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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 APPEALS FROM SUPERIOR COURT JUDGMENTS GRANTING APPLICATIONS FOR POST-CONVICTION RELIEF

BRIEF OF THE RHODE ISLAND PAROLE BOARD AS *AMICUS CURIAE*

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I. STATEMENT OF INTEREST OF THE RHODE ISLAND PAROLE BOARD AS *AMICUS CURIAE*

> **The mission of the Rhode Island Parole Board is to enhance public safety, contribute to the prudent use of public resources and consider the safe and successful re-entry of offenders through discretionary parole.**
>
> *Rhode Island Parole Board 2018 Guidelines* (adopted Dec. 5, 2015). Appendix.

The Rhode Island Parole Board (the "Parole Board" or "Board") is an Executive Branch public body empowered by statute with the discretionary authority to issue parole permits to prisoners whose sentence(s) are subject to its control and "upon any terms and conditions that the board may prescribe." R.I. Gen. Laws §§ 13-8-8, 13-8-9. The Board is comprised of seven persons: one full-time chairperson and six part-time members, all of whom are appointed by the Governor. R.I. Gen. Laws § 13-8-1. Defined statutory requirements for membership on the Parole Board include a member of law enforcement, a psychiatrist or psychologist, a member in good standing of the Rhode Island bar, and a person who is professionally trained in correctional work or in some closely related general field such as a social work. R.I. Gen. Laws § 13-8-2.

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The Parole Board is established within the Department of Corrections ("DOC") —although not subject to the DOC's jurisdiction and it is wholly independent in its decision-making concerning parole release, condition-setting, and revocation. R.I. Gen. Laws § 13-8-1, *et. seq.; see State v. Ouimette,* 367 A.2d 704, 709 (R.I. 1976) (recognizing a "hands off policy" and special expertise of parole board to be afforded extraordinary discretion to make parole release decisions). The DOC has exclusive authority over the supervision, custody, care, discipline, training, and treatment of persons committed to state correctional institutions, R.I. Gen. Laws §42-56-1. Recognizing this, Rhode Island's statutory scheme for parole expressly leaves the calculation of parole eligibility to the DOC. *See* R.I. Gen. Laws §13-8-23(1) (director of DOC shall submit a list of all prisoners under his or her control who will be eligible for parole each month).

The issues raised by the Petitioner-Appellant and Petitioner-Appellee in these consolidated cases involve the interpretation and application of the Rhode Island parole statutes to Petitioner-Appellees' sentences, particularly statutes involving how initial parole eligibility is calculated on life plus consecutive term sentences and the recently enacted Youthful Offender Act. *See* R.I. Gen. Laws § 13-8-13(e). The Parole Board is dedicated to carrying out its legislative duties faithfully according to

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statutory direction. The Board is mindful that although it has extraordinary discretion to make parole release decisions, issue conditional liberty permits and revoke parole, it may not exceed its delegated statutory authority. *Skawinski v. State,* 538 A.2d 1006, 1010 (R.I. 1988). Rather, the Judiciary, sits as "final arbiter of the validity or interpretation of statutory law" as well as of any agency regulations promulgated to administer that law. *Clarke v Morsilli,* 714 A.2d 597, 600 (R.I. 1998) *(quoting DeAngelis v. Rhode Island Ethics Commission,* 656 A.2d 967,970 (R.I.1995)); *see also Lerner v. Gill*, 463 A.2d 1352, 1358 (R.I. 1983) (legislature has not delegated authority to parole board to issue rulings on the meaning of parole-eligibility statutes).

Given these parameters and limitations on the Parole Board, this case represents a vehicle for the Court to clarify the conflicting interpretations concerning the law governing the calculation of parole eligibility on life plus consecutive term sentences and the application of the recently enacted Youthful Offender Act in the same context. The resolution of these issues has import to the Parole Board and its stakeholders: inmates, victims, and the public alike.

