NO. 97689-9

SUPREME COURT OF THE STATE OF WASHINGTON

In re the Personal Restraint Petition of:

CARL ALONZO BROOKS,

Petitioner.

SUPPLEMENTAL BRIEF OF RESPONDENT

ROBERT W. FERGUSON
Attorney General

Alex Kostin, WSBA #29115
Assistant Attorney General
Corrections Division OID #91025
PO Box 40116
Olympia WA 98504-0116
(360) 586-1445
Alexei.Kostin@atg.wa.gov

TABLE OF CONTENTS

I. INTRODUCTION 1

II. STATEMENT OF THE CASE 3

III. ARGUMENT 7

A. Brooks Does Not Show an Unlawful Restraint Under RAP 16.4 7

B. RCW 9.94A.730 Does Not Apply to Indeterminate Sentences that Already Provide an Opportunity for Parole 7

C. Brooks Does Not Show a Constitutional Violation Because the Sentence Includes the Opportunity for Parole, and the Board Has Repeatedly Considered Whether to Release Brooks 16

D. Brooks is Afforded Meaningful Opportunities to Obtain Release, But His Demonstrated Lack of Rehabilitation So Far Has Prevented Release 18

IV. CONCLUSION 20

TABLE OF AUTHORITIES

Cases

Aetna Life Ins. Co. v. Wash. Life & Disability Ins. Guar. Ass'n,
83 Wn.2d 523, 520 P.2d 162 (1974) 15

Anderson v. Seattle,
78 Wn.2d 201, 471 P.2d 87 (1970) 14

Davison v. State,
___ Wn.2d___, 466 P.3d 231 (June 25, 2020) 14

In re Addleman,
151 Wn.2d 769, 92 P.3d 221 (2004) 11, 12

In re Cashaw,
123 Wn.2d 138, 866 P.2d 8 (1994) 7, 11

In re Dalluge,
162 Wn.2d 814, 177 P.3d 675 (2008) 7

In re Grantham,
168 Wn.2d 204, 227 P.3d 285 (2010) 7

Millay v. Cam,
135 Wn.2d 193, 955 P.2d 791 (1998) 15

Miller v. Alabama,
567 U.S. 460, 132 S. Ct. 2455, 183 L. Ed. 2d 407 (2012) ..... passim

