Case Number: SU-2022-0092-MP
Filed in Supreme Court
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Reviewer: Zoila Corporan

STATE OF RHODE ISLAND
SUPREME COURT

JOAO NEVES	:	
	:	
v.	:	**SU-2022-0092-MP**
	:	**(PM-2022-00259)**
STATE OF RHODE ISLAND	:	
KEITH NUNES	:	
	:	
v.	:	**SU-2022-0093-MP**
	:	**(PM-2022-00901)**
STATE OF RHODE ISLAND	:	
PABLO ORTEGA	:	
	:	
v.	:	**SU-2022-0094-MP**
	:	**(PM-2022-00260)**
STATE OF RHODE ISLAND	:	
MARIO MONTEIRO	:	
	:	
v.	:	**SU-2023-0167-MP**
	:	**(PM-2023-00921)**
STATE OF RHODE ISLAND	:	

CONSOLIDATED REVIEW ON CERTIORARI FROM THE GRANT OF POST-CONVICTION RELIEF ENTERED IN THE SUPERIOR COURT

BRIEF AMICUS CURIAE OF THE ROGER WILLIAMS UNIVERSITY SCHOOL OF LAW PRISONERS' RIGHTS CLINIC IN SUPPORT OF RESPONDENTS

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INTERESTS OF THE AMICUS CURIAE

The Prisoners' Rights Clinic is a law clinic at Roger Williams University School of Law, which is dedicated to training students in the skills of civil litigation by zealously defending the civil rights of incarcerated persons in Rhode Island. It was established in 2023 and will begin enrolling students in Fall 2024. As an advocate for the civil rights of incarcerated persons, the Clinic has a substantial interest in the issues raised by these consolidated cases. The U.S. Supreme Court has recognized that significant Eighth Amendment questions arise from the imposition of lengthy terms of incarceration for crimes committed in youth. *Roper v. Simmons*, 543 U.S. 551 (2005); *Graham v. Florida*, 560 U.S. 48 (2010); *Miller v. Alabama*, 567 U.S. 460 (2012). R.I.G.L. § 13-8-13(e), also known as the "Youthful Offender Act," addresses those questions by ensuring that all persons convicted of crimes committed when they were 21 years old or younger will be incarcerated for no more than twenty years before they become eligible for parole.

The Prisoners' Rights Clinic submits this brief to address a question on which the Court requested briefing: whether it would violate separation-of-powers principles to apply the Youthful Offender Act to individuals such as Respondents whose sentences had become final before the enactment of the Act. As addressed below, the answer to that question is straightforward: It would not violate separation of powers to apply the Act to Respondents because the Act does not

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modify their sentences in any way.

SUMMARY OF ARGUMENT

It is well-established that it would violate separation-of-powers principles if the legislature enacted a law that overturned or otherwise modified a court's final judgment, including a criminal sentence. However, that principle has no application to the Youthful Offender Act, R.I.G.L. § 13-8-13(e), because the Act does not modify any final judgments.

For individuals like Respondents, the Act makes parole available earlier than it had been available before the law's enactment, but it does not change Respondents' sentences. Respondents will be required to serve the entire sentences imposed by the courts, including the consecutive sentences handed down to them. If the Parole Board allows them to be released on parole, it would change *where* Respondents will serve their sentences—in prison or in the community—but it would not modify their sentences.

To understand why the Youthful Offender Act does not modify any final judgments, it is important to recognize what constitutes a final judgment in a criminal case. As this Court has held, a court's judgment in a criminal case consists of the verdict and a sentence. *State v. Garnetto*, 63 A.2d 777, 779-780 (R.I. 1949). Respondents Neves, Nunes, and Ortega each received sentences of life imprisonment followed by sentences of a term of years, while Respondent

Monteiro received two life sentences. Respondents Appendix 116, 137, 193-194. Respondents' sentences contain no mention of parole eligibility and do not fix the amount of time they must serve before they become eligible for parole. A change in Respondents' parole eligibility therefore does not modify the final judgments in Respondents' cases.

Numerous aspects of Rhode Island law confirm that Respondents' sentences do not establish particular lengths of incarceration they must serve before becoming eligible for parole. As the provisions of Rhode Island's parole statute demonstrate, parole does not effectuate a change in a criminal sentence but instead determines *where* a sentence will be served. Although this Court has repeatedly confirmed the principle that it would violate separation of powers if the legislature modified a sentence, the Court has long recognized that release on parole does not effectuate a change in an individual's sentence.

The conclusion that changes in parole eligibility do not run afoul of separation-of-powers principles is also shown by a review of the history of the parole system. When parole systems were first established in the nineteenth century, they were challenged as unconstitutional on the ground that a parole board's release of individuals on parole usurped the courts' exclusive judicial power to determine sentencing. For well over one hundred years, however, state courts across the country have rejected that separation-of-powers argument and

have held that release on parole is an administrative decision about *where* a criminal sentence should be served, little different than the decision whether to incarcerate an individual in a minimum or maximum security facility. These cases establish as a foundational principle of the parole system that release on parole does not modify a criminal sentence and therefore does not raise separation-of-powers issues.

The conclusion that changes to parole eligibility do not modify existing sentences also forms the foundation for the uniform conclusion of state courts that have held that laws like the Youthful Offender Act do not violate separation-of-powers. Following the Supreme Court's decision in *Miller v. Alabama*, many state legislatures, like Rhode Island's, amended their parole statutes to allow youthful offenders to become eligible for parole at an earlier time than was allowed at the time of sentencing. Far from condemning such legislative changes as violations of separation of powers, the Supreme Court has spoken approvingly of these reform efforts. Every court to examine the question has ruled that legislative changes to parole eligibility do not violate separation of powers.

