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NO. 97689-9

SUPREME COURT OF THE STATE OF WASHINGTON

In re the Personal Restraint Petition of:

CARL ALONZO BROOKS,

Petitioner.

RESPONSE TO AMICI CURIAE BRIEF

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

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I. INTRODUCTION

Brooks is a dangerous person, convicted of sex and serious violent offenses, who continues to present a significant threat to public safety. Brooks still has an opportunity for parole to the community without spending his entire life in prison, but he steadfastly refuses to participate in sex offender treatment or even acknowledge that he committed a sex crime, continues to commit serious infractions in prison, and continues to receive psychological assessments that demonstrate his high risk of re-offense. Although the Washington Constitution prohibits imposing on a juvenile a de facto sentence of life without parole, the Constitution does not require the Indeterminate Sentence Review Board to release a person when the person still poses a danger to community safety. Neither the Constitution, nor the statutes require the Board to release Brooks in light of the fact that he presents a serious risk of re-offense.

Despite the danger posed by Brooks, Amici argue that the Court must grant relief. However, Amici do so only by erroneously contending that Brooks has a de facto sentence of life without parole and by raising an issue not presented by the parties. Amici first erroneously contend that the Board cannot release Brooks to the community under the current sentence structure until he reaches age 105. This argument ignores the fact that the Board may release Brooks much earlier under RCW 9.95.040 (Board may

release a person before the expiration of a mandatory minimum for crimes other than murder) and RCW 9.95.052 (authorizing the Board to reduce a person's minimum terms). These provisions would allow for a significant decrease of the term of confinement, provided that Brooks demonstrates a meritorious effort in rehabilitation. Even now going forward, if Brooks shows rehabilitation he can still release much earlier than the date calculated by Amici. Brooks has had and still has a meaningful opportunity for parole prior to the expiration of his life. It is Brooks' own failure to rehabilitate, not the sentence imposed by the superior court or the actions of the Board, which prevents Brooks from being released to the community.

Amici also raise the issue of racial disproportionality. However, the parties simply have not raised this issue and the Court's precedent has long established that the Court will not reach an issue raised solely by amicus. Moreover, the existing factual record is insufficient for the Court to resolve such an important issue. Brooks is African-American, and Amici cite general studies on racial disproportionality in the criminal justice system. The existing record contains no evidence of racial animus in the case of Mr. Brooks and no evidence that the "Miller fix" has been applied in any racially disparate manner. The Court should not resolve such an important issue on an inadequate record.

Finally, even assuming Amici were correct that Brooks' consecutive sentence is unconstitutional because the sentence is a de facto and racially disproportionate life sentence, the proper remedy is not to judicially rewrite RCW 9.94A.730 to make it apply to indeterminate sentences that already have the opportunity for parole. Even applying RCW 9.94A.730, the Board cannot release Brooks because he presents a dangerously high risk of re-offense. Rather, if Amici are correct that Brooks' sentence is unconstitutional, the proper remedy is to remand the matter to the superior court for resentencing consistent with the Court's recent decisions in *In re Personal Restraint of Domingo-Cornelio*, No. 97205-2 (Wash. Sep. 17, 2020), http://www.courts.wa.gov/opinions/pdf/972052.pdf; and *In re Personal Restraint of Ali*, No. 95578-6 (Wash. Sep. 17, 2020), http://www.courts.wa.gov/opinions/pdf/955786.pdf.

II. ARGUMENT

A. The Sentence is Not a De Facto Sentence of Life Without Parole Because a Realistic Opportunity for Release to the Community Exists if Brooks Demonstrates Rehabilitation

Amici contend that Brooks' current sentence prevents the Board from paroling him to the community before age 105. Amici Brief, at 1, 4. However, Amici fail to recognize that, despite the consecutive nature of the sentences, the Board may parole Brooks long before the expiration of the existing minimum terms if he demonstrates that he is a fit subject for

release. In fact, the Board could have paroled Brooks to the community several years ago, in 2018, if he had only shown meritorious efforts in rehabilitation.

RCW 9.95.040 governs minimum terms for indeterminate sentences for crimes committed prior to July 1, 1984. Because Brooks committed his crimes with a deadly weapon, the crimes each had a mandatory minimum term of five years. RCW 9.95.040(1). But unlike the deadly weapon enhancements for crimes committed today, the statute in 1978 did not require the deadly weapon mandatory minimums to run consecutively to each other. *Compare* RCW 9.95.040 *with* RCW 9.94A.533.