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II. BACKGROUND FACTS AND TRAVEL

1. Joao Neves, Keith Nunes, Pablo Ortega, and Mario Monteiro are inmates at the Rhode Island Adult Correctional Institutions ("ACI") sentenced by the state Superior Court to serve sentences of life plus a consecutive term or consecutive terms of years for murder and other offenses committed between January 8, 1999 and July 3, 2001 and when each petitioner was under the age of 22.[1] Nunes and Ortega were convicted and sentenced for crimes committed on the same date and charged within the same Indictment.[2] Neves was convicted for crimes committed on different dates charged by two different Indictments.[3] Monteiro was convicted for crimes committed on different dates charged within the same Indictment.[4]

2. The Department of Corrections determined and scheduled an initial parole eligibility date for each inmate to appear before the Parole Board and the Parole

---

[1] Neves PCR 1-4, 8, 11; Nunes PCR I 1-4, 8; Ortega PCR I 1-5, 8, 10; Monteiro PCR 1-2.
[2] Ortega PCR 4, Nunes PCR 4.
[3] Neves PCR 4.
[4] Monteiro PCR 2.

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Board heard and considered each Petitioner on the respective eligibility date determined by the DOC.[5]

3. On August 21, 2019, the Parole Board considered Neves' case and unanimously granted conditional parole release "[for] August 2021 to his next consecutive sentence."[6]

4. On June 17, 2019, the Parole Board considered Nunes' case and unanimously voted to grant conditional parole release "from his life sentence to his next Consecutive Sentence of ten years."[7]

5. On November 21, 2021, the Parole Board considered Ortega's case and acknowledged on the record "that he has a consecutive sentence of five years and that there is an existing legal debate in court on the application of this term whether it is aggregated and parole is to the community or whether he must serve his consecutive sentence imposed by the court." Ortega's attorney and the Board agreed "that this debate is outside the statutory authority of the Parole Board and we must

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[5] Neves PCR Ex. 2, 5. Nunes PCR Ex. 3, 6; Ortega PCR Ex. 2; Monteiro PCR Ex. 5, 6.

[6] Neves PCR Ex. 3. Neves signed a parole permit on August 31, 2021. Appendix.

[7] Nunes PCR Ex. 3. Nunes signed a parole permit on September 6, 2019. Appendix.

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leave this to the Department of Corrections and/or the Court to decide." The Board voted unanimously to grant conditional parole release "from his Life sentence to the community or to his next sentence, the same to be determined by the Department of Corrections."[8]

6. On December 15, 2021, the Parole Board considered Monteiro's case and acknowledged on the record "an existing legal debate" as to whether Monteiro should be paroled to his consecutive life sentence or to the community. The Board voted unanimously to grant conditional parole release effective December 15, 2021 if Monteiro were paroled to his consecutive life sentence and "no sooner than December 2022" if he were paroled into the community. The Board explained that "[t]he reason for the staggered release (if to the community) is the Board believes there should be some time for Mr. Monteiro to transition to a lower security and preparation for eventual release."[9]

[8] Ortega PCR Ex 2. Ortega signed a parole permit on December 9, 2021. Appendix.
[9] Monteiro PCR Ex 6. Monteiro signed a parole permit on December 21, 2021. Appendix.

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III. ARGUMENT

A. THE BOARD LACKS THE AUTHORITY TO DETERMINE PAROLE ELIGIBILITY AND WHERE THERE IS A DISPUTE ABOUT STATUTORY INTERPRETATION, AS THERE IS HERE, THE COURT SHOULD DETERMINE THE APPLICABLE INTERPRETATION.

The Parole Board takes the position that statutory authority to determine initial parole eligibility for those sentences within the control of the Board rests with the Department of Corrections under section 13-8-23(1), applying the statutory scheme for eligible sentences. Once parole eligibility is determined, section 13-8-8 "empowers the parole board to grant parole to any prisoner within its control *upon completion of a specified portion of the sentence imposed*") (emphasis added). *Skawinski*, 538 A.2d at 1007. Reading section 13-8-8 with section 13-8-23(1) makes plain that DOC determines eligibility for parole, and the Board decides whether parole is granted. *See Curtis v. State,* 996 A.2d 601, 604 (R.I. 2010) (when construing meaning of statutes, courts must consider sections in context of entire statutory scheme).

