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STATE OF RHODE ISLAND

PROVIDENCE, SC. SUPREME COURT

JOAO NEVES	:	SU-2022-0092-MP
v.	:	(PM-2022-0259)
STATE OF RHODE ISLAND	:	
KEITH NUNES	:	SU-2022-0093-MP
v.	:	(PM-2022-0901)
STATE OF RHODE ISLAND	:	
PABLO ORTEGA	:	SU-2022-0094-MP
v.	:	(PM-2022-0260)
STATE OF RHODE ISLAND	:	
MARIO MONTEIRO	:	SU-2023-0167-MP
v.	:	(PM-2023-00921)
STATE OF RHODE ISLAND	:	

Consolidated Review on Certiorari from the Grant of Post-Conviction Relief Entered in the Superior Court of Providence County

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BRIEF FOR AMICUS CURIAE RHODE ISLAND PUBLIC DEFENDER

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STATEMENT OF INTEREST BY AMICUS CURIAE

The Office of the Public Defender is a state agency entrusted with representing indigent defendants in criminal cases in Rhode Island. Those clients include children and young adults charged and sentenced for crimes that they committed before their twenty-second birthday. As such, the Office of the Public Defender has an interest in ensuring that R.I.G.L. § 13-8-13(e) ("Subsection (e)") is enforced, so that children and young people convicted of serious crimes have a chance to demonstrate to the Parole Board that they have been rehabilitated.

The Office of the Public Defender also has an interest in how sentences are calculated for parole eligibility. In this Court's full briefing order, it directed the Department of Corrections ("DOC") and the Parole Board to address DOC's recent change to how parole is calculated for those serving certain consecutive sentences. The Office of the Public Defender represents individuals affected by this change in concurrent litigation and submits this brief to address this consequential matter.[1]

[1] Two impacted offenders, Francisco Martinez and Michael Lambert, were granted relief in the Superior Court. The State filed petitions for writ of certiorari in both cases, numbered as SU-2021-0292-M.P., and SU-2022-0079 M.P., respectively. This Court granted certiorari, and the cases are now consolidated for appeal.

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SUMMARY OF THE ARGUMENT

Subsection (e) sets parole eligibility at twenty years of imprisonment for youthful offenders serving lengthy sentences. This legislation allows the Parole Board to perform its normal statutory function: carefully considering whether an offender is ready for community release. The legislation does not reduce a sentence. It merely authorizes the Parole Board to consider whether the interests of safety, rehabilitation, and cost-cutting are best realized by permitting an offender to serve the balance of his sentence closely supervised in the community.

By its black-and-white terms, Subsection (e) applies to nearly all youthful offenders, including those like Mario Monteiro, Joao Neves, Keith Nunes, and Pablo Ortega who are serving consecutive sentences. The plain language of Subsection (e) excludes only those who committed offenses before 1991 or those serving life without parole sentences.

Applying Subsection (e) to consecutive sentences conforms with Rhode Island law mandating that consecutive sentences be aggregated—combined—for parole eligibility calculations. Both R.I.G.L. § 13-8-10 and R.I.G.L. § 13-8-13(d) require that consecutive sentences be aggregated to produce a single parole eligibility date. And the comprehensive parole scheme laid out in Chapter 8 of Title 13 of the General Laws repeatedly refers to single parole eligibility dates and release to the community—not multiple parole eligibility dates with release

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from one sentence to the next. Whether in the specific context of R.I.G.L. § 13-8-13(e) or more broadly, aggregating consecutive sentences for parole review is consistent with the statutes and rules governing the Parole Board as well as the rehabilitative and cost-saving goals of the parole system.

ARGUMENT

I. Subsection (e) Authorizes The Parole Board To Perform Its Standard Function.

Parole is an essential component of Rhode Island's sentencing landscape that encourages safe reintegration into society while lowering correctional costs. Subsection (e) fits into that parole system by permitting the Parole Board to begin reviewing youthful offenders after twenty years of imprisonment. In doing so, Subsection (e) allows the Parole Board to perform its standard function: deciding when and whether a person is ready to live in the community, under strict supervision.

The parole eligibility provided in Subsection (e) does not guarantee automatic release. A person eligible for parole might never be paroled. In reviewing youthful offenders, the Parole Board must abide by its legislative directives, giving due regard to the seriousness of the offense. *See* R.I.G.L. § 13-8-14(a)(2). Only those who can show they can "properly assume a role" in the community "without violating the law" may be released to the community. R.I.G.L. § 13-8-14(a)(3)–(a)(4).

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A. Parole Is A Variation On Imprisonment That Promotes Successful Reintegration And Reduces Costs.