In contrast, if this Court were to rule—for the first time by any court—that a law like the Youthful Offender Act violates separation-of-powers principles, it would call into question several other important provisions of Rhode Island's parole laws. Relying on the well-established principle that parole eligibility is not

ordinarily part of a criminal sentence, in 1999 the General Assembly authorized the Parole Board to release individuals on medical parole and made medical parole available to incarcerated individuals, regardless of the sentence they were serving or when they were sentenced. R.I.G.L. § 13-8.1-2(a). In 2021, the legislature authorized the Parole Board to release individuals on geriatric parole, and that type of parole is similarly available to incarcerated individuals, regardless of the length of their sentences or whether they were sentenced before the establishment of geriatric parole. R.I.G.L. § 13-8.1-2(b). Like the Youthful Offender Act, these statutory provisions allow the Parole Board to release certain individuals from incarceration on humanitarian grounds to serve the remainder of their sentences in the community, subject to conditions imposed by the Parole Board, and subject to re-incarceration for violating those conditions. If it would violate separation-of-powers principles to apply the Youthful Offender Act to Respondents, it would be hard to escape the conclusion separation-of-powers principles also prohibits the Parole Board from releasing individuals on medical and geriatric parole, regardless of these humanitarian concerns, if they were sentenced before the enactment of those provisions. Fortunately, this Court does not need to make such a ruling because it is clear that Respondents' sentences do not fix a length of incarceration that Respondents must serve before they become eligible for parole.

ARGUMENT

THE YOUTHFUL OFFENDER ACT DOES NOT MODIFY RESPONDENTS' SENTENCES AND THEREFORE DOES NOT VIOLATE SEPARATION OF POWERS

Over the past generation, a scientific consensus has emerged that juveniles are significantly different from adults in social, cognitive, and emotional development. This consensus persuaded the U.S. Supreme Court to rule that the Eighth Amendment prohibits capital punishment for offenses committed as a minor, *Roper v. Simmons*, 543 U.S. 551 (2005), prohibits imposing life without the possibility of parole on minors for non-homicide offenses, *Graham v. Florida*, 560 U.S. 48 (2010), and prohibits imposing life without the possibility of parole for minors for all offenses, *Miller v. Alabama*, 567 U.S. 460 (2012). As the Court concluded, the law must take into account the fact that juveniles are still developing cognitively, socially, and emotionally, and it is therefore constitutionally impermissible to impose lifelong incarceration on individuals for crimes they committed in their youth.

The same scientific consensus that persuaded the Supreme Court in *Roper*, *Graham*, and *Miller*, also persuaded the Rhode Island General Assembly to enact the Youthful Offenders Act, R.I. Gen. Laws § 13-8-13(e). The Act ensures that anyone who is sentenced for a crime they committed when they were twenty-one years old or younger (other than someone sentenced to life without parole) will be incarcerated for no more than twenty years before they become eligible for parole:

> Any person sentenced for any offense committed prior to his or her twenty-second birthday, other than a person serving life without parole, shall be eligible for parole review and a parole permit may be issued after the person has served no fewer than twenty (20) years' imprisonment unless the person is entitled to earlier parole eligibility pursuant to any other provisions of law. This subsection shall be given prospective and retroactive effect for all offenses occurring on or after January 1, 1991.

Id.

By applying the Act to anyone convicted of a crime occurring after 1990, the Act makes parole available earlier for some offenders, including Respondents, than it had been before the law's enactment. Respondents Neves, Nunes, and Ortega received life sentences, to be served consecutively with a sentence of a term of years sentence, while Respondent Monteiro received two life sentences to be served consecutively. Respondents Appendix 116, 137, 193-194. Under the law existing before the Youthful Offender Act, Respondents Neves, Nunes, and Ortega would have become eligible for parole after serving twenty years in prison on their life sentences plus one-third of the time imposed through their terms of years, while Respondent Monteiro would have become eligible for parole after serving a total of thirty years in prison. *See* R.I.G.L. §§ 13-8-13(a)(3), 13-8-10(a). The Youthful Offenders act provides that Respondents became eligible for parole after twenty years imprisonment.

By making Respondents eligible for parole earlier than they would have been

under the law as it existed when they were sentenced, the Youthful Offender Act raises a separation-of-power question. It is well-established that separation-of-powers principles do not ordinarily allow the legislature to modify a court's final judgment, including sentences imposed in criminal cases. *See Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211 (1995); *State v. Garnetto*, 63 A.2d 777 (R.I. 1949). Accordingly, this Court invited the parties and *amici* to submit briefs addressing the separation-of-powers issue raised by the Youthful Offender Act:

> [T]o what extent, if any, does § l3- 8-l3(e) violate the principle of separation of powers under the Rhode Island Constitution? *See, e.g.*, *State v. Garnetto*, 75 R.I. 86, 63 A.2d 777 (1949); *G. & D. Taylor & Co. v. R.G. & J.T. Place*, 4 R.I. 324 (1856). Specifically, the parties should address whether § 13-8-13(e) serves to nullify the Superior Court's judgement that certain sentences be served consecutive to a life sentence(s), or otherwise converts the Superior Court's judgment that mandatory consecutive sentence(s) be served into a sentence that is concurrent with the life sentence, and the separation of powers effect, if any.

Order, Nov. 28, 2023, ¶ 7.

As discussed below, the answer to the separation-of-powers issue is straightforward: the Youthful Offender Act does not conflict in any way with separation of powers principles because it does not modify the final judgments in Respondents' cases. In sentencing Respondents, the courts made no determinations of when they would be eligible for parole, and the sentences imposed on them do not specify when they would become eligible for parole. The Youthful Offender

Act does not modify Respondents' sentences because the availability of parole simply is not part of Respondents' sentences. Having been sentenced to consecutive terms, Respondents will still be required to serve the entirety of their sentences. The Act simply establishes that they may serve part of those sentences in the community under the supervision of the Parole Board.