Under §13-8-9:

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> The parole board, in the case of any prisoner whose sentence is subject to its control, unless that prisoner is sentenced to imprisonment for life, and unless that prisoner is confined as a habitual criminal under the provisions of§ 12-19-21, may, by an affirmative vote of a majority of the members of the board, issue to that prisoner a permit to be at liberty upon parole, whenever that prisoner has served not less than one-third (½) 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.
>
> (b) Notwithstanding the provisions of subsection (a) of this section, in the case of a conviction for a first- or second-degree murder committed after July 1, 2015, when the prisoner has not been sentenced to life, the prisoner shall not be eligible for a parole permit until he or she has served at least fifty-percent (50%) of his or her sentence.

R.I. Gen. Laws § 13-8-9. Provisions regarding parole eligibility for life and lengthy sentences or when a prisoner is subject to more than one court-imposed sentence, are contained in sections 13-8-10 and 13-8-13 and these statutes must also be examined and applied to determine the minimum amount of time a prisoner must serve before initial parole eligibility.

Where, as here, the parties disagree regarding the application of sections 13-8-9 and 13-8-13 to life sentences followed by consecutive term sentences and the proper method for calculating parole eligibility as well as the *effect* of that calculation on such sentences, final statutory construction is now a matter properly

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for the Court. *Clarke,* 714 A.2d at 600. As *Lerner* makes clear, "[t]he General Assembly has not delegated authority to the parole board to issue rulings on the meaning of parole-eligibility statutes." *Lerner,* 463 A.2d at 1358; *Cf. Jefferson v. State,* 184 A.3d 1094, 1100 (R.I. 2018) (Suttell, C.J., concurring in part, dissenting in part) (noting that resolution of statutory questions of law are to be resolved by the courts, not the parole board).

The same analysis and principles hold true concerning the limitations of the Board to interpret the Youthful Offender Act as it relates to Petitioner-Appellee's sentences. The Board lacks the authority to determine parole eligibility, R.I. Gen. Laws 13-8-23(1); *see Lerner,* 463 A.2d at 1358, and where there is a dispute about statutory interpretation, the Court—not the Board—should determine the applicable interpretation. *Brennan v. Kirby,* 529 A.2d 633, 637 (R.I. 1987) ("The construction of legislative enactments is a matter reserved for the courts ... and, as final arbiter on questions of construction, it is [the Rhode Island Supreme Court's] responsibility in interpreting a legislative enactment to determine and effectuate the Legislature's intent and to attribute to the enactment the meaning most consistent with its policies or obvious purposes.") (citations omitted); *see also Clarke,* 714 A.2d at 600. For

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these reasons, the Board defers to the Court as the final arbiter on questions of law and statutory and constitutional construction.

B. THE AGGREGATION METHOD CHANGES HAVE LED TO UNCERTAINTY AND IMPAIRED THE BOARD'S ABILITY TO MAKE FULLY INFORMED PAROLE DECISIONS.

The Court has asked the Board to address how the change in the method of aggregation of a prisoner's sentences for purposes of parole eligibility has affected its procedures and the manner in which it administers parole responsibilities. Initially, changes in the aggregation method have created uncertainty for the Board when it makes decisions about granting parole. As explained above, the statutory authority to determine initial parole eligibility for those sentences within the control of the Board rests with the DOC under section 13-8-23(1). Once parole eligibility is determined, the Board is then empowered under section 13-8-8 to grant parole. Due to the limitations on the Board's delegated statutory authority in the realm of determining parole eligibility, the Board is constrained by the aggregation method used at any time by DOC. Any changes to this aggregation method create uncertainty on the part of the Board as to who is eligible for parole into the community.