Parole is not a get out of jail free card. It is "an established variation on imprisonment." *Morrissey v. Brewer*, 408 U.S. 471, 477 (1972). A paroled offender is released from prison on the condition that they abide by certain rules for the rest of the sentence. *Id.* While on parole, the offender continues to serve the sentence; if they violate the conditions, they can be returned to prison to serve out the balance. *Id.* at 478–79. Thus, parole under Subsection (e) does not reduce an offender's sentence. Parole simply allows the youthful offender to serve the remainder of the sentence while monitored in the community—and only after the Parole Board decides that release is safe and appropriate.

The benefits of parole extend beyond those that accrue to the single offender. Here in Rhode Island, the parole system benefits the greater community by reducing recidivism and saving money. Parole does this in two ways: (1) by "help[ing] individuals reintegrate into society as constructive individuals as soon as they are able" and (2) by "alleviat[ing] the costs to society of keeping an individual in prison." *Id.* at 477.

First, the Parole Board promotes safe and successful reintegration by setting individualized conditions on release and closely monitoring compliance. The Parole Board sets conditions specific to each parolee. R.I.G.L. §§ 13-8-9(a), 13-8-16. For example, the Parole Board will often condition parole on admission

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into residential reentry programs specifically designed for parolees, like 9 Yards, Amos House, and the Salvation Army.[2] Other conditions that serve reintegration include employment or community service requirements, substance use assessment and counseling, and mental health assessment and counseling. The Parole Board often imposes 24/7 electronic monitoring to ensure compliance while protecting the community:

> Conditions of parole are stricter and more detailed [than probation]. Prior to release and for every subsequent change, offenders must have approval from the Parole Board of plans for employment, where they are living in the community and with whom. Parolees cannot socialize with other parolees unless special permission is granted by the Parole Board. Regular drug testing is required. The PO supervises closely, and maintains contact with family members, employers, treatment providers, and others. In addition to the general conditions that apply to all parolees, the Parole Board usually orders special conditions for particular offenders, and most parolees are first released either to residential treatment or electronic monitoring.

RIDOC, *Probation & Parole FAQ*, https://doc.ri.gov/community-corrections/probation-parole/probation-parole-faq (last visited Feb. 16, 2024).

These conditions, although onerous, provide support to individuals who are reintroduced to the community for the first time in years or decades. For

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[2] *See, e.g.*, John Hill, *For Ex-Inmates, Going the Whole '9 Yards' Works*, The Providence Journal, Feb. 27, 2017, https://www.providencejournal.com/story/news/2017/02/27/after-aci-going-whole-9-yards-works/22062486007.

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youthful offenders, this will be the first time they exist as adults in society. In this way, parole serves as a step down from incarceration: an adjustment period from prison life to freedom.

In turn, a successful transition to work, education, or a reentry program protects the community by decreasing the likelihood of recidivist criminal behavior.[3] Meanwhile, parole officers ensure that parolees are housed, employed, associating with the right people, and staying out of trouble. *See Morrisey*, 408 U.S. at 478 (discussing how supervision promotes both reintegration and community safety). In contrast, those that "flatten"—complete their sentences rather than being released on parole—have no comparable checks, supervision, or conditions of release.

Second, the parole system saves Rhode Islanders a substantial sum. The cost per incarcerated offender for fiscal year 2023 varied from $88,282 to $256,534 per year, depending on the facility, for an average of $107,969 per offender per year. RIDOC, *FY2023 Cost Per Offender*, https://doc.ri.gov/more-resources/financial-resources (last visited Feb. 16, 2024). These eye-popping figures exclude DOC administrative and capital costs.

[3] *See, e.g.*, The Harvard University Institute of Politics Criminal Justice Policy Group, *Successful Reentry: A Community-Level Analysis* (2019), https://iop.harvard.edu/sites/default/files/2023-02/IOP_Policy_Program_2019_Reentry_Policy.pdf.

Facility Description	Average Population [a]	Excluding Central DOC Admin & Capital Costs: Total Expenditures [b]	Cost per Offender: Per Annum	Cost per Offender: Per Diem
Institutionalized Offenders				
Men's Facilities				
Minimum	150	$23,067,048	$153,780	$421.32
Medium/Moran	828	$73,600,652	$88,890	$243.53
Intake Service Center	810	$71,508,689	$88,282	$241.87
Maximum	307	$38,199,816	$124,429	$340.90
High Security Center	80	$20,522,732	$256,534	$702.83
Women's Facilities	123	$21,214,873	$172,479	$472.54
Total Institution Population	**2,298**	**$248,113,810**	**$107,969**	**$295.81**

Id. Offenders serving life sentences will cost Rhode Islanders millions over the course of their sentences, especially young people who began their sentences as teenagers, like the respondents here. Parole, on the other hand, costs Rhode Islanders $2,650 per offender per year:

Community Based Offenders				
Probation & Parole [e]	6,537	$17,326,084	$2,650	$7.26
Home Confinement [f]	159	$3,004,829	$18,898	$51.78
Total Community Population	**6,696**	**$20,330,913**	**$3,036**	**$8.32**

Id.

