IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

In re the Personal Restraint Petition of GUADALUPE SOLIS DIAZ, JR., Petitioner.	No. 42064-3-II UNPUBLISHED OPINION

Quinn-Brintnall, P.J. — On December 7, 2007, a jury found Guadalupe Solis Diaz, Jr. guilty of six counts of first degree assault, one count of drive-by shooting, and one count of second degree unlawful possession of a firearm for his role in a drive-by shooting. RCW 9A.36.011(1)(a), .045(1); RCW 9.41.040(2)(a)(iii). The trial court sentenced Solis Diaz, who was 16 years old at the time he committed the crime, to 1,111 months total confinement, a standard range sentence under the Sentencing Reform Act of 1981 (SRA), ch. 9.94A RCW. Solis Diaz unsuccessfully challenged only his convictions in a direct appeal to this court. *State v. Solis-Diaz*, noted at 152 Wn. App. 1038 (2009), *review denied*, 168 Wn.2d 1020 (2010). Having never challenged his sentence, and in light of the United States Supreme Court's recent decision in *Graham v. Florida*, ___ U.S. ___, 130 S. Ct. 2011, 176 L. Ed. 2d 825 (2010), Solis Diaz now brings this personal restraint petition (PRP), arguing that his sentence violates the Eighth

Amendment's ban on cruel and unusual punishment and the ban against cruel punishment in article I, section 14 of the Washington Constitution. RAP 16.4(c)(2), (4). Solis Diaz also contends for the first time that he received ineffective assistance of counsel at sentencing. We agree with Solis Diaz that his counsel's representation during sentencing was constitutionally deficient and we remand for resentencing.

FACTS

At approximately midnight on August 10, 2007, 16-year-old Solis Diaz, a passenger in a car driven by 21-year-old Juan "Pollo" Velasquez, fired seven shots into a crowd of people outside of the Tower Tavern in Centralia, Washington. All, including the intended target of the drive-by shooting, escaped injury. *Solis-Diaz*, 2009 WL 3261249, at *1. Several days later, police arrested Solis Diaz who was subsequently charged with six counts of first degree assault,[1] one count of drive-by shooting, and one count of second degree unlawful possession of a firearm. *Solis-Diaz*, 2009 WL 3261249, at *2.

Before trial, the State offered Solis Diaz a plea agreement: 180 months confinement plus 24 to 48 months community supervision.[2] Solis Diaz did not accept the offer. At the end of a five-day trial, the jury found Solis Diaz guilty of all eight counts as charged and, by special verdict, found that he committed the six assaults while armed with a firearm.

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

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

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

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

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

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

Solis Diaz unsuccessfully appealed his convictions to this court, arguing that the trial court erred by "(1) excluding expert testimony on heuristic reasoning, (2) limiting cross-examination of

a witness on an unrelated plea agreement, (3) permitting the State to question a witness about who was present in the courtroom during trial, and (4) denying his motion in limine to exclude all evidence of gang affiliation." *Solis-Diaz*, 2009 WL 3261249, at *1. Solis Diaz also argued that his attorney was ineffective for failing to "object to numerous statements containing rumor and hearsay about [Solis Diaz's] gang involvement, speculation about motive for the shootings, and [for failing] to pin down [Solis Diaz's] alibi." *Solis-Diaz*, 2009 WL 3261249, at *7 (2d alteration in original). We affirmed Solis Diaz's convictions and the Washington Supreme Court denied review. *Solis-Diaz*, 2009 WL 3261249, at *8, *review denied*, 168 Wn.2d 1020. We issued a mandate on Solis Diaz's case on May 10, 2010.

