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SUPREME COURT  
STATE OF WASHINGTON  
9/25/2020 2:22 PM  
BY SUSAN L. CARLSON  
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FILED  
SUPREME COURT  
STATE OF WASHINGTON  
10/6/2020  
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No. 97689-9

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IN THE SUPREME COURT OF THE STATE OF WASHINGTON

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In re the Personal Restraint of:

CARL BROOKS,  
Petitioner,

v.

STATE OF WASHINGTON,  
Respondent.

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**BRIEF OF AMICI CURIAE AMERICAN CIVIL LIBERTIES  
UNION OF WASHINGTON, COLUMBIA LEGAL SERVICES,  
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PUBLIC DEFENSE, FRED T. KOREMATSU CENTER FOR LAW  
AND EQUALITY, NATIONAL JUVENILE DEFENDER CENTER,  
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## **I. IDENTITY AND INTEREST OF AMICI CURIAE**

The identity and interests of Amici are set forth in the Motion for Leave to File Amici Curiae brief filed contemporaneously with this brief.

## **II. ISSUE TO BE ADDRESSED BY AMICI CURIAE**

This Court has repeatedly stated that “children are different.” Does that principle as well as racial justice support a ruling that the *Miller* fix statute applies to Mr. Brooks’s life-equivalent sentence?

## **III. STATEMENT OF THE CASE**

Petitioner Brooks is Black, pleaded guilty four months after being charged, and was sentenced to a 90-year minimum prison term for crimes committed when he was a child. He has been serving his sentence since 1978 and will not be eligible for release until he is 105 years old. In other words, he will be denied the constitutionally required “meaningful opportunity for release” and will die in prison if this Court accepts the State’s argument that the *Miller* rule does not apply to Mr. Brooks’s sentence because he has an opportunity for parole<sup>1</sup> or that the *Miller* fix

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<sup>1</sup> The State’s argument in its Supplemental Brief at 2 is deeply troubling, as it focuses on parole being available formally for each sentence, including the next parole review in 2022, without directly acknowledging that a grant of parole in 2022 would result not in release but Mr. Brooks beginning to serve the next consecutive block of his sentences. Not only is this cramped reading of *Miller* incorrect, it would eviscerate *State v. Bassett*, 192 Wn.2d 67, 428 P.3d 343 (2018).

statute, RCW 9.94A.730,<sup>2</sup> does not apply to pre-SRA sentences. It is not surprising, in light of the hopelessness of that situation, that Mr. Brooks has attempted suicide during his lengthy incarceration. Pet. Supp. Br. at 7-8.

#### IV. INTRODUCTION

This Court has demonstrated important leadership in both remedying unconstitutional sentences imposed upon children, and in taking the necessary steps to recognize and remedy racial injustice. In both realms, prospective change is not enough. Substantive justice requires equal attention to righting the wrongs of the past.

It would be a grave injustice to deny a remedy for Mr. Brooks's sentence while the *Miller* fix and other remedies are available to others serving long and life-equivalent adult prison sentences for crimes committed as children, and while most other children prosecuted as adults will be entitled to relief under *Pers. Restraint of Domingo-Cornelio*, No. 97205-2 (Sept. 17, 2020), and *Pers. Restraint of Ali*, No. 95578-6 (Sept. 17, 2020). As this Court stated earlier this year, "We have continually recognized that children are different from adults for the purpose of

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<sup>2</sup> RCW 9.94A.730(3) states that after serving 20 years in prison, far less than Mr. Brooks has served, the ISRB "shall order the person released under such affirmative and other conditions as the board determines appropriate, unless the board determines by a preponderance of the evidence that, despite such conditions, it is more likely than not that the person will commit new criminal law violations if released."

sentencing.” *State v. Delbosque*, 195 Wn.2d 106, 110, 456 P.3d 806 (2020) (overturning 48-year minimum term, about half of Mr. Brooks’ sentence, imposed under *Miller* fix statute for aggravated first-degree murder committed when defendant was age 17).