To put it plainly, there are significant benefits to providing parole opportunities to young offenders with lengthy sentences, both in terms of safe reintegration and costs. Subsection (e) allows the Parole Board to review a young offender after twenty years to determine whether release may be appropriate in certain cases, when the offender has met the burden described in the next section.

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B. <u>The Parole Board Evaluates Each Parole Application According To Statutory Criteria And Published Guidelines To Determine When Release Is Appropriate.</u>

Although there are societal benefits to parole, not every offender is ready for release at the first opportunity—indeed, some are never ready. To make this determination, the Parole Board evaluates each offender according to release criteria identified in R.I.G.L. § 13-8-14, as well as the standards developed in accordance with R.I.G.L. § 13-8-14.1. The Parole Board will follow this standard protocol before issuing a parole permit under Subsection (e).

1. <u>Submission Of Materials, Victim Input, Attorney General Reports, And The Hearing</u>

The Parole Board reviews various materials before a parole hearing, including police reports, criminal history, prison records, and the parole plan submitted by the applicant. *See* R.I.G.L. §§ 13-8-22, 13-8-23. A parole plan must include a job offer letter, a residence letter, and may also include letters of support and certificates of program completion. R.I. Parole Board, *Guidelines 2023* § 1.4(B), https://paroleboard.ri.gov/parole-consideration-guidelines [hereinafter, *Guidelines*]. Applicants can also submit a personal letter, and a request to be paroled to a residential reentry program, like 9 Yards or Amos House, as an alternative to a residence. A person will not be paroled without a satisfactory parole plan.

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Victims are also notified before the hearing and may choose to meet with the Parole Board privately. R.I.G.L. § 13-8-6(a)(7); *Guidelines* § 1.6(A). The Parole Board considers the loss or injury to the victim, as well as any special concerns of the victim or community in its determination. *Guidelines* § 1.5(C).

The Attorney General's Office also provides a recommendation to the Parole Board, which sets forth the reasons the offender should or should not be paroled. R.I.G.L. § 13-8-23(3). The Attorney General's Office is ordered by statute to consult the trial judge "to determine if he or she may wish to make any comment or recommendation." *Id.* The Parole Board provides law enforcement the opportunity to provide comment as well. R.I.G.L. § 13-8-6(a)(7). The Parole Board may also solicit reports from psychiatrists and licensed mental health professionals. R.I.G.L. § 13-8-23(4) & (5).

At the hearing, an applicant appears before members of the Parole Board. Parole Board members are named by the governor and must include a person trained in correctional work or a closely related field, a law enforcement officer, a psychologist or physician qualified in the field of psychiatry or neurology, and at least one member in good standing with the Rhode Island Bar. R.I.G.L. § 13-8-2.

The applicant may make a statement to the Parole Board, and the Parole Board may ask questions. Questions may cover a range of topics including details

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of the crime, participation in prison programming, plans for release, acceptance of responsibility, disciplinary infractions, mental health, and substance use history. The Parole Board does not issue a decision at the hearing.

2. Parole Standards

In determining whether to grant or deny parole, the Parole Board considers an applicant's prison discipline record, risk of recidivism, any aggravating or mitigating factors, and any special considerations, such as whether the applicant was a juvenile at the time of the offense or a sex offender.

- Discipline: The Parole Board will only parole those who have substantially complied with prison rules. R.I.G.L. § 13-8-14(a)(1). The Board generally does not parole offenders with disciplinary infractions in the prior six months. *Guidelines* § 1.5(A).
- Risk of Recidivism: The Board uses a validated risk assessment tool to determine the risk that a prisoner will reoffend. R.I.G.L. § 13-8-14.1(a); *Guidelines* § 1.5(B). This risk assessment accounts for static factors, like criminal history, the commitment offense, and history of violence, if any, and dynamic factors, like education level, age, custody level, and recent disciplinary infractions. *Guidelines* § 1.5(B). The risk assessment recommends that the Parole Board deny parole to those who committed the most serious offenses, especially

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those with aggravating factors and without mitigating factors. *Id.* For this population, the risk assessment recommends further programming designed to reduce the risk of reoffending. *Id.* The Board may only deviate from the recommendation of the risk assessment tool when specific factors warrant a departure. R.I.G.L. § 13-8-14.1(b). For offenders convicted of murder, sexual assault, or child molestation, a designated licensed mental health professional or psychiatrist/psychologist may also "complete a comprehensive examination or assessment to determine if the inmate is at high risk to reoffend." *Guidelines* § 1.5(E)(2).