Montgomery v. Louisiana,
136 S. Ct. 718 (2016) 16, 17, 18, 19

Skagit Surveyors v. Friends,
135 Wn.2d 542, 958 P.2d 962 (1998) 9

State v. Bassett,
192 Wn.2d 67, 428 P.3d 343 (2018) 4, 17

State v. Contreras,
124 Wn.2d 741, 880 P.2d 1000 (1994) 9

State v. Fagalde,
85 Wn.2d 730, 539 P.2d 86 (1975) 9

State v. Johnson,
119 Wn.2d 167, 829 P.2d 1082 (1992) 9

State v. Ramos,
187 Wn.2d 420, 387 P.3d 650 (2017) 17

State v. Scott,
190 Wn.2d 586, 416 P.3d 1182 (2018) 5, 14, 17, 18

State v. Sommerville,
111 Wn.2d 524, 760 P.2d 932 (1988) 9

State v. Stannard,
109 Wn.2d 29, 742 P.2d 1244 (1987) 10

State v. Thorne,
129 Wn.2d 736, 921 P.2d 514 (1996) 9

Statutes

Chapter 9.94A RCW 10, 13

Chapter 9.95 RCW ..... passim

RCW 10.95.030(3) 4, 13

RCW 10.95.035(1) 4

RCW 9.94.730 13

RCW 9.94A.010 8

RCW 9.94A.030(5) 12

RCW 9.94A.505 8

RCW 9.94A.533(3)(e) 10

RCW 9.94A.535..... 8

RCW 9.94A.730..... passim

RCW 9.94A.730(1)..... 5, 10, 13

RCW 9.94A.730(3)..... 10, 20

RCW 9.94A.730(5)..... 12

RCW 9.94A.730(7)..... 12

RCW 9.95.0001(2)..... 12

RCW 9.95.009 11

RCW 9.95.017(2)..... 12

RCW 9.95.040(4)..... 18, 19

RCW 9.95.052 19

RCW 9.95.100 11

RCW 9.95.110(1)..... 12

RCW 9.95.110(2)..... 12

RCW 9.95.900 8

Other Authorities

House Bill Report 2SSB5064 6

Senate Bill Report 2SSB5064..... 6

Rules

RAP 16.4 7

RAP 16.4(a) 7

RAP 16.4(c) 7

I. INTRODUCTION

In 1978, at the age of 17, Brooks committed the crimes of murder, rape, kidnapping, robbery, assault, and burglary. The superior court sentenced Brooks to multiple terms of life imprisonment with parole for these crimes, and both the judge and prosecutor recommended a minimum term of life. Despite this recommendation, the Indeterminate Sentence Review Board set a lower minimum term and subsequently considered Brooks for parole on multiple occasions, eventually paroling him in 1991 from his assault, robbery, and burglary sentences to begin serving his remaining consecutive sentences. Most recently, the Board considered Brooks for parole in 2018. The Board found Brooks not yet suitable for parole, and the next parole eligibility review will occur in 2022.

Despite the fact that the Board has already repeatedly reviewed Brooks' suitability for parole, Brooks filed a personal restraint alleging that the Board must consider him for early release under RCW 9.94A.730. Brooks essentially argues that the Supreme Court's decision in *Miller v. Alabama*, 567 U.S. 460, 132 S. Ct. 2455, 183 L. Ed. 2d 407 (2012), and this Court's expansion of the *Miller* rule require the Board to apply the statute to him. However, the court of appeals correctly dismissed the personal restraint petition because Brooks did not demonstrate that his current restraint was unlawful under either statutory or constitutional law.

Brooks cannot show a statutory violation because RCW 9.94A.730 simply does not apply to individuals, such as Brooks, who were sentenced under Chapter 9.95 RCW for crimes committed prior to July 1, 1984. Nothing in the language of RCW 9.94A.730 or in the legislative intent indicates that the statute applies to sentences imposed under the indeterminate sentencing scheme of Chapter 9.95 RCW. The Legislature knows how to apply a statute to indeterminate sentences, and the Legislature chose not to do so for RCW 9.94A.730. Given this legislative decision, this Court may not construe the statute to apply to Brooks' sentence.

Nor does Brooks show any constitutional violation in his restraint. The *Miller* rule, even as extended by this Court, prohibits only life sentences imposed without any opportunity for parole or early release. The constitutional rule does not mandate the actual release of any particular person, and it does not mandate the application of RCW 9.94A.730 to Brooks. Rather, the *Miller* rule requires only that the person receive some opportunity for parole. This constitutional requirement has already been satisfied because the Board has reviewed and will continue review Brooks' fitness for parole under the standards imposed by Chapter 9.95 RCW.

Brooks cannot show a statutory or constitutional violation that places him under an unlawful restraint. For this reason, the Court should affirm the dismissal of the personal restraint petition.

II. STATEMENT OF THE CASE

The superior court sentenced Brooks in 1978 to multiple terms of life imprisonment with parole for his crimes of murder, rape, kidnapping, robbery, assault and burglary, with the sentences for the kidnapping, rape and murder convictions running consecutively. Resp. App. 2, at 2.[1] Despite the recommendation of the judge and prosecutor to set the minimum term at life (*see* Resp. App. 4), the Board set a lower minimum term and subsequently reviewed Brooks' situation several times (*see, e.g.,* Resp. App. 5 through 7; Pet. App. 13), eventually paroling Brooks from the sentences on the robbery, assault and burglary convictions so that he could begin serving the remaining consecutive life sentences (*see* Resp. App. 7). The Board subsequently reevaluated Brooks' suitability for parole from his sentences in 2008, 2010, and 2013. Resp. App. 8, 9, 10, and 11.

The Board most recently evaluated Brooks in 2018. Resp. App. 3. The Board denied Brooks parole at that time due to his failure to complete sex offender treatment, him continuing to incur serious infractions and negative behavioral observations (which included predatory behavior), and the assessment of high risk of re-offense in a recent psychological evaluation. Resp. App. 3, at 4.

[1] "Resp. App." refers to the exhibits in the appendix to the answer to the motion for discretionary review, and "Pet. App." refers to the exhibits in the appendix to the motion for discretionary review.

