NO. 94439-3

**SUPREME COURT OF THE STATE OF WASHINGTON**

STATE OF WASHINGTON,

V.

ERIK PETTERSON

# RESPONSE TO BRIEF OF AMICUS CURIAE

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## I. SUMMARY OF ARGUMENT

Amicus Washington Association of Criminal Defense Lawyers filed a brief on behalf of Mr. Petterson's claim that the Court of Appeal's decision is contrary to this Court's decisions in *State v. Shove*, 113 Wn.2d 83, 776 P.2d 132 (1989) and *State v. Harkness*, 145 Wn. App. 678, 186 P.3d 1182 (2008) because the SSOSA statute "specifically and carefully delineates that the trial court may modify conditions." *See* Petition, at 13.

However, Amicus' policy arguments are better addressed to the Legislature, not the Court. Amicus essentially argues that expansive principles of family reunification justify an expansive interpretation of the statute. In presenting this argument, however, Amicus far exceeds the narrow claim presented by Mr. Petterson. The Court should not consider Amicus' argument because Mr. Petterson did not raise them in any form.

The only issue before this Court is whether former RCW 9.94A.670(8) limited the trial court's authority to modify conditions of a SSOSA community custody to the treatment termination hearing. The amicus brief fails to address this issue.

## II. ARGUMENT

### A. The Court Should Not Consider Arguments of Amicus That Exceed the Issues Raised By the Parties

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).

Amicus identifies the issue raised in its brief as follows: (1) "Whether a party in a SSOSA case – defendant or victim – has any recourse to petition the sentencing judge for modifications or terminations of no contact orders at any time during supervision is a matter of substantial public importance" and (2) conditions that touch on fundamental constitutional rights, like restrictions on contact with one's children, require judicial review in order to ensure that those rights are respected." Brief, at i. In support, Amicus argues that both defendants and victims suffer from a system that does not allow modification of sentencing conditions and that resolving how victims get to petition courts for relief from restrictions on contact with defendants in a SSOSA case is a matter of substantial public importance. *See* Brief, at 3, 8. Amicus' issues and arguments in support of the issues far exceed that raised by the parties in this case.

The decision of the Court of Appeals rests on the plain meaning of specific language in the SSOSA statute as it relates to Mr. Petterson's claim that the superior court may modify conditions in a SSOSA at any time. Amicus completely fails to discuss the limitations stated plainly in the statute.

The heart of the Court of Appeals' decision was this Court's prior holdings that *absent explicit authorization*, the superior court lacks jurisdiction to modify an offender's sentence. *See* Slip Op. at 6. At the time Mr. Petterson committed his offense, the SSOSA statute specifically delineated *one* instance in which the superior court could modify conditions of community custody: at the treatment termination hearing. *See* Slip Op. at 5 (citing RCW 9.94A.670(8)(2001)). The statute has since been amended and now the court's authority to modify conditions is limited to the treatment termination hearing and annual reviews "on the offender's progress in treatment." RCW 9.94A.670(8)(9).

Amicus cites statistics and discusses goals of family reunification, but neither is relevant to whether the Court of Appeals correctly interpreted the plain language of former RCW 9.94A.670(8). Rather, as mentioned previously, these are arguments and discussions more appropriately addressed by the Legislature. Mr. Petterson never raised a challenge in the superior court or the Court of Appeals specific to any

particular condition imposed by the Department. Rather, the appeal challenged the Department's ability to impose conditions at all. In essence, Mr. Petterson wanted the benefit of a SSOSA sentence's short period of incarceration without the lifetime community custody (subject to Department imposed conditions) that went with the SSOSA sentence. CP 40; CP 52-53.

Like Mr. Petterson, Amicus ignores this Court's prior holdings that sentences imposed under the Sentencing Reform Act (SRA) may be modified "only if they meet the requirements of the SRA provisions relating directly to the modification of sentences" and "absent explicit authorization, the superior court lacks jurisdiction to modify an offender's sentence." *See* Slip Op., at 6. Here, former RCW 9.94A.670(8) specifically stated, "[A]t the treatment termination hearing the court may: (a) modify conditions of community custody . . . ." *See* Slip Op., at 5. This is the only time the Court is authorized to modify conditions in former RCW 9.94A.670(8). Amicus fails to explain how principles of family reunification allow a Court to ignore the plain meaning of the SSOSA statute.

A further, specific condition imposed by the Department was not at issue before the lower courts. Amicus discusses no contact orders and cites to *State v. Letourneau*, 100 Wn. App. 424, 428-29, 997 P.2d 436 (2000) to

suggest that constitutionality of conditions requires judicial review by the Superior Court so it may act as a check on conditions. First, *Letourneau* discussed the trial court's condition, not the Department's condition. Second, this argument ignores the plain language of former RCW 9.94A.715, currently codified as RCW 9.94A.703, which requires the Department to impose conditions based on an offenders risk of re-offense and allows the Department to establish and modify additional conditions of community custody. Despite Amicus' argument that imposing conditions requires "legal training," the Legislature certainly did not view it that way.

Typically, the Department maintains contact and involvement with offenders long after the Court loses jurisdiction. *See Harkness*, 145 Wn.App., at 685 (stating that after final judgment and sentencing the court loses jurisdiction to the Department of Corrections); *State v. Shove*, 113 Wn.2d at 88-89 (unless the SRA allows modification in specific delineated circumstances, the superior court cannot modify a judgment and sentence). Thus, the Legislature empowered the Department and its community corrections officers, who have current information on an offender's compliance with community custody, and his or her needs based on risk assessments, to impose and modify additional conditions.

Should an offender disagree with a condition imposed by the Department, RCW 9.94A.704(7)(b) allows the offender to request an administrative review. Should that avenue fail to alleviate offenders concerns, he or she has the option of filing a personal restraint petition pursuant to RAP 16.4. Thus Amicus' suggestion that conditions imposed upon an offender require judicial review by the trial court is without merit. The Court of Appeals is well-equipped to review the constitutionality of conditions, and frequently does just that considering that after sentencing, jurisdiction over an offender transfers to the Department. *Harkness*, 145 Wn. App., at 685.

The superior court can modify conditions of community custody in a SSOSA sentence either during annual reviews, or the treatment termination hearing under the current version of RCW 9.94A.670. The arguments presented by Amicus are not helpful to this Court's decision concerning the proper interpretation of the SSOSA statute. The arguments are better addressed to the Legislature.

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## III. CONCLUSION

For the reasons stated above, Respondents respectfully request that the Court reject the argument of amicus, and affirm the judgment of the superior court.

RESPECTFULLY SUBMITTED this 21st day of July, 2017.

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**CERTIFICATE OF SERVICE**

I certify that on the date below I caused to be electronically filed the RESPONSE TO BRIEF OF AMICUS CURIAE 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:

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

EXECUTED this 21st day of July, 2017 at Olympia, Washington.

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