- Aggravating Factors: The Parole Board has identified certain factors that weigh against the grant of parole. Those include negative institutional conduct; the failure to complete recommended prison programming; "the nature of the offense as it relates to the parole candidate's motivation for committing the offense, their role in the offense, level of violence used, the amount of loss and/or injury to the victim, and the degree of sophistication evidenced in the offense"; unsatisfactory parole plan; prior parole violations; special concerns of the victim(s) or community; gang membership; prior escape attempts; and sexually predatory activities. *Id.* § 1.5(C).

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- Mitigating Factors: The Parole Board has also identified mitigating factors that may point to a grant of parole when the risk of recidivism is low. Those include participation and success in a work release program or recommended programming; a favorable and realistic reentry plan; strong community support; and being within a year of the expiration of the sentence. *Id.* § 1.5(D).
- Persons convicted as juveniles: By statute, the Parole Board will consider the age of the offender when a person was less than eighteen years old at the time of the offense. R.I.G.L. § 13-8-14.2.

3. The Parole Decision

Following a parole hearing, the Parole Board may:

- Deny parole altogether (commonly known as telling the inmate to "flatten");
- Deny parole but set another hearing date called a reconsideration date, along with recommendations to the prisoner, such as specific prison programming designed to reduce the risk of recidivism;
- Set a permit to issue at a date in the future (for example, once the offender secures a position in a residential reentry program or other community program); or
- Issue a permit "to be at liberty upon parole" immediately.

R.I.G.L. §§ 13-8-9, 13-8-24; *Guidelines* § 1.4(D). These decisions may be made by a majority of the Board, except that for prisoners serving life sentences, a permit will be issued only if there is a unanimous vote of the attending members of the Board. R.I.G.L. § 13-8-13(b).

II. Subsection (e) Applies To Offenders Serving Consecutive Sentences By Its Plain Language.

The state argues that offenders serving consecutive sentences are excluded from the parole eligibility provided for in Subsection (e). State's Brief 23–24. This ignores the plain language of Subsection (e), which controls here. "If the language of a statute is clear and unambiguous, this Court must interpret the statute literally and must give the words of the statute their plain and ordinary meanings." *State v. McGuire*, 273 A.3d 146, 152 (R.I. 2022) (quotations omitted). Indeed, applying the plain meaning of the statute is the first and best way "to give effect to the purpose of the act as intended by the Legislature." *Id.*

Subsection (e) sets parole eligibility for youthful offenders with only two exceptions. The language provides for a review date after twenty years for "[a]ny person sentenced for any offense committed prior to his or her twenty-second birthday" except those serving life without parole and those who committed offenses before 1991:

> 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

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> 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.

Despite the state's insistence, there is nothing in the plain language of the statute that excludes those serving consecutive sentences. Each respondent here is a "person sentenced for any offense committed prior to his or her twenty-second birthday." None of them are serving life without parole sentences. None of them committed any offense before 1991. The state's argument disregards the words on the page, injecting an exception for consecutive sentences where none appears. Subsection (e) applies by its own terms to offenders serving consecutive sentences.[4]

[4] The plain language shows the General Assembly's intent that Subsection (e) apply to people serving consecutive sentences. But if that were not enough, the legislation was commonly referred to by legislators during drafting as "Mario's Law," after Mario Monteiro, a respondent in this matter who is serving two consecutive life sentences. Respondent's Appendix ("RA") 205–206. Indeed, the legislation would impact very few—if any—young offenders were it not to apply to those serving consecutive sentences. This is especially true considering the mandatory consecutive sentences for offenses involving guns.

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III. <u>Consecutive Sentences Are Aggregated For Parole Eligibility, Including Eligibility Under Subsection (e).</u>

As discussed in Part II, Subsection (e) provides that a youthful offender serving consecutive sentences may be considered for parole to the community after serving twenty years of imprisonment. DOC's position—that those individuals must be paroled to the next consecutive sentence—contradicts Rhode Island law and the purpose of parole. Rather, consecutive parolable sentences must be aggregated—combined—for parole eligibility under Subsection (e). This reflects how parole eligibility has historically operated in this state. This interpretation is also consistent with the statutes and guidelines that control the parole process, as well as the goals of parole.

A. <u>Aggregation Is The Mandated Practice Of Combining Consecutive Sentences To Determine A Single Parole Eligibility Date.</u>

Consecutive sentences are a common feature in Rhode Island sentencing structure. Defendants are often convicted and sentenced for multiple counts at the same time. For example, a defendant who killed someone with a knife might be convicted of second-degree murder and possessing a knife during the commission of a crime. Each charge carries a separate sentence. Many times, those sentences will be imposed consecutively.