In its brief to this Court, the State articulates the correct separation-of-powers principle: "There are few acts that constitute more of an impermissible encroachment on judicial power than an attempt by the legislature to reverse or vacate a state court judgment." State Br. 33. That principle is addressed in Section A. As discussed in Section B, however, the State is wrong in asserting that this principle has any application to the Youthful Offender Act. Respondents' sentences make no mention of parole eligibility and did not fix a length of incarceration that Respondents must serve before they become eligible for parole. Rhode Island law makes clear that release on parole does not change an individual's sentence, and an individual released on parole must still serve the entire sentence imposed by a court, regardless whether it is a term of years, a life sentence, or consecutive sentences. Parole allows individuals to serve a portion of their sentence in the community, subject to conditions imposed by the Parole Board, but it does not alter the length of the sentence imposed by the court.

As discussed in Section C, every state court that has examined the question

has concluded that it does not violate separation-of-powers to make parole available earlier for youthful offenders than it was available at the time of their sentencing.

As section D discusses, if this Court were to become the first state court to rule that it violates separation-of-powers principles to make parole available earlier for youthful offenders, it would call into doubt several other statutory provisions enacted by the General Assembly, under which the Parole Board can release individuals on humanitarian grounds, including medical and geriatric parole, which the legislature made available to all incarcerated individuals, regardless of the length of their sentences or whether such parole was available at the time of sentencing. Because changes to parole eligibility do not change Respondents' sentences, however, there is no basis for this Court to take that step.

A. Separation-of-Powers Principles Prohibit a Legislature From Modifying a Court's Final Judgment

Article V of the Rhode Island Constitution expressly embodies principles of separation of powers. It declares: "The powers of the government shall be distributed into three separate and distinct departments: the legislative, executive and judicial." As this Court has stated, separation of powers issues arise whenever one branch of government assumes a power that is "central or essential to the operation" of another. *In re Advisory Opinion to the Governor (Ethics Commission)*, 612 A.2d 1, 18 (R.I. 1992).

In adopting separation of power principles, the Rhode Island Constitution draws on principles that were established at the foundation of the United States. The central and unwavering purpose of separation of powers is to protect liberty by avoiding the concentration of power. As James Madison wrote in Federalist No. 47, "The accumulation of all powers, legislative, executive, and judiciary, in the same hands . . . may justly be pronounced the very definition of tyranny." Indeed, "the separate and distinct exercise of the different powers of government . . . is admitted on all hands to be essential to the preservation of liberty." The Federalist No. 51.

This case raises a question of the separation of powers between the legislature and the judiciary. As Madison wrote in Federalist No. 47, quoting Montesquieu, "There can be no liberty . . . if the power of judging be not separated from the legislative and executive powers." As the Supreme Court has explained, the division of powers established in the Constitution between the legislative and judicial branch "was a simple one. The Legislature would be possessed of power to 'prescrib[e] the rules by which the duties and rights of every citizen are to be regulated' but the power of '[t]he interpretation of the laws' would be 'the proper and peculiar province of the courts.'" *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 222 (1995) (quoting The Federalist No. 78).

As relevant to this case, separation-of-powers principles have one central

application: A legislature may not undo, overturn, or modify a court's final judgment. As the U.S. Supreme Court has explained, a legislative attempt to overturn a court's final judgment "offends a postulate" that is "deeply rooted in our law": the principle the Constitution "establishes a 'judicial department' with the 'province and duty ... to say what the law is' in particular cases and controversies." *Plaut*, 514 U.S. at 218 (quoting *Marbury v. Madison*, 5 U.S. 137, 177 (1803)).

In *Plaut*, the Court applied this principle and found unconstitutional a federal statute that re-opened judgments that had become final prior to the passage of the statute. As *Plaut* makes clear, Congress can enact law that create new rules that apply in future judicial actions and in pending cases, but it cannot enact laws that would re-open judgments that have become final before the passage of the law. This Court has applied this same principle for more than 150 years. In *Taylor v. Place*, 4 R.I. 324 (1856), this Court held that the legislature transgressed separation-of-powers principles by allowing litigants in certain garnishment cases to amend their affidavits the issuance of final judgments. This Court ruled that the act of re-opening final judgments was a judicial act, which could not be exercised by the legislature.

In *State v. Garnetto*, 63 A.2d 777 (R.I. 1949), this Court applied this separation-of-powers principle in a criminal case, and in so doing articulated the fundamental separation-of-powers principle that should govern the present case.

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Garnetto addressed a statute that required a court to nullify certain deferred sentences. *Id.* at 778. This Court ruled that the legislature had violated separation-of-powers principles by overturning a judicially imposed sentence:

> It has unquestionably been the established law here for many years that the general assembly cannot under our constitution rightfully exercise judicial power. That power is conferred only upon the courts and is necessarily prohibited to the general assembly.

Id. at 779. Although the defendant argued that separation-of-powers only bars a legislature from overturning a *conviction* but allows the legislature to modify a *sentence*, the Court ruled that a sentence is the central element of a court's judgment in a criminal case:

> It is our opinion that the imposition of a sentence by the court in a criminal case is clearly an exercise of judicial power. Broadly speaking such sentencing is the final and conclusive judgment of the court in the case. So considered we see no material distinction between judgment and sentence. The terms may often be used more or less interchangeably.

Id. at 779–80.

As *Garnetto* thus makes clear, a statute that modifies a court's final judgment violates separation of powers principles, and in a criminal case a court's final judgment means the conviction and sentence. Separation of powers therefore precludes a statute that overturns a conviction or modifies a sentence.