Mr. Brooks’s case is also an opportunity to fulfill this Court’s promise to remedy racial injustice not just moving forward, but also reaching back. This Court acknowledged “We continue to see racialized policing and the overrepresentation of black Americans in every stage of our criminal and juvenile justice systems. . . . The legal community must recognize that we all bear responsibility for this on-going injustice, and that we are capable of taking steps to address it, if only we have the courage and the will.” Washington Supreme Court, Open Letter to the Legal Community (June 4, 2020)<sup>3</sup>. Fulfilling this commitment requires not only prospectively remedying unjust sentences, but also remedying life-equivalent sentences imposed long ago when those sentences reflect the injustices of the past. Applying the *Miller* fix statute to Mr. Brooks’s sentence is necessary to combat the harm from racially disproportionate incarceration that continues to exist in this state. Racial justice, in addition to the advances in juvenile sentencing based on juvenile brain science,

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<sup>3</sup><http://www.courts.wa.gov/content/publicUpload/Supreme%20Court%20News/Judiciary%20Legal%20Community%20SIGNED%20060420.pdf>

compel granting relief to Mr. Brooks.

## V. ARGUMENT

### A. **Mr. Brooks's Sentence Is Disproportionate and Unconstitutional Under the Eighth Amendment and Article I, Section 14.**

Because Mr. Brooks is not eligible for release until he is 105 years old, his sentence is the functional equivalent of a formal life-without-parole sentence. Under Wash. Const. article I, section 14, life-without-parole sentences are categorically unconstitutional when imposed for crimes committed by children. *State v. Bassett*, 192 Wn.2d 67, 90, 428 P.3d 343 (2018). His sentence is a life-equivalent sentence that should be granted the constitutional protections established in *Bassett* and other cases that acknowledge juveniles' diminished culpability. *See State v. Ramos*, 187 Wn.2d 420, 437, 439 n.6, 387 P.3d 650 (2017) (holding *Miller* applies to de-facto-life-without-parole sentences and acknowledging that 85-year sentence undisputedly equates to de-facto life).

This Court's mandates regarding sentencing of juveniles as adults, as well as the heightened protection afforded under Article I, section 14, and *Bassett*, 192 Wn.2d at 78-82, render Mr. Brooks's sentence unconstitutional. This Court has indicated that all life-equivalent sentences are constitutionally suspect. *Delbosque*, 195 Wn.2d at 122

(“Consequently, every judge conducting a *Miller* sentencing in Washington *must* set a minimum term that is less than life.”) (underline emphasis added). In *Delbosque*, this Court emphasized its prior instruction that “courts ‘must *meaningfully* consider how juveniles are different from adults, how those differences apply to the facts of the case, and whether those facts present the uncommon situation where a life-without-parole sentence for a juvenile homicide offender is constitutionally permissible.’” *Delbosque*, 195 Wn.2d at 121 (quoting *Ramos*, 187 Wn.2d at 434-35). Sentences that fail to take into account the diminished culpability of children are constitutionally infirm, without qualification as to the date of the sentence. *State v. Gilbert*, 193 Wn.2d 169, 175-76, 438 P.3d 133 (2019). And “our case law indicat[es] that irreparable corruption should be rare. *State v. Bassett*, *supra*, 192 Wn.2d at 89. Indeed, *Bassett*’s prohibition on juvenile life without parole sets a high standard for concluding that a juvenile is permanently incorrigible.” *Delbosque*, 195 Wn.2d at 118. There has been no judicial finding of “irreparable corruption” in Mr. Brooks’s case.

Further, a central promise of both this Court’s and the United States Supreme Court’s juvenile justice jurisprudence is that children be given a meaningful opportunity for release. In a series of decisions issued long after Mr. Brooks was sentenced, the United States Supreme Court

interpreted the Eighth Amendment to recognize that juvenile brain science and “evolving standards of decency” require treating children as constitutionally different from adults for purposes of sentencing. *Roper v. Simmons*, 543 U.S. 551, 125 S.Ct. 1183, 161 L.Ed.2d 1 (2005); *Graham v. Florida*, 560 U.S. 48, 130 S. Ct. 2011, 176 L. Ed. 2d 825 (2010); *Miller v. Alabama*, 567 U.S. 460, 132 S. Ct. 2455, 183 L. Ed. 2d 407 (2012); *Montgomery v. Louisiana*, \_\_\_ U.S. \_\_\_, 136 S. Ct. 718, 193 L. Ed. 2d 599 (2016); *see also State v. Houston-Sconiers*, 188 Wn.2d 1, 8, 18, 21, 391 P.3d 409 (2017) (interpreting *Graham* and *Miller* as requiring consideration of youth as a mitigating factor). In these cases, the Court recognized that “the State must [ ] [give children convicted as adults] some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation.” *Graham*, 560 U.S. at 75.