In 2012, prior to the Board's most recent reviews of Brooks' suitability for parole, the Supreme Court decided the landmark case of *Miller v. Alabama*, 567 U.S. 460, 132 S. Ct. 2455, 183 L. Ed. 2d 407 (2012), holding that the Eighth Amendment prohibits mandatory sentences of life without parole for juveniles. The Court did not foreclose life imprisonment, but ruled that a judge must make an individualized determination of the juvenile's culpability and amenability to rehabilitation before imposing a sentence of life imprisonment without parole. *Id*.

In response to *Miller*, the Washington Legislature passed a bill that has become known as the "*Miller* Fix." Laws of 2014, ch. 130. The "*Miller* Fix" law eliminated mandatory sentences of life without parole for juveniles convicted of aggravated first-degree murder,[2] mandated the resentencing of juveniles sentenced to life imprisonment without parole for such crimes prior to *Miller*, and authorized the Board to release such juvenile offenders after they have served at least twenty-five years in prison. RCW 10.95.030(3); RCW 10.95.035(1).

[2] Although the *Miller* Court did not categorically prohibit sentences of life imprisonment without parole under the Eighth Amendment, this Court subsequently held that the Washington Constitution prohibits sentencing a juvenile to life imprisonment without parole. *State v. Bassett*, 192 Wn.2d 67, 91, 428 P.3d 343 (2018) ("We hold that sentencing juvenile offenders to life without parole or early release constitutes cruel punishment and, therefore, RCW 10.95.030(3)(a)(ii) is unconstitutional, insofar as it allows such a sentence, under article I, section 14 of Washington Constitution"). The Court thus invalidated the part of the "*Miller* fix" law that would still allow for sentencing a juvenile to life imprisonment without parole.

In addition to amending the sentences for aggravated murder, the "*Miller* Fix" law also authorized the Board to grant early release to other juveniles serving lengthy determinate sentences without an opportunity for parole, after they served twenty-years of confinement. RCW 9.94A.730(1). As this Court recognized, '"[t]he constitutional violation identified in the *Miller* line of cases is the failure to allow a juvenile offender the opportunity for release when his or her crime was the result of youthful traits.'" *State v. Scott*, 190 Wn.2d 586, 590, 416 P.3d 1182 (2018) (quoting *State v. Scott,* 196 Wn. App. 961, 971, 385 P.3d 783 (2016)). "[T]he Court reiterated that '"[a] State is not required to guarantee eventual freedom," but must provide "some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation."'" *Scott*, 190 Wn.2d at 593 (quoting *Miller*, 567 U.S. at 479) (quoting *Graham v. Florida*, 560 U.S. 48, 75, 130 S. Ct. 2011, 176 L. Ed. 2d 825 (2010)). Thus, the constitutional error under *Miller* is not the existence of a lengthy sentence, but the lack of an opportunity for parole or other early release from the sentence. *Scott*, 190 Wn.2d at 596-97. To cure this constitutional infirmity, without requiring a resentencing of all juveniles serving lengthy determinate sentences, the Legislature enacted RCW 9.94A.730 to establish an avenue of early release for juveniles who otherwise lacked an opportunity for parole. *Scott*, 190 Wn.2d at 597 (holding the "statute's parole provision cures the *Miller* violation. . . .").

The legislative history confirms that the Legislature enacted this "*Miller* fix" law to cure the potential constitutional infirmity of a juvenile serving a lengthy prison sentence without the possibility of parole or other early release. *See, e.g.*, House Bill Report 2SSB5064; Senate Bill Report 2SSB5064.[3] However, nothing in the statue or the legislative history indicates an intent to apply RCW 9.94A.730 to juvenile offenders who already had the opportunity for parole.

After the Board denied Brooks parole in 2018, Brooks filed his current petition, contending that the Board must consider him for early release under RCW 9.94A.730. Without calling for a response from the Board, the Acting Chief Judge dismissed the petition after concluding that RCW 9.94A.730 did not apply to juveniles sentenced under the indeterminate sentencing scheme of Chapter 9.95 RCW. The Acting Chief Judge determined that Brooks had an opportunity for parole, and that system for parole, not the system for early release under the Sentencing Reform Act (SRA), governed whether the Board should release Brooks.