B. Parole Eligibility Is Not Part of Respondents' Sentences and Therefore the Youthful Offenders Act Does Not Modify Their

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Sentences

It is well-established that it would violate separation of powers principles if the legislature modified a final judgment, including a criminal sentence, but that principle is not implicated by applying the Youthful Offender Act to Respondents because Respondents' sentences do not mention when Respondents would become eligible for parole or fix the amount of time that Respondents must serve before they become eligible for parole.

1. Respondents' Sentences Do Not Address When Respondents Would Become Eligible for Parole

In assessing whether the Youthful Offender Act violates separation-of-powers principles by modifying final judgments, it is important to be precise about what constitutes a final judgment in a criminal case. As this Court has explained: "Final judgment in a criminal case means sentence. The sentence is the judgment." *State v. Brown*, 899 A.2d 517, 517 (R.I. 2006) (quoting *Berman v. United States*, 302 U.S. 211, 212 (1937)); *see also* 24 C.J.S. Criminal Procedure and Rights of Accused § 2183 ("A judgment in a criminal case consists of a verdict and either the pronouncement of sentence or the suspension of its imposition or execution."); *Lewis v. State*, 421 A.2d 974, 977 (Md. 1980) ("[A] final judgment consists of a verdict [in a criminal case] and either the pronouncement of sentence or the suspension of its imposition or execution."); *Ex parte Walker*, 152 So. 3d 1247, 1252 (Ala. 2014) (a final judgment in a criminal case "consists of the

pronouncement of *both* a determination of a defendant's guilt and a sentence").

The final judgments in the consolidated cases are consistent with the general principle that parole eligibility is not ordinarily part of the sentence imposed by a court. *See* Respondents Appendix 116, 137, 193-194. The judgments declare that Respondents have been found guilty of particular crimes. The judgments each assert a monetary assessment against the defendant. The judgments each impose a sentence, which is specified as a length of time in which Respondents are subject to control by the Department of Corrections. The judgments also specify whether the sentences will run concurrently or consecutively with other sentences imposed on the Respondents.

None of the judgments in Respondents' cases makes any mention of the availability of parole or fixes a length of incarceration that Respondents must serve before they would become eligible for parole.

Because the plain terms of the final judgments in Respondents' cases make no mention of parole, a change to when the Respondents became eligible for parole does not modify the judgments imposed against them. The Youthful Offender Act does not in any way modify the final judgments imposed on Respondents because those judgments say nothing about how long Respondents must be incarcerated before they become eligible for parole. Nor does it modify in any way the provision of consecutive sentences. Regardless of whether they serve a portion of

their sentences on parole, Respondents will still serve their sentences consecutively, as set out in the court's judgments. The availability of parole merely authorizes the Parole Board to allow Respondents to serve part of their sentences in the community rather than in prison. That is, the availability of parole affects *where* Respondents serve their sentences and under what conditions, but does not modify the sentences imposed by the courts.

2. Rhode Island Law Makes Clear that Parole Eligibility Is Not Ordinarily Part of a Sentence

The conclusion that parole does not modify a sentence is manifest throughout the Rhode Island's criminal justice system. Under that system, the judicial branch determines whether an individual is guilty of a crime and, if so, what sentence the individual will serve. The executive branch, under directions of the legislature, has the responsibility for carrying out that sentence. Under this division of power, the executive branch has authority by statute for determining the terms upon which an offender will serve their sentence.

When a court imposes a criminal sentence, it determines the length of time that the defendant is subject to control by the Department of Corrections ("DOC"). It does not determine, the terms by which DOC will carry out that sentence. Instead, DOC determines how a sentence will be carried out. DOC has statutory authority to determine whether a defendant will serve a sentence in a minimum security, medium security, or maximum security facility, as the legislature has

directed DOC to "[d]etermine at the time of commitment, and from time to time thereafter, the custody requirements and program needs of each person committed to the custody of the department and assign or transfer those persons to appropriate facilities and programs." R.I.G.L. § 42-56-10(13).

Just as DOC has authority to determine whether offenders will serve their sentences in a minimum or maximum security facility, the Parole Board has authority to determine whether individuals will serve a portion of their sentences in the community, rather than in the prison, subject to terms imposed by the Parole Board. *See* R.I.G.L. § 13-8-8 ("Whenever a person convicted of any offense shall be sentenced to be imprisoned in the adult correctional institutions for a period of more than six (6) months, his or her sentence shall be subject to the control of the parole board as provided for in this chapter."). Rhode Island law thus provides that the Parole Board may issue a permit to an offender "to be at liberty upon parole, whenever that prisoner has served not less than one-third (⅓) of the term for which he or she was sentenced. *The permit shall entitle the prisoner to whom it is issued to be at liberty during the remainder of his or her term of sentence upon any terms and conditions that the board may prescribe*." R.I.G.L § 13-8-9; *see also* R.I.G.L. § 13-8-16 (a) ("Every permit issued by the parole board under this chapter shall entitle the prisoner to whom it is issued to be at liberty upon parole during the remainder of the term which he or she is under sentence to serve, upon any terms

and conditions that the board may see fit in its discretion to prescribe . . .").

As these provisions make clear, when individuals are granted parole, they must still serve the entirety of their sentences; parole solely determines *where* they serve their sentences and under what conditions. This central feature of parole is further made clear by the fact that if parolees violate the conditions imposed by the Parole Board, the Board may revoke parole and require them to serve the remainder of their sentences in prison. See R.I.G.L. § 13-8-19(a) ("Whenever the permit of a prisoner is revoked, . . . the parole board shall order the prisoner to be returned to the adult correctional institutions or to the women's division of the adult correctional institutions, as the case may be, to serve the remainder of the prisoner's original sentence according to the terms of that sentence."). Revocation of parole, like the issuance of parole, affects *where* an individual serves a criminal sentence and under what conditions; it does not modify an individual's sentence.

