graham*). The *Mendez* Court explained: "[e]ven without *Graham*, we would conclude that Mendez's sentence is unconstitutional when evaluated under the traditional 'proportionality' test used by the federal and state courts when evaluating individual claims that a sentence is cruel and unusual." *Id.* at 64. The court further stated that although *Graham* did not define what constitutes a "meaningful opportunity" for parole, "common sense dictates that a juvenile who is sentenced at age 18 and who is not eligible for parole until after he is expected to die does not have a meaningful, or as the court also put it, 'realistic,' opportunity of release." *Id.* at 63. Based on *Graham* and cases interpreting it, Solis Diaz's sentence of 1111 months violates the Eighth

Amendment. It should be reversed and remanded for a much shorter sentence.

B. Solis Diaz's Sentence Violates the Washington Constitution under the *Fain* Test

Washington's Constitution provides even greater protections for its citizens with respect to permissible punishments than the United States Constitution. *State v. Fain*, 94 Wn.2d 387, 392-93, 617 P.2d 720 (1980). Instead of banning "cruel and unusual" punishments, the Washington Constitution bans all punishments that are "cruel." Wash. Const. art. 1 § 14. The Court evaluates four factors in determining whether a sentence violates article I, section 14: (1) the nature of the offense, (2) the legislative purpose behind the statute, and whether that purpose can be equally well served by a less severe punishment, (3) the punishment the defendant would have received in other jurisdictions for the same offense, and (4) the punishment meted out for other offenses in the same jurisdiction. *Id.* at 397 and 401 n.7. Considering these factors, Solis Diaz's sentence violates our state's Constitution.

Factor 1- Nature of the Offense – Mitigating Facts about the Offender, Including His Age, Must be Considered in Sentencing for Crimes Committed by Juveniles. Solis Diaz was 16 years old at the time of the crime, but juvenile court jurisdiction was automatically declined,

subjecting him to the adult sentencing laws. His mere qualification for auto-decline does not provide a sufficient analysis of the factors affecting his culpability, since auto-decline statutes "tell[] us nothing about the judgment these States have made regarding the appropriate punishment for such youthful offenders." *Graham*, 130 S.Ct. at 2025. Indeed, *Graham* constitutionally dictates that his age must be considered in evaluating his culpability for the offense. Solis Diaz's current sentence fails to account for this mitigating factor.

Moreover, Solis Diaz's sentence cannot be justified by the auto-decline law because *Graham* places in doubt the reasoning the Washington Court used to uphold the auto-decline law. *In re Boot*, 130 Wn.2d 553, 925 P.2d 964 (1996) relied on the now-abrogated case of *Stanford v. Kentucky,* 492 U.S. 361, 109 S.Ct. 2969, 106 L.Ed.2d 306 (1989), upholding the execution of 16 and 17 year olds for murder. But *Stanford* was overruled by *Roper v. Simmons*, 543 U.S. 551, 125 S.Ct. 1183, 161 L.Ed.2d 1 (2005), which outlawed the death penalty for crimes committed by persons under 18. Additionally, in *Boot*, the Court relied on the now-overruled *Stanford* opinion to find no constitutional right to lesser punishment due to reduced culpability based on age. Both *Roper* and *Graham* have squarely condemned *Boot*'s reasoning, requiring that

Solis Diaz's age must be considered a mitigating factor regarding the nature of the offense.

In addition to his age at the time of the offense, Solis Diaz's history of cognitive impairment is a mitigating fact that weighs against the constitutionality of his 92-year sentence. The Supreme Court in *Atkins v. Virginia*, 536 U.S. 304, 318, 122 S.Ct. 2242, 153 L.Ed.2d 335 (2002), recognized people with cognitive impairments

> have diminished capacities to understand and process information, to communicate, to abstract from mistakes and learn from experience, to engage in logical reasoning, to control impulses, and to understand the reactions of others.... There is no evidence that they are more likely to engage in criminal conduct than others, but there is abundant evidence that they often act on impulse rather than pursuant to a premeditated plan .... Their deficiencies do not warrant an exemption from criminal sanctions, but **they do diminish their personal culpability**.