The Acting Chief Judge did not err in dismissing the petition. Because Brooks does not show his restraint is unlawful under the statute or the Constitution, the Court should affirm the dismissal of the petition.

---

[3]https://app.leg.wa.gov/billsummary?BillNumber=5064&Year=2013&Initiative=false

III. ARGUMENT

A. Brooks Does Not Show an Unlawful Restraint Under RAP 16.4

To obtain relief, Brooks must prove that he is under a present restraint that is unlawful for one of the reasons set forth in RAP 16.4(c). RAP 16.4(a); *In re Cashaw*, 123 Wn.2d 138, 149, 866 P.2d 8 (1994); *In re Dalluge*, 162 Wn.2d 814, 817, 177 P.3d 675 (2008). Brooks need not make a threshold showing of actual prejudice to obtain review, but he must prove the restraint is actually unlawful in order to obtain relief. *In re Grantham*, 168 Wn.2d 204, 214-17, 227 P.3d 285 (2010). Brooks may obtain relief by demonstrating either violation of state law or a constitutional violation. RAP 16.4(c); *Cashaw,* 123 Wn.2d at 148. Brooks does not show either one.

B. RCW 9.94A.730 Does Not Apply to Indeterminate Sentences that Already Provide an Opportunity for Parole

Brooks argues that his restraint is unlawful because the Board did not consider him for early release under RCW 9.94A.730. However, several factors show that RCW 9.94A.730 does not apply to Brooks since he already has an opportunity for parole under Chapter 9.95 RCW.

First, the fact that the Legislature specifically placed the statute in the SRA (Chapter 9.94A) rather than in the pre-SRA statutes (Chapter 9.95 RCW) shows the legislative intent to apply RCW 9.94A.730 only to determinate sentences. The Legislature purposely did so to create an

opportunity for early release because the SRA does not allow for parole from determinate sentences.

In enacting the SRA, the Legislature abolished parole for sentences imposed for crimes committed on or after July 1, 1984. *See* RCW 9.95.900. The abolishment of parole advanced the purpose of the SRA, which was to develop "a system for the sentencing of felony offenders which structures, but does not eliminate, discretionary decisions affecting sentences. . . ." RCW 9.94A.010. The Legislature achieved this purpose by eliminating indeterminate sentences with the opportunity for parole, and by requiring determinate sentences of a specified length depending upon the crime and the offender's criminal history. *See, e.g.*, RCW 9.94A.505 through .535 (establishing the sentencing grid and authorizing exceptional sentences). Thus, in enacting RCW 9.94A.730, the Legislature knew that determinate sentences did not allow for parole.

Since the SRA abolished parole, the Legislature after *Miller* recognized the specific need to establish a system of early release for juveniles serving a determinate sentence for crimes committed on or after July 1, 1984. The Legislature therefore placed RCW 9.94A.730 in the SRA to meet this specific need of creating a system for early release. The Legislature, however, also recognized there was no similar need for juveniles serving indeterminate sentences imposed under Chapter 9.95

RCW because those juveniles already had the preexisting opportunity for parole under that statutory sentencing scheme—an opportunity that was not taken away by the SRA.

Second, the language of RCW 9.94A.730 itself shows that the Legislature intended to apply the statute only to the sentences imposed under the SRA, not sentences imposed under Chapter 9.95 RCW. To determine legislative intent, the Court looks to the language of the statute, interpreting all provisions in relation to each other. *Skagit Surveyors v. Friends*, 135 Wn.2d 542, 564, 958 P.2d 962 (1998). The Court attempts "to give effect to the plain meaning of the words the Legislature has used." *State v. Sommerville*, 111 Wn.2d 524, 531, 760 P.2d 932 (1988). "Each provision is viewed in relation to other provisions and the object is a consistent construction of the whole." *Id*. (*quoting Addleman v. Board of Prison Terms & Paroles*, 107 Wn.2d 503, 509, 730 P.2d 1327 (1986)); *see also State v. Thorne*, 129 Wn.2d 736, 761, 921 P.2d 514 (1996).