This Court's cases have long recognized this fundamental principle of separation of powers, under which the courts determine the length of a sentence and the executive branch, acting under directions of the legislature, determines how and where a defendant serves a sentence:

> A person imprisoned by a court is turned over to an administrative agency for the execution of the sentence. The imprisonment can, if so authorized by the legislature, be ameliorated by allowing it to be served beyond the confines of the penal institution on parole. This is not a right of a prisoner, but accrues to him through legislative

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> grace and can be withheld or withdrawn by the legislature at will. As part of the act of grace it is within the legislative power to attach conditions to the grant of parole and to provide for the administration thereof. *Courts have no power to determine the penological system; this is within the exclusive jurisdiction of the legislature.*

State v. Fazzano, 194 A.2d 680, 684 (R.I. 1963) (internal citations omitted) (emphasis added). As this Court similarly stated in *Lee v. Kindelan*, 95 A.2d 51, 56 (R.I. 1953), parole does not modify or reduce an individual's sentence. The parole statute, this Court stated:

> grants no right to a convicted prisoner to have his freedom or to end his sentence at any time short of the sentence imposed. On the contrary it authorizes the board, except in certain designated cases, to grant conditional permits for liberty. . . . But nowhere is there any provision that the parole board must grant an applicant his liberty whenever he is eligible according to such computation; or that his sentence, if parole is granted, is thereby satisfied for all purposes.

As these cases makes clear, the judicial branch has power to determine whether a defendant committed a crime, to determine if the defendant should be turned over to the custody of the executive branch, and to determine the length of time in which a defendant will be in the penological system. DOC, in turn, has authority pursuant to statute, to determine the conditions of incarceration, and the Parole Board has authority to determine if a sentence should be served in prison or

in the community.[1]

As Rhode Island law thus makes clear, the length of time that Respondents must serve in prison before becoming eligible for parole is simply not part of the sentences they received. Because their sentences did not fix when they would become eligible for parole, no separation of power problem arises from the Youthful Offender Act, which allows Respondents to become eligible for parole after serving twenty years in prison.

3. The History of Parole Systems Makes Clear that Changes in Parole Eligibility Do Not Run Afoul of Separation-of-Powers Principles

When state parole systems were initially created in the late nineteenth century, allowing executive bodies to release inmates to the community before their sentences were completed, it raised a significant separation-of-powers

[1] To be sure, several provisions of Rhode Island specifically preclude parole eligibility for certain offenses: Rhode Island law authorizes the imposition of life without the possibility of parole for homicide, R.I.G.L. §§ 12-19.2-1 to 12-19.2-6; authorizes that habitual criminals must serve a specified number years of incarceration before becoming eligible for parole, R.I.G.L. § 12-19-21(b); and provides that certain sentences for firearms violations are not eligible for parole, R.I.G.L § 11-47-3.2(b), (c). However, none of the Respondents were sentenced under these provisions, and this Court does not need to address any issues that might be raised by the application of the Youthful Offender Act to individuals sentenced under one of those provisions. Although the issue is not presented here, it bears noting that every court that has addressed the issue has ruled that retroactive changes to parole eligibility do not violate separation-of-powers principles even when an original sentence specifically precluded parole eligibility. *See infra* Section C.

concern. Initially, several state courts struck down parole systems on separation-of-powers grounds, ruling that parole interfered with the court's exclusive power to determine an offender's sentence.[2] As these courts held, the judicial department has the exclusive authority, as well as a duty, to impose definite sentences on offenders, and the issuance of parole by executive bodies conflicted with that principle by making sentences imposed by the courts unconstitutionally indeterminate.

By the early twentieth century, however, a consensus had developed that parole systems do not violate separation-of-powers principles because release on parole does not modify an offender's sentence and therefore does not interfere with the judiciary's exclusive authority to impose sentences. For instance, in 1894, the Supreme Court of Illinois upheld a system by which a juvenile sentenced to a state reform school might be released early while still being subject to various conditions. The challenger argued that the system made his sentence unconstitutionally indeterminate. The Illinois court recognized that sentencing "must be specific and certain, and must determine the rights recovered or the

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[2] *People v. Cummings*, 50 N.W. 310, 314 (Mich. 1891); *Fite v. State ex rel. Snider*, 88 S.W. 941, 944 (Tenn. 1905); *Ex parte Marshall*, 161 S.W. 112, 113-14 (Tex. Crim. App. 1913); *State ex rel. Bishop v. State Bd. of Corr.*, 52 P. 1090, 1092 (Utah 1898); *Ex parte Ridley*, 106 P. 549, 550-51 (Okla. Crim. App. 1910); *In re Conditional Discharge of Convicts*, 51 A. 10, 14-15 (Vt. 1901); *see generally* Kristen Bell, *The Forgotten Jurisprudence of Parole and State Constitutional Doctrines of Vagueness*, 44 Cardozo L. Rev. 1953, 1957 (2023).

penalties imposed." The court nonetheless upheld the possibility of early release because it concluded that the sentence imposed by the court was the maximum term allowed by statute, regardless of the possibility of early release on parole. *People ex rel. Bradley v. Ill. State Reformatory*, 36 N.E. 76, 78 (Ill. 1894). The Massachusetts Supreme Judicial Council upheld a parole system on similar grounds. *Oliver v. Oliver*, 48 N.E. 843, 843 (Mass. 1897).