(emphasis added.) *See also*, *Smith v. Texas*, 543 U.S. 37, 44, 125 S.Ct. 400, 160 L.Ed.2d 303 (2004) (the defendant's IQ scores and history of participation in special education classes can be considered a reason to impose a sentence more lenient than death.)

Third, Solis Diaz' lack of a criminal history (no prior felonies and only two minor juvenile offenses) is a mitigating factor that should lessen the severity of his sentence. The Washington Supreme Court has said that factors relevant to increasing or decreasing a sentence include factors that

"relate to the crime, the defendant's culpability for the crime, or **the past criminal record of the defendant**." *State v. Law*, 154 Wn.2d 85, 89, 110 P.3d 717 (2005) (emphasis added). The Court has recognized that "[t]he repetition of criminal conduct aggravates the guilt of the last conviction and justifies a heavier penalty." *State v. Lee*, 87 Wn.2d 932, 937, 558 P.2d 236 (1977). The fact that Solis Diaz did not have repeated serious criminal conduct must be considered a factor which should mitigate his sentence.

Nature of Offense - Less Egregious Injury than Typical for the Offense. In distinguishing homicide crimes from other offenses committed by persons under 18, the *Graham* Court recognized that the result of the crime – injury or death or lack thereof - was "categorically" relevant to whether a constitutional violation had occurred. The Court recognized that a "homicide" crime is only one in which the act results in the death of a human being. *See Manuel v. State*, 48 So.3d 94 (Fl. App. 2010) (13 year old convicted of robbery and two counts of attempted murder; the Court refused to classify this as a "homicide" crime pursuant to *Graham*, 130 S. Ct. at 2027). Whether or not a 92-year sentence is appropriate even for a murder committed by a person under 18 is not before this Court, but in any event it is clear that imposing on Solis Diaz

the same or a *longer* sentence than an adult would receive for murder violates the constitution.

Secondly, Washington cases have consistently recognized that an exceptional sentence is appropriate when the facts of a case are atypical and result in a harm either more or less egregious than the norm. *State v. Akin*, 77 Wn. App. 575, 584-85, 892 P.2d 774 (1995) (escape where defendant voluntarily surrendered was less egregious than typical, justifying mitigated sentence); *State v. Harmon*, 50 Wn. App. 755, 760, 750 P.2d 664 (1988) (rape was more egregious than typical, based on deliberate cruelty, justifying aggravated sentence).

Solis Diaz's offense was less egregious than typical for first degree assault based on the lack of any physical injury. The lack of any injury is not already an element of first degree assault considered in setting the standard range, and therefore can be considered a factor justifying a sentence below the standard range. *See*, *State v. Stubbs*, 170 Wn.2d 117, 240 P.3d 143 (2010) (reversing 480-month exceptional sentence for first degree assault because infliction of great bodily harm is already considered in the standard range sentence for that crime). Applying the same analysis as *Stubbs* used for an aggravating factor, the lack of any injury in Solis Diaz's case must be considered a mitigating factor. And since even a 480-month sentence was too long for an adult convicted of

inflicting injuries the trial judge in *Stubbs* considered "worse than death," (117 Wn.2d at 122), it follows that Solis Diaz's sentence which is more than double Stubbs's sentence and is imposed for a crime committed as a juvenile is not justified by the nature of the offense.

Nature of the Offense – Excessive Multiple Counts with Consecutive Sentences. The issue before the Court is whether the seriousness of the offense justifies a sentence as serious as a *de facto* life sentence. Here, convictions for fewer first degree assault convictions would not have resulted in a *de facto* life sentence. It was the piling on of more consecutive assault and firearm enhancement sentences for unintended victims who were not injured that led to the life sentence.

