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

REPLY BRIEF OF PETITIONER-APPELLANT STATE OF RHODE ISLAND

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I. The Plain Language Of R.I. Gen. Laws § 13-8-13(e) Establishes That The Statute Applies To Individuals Serving A Single Sentence.

There is no dispute that the ultimate goal in statutory interpretation is to give effect to the General Assembly's intent. *See* Brief of Respondents at 36. The best indicator of legislative intent is the plain language of a statute. *See State v. Diamante*, 83 A.3d 546, 550 (R.I. 2014). If the language of a statute is clear and unambiguous, a court's "interpretive task is done." *Id.*

This Court's interpretation of R.I. Gen. Laws § 13-8-13(e) should begin and end with the plain language of the statute. It states that an individual sentenced for "any *offense* committed prior to his or her twenty-second birthday" is eligible for parole after "no fewer than twenty (20) years' imprisonment . . . ." R.I. Gen. Laws § 13-8-13(e). The word "offense," which is singular, clearly indicates that the General Assembly intended subsection (e) to apply to individuals serving a single sentence.

Neves, Nunes, Ortega, and Monteiro's contrary interpretation—that it applies to individuals serving consecutive sentences—is not based on the plain language of the statute. *See generally* Brief of Respondents at 35-43. They ignore that § 13-8-13(e) refers to the singular "offense" and posit that, because the statute excludes individuals serving life without parole from its reach, it must apply to all other individuals based on the principle of statutory interpretation, "*expressio unius*

est exclusio alterius." Brief of Respondents at 38. This maxim, which "is often quoted in Latin has been translated into English as follows: 'The express mention of one person or thing is the exclusion of another.'" *Ricci v. Rhode Island Commerce Corp.*, 276 A.3d 903, 907 n.8 (R.I. 2022) (quoting *Latin for Lawyers* 146 (Sweet & Maxwell Ltd., 3d ed. 1960)); *see also Retirement Bd of Employees' Retirement System v. DiPrete*, 845 A.2d 270, 287 (R.I. 2004).

Neves, Nunes, Ortega, and Monteiro's reliance on this principle is misplaced for at least two reasons. First, "*expressio unius* is a rule of statutory construction and not a rule of law" and is "subordinate to the primary rule that legislative intent governs the interpretation of a statute, and is, consequently, overcome by a strong indication of contrary legislative intent." 2A Sutherland Statutory Construction § 47:23 (footnotes omitted). So it is here. The legislative intent behind § 13-8-13(e) is evident from the plain language of that statute, specifically, the use of "offense," and resort to the *expressio unius* principle is not necessary.

Second, Neves, Nunes, Ortega, and Monteiro argue that, because § 13-8-13(e) only excludes individuals serving life without parole, based on the *expressio unius* principle, it applies to everyone else. But that does not answer the question of whether § 13-8-13(e) applies to individuals serving consecutive sentences; the only conclusion that could be drawn is that the statute would apply to anyone

serving a sentence other than life without parole. This principle of statutory interpretation is of no use in this case.

Neves, Nunes, Ortega, and Monteiro also mischaracterize the State's main argument. The State's interpretation of § 13-8-13(e) as applying to individuals serving a single sentence is based on the use of "offense" in the statute. It is not, as Neves, Nunes, Ortega, and Monteiro suggest, based on the language in R.I. Gen. Laws § 13-8-14.2. *See* Brief of Respondents at 38-39. The State only cites to § 13-8-14.2 to point out that, if the General Assembly intended § 13-8-13(e) to apply to individuals serving more than one sentence, it could have used the phrase that it used when it simultaneously enacted § 13-8-14.2—"offense or offenses." It did not.

The State would add that, unlike R.I. Gen. Laws § 13-8-13(e), three of the four statutes that Neves, Nunes, Ortega, and Monteiro cite as examples of legislation that other jurisdictions enacted to reduce initial parole eligibility for juveniles or young adults clearly state that they apply to individuals serving multiple sentences. *See* Conn. Gen. Stat. § 54-125a(f)(1) ("[A] person convicted of *one or more crimes* committed while such person was under eighteen years of age . . . and *who received a definite sentence or total effective sentence* of more than ten years for *such crime or crimes* . . . may be allowed to go at large on parole in the discretion of the panel of the Board of Pardons and Paroles . . . .") (emphasis

added); Or. Rev. Stat. § 144.397 ("A person convicted of *an offense or offenses* committed when the person was under 18 years of age, who is serving a sentence of imprisonment *for the offense or offenses*, is eligible for release on parole . . . .") (emphasis added); Wash. Rev. Code § 9.94A.730 ("any person convicted of *one or more crimes* committed prior to the person's eighteenth birthday may petition the indeterminate sentence review board for early release . . . .") (emphasis added). The fourth statute that Neves, Nunes, Ortega, and Monteiro cite refers to "offense," but it is not a parole statute and instead permits individuals to file motions to reduce sentence. *See* D.C. Code § 24-403.03.