As these courts held, the availability of parole does not interfere with judicial power to determine sentencing because it does not affect the length of a judicially imposed sentence. Instead, a court imposes a sentence that sets the maximum time that a defendant can be incarcerated. Acceptance of this principle soon became widespread and formed a national consensus.[3] As the California Supreme Court declared in 1918: "It has uniformly been held that the indeterminate sentence is in legal effect a sentence for the maximum term. It is on this basis that such sentences have been held to be certain and definite, and therefore not void for uncertainty." *Ex parte Lee*, 171 P. 958, 959 (Cal. 1918).

In these early cases, some litigants argued that parole boards impinge on the

[3] *People v. Joyce*, 92 N.E. 607, 613 (Ill. 1910); *Ex parte Marlow*, 68 A. 171, 173 (N.J. 1907); *Skelton v. State*, 49 N.E. 901, 903 (Ind. 1898); *State v. Perkins*, 120 N.W. 62, 64 (Iowa 1909); *People ex rel. Clark v. Warden of Sing Sing Prison*, 78 N.Y.S. 907, 908-09 (Sup. Ct. 1902); *State v. Tyree*, 78 P. 525, 527 (Kan. 1904); *Oliver*, 48 N.E. at 844; *Woods v. State*, 169 S.W. 558, 562 (Tenn. 1914); *Commonwealth v. Kalck*, 87 A. 61, 63 (Pa. 1913); *see generally* Bell, *supra*, 44 Cardozo L. Rev. at 1969-1973.

judiciary's power to determine sentences because the parole board, not the court, determines when an offender would be released from prison.[4] Courts rejected these arguments, however, by concluding that the judicially imposed sentence consists of the term imposed by the court, pursuant to statute, and parole boards have no power to override the length of the sentence. *See, e.g.*, *Ex parte Lee*, 171 P. at 959. Instead, parole boards have authority to determine whether a sentence will be served inside the prison or in the community, subject to conditions imposed by the board.

As these courts concluded, granting release on parole does not extinguish or reduce a sentence. A person released on paroles continues to serve the sentence imposed by the court, but they serve it in the community rather than in prison.[5]

This Court has long recognized that it is a foundational principle of the parole system that the legislature can "ameliorate a judicial sentence" by authorizing release through parole and that such release does not usurp the court's exclusive power to determine a sentence:

> [I]t is clearly within the legislative power to ameliorate a judicial sentence. . . . If it were not so held, our parole system could not exist and those serving sentences for commissions of crimes could obtain releases prior to

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[4] See Edward Lindsey, *Historical Sketch of the Indeterminate Sentence and Parole System*, 16 J. Am. Inst. Crim. L. & Criminology 9, 46 n.47 (1925) (collecting cases).

[5] *State v. Duff*, 122 N.W. 829, 830 (Iowa 1909); *State* ex rel. *Att'y Gen. v. Peters*, 734 N.E. 81, 87 (Ohio 1885).

> expiration of the terms to which they had been sentenced only by pardon or executive clemency.

State v. Fazzano, 194 A.2d 680, 685 (R.I. 1963).

In so ruling, *Fazzano* relies on *Commonwealth ex rel. Banks v. Cain*, 28 A.2d 897, 899 (Pa. 1942), which reiterates the key point: Parole "is a penological measure for the disciplinary treatment of prisoners who seem capable of rehabilitation outside of prison walls. It does not set aside or affect the sentence; the convict remains in the legal custody of the state and under the control of its agents, subject at any time, for breach of condition, to be returned to the penal institution." For this reason, the Pennsylvania Supreme Court ruled, there is no separation-of-powers problem to apply statutory changes to parole eligibility to individuals sentenced before the statute's enactment: "The exercise of the power of parole being but an administrative function which does not impinge upon the judicial power of sentencing the accused in conformity with the law, it follows that the present act may constitutionally be applied to cases where sentences were imposed before its effective date." *Id.* at 901.

4. This Court's Cases Confirm that Parole Does Not Change a Judicially Imposed Sentence

This Court has repeatedly declared that the legislature would violate separation of powers principles if it reduced or modified a criminal sentence. For instance, in *State v. Parrillo*, 158 A.3d 283, 291 (R.I. 2017), this Court stated:

"The power to reduce a sentence, either directly or indirectly, is reserved to the judiciary." Similarly, in *Rose v. State*, 92 A.3d 903, 911 (R.I. 2014), this Court declared: "While the executive branch may execute a sentence, the power to reduce the length of a sentence imposed by a justice of the Superior Court is a judicial one." Neither of those cases, however, or any other decided by this Court, found a separation-of-powers problem from changes to the availability of parole.

Rose confirms that when a prisoner is released on parole, it does not modify or reduce the length of a criminal sentence. In *Rose*, the petitioner Alexander Rose received a twenty-year sentence, which was described by the sentencing justice as involving eight years to serve, with the remaining years suspended, with twelve years on probation. 92 A.3d at 905. Rose then served four years in prison and was released on parole, due to his accumulation of good-time credits. Rose asserted that he had completed serving his sentence twelve years after his release on parole. This Court disagreed and ruled that Rose had received a twenty-year sentence, which was not affected by his release on parole. While DOC was authorized to reduce the length of Rose's *incarceration* by awarding good time credits and the Parole Board was authority to issue a permit for Rose's release on parole, neither good time credits nor parole reduced the length of Rose's *sentence*, which had been set by the court.

As this Court concluded in *Rose*: "While the Legislature in § 42-56-24

clearly gave the DOC the discretion to mitigate that sentence by providing for Rose's early release from the ACI, it did not endow the DOC with the power to modify the overall length of a judicially imposed sentence." 92 A.3d at 911. That is, Rose's release from incarceration due to good time credits and parole affected *where* he served his sentence; it did not change the twenty-year sentence imposed by the court.

The same principle applies here. By ensuring that youthful offenders are eligible for parole after no more than twenty years of incarceration, the Youthful Offender Act does not modify the sentence that Respondents received but instead merely ensures that they have the possibility to serve a portion of their sentences outside the prison, subject to conditions imposed by the Parole Board. Because the Act does not modify Respondents' sentences, the Act does not violate separation of powers.