These decisions recognizing the constitutional significance of the brain science required a “meaningful opportunity for release” because children who commit crimes, when their brains are still developing, are necessarily less culpable and have greater capacity for rehabilitation. This Court has explained that “*Miller* further attests that ‘a child’s character is not as ‘well formed’ as an adult’s; his traits are ‘less fixed.’” *Delbosque*, 195 Wn.2d at 121 (quoting *Miller*, 567 U.S. at 471 (quoting *Roper*, 543 U.S. at 570)). Children’s developmental characteristics distinguish them

from adults and must be taken into account in sentencing.<sup>4</sup> *See Miller*, 567 U.S. at 471.

These decisions led this Court to hold that, under the Eighth Amendment, de-facto-life sentences for children meet constitutional muster only when a meaningful opportunity for release is available. *See State v. Scott*, 190 Wn.2d 586, 597, 416 P.3d 1182 (2018) (upholding 75-year sentence under Eighth Amendment because Scott could seek release after serving 20 years under RCW 9.94A.730).

Finally, Mr. Brooks has never received the constitutionally required judicial consideration of youth as a mitigating factor. *Miller* requires sentencing courts to consider (1) the youth's chronological age and age-related characteristics, including "immaturity, impetuosity, and failure to appreciate risks and consequences," (2) the juvenile's "family and home environment that surrounds him," (3) the circumstances of the offense, including the extent of participation in the criminal conduct, (4) the impact of familial and peer pressures, (5) the effect of the offender's

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<sup>4</sup> These cases accepted that juvenile brain science was constitutionally relevant to the legality of an adult prison sentence imposed for a crime committed as a juvenile. Adolescents are less able to control their impulses; they weigh the risks and rewards of possible conduct differently; and they are less able to envision the future and apprehend the consequences of their actions. *Graham*; *Miller*; *State v. Houston-Sconiers*, 188 Wn.2d at 8. Even older adolescents show deficits in these aspects of social and emotional maturity. Laurence Steinberg, Adolescent Development and Juvenile Justice, 5 Ann. Rev. Clinical Psychol. 47, 55-56 (2008); *cf. State v. O'Dell*, 183 Wn.2d 680, 358 P.3d 359 (2015).

youth on his ability to navigate the criminal justice process, and (6) the possibility of rehabilitation. *See Miller*, 567 U.S. at 477-78; *see also Delbosque*, 195 Wn.2d at 123 (explaining the major differences between resentencing under the *Miller* fix statute and a parole board hearing); *In re Pers. Restraint of Domingo-Cornelio*, No. 97205-2 (Sept. 17, 2020), <https://www.courts.wa.gov/opinions/pdf/972052.PDF> (holding that *Houston-Sconiers* applies retroactively); *In re Pers. Restraint of Ali*, No. 95578-6 (Sept. 17, 2020), <https://www.courts.wa.gov/opinions/pdf/955786.PDF> (same). The constitutionally required consideration of youth has been denied to Mr. Brooks, even though *Miller* and *Houston-Sconiers* apply retroactively, and even though Washington recognizes that de facto life sentences are to be treated the same as formal life without parole (*Ramos, supra*).

Further, the legislative history of the *Miller* fix statute demonstrates that it was intended to benefit all children. As a result of the *Miller* opinion, prosecutors recognized Washington State's aggravated murder statute at the time was unconstitutional as applied to juveniles. The Washington State Association of Prosecuting Attorneys drafted SB 5064, which was introduced during the 2013 Regular Session. See S.B. 5064 (63rd Legislature, 2013 Regular Session). The original version of 5064 also included a section to allow youth convicted of long sentences to

petition for review and presumptive release after serving at least 30 years of their sentence. *Id.* This provision was later amended to allow an individual to petition for release after 20 years. *See* 2SSB 5064.

Prosecutors' support for the *Miller*-fix bill stemmed from their recognition that all children are different from adults for purposes of sentencing, and that those serving long sentences should have the opportunity for redemption and early release. Based on their testimony describing the "functional equivalent" section of the *Miller*-fix bill, treating very long sentences as the "functional equivalent" of life without parole, prosecutors supported broad application to all youth rather than just those sentenced under the SRA.