Washington courts recognize that an offense is more culpable when injuries greater than typical are inflicted and less culpable when the cumulative effects of added multiple counts are less than typical. *State v. Batista*, 116 Wn.2d 777,787–88, 808 P.2d 1141 (1991); *State v. Sanchez*, 69 Wn.App. 255, 848 P.2d 208 (1993); *State v. Randoll,* 111 Wn.App. 578, 45 P.3d 1137 (2002). As *State v. Sanchez*, *supra*, 69 Wn.App. at 260-63, explained, Washington courts evaluate the excessiveness of a sentence for multiple counts of a criminal offense by examining the additional harm caused by the additional counts. In Solis Diaz's case, the presence of six people during the shooting does not mean the nature of the

offense was six or twelve times as serious, warranting six consecutive assault sentences plus six consecutive firearm enhancements. Applying the same rationale as *Sanchez*, the cumulative effect of the additional counts was excessive. Furthermore, Washington law requires mitigation of sentences when the application of standard sentencing ranges to multiple counts would lead to a sentence that is clearly excessive. RCW 9.94A.535(1)(g). Such mitigation is justified here.

Nature of Offense: Prosecutor's Plea Offer and Co-Defendant's Sentence. The prosecutor's offer to Solis Diaz of a 15-year sentence, and the co-defendant's 12.5 year sentence, shows the State believed 12 to 15 years in prison was appropriate punishment for this crime. In contrast, Solis Diaz's 92-year sentence – more than six times the plea offer and the co-defendant's sentence - is excessive and not justified by the nature of Solis Diaz's offense.

Moreover, as the *Graham* Court recognized, a juvenile like Solis Diaz is not capable of making the same kind of mature decision about the plea offer as an adult, rendering it unfair and unconstitutional to allow the extremely severe consequence of his rejection of the plea offer to stand. *See*, *Graham*, 130 S.Ct. at 2032 (noting juveniles' "Difficulty in weighing long-term consequences; a corresponding impulsiveness; and reluctance to trust defense counsel seen as part of the adult world a rebellious youth

rejects, all can lead to poor decisions by one charged with a juvenile offense.") Adolescents' neurological development is particularly unsuited to the adult plea bargaining process, because the frontal lobe of the brain, which "manages impulse control, long-term planning, priority setting, calibration of risk and reward and insight ... [,] is still growing and changing during adolescence and beyond . . . ." Abbe Smith, "I Ain't Takin No Plea": The Challenges in Counseling Young People Facing Serious Time, 60 Rutgers L. Rev. 11, 20 (2007). Evaluating long-term consequences and conducting the kind of cost-benefit analysis based on experience that an adult would conduct when faced with a plea offer are especially difficult for adolescents. Laura Cohen & Randi Mandelbaum, "Kids Will Be Kids: Creating a Framework for Interviewing and Counseling Adolescent Clients," 79 Temple L. Rev. 357, 367, 368 (2006). For these reasons, the adult plea bargaining process is difficult for any adolescent, but it is even more difficult for an adolescent with Solis Diaz's cognitive impairments. All these cognitive differences should be considered by the Court in determining the constitutionality of Solis Diaz's sentence.

Factor 2 – Legislative Purpose. As petitioner's brief points out, Solis Diaz's sentence violates the purpose section of the Sentencing

Reform Act ("SRA") in numerous ways. It also violates several other provisions of the SRA.

The heart of the SRA is the "adult" felony sentencing grid in RCW 9.94A.510, which sets out the presumptive range sentence for each category of offense. The sentencing ranges of the SRA were established with crimes committed by adults in mind. *See* RCW 9.94A.030(33) (defining "offender" to whom the SRA applies as a person 18 or older, unless juvenile court jurisdiction has been declined). The ranges are carefully calibrated to impose a longer sentence for defendants who commit a more serious offense and have a higher offender score (prior criminal record). For offenders with no countable criminal record, like Solis Diaz, the mid-point of the range goes from 23 years for first degree murder down to 14 years for second degree murder and less for less serious crimes. Solis Diaz's sentence of 92 years is literally off the chart; the longest sentence on the grid is 548 months, the top end of the range for committing first degree murder and having an offender score of 9 or more. RCW 9.94A.510. Sentencing Solis Diaz to double that, for a non-homicide crime committed while under 18, defies the legislative purpose of the entire sentencing grid.

The SRA's prosecution standards also support a reduced sentence here. RCW 9.94A.411(1) encourages prosecutors not to charge counts

which serve no additional public purpose, "would result in decreased respect for the law," or where the accused is already being sentenced to a lengthy period of confinement on other charges. Charging Solis Diaz with six first degree assault counts each with a mandatory firearm enhancement does not serve an additional public purpose and thus violates the SRA's prosecution standards.