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

DISCUSSION

Ineffective Assistance

Solis Diaz contends that he received ineffective assistance at sentencing because his counsel's performance fell below objective standards of reasonableness and prevailing

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

Standard of Review

A petitioner may request relief through a PRP when he is under unlawful restraint. RAP 16.4(a)-(c). Under both the Washington and United States Constitutions, a criminal defendant is entitled to the effective assistance of counsel at critical stages in the litigation. *State v. Page*, 147 Wn. App. 849, 855, 199 P.3d 437 (2008), *review denied*, 166 Wn.2d 1008 (2009). To establish ineffective assistance of counsel, a defendant must show that (1) his counsel's performance was deficient *and* (2) the deficient performance prejudiced him. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); *State v. McFarland*, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995). If a defendant fails to satisfy either prong (deficient performance *and*

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

prejudice), we need not inquire further. *State v. Hendrickson*, 129 Wn.2d 61, 78, 917 P.2d 563 (1996).[4]

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

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

> [S]trategic choices made *after thorough investigation of law and facts relevant to plausible options* are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation. In

[4] In a recent decision, *In re Crace*, our Supreme Court concluded that, as on direct appeal, a defendant alleging ineffective assistance in a PRP need only show that there is a "reasonable probability" that defense counsel's deficient performance caused prejudice rather than the heightened "actual and substantial" prejudice standard employed in reviewing other collateral attacks. *But see In re Crace*, 280 P.3d at 1109 (Wiggins, J., concurring) ("In my view, we should wait to address the 'double prejudice' question for a case that actually raises it—a case in which a petitioner has not met the 'actual and substantial prejudice' burden but has met the prejudice standard from [*Strickland*]. If that case exists, it should be there that we resolve this issue, not a case where the petitioner has not made the showing required by *Strickland*."). Here, Solis Diaz's ineffective assistance claim meets both the "reasonable probability" of prejudice and "actual and substantial" prejudice standard.

> other words, *counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary*. In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments.

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

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

Failing to Apprise the Trial Court of Important Factual and Procedural Considerations

At sentencing, Solis Diaz's counsel failed to inform the trial court of a number of important factual and procedural considerations. Although none of these errors or omissions alone require reversal, viewing them cumulatively strongly indicates that the actions of Solis Diaz's trial counsel at sentencing fell below objective standards of effective representation.

First, counsel mistakenly indicated to the trial court that Solis Diaz was "declined as a juvenile and tried [in superior court]." Br. of Resp't, App. F at 6. In fact, because Solis Diaz was 16 and charged with multiple counts of first degree assault (a serious violent offense as defined in former RCW 9.94A.030(41) (2006)), he was tried as an adult by operation of statute, sometimes referred to as "auto-declined." RCW 13.04.030(1)(e)(v)(E)(I). As such, no judicial

officer ever held a declination hearing pursuant to *Kent*[5] to consider Solis Diaz's maturity and mental development and determine whether he had the mental and emotional sophistication necessary to warrant prosecution as an adult. Instead, based solely on the nature of the charged offense and Solis Diaz's age, the auto-declination statute mandated that he be tried as an adult. RCW 13.04.030(1)(e)(v)(E)(I).

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

Second, while a presentencing report could have shed light on issues related to Solis Diaz's mental and emotional sophistication, Solis Diaz's trial counsel failed to produce or request such a report for sentencing. As the American Bar Association's standards clearly state, if no

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

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

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

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

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

Failing to Apprise the Trial Court of Important Legal Considerations

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

Solis Diaz relies primarily on *In re Mulholland*, 161 Wn.2d 322, 166 P.3d 677 (2007). The facts of *Mulholland* are strikingly similar to the facts of Solis Diaz's case. In *Mulholland*, the defendant fired a series of shots at a home wherein six people were eating dinner. 161 Wn.2d at

324-25. Nobody was injured and after Mulholland was arrested, he was convicted of six counts of first degree assault (with attendant firearm enhancements) and one count of drive-by shooting. *Mulholland*, 161 Wn.2d at 324-25. At sentencing, Mulholland requested an exceptional downward sentence. The trial court denied the request, stating, "I don't believe there is any discretion that this court has with regard to running the sentences concurrent [sic]. I think the law requires me to run them consecutive [sic]. I don't believe there's any discretion that this court has in that regard." *Mulholland*, 161 Wn.2d at 326 n.1 (alterations in original). The court sentenced Mulholland to 927 months.