In other cases, this Court has clearly suggested that, because release on parole does not affect the length of a criminal sentence, legislative changes to parole eligibility could be applied after sentencing. In *Rondoni v. Langlois*, 153 A.2d 163, 165 (R.I. 1959), the Court declared that parole "is a privilege which the legislature may confer, withhold or withdraw. And the conditions under which it

may be obtained may be changed at any time before parole is granted."[6] Similarly, in *State v. Winston*, 252 A.2d 354, 359 n.2 (1969), the Court noted that, after the defendant was sentenced, the legislature enacted a statute that reduced the time when a prisoner would become eligible for parole. The Court noted that "The general assembly gave this statute a retroactive effect by providing that any prisoner serving a sentence, including a life sentence, at the time of its enactment may petition the sentencing court and ask that he be accorded the benefit of the new law. The defendant may be a beneficiary of the legislature's benevolence." As these cases correctly recognize, legislative changes to parole eligibility do not implicate separation-of-powers issues because they do not affect the length of a sentence imposed by the court.

C. Every State Court that Has Examined Similar Changes to Parole Eligibility Has Found No Separation-of-Powers Violation

Following the Supreme Court's decision in *Miller v. Alabama*, many state legislatures have amended their parole statutes to allow youthful offenders to become eligible for parole at an earlier time than had been allowed at the time of sentencing. When *Miller* was decided, twenty-eight states allowed minors to be

[6] As discussed in Section E *infra*, *Rondoni*'s conclusion that it would not violate the Ex Post Facto Clause for the legislature to eliminate or extend the time for parole eligibility is inconsistent with more recent cases, *see Garner v. Jones*, 529 U.S. 244, 250 (2000), but that conclusion does undermine the conclusion that no separation-of-powers issue arises through statutory changes to parole eligibility after sentencing.

sentenced to life without parole. *Miller v. Alabama*, 567 U.S. 460, 482 (2012). According to the National Conference of State Legislatures, half of those states have now amended their parole laws following *Miller*. Anne Teigen, Miller v. Alabama *and Juvenile Life Without Parole Laws* (June 15, 2023), https://www.ncsl.org/civil-and-criminal-justice/miller-v-alabama-and-juvenile-life-without-parole-laws. Like Rhode Island, some state legislatures, including Illinois and the District of Columbia, have extended *Miller*'s protections to all persons who committed offenses committed by persons who were twenty-one or twenty-five years old or younger. *See* Joshua Rovner, *Juvenile Life Without Parole: An Overview*, The Sentencing Project (April 7, 2023), https://www.sentencingproject.org/policy-brief/juvenile-life-without-parole-an-overview/. The Massachusetts Supreme Judicial Court and the Washington State Supreme Court have each extended *Miller* to twenty-one year-olds. Commonwealth v. Mattis, 224 N.E.3d 410 (Mass. 2024); *Matter of Monschke*, 482 P.3d 276, 288 (Wash. 2021).

Although *Miller* does not require that states provide parole eligibility for individuals who committed crimes when they were older then eighteen, the Supreme Court has expressly endorsed the prospect that states could amend their parole laws in ways that would go beyond the minimum necessary to correct the problem identified *Miller*. In *Jones v. Mississippi*, 593 U.S. 98 (2021), the Court

ruled that states could comply with *Miller* by re-sentencing juvenile offenders under processes that allowed for parole eligibility, and they did not need to make findings that the defendant was permanently incorrigible. In so ruling, however, the Court explained that states were entitled to go farther than the constitutional minimum: "our holding today does not preclude the States from imposing additional sentencing limits." *Id.* at 120. In particular, the Court declared that States have the option of eliminating life without parole for all minors, even though this is not constitutionally required. *Id.*

No court has found any separation-of-powers problem from any of the laws adopted in the wake of *Miller* that make parole available earlier for youthful offenders. Instead, every court that has examined the question has upheld such statutes. For instance, Illinois enacted a law similar to Rhode Island's that provides parole eligibility to a person who was under 21 years old at the time of the commission of a nonhomicide offense. In *People v. Beck*, 192 N.E.3d 842, 849 (Ill. Ct. App. 2021), the Illinois Appellate Court found no separation-of-powers problem in applying the statute to an individual who had originally been sentenced more than twenty years before the law's enactment.

The Missouri Supreme Court similarly upheld a statute altering parole eligibility and that applied the change to persons sentenced before the statute's enactment. In *Hicklin v. Schmitt*, 613 S.W.3d 780, 790 (Mo. 2020), the challenger

argued that the statute "violates the separation of powers by allowing the parole board, an administrative agency in the executive branch, to determine an offender's sentence, thereby usurping the role of the judiciary." The court rejected that argument:

> But the parole board does not determine the sentence. It determines whether to grant parole. It was the Missouri General Assembly—not the parole board—that granted to Ms. Hicklin the benefit of parole eligibility. This, of course, does not offend the separation of powers because, "[i]n our tripartite form of government ... sentencing power is not inherent to the judiciary, but is dependent upon legislative authorization."