With the sentences for the five counts of robbery, burglary, and assaults all running concurrently, the mandatory minimum term for those crimes was only 5 years. With the sentences for the remaining three counts of kidnapping, rape, and murder running consecutively, the total mandatory minimum terms for those three crimes was 15 years. Adding the terms together, the total mandatory minimum terms required for all eight crimes was only twenty years. Unlike today, murder in the second degree did not have a mandatory minimum in 1978. Moreover, a conviction for the crime of rape in the first degree required at least three years confinement in prison, but the five-year deadly weapon mandatory minimum would have consumed that time. Former RCW 9.79.170(2) (now RCW 9A.44.045).

Even assuming the Board added the three-year minimum term for rape to the five-year deadly weapon minimum term, it would still require a minimum confinement of 23 years. Simply put, even accounting for the required mandatory minimums, the sentence on its face does not constitute a de facto sentence of life imprisonment without parole because the Board could have originally set the minimum term at just twenty years.

Moreover, even with the Board originally setting the minimum terms beyond the required statutorily required mandatory minimum terms, the sentence still does not constitute a de facto sentence of life imprisonment without parole because the Board has statutory authority to either reset the minimum terms or to parole Brooks prior to the expiration of the currently set minimum terms. First, the Board has statutory authority to reset a minimum term at any time. RCW 9.95.052. Second, except for the crime of murder, "the board may parole an inmate prior to the expiration of a mandatory minimum term, provided such inmate has demonstrated a meritorious effort in rehabilitation and at least two-thirds of the board members concur in such action." RCW 9.95.040. Thus, except for the five-year mandatory minimum term imposed for the use of a deadly weapon on the murder conviction, the Board may parole Brooks even if he has not fully served the mandatory minimum terms for the remaining crimes.

Therefore, contrary to Amici's contention, Brooks need not remain confined until age 105 before he becomes eligible for parole to the community. Rather, the Board may reset the minimum terms, or even parole Brooks without requiring him to serve the existing minimum terms, and the Board could release Brooks to the community long before he reaches the expiration of the currently set minimum terms for his crime.

In fact, even with Brooks having not paroled from the first five concurrent sentences (robbery, assault, and burglary) until 1991, Brooks still had the opportunity to release from confinement fifteen years later if the Board had determined at that time that Brooks had shown meritorious effort in rehabilitation.[1] RCW 9.95.040; RCW 9.95.052. The Board could have also released Brooks during subsequent parole eligibility hearings, including the most recent hearing in 2018, if the Board did not determine that Brooks posed such a high risk of re-offense.

For example, during the 2008 parole eligibility hearing, if Brooks had demonstrated rehabilitation, the Board could have paroled him from his kidnapping sentence and reduced the remaining two consecutive sentences

[1] The Board did not lower the minimum term for his kidnapping offense in 1993 after Brooks was paroled from the first cluster of offenses because of his failure to complete sex offender treatment resulting in Brooks being an untreated sex offender at the time. Resp. Appendix 7, at 3. Despite multiple opportunities to enroll in sex offender treatment since, Brooks steadfastly refuses to enroll in such treatment. In 2018, he not only, again, refused to enroll in sex offender treatment, but even refused to acknowledge he committed a sex crime. Resp. Appendix 3, at 7.

for rape and murder to as low as five years each. The Board could then parole Brooks in 2018 at the age of 58. Even now, other than the five-year mandatory minimum term for the murder sentence, the Board could parole Brooks even if did not serve the mandatory minimum term on a remaining sentences. RCW 9.95.040. Thus, if Brooks was paroled from his kidnapping and rape offenses, the Board held a hearing in 2020, and Brooks demonstrated rehabilitation, the Board could release him by 2025 once he served five years on the murder sentence. Simply put, Brooks does not remain confined serving a de facto sentence of life imprisonment without parole. Rather, Brooks remains confined because the Board has determined that Brooks poses a dangerously high risk of re-offense and thus has not demonstrated his suitability for parole.

While RCW 9.94A.730(3) contains a presumption of release, the Legislature still entrusted the Board with the full discretion to determine, by a preponderance of the evidence, whether a person convicted of a crime committed as a juvenile is more likely that not to commit a new crime if released. RCW 9.94A.730; *State v. Ronquillo*, 190 Wn. App. 765, 778, 361 P.3d 779 (2015). The Board "shall give public safety considerations the highest priority" when making all discretionary decisions regarding the ability for release and conditions of release. RCW 9.94A.730(3). Even

under the standard of RCW 9.94A.730, the Board would not find Brooks releasable because he simply poses too high a risk of re-offense at this time.