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

> Here, the trial court sentenced Mulholland while possessed of a mistaken belief that it did not have the discretion to impose a mitigated exceptional sentence for which he may have been eligible. This error is particularly significant because the trial court made statements on the record which indicated some openness toward an exceptional sentence, expressing sympathy toward Mulholland because of his former military service. Addressing Mulholland, the trial court noted:
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> > Mr. Mulholland, I know that this incident has impacted your family tremendously and it's impacted you, and I can't ignore what you gave to this country. It's a sacrifice to serve in the military and we—that's important and we recognize that. But when I'm looking at the counts

> and what the jury decided, I don't have discretion to do anything but follow the law. I don't have the discretion to have the sentences in my view run at the same time.
>
> The record does not show that it was a certainty that the trial court would have imposed a mitigated exceptional sentence if it had been aware that such a sentence was an option. Nonetheless, the trial court's remarks indicate that it was a possibility. In our view, this is sufficient to conclude that a different sentence might have been imposed had the trial court applied the law correctly. Where the appellate court "cannot say that the sentencing court would have imposed the same sentence had it known an exceptional sentence was an option," remand is proper. *State v. McGill*, 112 Wn. App. 95, 100-01, 47 P.3d 173 (2002). As we said in *Grayson*, "[w]hile no defendant is entitled to an exceptional sentence . . ., every defendant is entitled to ask the trial court to consider such a sentence and to have the alternative actually considered." *Grayson*, 154 Wn.2d at 342 (citing *Garcia-Martinez*, 88 Wn. App. [322,] 330, 944 P.2d 1104 [(1997)]).

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

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

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

> Three general differences between juveniles under 18 and adults demonstrate that juvenile offenders cannot with reliability be classified among the worst offenders. First, as any parent knows and as the scientific and sociological studies respondent and his *amici* cite tend to confirm, "[a] lack of maturity and an underdeveloped sense of responsibility are found in youth more often than in adults and are more understandable among the young. These qualities often result in impetuous and ill-considered actions and decisions." [*Johnson v. Texas*, 509 U.S. 350, 367, 113 S. Ct. 2658, 125 L. Ed. 2d 290 (1993)]. . . . It has been noted that "adolescents are overrepresented statistically in virtually every category of reckless behavior." *Arnett, Reckless Behavior in Adolescence: A Developmental*

> *Perspective*, 12 Developmental Rev. 339 (1992). In recognition of the comparative immaturity and irresponsibility of juveniles, almost every State prohibits those under 18 years of age from voting, serving on juries, or marrying without parental consent. . . .
>
> The second area of difference is that juveniles are more vulnerable or susceptible to negative influences and outside pressures, including peer pressure. . . . This is explained in part by the prevailing circumstance that juveniles have less control, or less experience with control, over their own environment. . . .
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> The third broad difference is that the character of a juvenile is not as well formed as that of an adult. The personality traits of juveniles are more transitory, less fixed. . . .
>
> These differences render suspect any conclusion that a juvenile falls among the worst offenders. The susceptibility of juveniles to immature and irresponsible behavior means "their irresponsible conduct is not as morally reprehensible as that of an adult." [*Thompson v. Oklahoma*, 487 U.S. 815, 835, 108 S. Ct. 2687, 101 L. Ed. 2d 702 (1988) (plurality opinion)]. Their own vulnerability and comparative lack of control over their immediate surroundings mean juveniles have a greater claim than adults to be forgiven for failing to escape negative influences in their whole environment. . . . The reality that juveniles still struggle to define their identity means it is less supportable to conclude that even a heinous crime committed by a juvenile is evidence of irretrievably depraved character. From a moral standpoint it would be misguided to equate the failings of a minor with those of an adult, for a greater possibility exists that a minor's character deficiencies will be reformed. Indeed, "[t]he relevance of youth as a mitigating factor derives from the fact that the signature qualities of youth are transient; as individuals mature, the impetuousness and recklessness that may dominate in younger years can subside." [*Johnson*, 509 U.S. at 368].

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

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

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

Accordingly, remand for resentencing is appropriate in light of counsel's deficient performance.[6]

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

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

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

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

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

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

QUINN-BRINTNALL, P.J.

We concur:

VAN DEREN, J.

PENOYAR, J.

what that is.

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

The legislature is the appropriate body to define crimes and fix punishments. To the extent that *Graham* suggests that an opportunity for parole must be available for juvenile offenders convicted of nonhomicide offenses, only the legislature has the authority to amend the SRA to allow for such remedy, and only the executive branch can implement it.