Rhode Island law requires aggregation of these consecutive sentences for parole eligibility, as will be discussed in Part III.B. When consecutive sentences

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are aggregated to calculate parole eligibility, that means DOC calculates one date that a person is eligible for parole. After that single eligibility date, the offender will be reviewed by the Parole Board. If the Parole Board determines that a parole permit should be issued, the offender is released to the community under supervision. Otherwise, the Parole Board will deny parole and the person will continue serving at the prison.

When DOC unlawfully disaggregates consecutive parolable sentences, it calculates a parole eligibility date for *each* sentence. The offender will be seen by the Parole Board on one sentence at a time. If parole is appropriate, a parole permit issues, but the offender is "paroled" to the next sentence—not the community. Once paroled to the next sentence, then there is another parole eligibility date calculated for that sentence, and so on, until there are no more sentences remaining and the individual is eligible to be considered for release to the community.

Aggregation of consecutive sentences—whether for determining eligibility under Subsection (e) or any other parole eligibility—is the default system of calculation in Rhode Island. As discussed below, this is because aggregation is required by law and fulfills the purpose of parole.

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B. The General Laws, Including Subsection (e), Command Aggregation And A Single Parole Eligibility Date For All Parolable Sentences.

Subsection (e) is one provision of the "life prisoners and prisoners with lengthy sentences" parole statute, which in turn is part of a comprehensive parole scheme provided for in Chapter 8 of Title 13 of the Rhode Island General Laws. The scheme requires aggregation of sentences as well as the setting of a single parole eligibility date for consecutive sentences.

1. The Comprehensive Statutory Scheme Mandates Aggregating Consecutive Sentences For Parole Eligibility.

Rhode Island's parole statutory scheme mandates that sentences be aggregated for parole eligibility. R.I.G.L. § 13-8-10, which requires aggregation, applies "[i]f a prisoner is confined upon more than one sentence." R.I.G.L. § 13-8-10(a). That section provides that a permit may issue when such a prisoner has served "a term equal to one-third (⅓) of the *aggregate* time which he or she shall be liable to serve under his or her several sentences." *Id*. (emphasis added). Section 13-8-10(b) also refers to the method for "calculating *the* date the prisoner shall become eligible for a permit." R.I.G.L. § 13-8-10(b) (emphasis added).

The statute is clear: all consecutive sentences must be combined to calculate a single parole eligibility date. Further, R.I.G.L. § 13-8-10 does not provide an exception for life sentences. In line with this statutory mandate, consecutive life sentences are aggregated for parole eligibility. The permit may

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be issued only after the minimum aggregate sentence is completed—not between the first and second sentence. *See* R.I.G.L. § 13-8-13(d) (providing that "[i]n the case of a prisoner sentenced consecutively to more than one life term . . . the permit may be issued only after the prisoner has served not less than twenty-five years (25) years consecutively on each life sentence."). In other words, one is not paroled from life sentence to life sentence. *See DeCiantis v. State*, 666 A.2d 410, 412 (R.I. 1995) (finding that the Superior Court "properly applied § 13-8-13(b) to require that applicant serve ten years of the concurrent life sentences and an additional ten years on the consecutive life sentence before becoming eligible for parole"—the minimum at the time); *Lerner v. Gill*, 463 A.2d 1352, 1354 (R.I. 1983) (stating that a prisoner "must serve ten years consecutively on each life sentence before becoming parole eligible"). The consecutive sentences are aggregated, and a single parole eligibility date is calculated. If that offender is paroled, they are paroled to the community.

Life plus consecutive term-of-years sentences are included in the statutory mandate to aggregate all parolable sentences for parole eligibility as well. In *Dinkins v. Massachusetts Parole Bd.*, 160 N.E.3d 613 (Mass. 2021), the Supreme Judicial Court of Massachusetts reached the same conclusion with similar statutory language to R.I.G.L. § 13-8-10. There, the Massachusetts Parole Board excluded life sentences from aggregation with consecutive sentences by

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regulation. *Id.* at 619. The Court concluded that the regulation contravened Massachusetts law. *Id.* at 619–22. The Massachusetts Parole Board had erroneously relied on language in one statutory section (describing how the "minimum term" for life sentences should be calculated) as excepting those sentences from aggregation, despite other statutory language that provided that "[w]here an inmate is serving two or more consecutive or concurrent state prison sentences, a single parole eligibility [date] shall be established for all such sentences." *Id.* at 621 (quotations omitted). The legislative intent to aggregate all sentences was clear from the plain language of the statute. Similarly, R.I.G.L. § 13-8-10 expresses the legislature's intent that prisoners "subject to more than one sentence"—including those serving life plus a consecutive term of years—must have their sentences aggregated so that a single date for parole eligibility can be calculated. This sentencing configuration—the subject of ongoing litigation—will be addressed further in Part IV.