Representatives of WAPA who testified at hearings on 5064 focused primarily on the need to more broadly incorporate juvenile brain science and the underlying principles of *Miller* into the law. The co-chair of WAPA's legislative committee testified that,

We took this [*Miller* decision] as a sign and an opportunity to ask the legislature to address some other policy issues that have been of great concern to those of us who, again, who try cases on both sides of the issue dealing with long sentences given to youthful offenders. We're learning more and more all the time about the ability of young people to actually form intent and what this bill does I think represent a good compromise worked out between those two sides to deal with those issues.

Testimony of Russ Hauge, House Public Safety Committee (Feb. 19, 2014)

at 1:02:50.

At an earlier hearing, Mr. Hauge similarly spoke about how juvenile brain science underlies the intent of the bill, rather than making distinctions on its applicability to youth based on the sentencing scheme under which the youth was sentenced:

This bill is a result of our effort to get out in front of not just the *Miller* decision, but what we have learned about brain science of as it relates to juveniles and to indeed address some of the issues put forth by the previous panel. We know that not every person under the age of 18 is fully responsible for their actions. We've tried to address that in our juvenile code; this takes a step further and in cases like the gang shooting where we have lots of firearms and lots of victims and we end up with a sentence of 100 plus years, this gives a way for a court and the ISRB to find a way to release that young person while they still have lots of life left to live... We would like to solve not just the *Miller* problem, there are lots of problems with juvenile jurisprudence that we would like to solve and we think this bill provides a vehicle to do that."

Testimony of Russ Hauge, Senate Human Services and Corrections  
Committee on SSB 5064 (Jan. 30, 2014) at 26:50.

Unless this Court finds that RCW 9.94A.730 applies to Mr. Brooks's sentence, his sentence is unquestionably unconstitutional under both the federal and state constitutions, and he is entitled to resentencing. His life-equivalent sentence must be struck down.

**B. Mr. Brooks’s Lengthy Sentence Must Be Considered in the Context of Severe Race Disproportionality Among Those Serving Long and Life Sentences.**

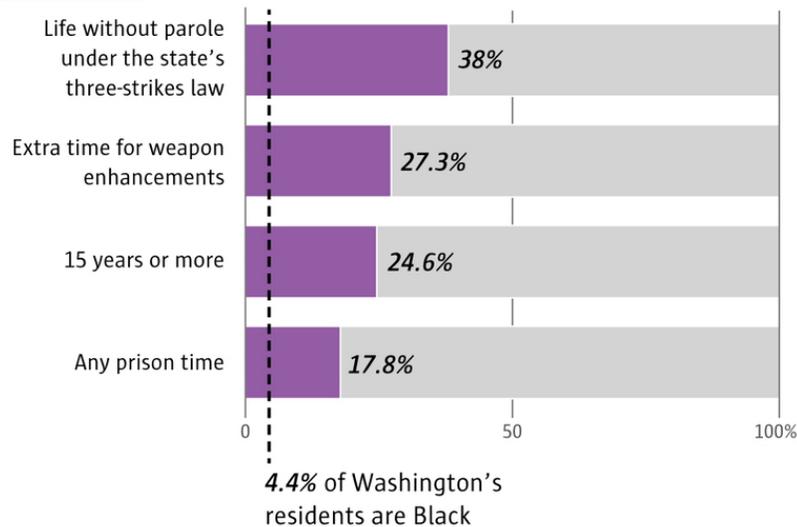
The racial disparities in Washington’s sentencing laws are well documented. “Long and life sentences are disproportionately imposed on people of color, and in particular, on black and Native American defendants.” Katherine Beckett and Heather Evans, *About Time: How Long and Life Sentences Fuel Mass Incarceration in Washington State* 27 (2020) (hereinafter “About Time”), <https://www.aclu-wa.org/docs/about-time-how-long-and-life-sentences-fuel-mass-incarceration-washington-state>). Long sentences like the one Mr. Brooks is serving are especially tainted by racial injustice. As is true nationally, in Washington racial disparities in “the prison population are starkest among those serving the longest prison terms. . . . [B]lack people comprise 3.5 percent of the state population, but 19 percent of those sentenced to prison and 28 percent of the defendants sentenced to Life without the possibility of parole since 1986.” “About Time” at 51; *see also* Nina Shapiro, *Washington’s prisons may have hit pivotal moment as they eye deep cut in their population*, *Seattle Times* (Sep. 17, 2020), <https://www.seattletimes.com/seattle-news/politics/a-transformational-moment-washingtons-prison-system-backs-reforms-as-it-faces-covid-19-budget-cuts-and-protests-over-racial->

[injustice/](#) (“Black people constitute [4% of Washington’s population](#) but nearly [18% of the state’s roughly 16,000 inmates](#), 25% of those serving 15 years or more (and also those serving life without parole), and 27% of prisoners given extra time for so-called weapon enhancements.”).