The records of Brooks' prison behavior and psychological evaluations show his consistent inability to conform to the norms even in a tightly regulated prison setting, his refusal to make any effort toward positive self-change, and his persistent high risk of committing another crime if released. The evidence supports the Board's conclusion that Brooks remains a dangerous individual whose release would more likely than not result in additional crimes and victims. Even applying RCW 9.94A.730, the Board could not release Brooks given the danger he poses.

During his confinement, Brooks has actively refused to participate in the risk reduction programs. Despite being a rapist who admitted using drugs while committing the crimes, Brooks repeatedly refused to participate in sex offender and chemical dependency programs. Resp. Appendix 8 at 4 (2008 hearing); Appendix 10, at 5 (2010 hearing); Appendix 11, at 7 (2013 hearing); Appendix 3, at 7 (2018 hearing – Brooks not only refused to participate in sex offender treatment, but stated he would not participate because he does not believe he has any prior sex offenses).

Moreover, Brooks continues committing serious infractions during his confinement. Resp. Appendix 8, at 4 (2008 hearing – Brooks committed 13 serious infractions since the last time the Board saw him, he averages 2

serious infractions per year); Appendix 10, at 4 (2010 hearing - Brooks committed 2 additional serious infractions); Appendix 11, at 5 (2013 hearing - 2 additional serious infractions, a total of 78 serious infractions so far); Appendix 3, at 6 (2018 hearing - Brooks committed additional 2 serious infractions).

The psychological evaluations also consistently reveal that Brooks presents serious danger to public safety if released. *See* Resp. Appendix 8, at 4 (2008 report showing high psychopathy and high risk of reoffending); Appendix 10, at 4 (2010 psychological evaluation finding of substantial violence potential and antisocial personality disorder); Appendix 11, at 7 (2013 psychological report showing re-offense and violence potential was probably substantial, Brooks' paranoia and preservation of his own view of things with inability to consider alternatives); Appendix 3, at 4 (2018 psychological evaluation actuarial tools findings shows Brooks' high risk for re-offense); Resp. Appendix 13 (psychological evaluation showing high psychopathy,.

B. The Court Should Not Consider the Issue of Whether Brooks' Sentence is Disproportionally Unconstitutional Where Only Amici Raise the Issue

Amici for the first time in the case raise an issue of racial disproportionality. Brief, at 11-13. The Board fully recognizes the importance of addressing racial injustice in sentencing. However, the Court

should not consider this issue here because Mr. Brooks has not raised the issue or developed a factual record necessary to resolve the important issue.

The purpose of an amicus brief is to assist the Court in resolving the issues and arguments raised by the parties on appeal. "Amicus cannot raise an issue not properly raised by a party to a case." *State v. Xiong*, 164 Wn.2d 506, 513 n. 1, 191 P.3d 1278 (2008). "It is further well established that appellate courts will not enter into the discussion of points raised only by amici curiae." *Long v. Odell*, 60 Wn.2d 151, 154, 372 P.2d 548 (1962). "'But we think the case must be made by the parties litigant, and its course and the issues involved cannot be changed or added to by "friends of the court. . . ."'" *Long*, 60 Wn.2d at 154 (quoting *Lorentzen v. Deere Mfg. Co.*, 245 Iowa 1317, 66 N.W.2d 499 (1954)).

Amici raise the issue of racial disproportionality, but Brooks never raised the issue in the court below, or in the motion for discretionary review. Consequently, the issue identified and argued by Amici is not properly before the Court in this particular case. Moreover, the existing factual record is insufficient for the Court to resolve such an important issue. The parties did not develop any record in the Court of Appeals or in this Court regarding racial disproportionality. The existing record contains no evidence necessary to specifically review whether racial disproportionality exists for individuals sentenced and granted or denied parole under the indeterminate

sentencing scheme prior to July 1, 1984. The Court should not resolve such an important issue on an inadequate record.

C. If Brooks' Sentence Were Unconstitutional, the Proper Remedy Would Be Remand for Resentencing

If Brooks' sentence were unconstitutional, the proper remedy is not for the Court to apply RCW 9.94A.730 to indeterminate sentences that already have the opportunity for parole. Rather, the proper remedy would be for the superior court to resentence Brooks in accordance with *Miller* and its progeny.