2. <u>The Statutory Scheme Provides For A Single Parole Eligibility Date For Consecutive Sentences.</u>

The General Assembly intended that sentences be aggregated so that a person be paroled once, and released to the community. This is clear from the scheme as a whole. *See State v. Hazard*, 68 A.3d 479, 485 (R.I. 2013) (individual statutory sections "must be considered in the context of the entire statutory scheme, not as if each section were independent of all other sections" (internal

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quotations omitted)). For example, R.I.G.L. § 13-8-9(a) provides that a parole "permit shall entitle the prisoner to whom it is issued to be at *liberty* during the remainder of his or her term of sentence." And R.I.G.L. § 13-8-16 provides that "[e]very permit issued by the parole board under this chapter shall entitle the prisoner to whom it is issued to be at *liberty* upon parole." Section 13-8-10(b) cites the method for "calculating *the* date the prisoner shall become eligible for a permit." These statutes provide for a single parole eligibility date and "liberty"—not another prison term.

Moreover, the parole release criteria outlined in R.I.G.L. § 13-8-14 refers to release from *physical* custody. The Board, by statute, is charged to consider whether there is a reasonable probability that the applicant would live and remain at *liberty* without violating the law. R.I.G.L. § 13-8-14(a)(3). The Board further considers whether the applicant can properly assume a role in the city or town in which they will reside, by considering type of employment, place of both employment and residence, and the need for specialized services. R.I.G.L. § 13-8-14(a)(4). These statutory considerations do not contemplate that a person may be "paroled" to a consecutive sentence. Indeed, if the legislature envisioned parole from a life sentence to a term of years that scenario would be accounted for in this provision and more appropriate factors would be codified. And yet

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there are no criteria to guide the Board in determining whether to release a prisoner from one sentence to another.

There are additional sections that also support a single parole eligibility date. For example, R.I.G.L. §§ 13-8-6.1 and 13-8-9.1 require the Parole Board to notify law enforcement and crime victims that a parolee is about to be released on parole. Additionally, R.I.G.L. § 13-8-17 addresses reports prepared by field services about the adjustment of a parolee outside the prison walls. These provisions make little sense when "parole" means serving a further prison sentence.

The parole-violation statutes, R.I.G.L. §§ 13-8-18 through 13-8-20, also use terms (such as a parolee being "at liberty," "re-committing a parolee to the Adult Correctional Institutions," and "detention") that equate the term parolee with someone living outside the walls of the prison, not serving a consecutive sentence. The statutory scheme, as a whole, intends a single parole eligibility date, with the Parole Board considering whether a person should be paroled to the community, and parole being served outside the prison walls. Subsection (e) must be understood as part of this broader context.

C. Disaggregating Consecutive Sentences For Parole Eligibility Undermines The Goals Of Parole And Wastes Resources.

The statutory scheme requires all parolable consecutive sentences be aggregated for parole eligibility determinations, including under Subsection (e),

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because the purpose of a parole system is to consider whether an offender should be released to the community. When consecutive sentences are disaggregated, the process is turned on its head, with the Parole Board "paroling" an offender back into prison. The result is an inefficient and confusing process that undermines the goals of a parole system.

1. Paroling Offenders To Prison Undermines The Purpose Of Parole.

As discussed above in Part I.A, parole serves two purposes: alleviating correctional costs and promoting safe reintegration into society. *See Morrisey*, 408 U.S. at 477. Disaggregating consecutive sentences for parole eligibility calculations frustrates both purposes.

The Parole Board determines when a prisoner is ready to be released to the community. Indeed, R.I.G.L. § 13-8-14 *requires* that the Parole Board not release the prisoner on parole until they are ready to live in the community. R.I.G.L. § 13-8-14 (providing a permit "shall not be issued . . . unless" "the prisoner can properly assume a role in the city or town in which he or she is to reside"). There are no separate standards—statutory or otherwise—to aid the Board in determining whether an offender should be paroled from one sentence to the next. Thus, even when sentences are disaggregated, the Parole Board may not "parole" an offender until they meet the requirements of community release laid out in R.I.G.L. § 13-8-14.

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In other words, at the point the offender is paroled to the next sentence, the Board has already determined that they are safe to live in the community. The Board has determined that they are not likely to reoffend, and that they have an adequate parole plan with housing and employment. Yet the offender will still have years to serve before they will have an actual opportunity for release. This delays the offender's enrollment in transitional programming and their safe reintegration into the community.