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This uncertainty was displayed in the Board's parole decision for Petitioner-Appellee Ortega in which it acknowledged that Ortega "has a consecutive sentence of five years and that there is an existing legal debate in court on the application of this term whether it is aggregated and parole is to the community or whether [Ortega] must serve his consecutive sentence imposed by the court." For this reason, it granted Ortega conditional parole release "from his Life sentence to the community or to his next sentence, the same to be determined by the Department of Corrections."

This uncertainty about whether the Board's grant of parole release will result in the prisoner being released into the community or their next sentence constricts the Board's ability to make fully informed parole determinations. As the above cited example demonstrates, for cases impacted by this issue, the Board is currently in the position where it must make determinations about granting parole release without knowing whether that means the prisoner will be paroled into the community or to their next sentence.

However, these are two drastically different outcomes. This is problematic as many of the considerations the Board must take into account when granting a prisoner parole implicate a prisoner's release into the community. *See*, *e.g.*, R.I. Gen.

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Laws §§ 13-8-14(a)(2) ("[t]hat release would not depreciate the seriousness of the prisoner's offense or promote disrespect for the law), 13-8-14(a)(3) ("[t]hat there is a reasonable probability that the prisoner, if released, would live and remain at liberty without violating the law"), 13-8-14(a)(4) ("That the prisoner can properly assume a role in the city or town in which he or she is to reside. In assessing the prisoner's role in the community the board shall consider: (i) Whether or not the prisoner has employment; (ii) The location of his or her residence and place of employment; and (iii) The needs of the prisoner for special services….). Therefore, the Board's ability to make fully informed parole determinations is constricted when it does not know if granting parole to a prisoner would in fact release them into the community or instead to their next sentence.

This uncertainty affects not just the Board's ability to make fully informed parole determinations, but also its ability to make referrals for rehabilitative programs. As a condition of parole, or a consideration for parole release, the Board often refers prisoners to rehabilitative programs related to their identified criminogenic needs. For example, a prisoner convicted of a crime in which substance abuse influenced their actions may be referred to a substance abuse program, a gang-involved prisoner might be referred to a program where they would disavow their

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affiliation, or a prisoner convicted of domestic violence may be referred to a domestic violence program. Uncertainty about the date a prisoner will be released into the community can complicate such program referrals in the time and the prisoner's ability to get into the program and/or complete the program prior to release or prior to starting their next sentence. The Department of Corrections has policies on program eligibility and timeframe during which a prisoner may be referred to a program, so the uncertainty over release to the community versus release to another sentence undoubtedly, impacts internal case planning, as well. Therefore, the uncertainty from aggregation method changes impacts the Board's rehabilitative efforts and re-entry planning vis-à-vis program referrals.

Additionally, the uncertainty of whether a prisoner will be paroled into the community or to their next sentence has a direct impact on the victims of crime. In addition to the stress of not knowing if the perpetrator of a crime against them will be released from custody or remain in prison to serve their next sentence, this uncertainty impacts victims' decisions to appear before the Parole Board. Victims often appear before the Board to express their opinion on a prisoner being considered for parole when their parole would mean their being released into the community.

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This decision is impacted when it is not clear if the prisoner being considered for parole will be released into the community or rather to their next sentence.

IV. CONCLUSION

The Board has concluded, based on *Lerner* and *Jefferson*, that it does not hold statutory authority to issue rulings on the meaning of parole-eligibility statutes or engage in statutory interpretation or the resolution of statutory questions of law. The Board therefore defers to the Court as the final arbiter on questions of law and statutory and constitutional construction and welcomes this opportunity for the Court to provide clarity regarding this statutory dispute.

Respectfully submitted,

THE RHODE ISLAND PAROLE BOARD AS *AMICUS CURAIE*

By:

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CERTIFICATION OF WORD COUNT & COMPLAINCE WITH RULE 18(B)

1. This amicus brief contains 2,872 words, excluding the parts exempted from the word count by Rule 18(b).
2. This amicus brief complies with the font, spacing, and size type requirements stated in Rule 18(b).

/s/ Patrick Reynolds

CERTIFICATION OF SERVICE

I hereby certify that on February 19, 2024, I electronically filed and served this document through the electronic filing system on the following:

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