### Percentage of Black prisoners serving time by type of sentence

Black people constitute about 4% of Washington’s population, but make up a much higher share of the prison population and those serving long sentences.

Black inmates serving:



Sources: Department of Corrections, U.S. census

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Shapiro, *supra*.

The injustice accompanying these long sentences is especially acute because they serve no legitimate purpose. Long sentences for youth are at odds with scientific research showing “young prisoners have

diminished capacity due to incomplete brain development.” “About Time” at 54. The practice of long sentences for youth is also “incompatible with evidence that young adults are likely to benefit from educational and other rehabilitative programming.” *Id.* at 4–5, 48–49. Notably, “[u]sing long and life sentences to incapacitate is also an inefficient means of protecting the public because recidivism rates decline markedly with age. . . . Even those with the most extensive criminal records desist from crime at relatively early ages, most commonly by their thirties.” *Id.* at 48.

A holding that the *Miller* fix statute applies to Mr. Brooks’s sentence would remedy racial injustice as well as give deference to the legislature’s policy choices in adopting the statute. When an offender is determined to be less culpable for conduct and a new penalty deemed adequate, “no purpose is served by imposing the older, harsher one.” *State v. Heath*, 85 Wn.2d 196, 198, 532 P.2d 621 (1975). Depriving Mr. Brooks of the opportunity for release under RCW 9.94A.730 serves no legitimate purpose.

**C. This Court’s Decision to Apply *Houston-Sconiers* Retroactively Supports Relief For Mr. Brooks**

This Court’s recent decisions in *Pers. Restraint of Domingo-Cornelio*, *supra*, and *Pers. Restraint of Ali*, *supra*, leave no doubt that this Court is committed to righting past wrongs where children were sentenced

as if they were adults. These two decisions mandate that any child who was treated as an adult at sentencing, no matter how long ago, is entitled to a resentencing during which a court must consider the mitigating qualities of youth and has unbridled discretion to disregard standard range sentences and any other mandatory sentencing schemes that might contribute to a lengthy, and therefore disproportionate, sentence. *See generally Pers. Restraint of Domingo-Cornelio, supra; Pers. Restraint of Ali, supra.* In so doing, this Court ensured that the sea change in juvenile justice jurisprudence brought about in *Houston-Sconiers* reaches back to remedy the unjust sentences of the past. Absent this Court's decision in these two cases, children who were treated as adults at sentencing would have little recourse against a system that left a wake of unconstitutional sentences in place, even as it charted a path forward to ensure more just sentences for children unfortunate enough to be prosecuted in adult court.

Absent action by this Court entitling Mr. Brooks to the presumption of release under RCW 9.94A.730 in recognition of his unconstitutional life equivalent sentence, he will be condemned to die in prison for crimes he committed as a child, while virtually all other children who were wrongfully treated as adults at sentencing will have an opportunity to seek justice.

## VI. CONCLUSION

For the reasons stated in Mr. Brooks's briefing, as well as the reasons stated in this brief, this Court should grant relief to Mr. Brooks.

RESPECTFULLY SUBMITTED this 25<sup>th</sup> day of September, 2020.

By: *s/ Nancy L. Talner*

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IN THE SUPREME COURT FOR THE STATE OF WASHINGTON

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**In re the Personal Restraint of:**

**CARL BROOKS,  
Petitioner,**

**v.**

**STATE OF WASHINGTON,  
Respondent.**

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**CERTIFICATE OF SERVICE**

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**CERTIFICATE OF SERVICE**

I hereby certify that on September 25, 2020, I caused to be served the foregoing *Motion for Leave to File Amicus Curiae Brief* and *Brief of Amici Curiae* to the parties below, in the manner noted:

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Respectfully submitted this 25<sup>th</sup> day of September, 2020.

By: *s/ Nancy L. Talner*

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