In the meantime, this person who the Parole Board has deemed appropriate for community release by statute will continue to serve at the ACI, costing Rhode Islanders about $107,969 per year. RIDOC, *FY*2023 *Cost Per Offender*, https://doc.ri.gov/more-resources/financial-resources (last visited Feb. 16, 2024). In sum, paroling from one sentence to another rather than aggregating consecutive sentences serves no rehabilitative or cost purpose.

2. <u>Paroling Offenders From One Sentence To Another Is Inefficient.</u>

With disaggregated sentences, the Parole Board must hold at least one hearing—likely multiple—just to determine that a person can serve a second prison sentence. Then, the Parole Board must have another hearing to determine whether this person—who the Parole Board already declared ready for parole to the community—should be paroled to the community. Not only does the Parole Board have no guidance in conducting this parole-to-the-next-sentence

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assessment, but it also costs the Parole Board and all other players in the process time and resources to conduct these purposeless hearings.

The complete statutory parole process must always be followed, even when an applicant applies for "parole" to the next sentence. There are no exceptions for disaggregated sentences. As discussed above in Part I.B, the Parole Board reviews materials for every single parole applicant, including criminal history, police reports, parole plan, letters from the applicant and any other supporters, prison records, and programming records. The Parole Board completes a risk assessment for each applicant as well. R.I.G.L. § 13-8-14.1. The Parole Board conducts a hearing, and issues a decision, making specific recommendations for conditions.

The Parole Board is not the only entity burdened by these hearings. Victims must be notified for each hearing, even if the Parole Board is considering release to a consecutive sentence. R.I.G.L. § 13-8-6(a)(7); *Guidelines* § 1.6(A). For each hearing, they must decide whether to testify or submit something in writing. The Attorney General must also continuously consider whether it needs to weigh in on hearings, requiring a review of casefiles and the drafting of written objections—all of this on top of other prosecutorial responsibilities. R.I.G.L. § 13-8-23(3). Disaggregated parole also creates burdens on parole applicants preparing parole plans. *Guidelines* § 1.4(B). Acquiring letters of residence and

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employment is already a challenge from behind the prison walls. This feat becomes nearly impossible when prisoners are tasked with presenting housing and employment letters for some indeterminate time years into the future.

DOC must also expend unnecessary resources on individuals "paroled" to the prison. Aside from the cost of incarcerating these parolees, "the assistant director of field operations or his or her designee" must "report on the adjustment of the parolee" every six months for the rest of the parole term. R.I.G.L. § 13-8-17. There are no exceptions for those paroled to a second sentence.

3. Paroling Offenders From One Sentence To Another Leads To Uncertainty.

When sentences are disaggregated, no one knows an offender's ultimate parole eligibility date throughout the duration of the first sentence. Not the offender, not the victim, not the Attorney General, not the Parole Board, not even the sentencing judge who imposed the sentence. For those serving life sentences or lengthy sentences, it will be decades and decades before a true parole-to-the-community eligibility date emerges. This is because the offender must first be "paroled" from the initial sentence before true parole eligibility can be calculated. This uncertainty discourages rehabilitation and creates administrative confusion.

Aggregating consecutive sentences for parole eligibility has a natural clarity. There is a single parole eligibility date, calculated by aggregating the parole eligibility of each consecutive sentence. The eligibility date will never

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change. All parties—the offender, the Parole Board, the victim, the Attorney General, the sentencing judge, the prison—know the date that the offender will become eligible for parole to the community. This helps focus those participants for the parole hearing. For offenders, they are able to work towards rehabilitative progress and seek employment and housing opportunities with a particular eligibility date in mind. The Attorney General and victims also know with precision when this date will come so that they can prepare and advocate in whatever way they choose. Aggregating consecutive sentences is the only method of achieving this clarity in parole eligibility.

IV. Life Sentences Plus Consecutive Terms Of Years Were Historically Aggregated By DOC Until DOC Retroactively Changed Its Calculation Method Without Notice.

Life plus consecutive term-of-years sentences are not exempt from the statutory mandate to aggregate all parolable sentences for parole eligibility. *See* Part III.B. Indeed, DOC aggregated these sentences prior to 2018. To aggregate life sentences and consecutive term-of-years sentences, DOC looked to the years until parole eligibility identified for life sentences in R.I.G.L. § 13-8-13(a) and added that to a 1/3 of the consecutive term-of-years sentence, consistent with R.I.G.L. § 13-8-9. This calculation was explained in a 2015 letter from the Parole Coordinator, a DOC employee, to an offender:

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> Your parole eligibility date is calculated on 20 yrs. for the Life sentence plus 1/3 of the 10 yr. consecutive which is 3 yrs. 4 mos. This is 23 yrs. 4 mos. as of the retro date of 11/19/95 which makes you eligible in March 2019.