Id. (quoting *State ex rel. Hughes v. Kramer*, 702 S.W.2d 517, 519 (Mo. App. 1985)); *see also State v. McCleese*, 215 A.3d 1154 (Conn. 2019) ("It is well established that judicial and legislative powers necessarily overlap in many areas, including sentencing."); *Matter of Dodge*, 502 P.3d 349 (Wash. 2022); *State v. Vera*, 334 P.3d 754, 760 (Ariz. Ct. App. 2014) (holding that an analogous statute did not violate separation of powers because "the legislature does not violate separation of powers when it acts to make a law retroactive without disturbing vested rights, overruling a court decision, or precluding judicial decision-making"

In upholding these statutes against separation-of-powers challenges, these courts relied upon the well-established principle, discussed above, that release on parole does not modify a criminal sentence. See, e.g., *State ex rel. Nixon v. Russell*,

129 S.W.3d 867, 870-71 (Mo. 2004) (upholding a retroactive change to parole eligibility and concluding: "The granting of parole does not reduce the sentence imposed. [The statutory change] does not shorten Estes' sentence; its application may, however, change the location or circumstances under which the sentence is served."); *Tyree v. Moran*, 550 P.2d 1076, 1078 (Ariz. 1976) (upholding application of amended parole statute to offender sentenced before its enactment and stating that the amendment did "not alter the penalty which was attached to any offense, nor create a new penalty, nor change the sentence imposed").

D. Invalidating the Youthful Offender Act on Separation of Powers Grounds Would Cast Doubt on the Availability of Geriatric and Medical Parole, Among Other Statutes

If this Court were to rule that the Youthful Offender Act violates separation-of-powers principles by modifying final judgments, it would call into doubt several other statutory provisions that also made parole available earlier than had been available at the time of an individual's sentencing.

In 1999, the General Assembly authorized the Parole Board to release prisoners on medical parole for "humanitarian reasons and to alleviate exorbitant medical expenses associated with inmates whose chronic and incurable illness render their incarceration non-punitive and non-rehabilitative." R.I.G.L. § 13-8.1-2(a). By the terms of that section, medical parole is available to "all prisoners, except those serving life without parole" and it is available "at any time after they

begin serving their sentences . . . regardless of the crime committed or the sentence imposed." *Id.* Under this provision, a prisoner may seek and obtain medical parole at any time after they begin a sentence, regardless of the length of sentence they received.

In 2021, the General Assembly similarly authorized the Parole Board to release individuals on geriatric parole: "Geriatric parole is made available for humanitarian reasons and to alleviate exorbitant expenses associated with the cost of aging, for inmates whose advanced age reduces the risk that they pose to the public safety." R.I.G.L. § 13-8.1-2(b). Like medical parole, geriatric parole is available to "all prisoners except those serving life without parole . . ., regardless of the crime committed or the sentence imposed." *Id.*

The medical and geriatric parole provisions allow the Parole Board to release inmates on parole, even if it means releasing individuals earlier than they would have been eligible for parole under the prevailing parole statute at the time they were sentenced. That is, R.I.G.L. § 13-8-9 requires that inmates serve one-third of their sentences before they can be considered for parole, but § 13-8.1-2(a) makes medical parole available "at any time after [inmates] begin serving their sentences." In accordance with the plain terms of these provisions, the Parole Board has released individuals on medical and geriatric parole, regardless whether such parole was available when the individuals were sentenced. In other words,

these statutory provisions have made parole available earlier than had been available at the time individuals were sentenced.

If the State were right in this case that it violates separation-of-powers principles for the legislature to make parole available to Respondents earlier than it had been available at the time of sentencing, it would be hard to escape the conclusion that the geriatric and medical parole provisions would similarly violate separation-of-powers principles. Fortunately, the State is wrong in its separation-of-powers analysis and this Court can avoid that unfortunate result.

In addition to the geriatric and medical parole provisions, the General Assembly has enacted additional provisions that authorize release on parole earlier than was available at the time of sentencing and therefore these provisions too would be called into question if the State were correct in its separation of powers analysis. R.I.G.L § 42-26-13.3(d) makes available a variety of measures to address the possibility of prison overcrowding, including authority to "Temporarily suspend existing guidelines for parole eligibility and consider all prisoners statutorily eligible for release or parole." Another provision authorizes the governor to issue "emergency good time to nonviolent offenders to expedite eligibility for parole" in order to address prison overcrowding. R.I.G.L. § 42-26-13.3(g). If the State were right in its separation of powers argument, these provisions too would be invalid. Fortunately, the State is wrong.

E. Although Changes to the Availability of Parole Do Not Implicate Separation-of-Powers Principles, Changes to Parole Eligibility Are Subject to Limitations Under Other Constitutional Provisions

Although it does not violate separation-of-powers principles for the legislature to make parole available earlier than it would have been available at the time of sentencing, it would violate a different constitutional prohibition—the Ex Post Facto Clause—if the legislature changed parole in the opposite direction, by eliminating parole or extending the time when parole is available. *Garner v. Jones*, 529 U.S. 244, 250 (2000) ("Retroactive changes in laws governing parole of prisoners, in some instances, may be violative of" the Ex Post Facto Clause)*;* *Girouard v. Hofmann*, 981 A.2d 419, 422-23 (Vt. 2009) ("Legislative amendments that eliminate opportunities for parole that previously existed can result in Ex Post Facto Clause violations."). Furthermore, limitations on parole may implicate Eighth Amendment concerns, as *Miller v. Alabama* and related cases makes clear. In addition, Parole Board processes for granting and revoking parole must adhere to the requirements of due process, *see State v. Ouimette*, 367 A.2d 704, 709 (R.I. 1976), and it is therefore possible that retroactive reductions in parole eligibility might deprive an individual of a protected liberty interest.

Accordingly, the conclusion that it does not violate separation-of-powers principles for the legislature to make parole available earlier for youthful offenders does not mean that changes to parole eligibility are immunized from judicial

review. Other constitutional limitations remain available if the legislature modifies parole eligibility in ways that deprive individuals of their protected rights.

CONCLUSION

For the reasons given above, this Court should find that applying the Youthful Offender Act, R.I.G.L. § 13-8-13(e), would not conflict with separation-of-powers principles.

Respectfully submitted,

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/s/ Jared A. Goldstein

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