The Court will also examine all applicable statutes and harmonize any ambiguous or conflicting provisions. *State v. Fagalde*, 85 Wn.2d 730, 736, 539 P.2d 86 (1975); *State v. Johnson*, 119 Wn.2d 167, 172, 829 P.2d 1082 (1992). The Court will avoid an interpretation that yields unlikely, strange, or absurd consequences. *State v. Contreras*, 124 Wn.2d 741, 747, 880 P.2d 1000 (1994); *State v. Stannard*, 109 Wn.2d 29, 36, 742 P.2d 1244

(1987). Viewing RCW 9.94A.730 as a whole, and reading it in conjunction with other statutes, including those in Chapter 9.95 RCW, shows the Legislature intended not to apply the statute to indeterminate sentences.

Here, the Legislature specifically used the phrase "notwithstanding any other provision of this chapter," *see* RCW 9.94A.730(1), rather than the broader language of "notwithstanding any other provision of law." *See, e.g.,* RCW 9.94A.533(3)(e). The statutory language in RCW 9.94A.730 thus exempts the juvenile's sentence from restrictions otherwise imposed under Chapter 9.94A RCW, but it does not exempt the sentence from restrictions imposed by other chapters of the Revised Code of Washington. Thus, while RCW 9.94A.730 allows for early release not withstanding any other provision in Chapter 9.94A RCW, the statute does not exempt the juvenile sentence from restrictions imposed by Chapter 9.95 RCW.

In fact, because the language of RCW 9.94A.730 does not exempt the sentences from restrictions imposed by other chapters, application of RCW 9.94A.730 to indeterminate sentences would necessarily create a conflict between the statutory provisions of Chapters 9.94A and 9.95 RCW. For example, RCW 9.94A.730 requires the Board to release the juvenile unless the Board determines that a preponderance of the evidence shows "more likely than not that the person will commit new criminal law violations if released." RCW 9.94A.730(3). This standard, however,

conflicts with the standard imposed by RCW 9.95.100, which prohibits the Board from paroling a person "unless in its opinion his or her rehabilitation has been complete and he or she is a fit subject for release."

If the Court applied RCW 9.94A.730 to indeterminate sentences imposed under Chapter 9.95 RCW, the application would create a statutory conflict because the two statutes create differing standards for determining release, and RCW 9.94A.730 does not exempt the sentence from the provisions of RCW 9.95.100.

As this Court has previously recognized, the Legislature expressly limited the scope of the SRA to crimes committed on or after July 1, 1984. *Cashaw*, 123 Wn.2d at 142. Although the Legislature directed the Board to make decisions for offenders who committed crimes before July 1, 1984, in a manner reasonably consistent with SRA standards, *see* RCW 9.95.009, the Legislature did not directly apply the SRA to offenders who committed crimes prior to July 1, 1984. Instead, Chapter 9.95 RCW still governs those indeterminate sentences. Moreover, while the Board must attempt to make parole decisions consistent with the SRA, the Board must also balance that "attempt" duty with the fact that the offenders under its jurisdiction for crimes committed prior to July 1, 1984 "are not resentenced under the SRA." *In re Addleman*, 151 Wn.2d 769, 775, 92 P.3d 221 (2004). The statutory duty not to parole a person until rehabilitation is complete

supersedes the coexisting duty to attempt to make decisions consistent with the SRA. *Id*.

Other language in RCW 9.94A.730 also indicates the intent to limit application of the statute to determinate sentences. For example, the early release provision directs that the juvenile will serve community custody following the early release. *See* RCW 9.94A.730(5) and (7). "Community custody" is the form of supervision imposed on defendants sentenced for crimes committed on or after July 1, 1984. *See, e.g.*, RCW 9.94A.030(5); RCW 9.95.0001(2); RCW 9.95.017(2); RCW 9.95.110(2). Conversely, parole is the form of supervision imposed on defendants sentenced for crimes committed prior to July 1, 1984. *See, e.g.*, RCW 9.95.110(1). The fact that the Legislature referred to releasing a juvenile to community custody, not parole, indicated that the Legislature intended to restrict application of RCW 9.94A.730 to juveniles serving determinate sentences for crimes committed on or after July 1, 1984, not to juveniles serving indeterminate sentences for crimes committed prior to July 1, 1984.