Similarly, the number of firearm enhancements sought here violated the legislative purpose of the "Hard Time for Armed Crime" law because Solis Diaz was involved with only one gun crime incident, and the increased risk to public safety of the crimes would have been punished adequately with fewer counts. Moreover, firearm enhancements do not apply to drive-by shooting convictions, indicating the Legislature understood that the use of a gun was already punished as part of the SRA for that offense and no additional punishment for gun use is necessary in that context. RCW 9.94A.533(f). The legislative purpose of considering the risk posed by gun crimes supports a lower sentence here.

Additionally, the Legislature mandated that if the "multiple offense policy" regarding consecutive sentences for multiple counts results in a standard range that is clearly excessive, the sentence must be mitigated. RCW 9.94A.535(1)(g). Accordingly, Solis Diaz's sentence violated the legislative purpose of RCW 9.94A.535.

Factor 3 – Sentence in Other Jurisdictions. As noted above in Section IVA of this brief, California has repeatedly ruled that lengthy sentences for non-homicide crimes committed by juveniles, whether officially designated life without parole sentences or instead a term of years equivalent to a lifetime, are unconstitutional. This factor helps demonstrate the unconstitutionality of Solis Diaz's sentence.

Factor 4 – Other Sentences in Washington. Sentencing practices in Washington show that several people have received a life sentence for four aggravated first degree murders, in contrast to Solis Diaz's *de facto* life sentence for crimes where no one was injured.[1] Another person who shot six people resulting in one death and five victims injured is also serving a life sentence.[2]

An unconstitutional lack of proportionality is also apparent from cases in which defendants received far shorter sentences than Solis Diaz for crimes resulting in death. In a case where numerous young people were in the vicinity of a school shooting, and one student was killed by being shot three times at close range, a sentence of 280 months was imposed (about 1/4 of Solis Diaz's sentence). *State v. Chanthabouly*, ___

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[1] David Anderson,Trial Judge Report No. 205; Alex Baranyi, Trial Judge Report No. 267; David Rice, Trial Judge Report No. 43; Leemah Carneh, http://www.seattlepi.com/local/article/Guilty-plea-life-sentence-in-2001-multiple-895126.php .

[2] Naveed Haq, http://www.komonews.com/news/local/81528947.html

Wn.App. ___, 262 P.3d 144 (2011). The Lewis County prosecutor's web site lists adult offenders convicted of murder or assault who received far lower sentences than Solis Diaz. http://lewiscountywa.gov/news-releases-february-2010-12. For instance, a 60 year old man convicted of second degree murder with a firearm enhancement for shooting and killing the victim with multiple gunshots to the neck and head was sentenced after trial to 280 months, again one-quarter of Solis Diaz's sentence.

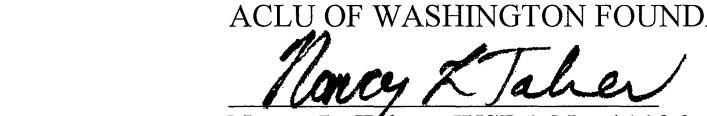
In addition, other more serious assault cases have not resulted in nearly as extreme a sentence as Solis Diaz's. One defendant received a 93-month sentence (1/12 of Solis Diaz's) for a first degree assault and robbery which resulted in very serious injuries. *State v. M.A.*, 106 Wn.App. 493, 23 P.3d 508 (2001). Another defendant received 24 months for a second degree assault case where the victim needed to have two brain surgeries. *State v. Randoll*, *supra*. Just these few examples demonstrate the unconstitutionality of Solis Diaz's sentence based on the fourth *Fain* factor.

V. CONCLUSION

For the foregoing reasons, Solis Diaz's *de facto* life sentence for a non-homicide offense committed while under 18 violates both the United States Constitution and the Washington Constitution. This Court should remand for resentencing to a far lower sentence.

Respectfully submitted this 15th day of December, 2011.

ACLU OF WASHINGTON FOUNDATION



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