Finally, the Superior Court held that § 13-8-13(e) applied to individuals serving multiple sentences because the statute referred to *any* offense. *See* Neves Tr. at 36-42 (Appendix Of Petitioner-Appellant State Of Rhode Island at 99-105 ("State's Appendix")); Monteiro Decision at 11-13 (State's Appendix at 45-47). The State explained why the court erred in doing so in its brief. *See* Brief Of The Petitioner-Appellant State Of Rhode Island at 25-26 ("State's Brief"). Neves, Nunes, Ortega, and Monteiro do not address the State's argument on this point and, aside from noting that this Court has recognized that "any" is "'broadly inclusive'" when recounting various principles of statutory interpretation, *see* Brief of Respondents at 36 (quoting *Ricci*, 276 A.3d at 908-09), do not appear to defend

this part of the Superior Court's conclusion in their brief. *See generally* Brief of Respondents at 35-43.

II. The United States Supreme Court's Decisions In *Roper*, *Graham*, And *Miller* Are Distinguishable.

Neves, Nunes, Ortega, and Monteiro claim that their interpretation of § 13-8-13(e) is consistent with the "growing recognition" that the United States Supreme Court discussed in *Roper v. Simmons*, 543 U.S. 551 (2005), *Graham v. Florida*, 560 U.S. 48 (2010), and *Miller v. Alabama*, 567 U.S. 460 (2012), that "people who commit crimes as teens or young adults warrant consideration of their youth in evaluating when and whether they can demonstrate that they have been rehabilitated." Brief of Respondents at 32. While true that the Supreme Court recognized that juveniles who commit crimes should be treated differently than adults for purposes of the Eighth Amendment, those cases do not support or compel the conclusion that § 13-8-13(e) should be interpreted as applying to individuals serving consecutive sentences.

In those three cases, the Court held that the Eighth Amendment prohibited the sentencing of individuals who were under the age of eighteen when they committed their crimes to death, *see Roper*, 543 U.S at 578-79, to life without parole for any offense other than homicide, *see Graham*, 560 U.S. at 82, or to a mandatory life without parole sentence, *see Miller*, 567 U.S. at 489. None of those cases held that the Eighth Amendment similarly applied to individuals between the

ages of eighteen and twenty-two. Moreover, a defendant may only be sentenced to life without parole in Rhode Island for first-degree murder, only in certain circumstances, and the sentence is not mandatory. *See* R.I. Gen. Laws § 11-23-2; R.I. Gen. Laws § 12-19.2-1 *et seq*. And the respondents have not cited any cases supporting the proposition that the sentences imposed in this case and the amount of time that Neves, Nunes, Ortega, and Monteiro each must serve before becoming eligible for parole—twenty years and twenty months for Ortega; twenty-three years and four months for Neves and Nunes; thirty years for Monteiro—are the equivalent of a life without parole sentence and prohibited by the Eighth Amendment.

III. Interpreting R.I. Gen. Laws § 13-8-13(e) As Applying To Individuals Serving Life And Consecutive Terms Of Years Would Be Inconsistent With The Provisions Of R.I. Gen. Laws § 11-47-3.2.

The State has consistently argued that this Court should not interpret § 13-8-13(e) as applying to individuals serving life and consecutive terms of years because that interpretation cannot be reconciled with the provisions of R.I. Gen. Laws § 11-47-3.2. *See* State's Brief at 30-32; Prebrief Of The State Of Rhode Island dated April 4, 2023, at 9-10. Neves, Nunes, Ortega, and Monteiro have never addressed this point directly. In their prebrief, Neves, Nunes, and Ortega simply stated that § 11-47-3.2 had no application in their cases, *see* Rule 12A Counterstatement Of Respondents dated Aug. 18, 2023, at 11-12, and, in their

brief, state only that "it is § 13-8-13, not § 11-47-3.2, which addresses the amount of time one must serve before eligibility for initial parole consideration." Brief of Respondents at 41.

In short, Neves, Nunes, Ortega, and Monteiro have not, and the State submits cannot, reconcile their interpretation of § 13-8-13(e) with § 11-47-3.2, which requires imposition of consecutive and nonparolable sentences.

IV. The General Assembly Has Not Defined When Individuals Serving Life And Consecutive Terms Of Years Are Eligible For Parole And Neves, Nunes, Ortega, And Monteiro Fail To Cite Authority That Would Permit Courts To Do So.

It is well settled that there is no constitutional right to parole. *See Estrada v. Walker*, 743 A.2d 1026, 1031 (R.I. 1999); *Lerner v. Gill*, 463 A.2d 1352, 1364 (R.I. 1983). It is a privilege and the General Assembly has "'provided a statutory scheme that creates a parole board and generally empowers the parole board to grant parole to any prisoner within its control *upon completion of a specified portion of the sentence imposed*.'" *Estrada*, 743 A.2d at 1029 (quoting *Skawinski v. State*, 538 A.2d 1006, 1007 (R.I. 1988)) (emphasis added).