The Board lacks authority to amend a judgment and sentence. *See, e.g., State v. Broadway*, 133 Wn.2d 118, 135-36, 942 P.2d 363 (1997); *Dress v. DOC*, 168 Wn. App. 319, 326, 279 P.3d 875 (2012). If the sentence imposed by the superior court violates the rule as established in *Miller* and its progeny, for example, because the superior court did not consider mitigating factors such as youth, then the proper remedy is resentencing. *In re Personal Restraint of Domingo-Cornelio*, No. 97205-2 (Wash. 17, 2020); *In re Personal Restraint of Ali*, No. 95578-6 (Wash. 17, 2020); *State v. Houston-Sconiers*, 188 Wn.2d 1, 391 P.3d 409 (2017).

In *Ali* and *Domingo-Cornelio*, this Court concluded that its seminal holding in *Houston-Sconiers* (requiring the sentencing courts to consider mitigating qualities of youth and explaining that they have discretion to

impose any sentence below the SRA ranges/enhancement) represented a significant change of law and must be applied retroactively. *Domingo-Cornelio*, Slip Op. at 5-11; *Ali*, Slip Op. at 2; *Houston-Sconiers*, 188 Wn.2d at 21. While this Court in *Ali* and *Domingo-Cornelio* considered SRA sentences and enhancements in light of the recent juvenile brain science/culpability developments, the sentencing court in Brooks' case did not, and could not, have the benefits of recent breakthrough findings that, when it comes to sentencing, children are different. The sentencing court also did not determine whether, considering all the facts[2] in this case, Brooks' crimes were the result of his irreparable corruption or transient youth qualities. *See Miller v. Alabama*, 567 U.S. 460, 472 (2012), *Graham v. Florida*, 560 U.S. 48, 60 (2010), *Roper v. Simmons*, 543 U.S. 551, 569-70 (2005), *State v. Bassett*, 192 Wn.2d 67, 86, 428 P.3d 343 (2018), *Houston-Sconiers*, 188 Wn.2d at 19.

Consequently, if this Court were to find that Brooks' sentence is unconstitutional, the Court could remand for resentencing.

[2] If the Court were to remand for resentencing, the sentencing court would have to consider, in addition to other factors, lengthy history of Brooks' prison misbehavior, his refusal to enroll in sex offender and chemical dependency treatment and his personality traits resulting in consistently poor psychological findings indicating high re-offense risk. *State v. Delbosque*, 195 Wn.2d 106, 112-13, 456 P.3d 806 (2020).

III. CONCLUSION

This Court should conclude that RCW 9.94A.730 does not apply to pre-SRA offenders like Brooks. It should also hold that even if it did apply, considering the well-documented risks to public safety Brooks presents, the Board has not acted improperly by not having released him. However, in light of *Ali* and *Domingo-Cornelio*, if this Court should find Brooks' original 1978 sentence unconstitutional in light of recent juvenile brain/child culpability for sentencing purposes developments, it could remand for resentencing in light of *Houston-Sconiers*.

RESPECTFULLY SUBMITTED this 23rd day of October, 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
(360) 586-1445
Alexei.Kostin@atg.wa.gov

CERTIFICATE OF SERVICE

I certify that on the date below I caused to be electronically filed the **RESPONSE TO AMICI CURIAE BRIEF** with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following CM/ECF participant:

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

NANCY L. TALNER
ANTOINETTE M. DAVIS
ACLU OF WASHINGTON FOUNDATION
P.O. BOX 2728
SEATTLE WA 98111

JESSICA LEVIN
ROBERT S. CHANG
MELISSA R. LEE
RONALD A. PETERSON LAW CLINIC
SEATTLE UNIVERSITY SCHOOL OF LAW
1112 E. COLUMBIA ST.
SEATTLE WA 98122

NICK ALLEN
COLUMBIA LEGAL SERVICES
101 YESLER WAY, STE. 300
SEATTLE WA 98101

MARK MIDDAUGH
WACDL AMICUS COMMITTEE
WASHINGTON DEFENDER ASSOCIATION
110 PREFONATINE PL. S., #610
SEATTLE WA 98104

MARSHA L. LEVICK
RIYA S. SHAH
JUVENILE LAW CENTER
1800 JFK BLVD., STE 1900B
PHILADELPHIA PA 19103

MARY A. SCALI
SERENA E. HOLTHE
NATIONAL JUVENILE DEFENDER CENTER
1350 CONNECTICUT AVE NW, STE. 304
WASHINGTON DC 20036

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

EXECUTED this 23rd day of October, 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

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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
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