RA 120. Thus, for these offenders, the aggregate minimum parole eligibility was the minimum term on the life sentence, as provided by R.I.G.L. § 13-8-13(a), plus one-third of any consecutive term-of-years sentences.

As an illustration, consider a defendant convicted of second-degree murder and possessing a knife over three inches long during the commission of a crime. Suppose that after a trial, the judge sentenced them to life plus ten years, consecutive. Assume for this example that the offense was committed before 2015, when a person serving a life sentence for murder had to serve twenty years of imprisonment before being eligible for parole. R.I.G.L. § 13-8-13(a)(3). Before 2018, DOC aggregated those sentences, consistent with the statutory scheme and the purpose of parole, by combining the parole eligibility for each sentence as depicted in the table below.

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Parole Eligibility Calculation – Life Plus A Consecutive Term Of Years

Count	**Sentence**	**Statutory Authority for Minimum Parole Eligibility**	**Years Until Parole Eligible**
Count 1	Life	R.I.G.L. § 13-8-13(a)(3)	20
Count 2	10 years	R.I.G.L. § 13-8-9(a)	3 years and 4 months
Aggregated Time Until Parole Eligible			23 years and 4 months

Indeed, this was precisely how parole eligibility was originally calculated for respondents Joao Neves, Keith Nunes, and Pablo Ortega before their sentences were disaggregated after 2018. *See, e.g.*, RA 121 (showing Neves' eligibility calculation changing from eligibility for community release in 2022, after 23 years and some months of imprisonment, to eligibility to be paroled to the next sentence in 2019, after twenty years of imprisonment).

Around 2018, DOC began disaggregating these sentences, so that offenders would have to be "paroled" from one sentence to the next, lengthening the time until their actual parole eligibility. This retroactive change was made according to instructions from DOC legal, as shown by an email from the Parole Coordinator in 2018:

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> Pablo Ortega's eligibility has changed to November 2021. According to Roy Fowler in legal, we are to no longer aggregate cons. sentences with Life sentences. The Board can grant parole to the cons. and eligibility on that sentence will be calculated at that time. I have a list from MIS of all the Lifer's to retro actively make this change. I'll notify Mr. Ortega's counselor of this eligibility correction.

RA 142. No legislation spurred this change.

This change in calculation had a concrete detrimental effect on offenders. Consider the defendant in the table above, sentenced to life plus ten years, consecutive. Imagine that the Parole Board used its guidelines, discussed above in Part I.B, to determine that this prisoner should be paroled after 25 years of imprisonment. Under an aggregation scheme, the offender would be released to the street after 25 years. Under a disaggregation scheme, that offender would instead be paroled to the next sentence, at which point they would have at least 3 years and 4 months left to serve in the prison before the Parole Board could consider them for release.

Offenders did not receive formal notice or an opportunity to contest this recalculation, even though it delayed their true parole eligibility dates. Rather, DOC began to insist on the disaggregation of life plus consecutive term-of-years sentences on an ad hoc basis as cases came before the Parole Board. DOC has not offered a legal basis for this change to date.

This change is the subject of *Francisco Martinez v. State*, S.U. 2021-0292-M.P., and *Michael Lambert v. Director of Rhode Island Department of*

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Corrections, et al., SU-2022-0079 M.P., currently being litigated by the Office of the Public Defender. In those cases, the Superior Court agreed with the petitioners that consecutive sentences must be aggregated to calculate a single parole eligibility date. As discussed above at Part III, that conclusion is supported by the plain language of the statute, the legislative intent of the General Assembly to set one parole eligibility date, and public policy favoring rehabilitation, efficiency, and administrative clarity. These are exactly the same reasons that support aggregating consecutive sentences for parole eligibility under Subsection (e).

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CONCLUSION

For these reasons, the Office of the Public Defender asks that this Honorable Court affirm the Judgments of the Superior Court.

Respectfully submitted,

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CERTIFICATION OF WORD COUNT AND COMPLIANCE WITH RULE 18(B)

1. This brief contains 6,196 words, excluding the parts exempted from the word count by Rule 18(b).
2. This brief complies with the font, spacing, and type-size requirements stated in Rule 18(b).

/s/ Kara J. Maguire

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CERTIFICATE OF SERVICE

I hereby certify that on this 19th day of February 2024, I filed and served this document through the electronic filing system on Christopher Bush; Judy Davis; Sonja L. Deyoe, Lisa Holley; Lynette J. Labinger; Laura A. Pisaturo; and Nicole B. Dilibero. The document electronically filed and served is available for viewing and/or downloading from the Rhode Island Judiciary's Electronic Filing System.

/s/ Elizabeth Munro