The Legislature knows how to include statutory language to authorize the Board to grant release to a juvenile such as Brooks, notwithstanding the requirements of Chapter 9.95 RCW. For example, the Legislature expressly authorized the Board to release juveniles convicted of aggravated first-degree murder regardless of the date of offense even though

such juveniles would otherwise not be eligible for parole under Chapter 9.95 RCW. *See* RCW 10.95.030(3). The Legislature did so with express language that specifically authorized the Board to grant early release to such offenders. The Legislature could have similarly enacted a similar statute in Chapter 9.95 RCW, or even expressly worded RCW 9.94A.730 to apply to juvenile offenders who committed the crimes prior to July 1, 1984, but the Legislature did not do so. Rather, the language of RCW 9.94.730 indicates that it applies only to determinate sentences under Chapter 9.94A RCW.

Brooks may argue that the language in RCW 9.94A.730, that "any person convicted of one or more crimes committed prior to the person's eighteenth birthday" is broad enough to cover juveniles sentenced under Chapter 9.95 RCW. However, the Court must read the "any person" phrase in conjunction with the introductory phrase of "Notwithstanding any other provision of this chapter. . . ." RCW 9.94A.730(1). The Court must also read the phrase "any person" to avoid conflicts with other statutes. Reading RCW 9.94A.730 as a whole, as well as in conjunction with other statutes cited above, indicates that "any person" means any person sentenced under Chapter 9.94A RCW, and not any person sentenced under Chapter 9.95 RCW.

Finally, applying RCW 9.94A.730 to pre-SRA indeterminate sentences does not serve the purpose of the statute, which is to avoid the

constitutional defect recognized in the *Miller* decision. As this Court previously recognized, RCW 9.94A.730 avoids the constitutional defect in a determinate sentence by providing the juvenile with the opportunity for early release from a sentence that otherwise does not authorize parole. *Scott*, 190 Wn.2d at 588. It is unnecessary to apply RCW 9.94A.730 to cure a constitutional defect if the sentence already provides for parole because the sentence that already includes an opportunity for parole is not constitutionally defective under *Miller* and its progeny.

Brooks essentially invites this Court to extend the application of RCW 9.94A.730 to pre-SRA offenders like himself, despite the fact the Legislature chose to limit its application to SRA offenders. This Court should decline Brooks' invitation. For the Court to apply RCW 9.94A.730 to indeterminate sentences under Chapter 9.95 RCW, the Court must deviate from the narrowly limited duty of statutory interpretation. This Court, however, repeatedly emphasized its utmost respect for the Legislature's law enactment function and the Court's refusal to interfere into that function by judicially amending the statutes. *See Davison v. State*, ___ Wn.2d___, 466 P.3d 231, 240 (June 25, 2020) ("We must respect the legislature's plenary power to enact laws."); *Anderson v. Seattle,* 78 Wn.2d 201, 202, 471 P.2d 87 (1970) ("It is neither the function nor the prerogative of courts to modify legislative enactments."); *Millay v. Cam,* 135 Wn.2d

193, 203, 955 P.2d 791 (1998) ("Courts do not amend statutes by judicial construction, nor rewrite statutes 'to avoid difficulties in construing and applying them.'") (citations omitted). This Court will not add language to a statute, and essentially become a "super legislature," by creating additional provisions that the Legislature chose not to create. Adding such new provisions to the statute would violate separation of powers doctrine, with the Court encroaching on the Legislature's function to enact the law. *See Aetna Life Ins. Co. v. Wash. Life & Disability Ins. Guar. Ass'n*, 83 Wn.2d 523, 528, 520 P.2d 162 (1974).

Here, the Legislature enacted RCW 9.94A.730 to grant an opportunity for early release to juveniles serving a determinate sentence under the SRA. The Legislature could have, but did not, extend this provision to juveniles serving an indeterminate sentence. The Legislature chose not to extend the provisions of RCW 9.94A.730 to indeterminate sentences because those sentence already include an opportunity for parole. Applying well-established principles, the Court should reject Brooks' suggestion to judicially extend the reach of RCW 9.94A.730.

In short, RCW 9.94A.730 does not apply to Brooks. Consequently, Brooks fails to show his current restraint violates RCW 9.94A.730. Brooks does not show a statutory violation requiring relief in this case.

C. Brooks Does Not Show a Constitutional Violation Because the Sentence Includes the Opportunity for Parole, and the Board Has Repeatedly Considered Whether to Release Brooks

Brooks also does not show a constitutional violation under *Miller* or its progeny, including this Court's extension of the *Miller* rule, because Brooks' sentence has always included an opportunity for parole. The Board has repeatedly considered whether to release Brooks on parole, and the Board determined that Brooks is not yet suitable for parole. No constitutional infirmity exists in this case.

As discussed above, *Miller* held that imposing a mandatory sentence of life without parole on a juvenile, without an individualized determination of the juvenile defendant's culpability and amenability to rehabilitation, violates the Eighth Amendment. *Miller*, 567 U.S. at 479. The Supreme Court, however, did not hold that the Eighth Amendment categorically bars a sentence of life imprisonment without parole. Moreover, the Supreme Court subsequently clarified that a juvenile's life sentence does not violate the Eighth Amendment if the juvenile has the opportunity for parole. *Montgomery v. Louisiana*, 136 S. Ct. 718, 736 (2016).

This Court has since expanded the *Miller* rule in two ways. First, the Court extended the *Miller* rule by holding that the Washington Constitution prohibits sentencing a juvenile offender to life imprisonment without possibility of parole. *State v. Bassett*, 192 Wn.2d 67, 91, 428 P.3d 343

(2018) (invalidating RCW 10.95.030 to the extent that the amended statute still allowed the superior court to impose a minimum sentence of life). Second, the Court extended the *Miller* rule to apply to an excessively lengthy determinate sentence that amounted to a *de facto* sentence of life imprisonment without parole. *State v. Ramos*, 187 Wn.2d 420, 434 and 439, 387 P.3d 650 (2017). However, like the Supreme Court in *Montgomery*, this Court has determined that a life sentence does not contain a constitutional infirmity if there is the opportunity for parole. *Scott*, 190 Wn.2d at 596-97.

This Court recognized that the constitutional infirmity in a sentence is not the act of confining the person for an extensive period of time, perhaps even for a majority of the person's life. *Scott*, 190 Wn.2d at 593 (quoting *Miller*, 567 U.S. at 479) (recognizing "'[a] State is not required to guarantee eventual freedom….'"). Rather, the constitutional harm occurs if the juvenile is not afforded "'a meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation.'" *Scott*, 190 Wn.2d at 593 (quoting *Miller*, 567 U.S. at 479) (quoting *Graham*, 560 U.S. at 75). In other words, the constitutional error is not the existence of a lengthy sentence, but the absence of any opportunity for release. *Scott*, 190 Wn.2d at 596-97. If the sentence includes the opportunity for release, such as parole, the constitutional infirmity does not exist. *Id*. Here, Brooks has had, and continues to have, opportunity for parole. No constitutional error exists.

D. Brooks is Afforded Meaningful Opportunities to Obtain Release, But His Demonstrated Lack of Rehabilitation So Far Has Prevented Release

Brooks may argue that the remaining sentences, ordered to be served consecutively, amount to a de facto life sentence. If this Court considers that argument, it should fail. As shown above, this Court recognized that the constitutional infirmity in a juvenile's sentence is not the lengthy sentence itself, but a lack of meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation. *Scott,* 190 Wn.2d at 593. An opportunity for release for those juveniles who demonstrated ability to reform despite the heinousness of their crimes is the central theme of *Miller* and its progeny. *Montgomery*, 136 S. Ct. at 736. Thus, a lengthy sentence for a person convicted as a juvenile is constitutional as long as there is an opportunity for release, even though a juvenile who demonstrates inability to reform may ultimately serve a life sentence. *Id.*

Brooks has a realistic possibility of release, but his prison misconduct, psychopathy and high re-offense risk prevent the Board from paroling him. RCW 9.95.040(4) authorizes the Board to parole Brooks from two remaining convictions before completing his minimum sentence, Counts III and II (rape and kidnapping) (it cannot grant him early parole for

his second-degree murder while armed conviction).[4] To receive parole, Brooks is required to demonstrate "meritorious effort in rehabilitation." *Id.* So far, he demonstrated none. As the 2018 psychological assessment shows, Brooks shows "inability to reform" and "irreparable corruption."[5] His underlying personality and behavior have not changed. *Id.* at 13. He has no remorse or empathy for his victims. Resp. App. 13, at 6 ,8, 9. Despite his rape conviction and predatory sexual misconduct in prison, Brooks does not think he needs to participate in sex offender treatment. *Id.* at 13. Multiple actuarial instruments demonstrate his high psychopathy score and high risk to reoffend. *Id.* at 12-13. Even in prison, Brooks requires close custody supervision to manage his behavior. *Id.* at 13. RCW 9.95.052 allows the Board to lower the minimum confinement terms, based upon Brooks' prospects of rehabilitation (in his case, the mandatory 5-year weapon terms cannot be lowered, but the base terms can be). So far, Brooks has not shown any prospects of rehabilitation.

Even if the Court were to hold that RCW 9.94A.730 applies, the Board, guided by its duty to give public safety the highest priority, did not

[4] The Board notes that while it could not change the consecutive nature of the remaining counts, as ordered by the judgment and sentence, it had discretion to, and did set the duration of the remaining counts not as life, per the court and prosecuting attorney's recommendation, but at 25 years for two counts and 20 years on one count. *See* Resp. App. 7, at 2.

[5] *Montgomery*, 136 S. Ct. at 736-737.

abuse its discretion in not releasing him based on the 2018 evaluation and other factors identified in its 2018 decision (Resp. App. 3). RCW 9.94A.730(3). These factors are based on Brooks' behavior in prison, not the heinousness of his crimes.

Thus, even if the Court were to find that Brooks' sentence is an unconstitutional de facto life sentence, the remedy would not be to order the Board to release him, since the Court would be exercising discretion that is statutorily conferred on the Board, and since there is no indication that the Board has abused its discretion in not releasing Brooks. The proper remedy would be to invalidate the sentence and direct the superior court to resentence Brooks in accordance with the Court's decision.

IV. CONCLUSION

The Court should affirm the dismissal of the personal restraint petition because Brooks does not show he is under an unlawful restraint.

RESPECTFULLY SUBMITTED this 11th day of September, 2020.

ROBERT W. FERGUSON

Attorney General

s/Alex Kostin
ALEX KOSTIN, WSBA #29115
Assistant Attorney General
Corrections Division OID #91025
PO Box 40116
Olympia WA 98504-0116
Alexei.Kostin@atg.wa.gov

CERTIFICATE OF SERVICE

I certify that on the date below I caused to be electronically filed the SUPPLEMENTAL BRIEF OF RESPONDENT with the Clerk of the Court using the electronic filing system and I hereby certify that I have mailed by United States Postal Service the document to the following non electronic filing participant:

GREGORY CHARLES LINK
WASHINGTON APPELLATE PROJECT
1511 3RD AVENUE, SUITE 610
SEATTLE WA 98101-1683

I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

EXECUTED this 11th day of September, 2020 at Olympia, Washington.

s/ Amy Jones
AMY JONES
Legal Assistant 3
Corrections Division
PO Box 40116
Olympia WA 98504-0116
(360) 586-1445
Amy.Jones@atg.wa.gov

CORRECTIONS DIVISION ATTORNEY GENERAL'S OFFICE

September 11, 2020 - 8:12 AM

Transmittal Information

Filed with Court:	Supreme Court
Appellate Court Case Number:	97689-9
Appellate Court Case Title:	Personal Restraint Petition of Carl Alonzo Brooks

The following documents have been uploaded:

- 976899_Briefs_20200911081117SC656110_7668.pdf
  This File Contains:
  Briefs - Respondents Supplemental
  The Original File Name was FINAL DRAFT 4SEP20.pdf

A copy of the uploaded files will be sent to:

- correader@atg.wa.gov
- greg@washapp.org
- tim.lang@atg.wa.gov
- wapofficemai@washapp.org
- wapofficemail@washapp.org

Comments:

Sender Name: Amy Jones - Email: amyj@atg.wa.gov
Filing on Behalf of: Alex A Kostin - Email: Alexei.Kostin@atg.wa.gov (Alternate Email:)

Address:
Corrections Division
PO Box 40116
Olympia, WA, 98104-0116
Phone: (360) 586-1445

Note: The Filing Id is 20200911081117SC656110