Neves, Nunes, Ortega, and Monteiro do not dispute that the General Laws are silent with respect to parole eligibility for individuals serving life sentences and consecutive terms of years. *See* Brief of Respondents at 24. Nor do they suggest that either § 13-8-10 or § 13-8-13 apply to those individuals. The plain language

of those statutes—the starting and, in this case, the ending point of statutory interpretation—certainly does not support such a conclusion.

Section 13-8-10 provides that an individual serving consecutive sentences is eligible for parole when "he or she has served a term equal to one-third (1/3) *of the aggregate time which he or she shall be liable to serve under his or her several sentences* . . . ." R.I. Gen. Laws § 13-8-10(a) (emphasis added). One cannot assign a numerical value to the amount of time an individual is "liable to serve" under a life sentence, however, and it is therefore not possible to aggregate a life sentence and a consecutive term of years under the plain language of that statute.

This Court seemingly reached the same conclusion in *Lerner v. Gill*. In that case, this Court specifically observed that R.I. Gen. Laws § 13-8-10 does not apply to inmates serving life sentences. *See Lerner*, 463 A.2d at 1365 ("[I]t is obvious that the concurrent and consecutive provisos of § 13-8-10 refer to those sentences whose terms are definite."); *see also* R.I. Gen. Laws § 13-8-9 (inmates serving life sentences not eligible for parole after serving one-third of sentence).

The plain language of R.I. Gen. Laws § 13-8-13 does not support an interpretation that it applies to individuals serving life plus terms of years either. The only part of § 13-8-13 that addresses parole eligibility for inmates serving consecutive sentences is subsection (d) and that provision only applies to individuals serving consecutive life sentences. *See* R.I. Gen. Laws § 13-8-13(d).

In short, there is no specific statutory authority supporting the proposition that a life sentence and a consecutive term of years must be "aggregated" to determine parole eligibility or explaining how to do so. The obvious and logical conclusion to draw from the General Assembly's silence is that it chose not to create a special formula for determining when those individuals would be eligible for parole.

Neves, Nunes, Ortega, and Monteiro do not accept this conclusion and instead assert that sentences of life plus terms of years must also be "aggregated." This position is predicated on their belief that the General Assembly's decision to empower the Department of Corrections to "aggregate" consecutive terms of years and consecutive life sentences when determining parole eligibility constitutes a "directive" that life sentences and consecutive terms of years must also be "aggregated." Neves, Nunes, Ortega, and Monteiro fail to cite any authority or evidence to support this inferential leap; nor do they cite any authority or evidence to suggest that the General Assembly intended that parole eligibility for those individuals be calculated using their formula. Moreover, the fact that the General Assembly did not say that life plus a consecutive term or years cannot be "aggregated," *see* Brief of Respondents at 25, does not mean that the General Assembly intended them to be.

Finally, the State would note that the change in the way that the Department of Corrections calculated parole eligibility for inmates serving life and consecutive terms of years, whenever it occurred, did not have any practical effect on when Nunes, Ortega, or Monteiro would be eligible for parole from the Adult Correctional Institutions.

Under the aggregation formula that Neves, Nunes, Ortega, and Monteiro propose, and because § 13-8-13(e) does not apply, Nunes would be eligible for parole to the community after serving twenty-three years and four months. This is because, under their formula, parole eligibility would be determined by adding the amount of time than an inmate serving a single life sentence for a murder committed between 1995 and 2005 would have to serve before becoming eligible for parole (twenty years), *see* R.I. Gen. Laws § 13-8-13(a)(3); R.I. Gen. Laws § 13-8-13(a)(4), to one-third of the consecutive ten-year sentence (three years, four months), *see* R.I. Gen. Laws § 13-8-10(a). *See* Brief of Respondents at 24. In fact, Nunes was paroled from his life sentence to his consecutive ten-year sentence after serving twenty years and would be eligible to be paroled to the community after serving one-third of that sentence, or after serving a total of twenty-three years and four months.

The same is true with respect to Ortega. Under Neves, Nunes, Ortega, and Monteiro's formula, Ortega would be eligible for parole to the community after

serving twenty-one years and eight months, a number arrived at by adding twenty years for the life sentence to one-third of the five year sentence, which is one year an eight months. In fact, Ortega was paroled from his life sentence after serving twenty years and would be eligible to be paroled to the community after serving an additional twenty months, which is one-third of the five-year sentence.

The change to the way the Department of Corrections calculates parole eligibility for individuals serving life and consecutive terms of years would not impact Monteiro's parole eligibility since R.I. Gen. Laws § 13-8-13(d) controls that decision.

V. Neves, Nunes, Ortega, and Monteiro Fail To Address The Separation Of Powers Concerns That Would Arise From Applying § 13-8-13(e) To Individuals Serving Life And Consecutive Terms Of Years.

Neves, Nunes, Ortega, and Monteiro offer a two-pronged response to the separation of powers concerns that the State identified in its brief. Neither is persuasive.

They first seem to suggest that application of § 13-8-13(e) to individuals serving life and consecutive terms of years does not run afoul of separation of powers principles because "the grant of parole does not reduce or modify the sentence imposed by the court; it modifies the location where the sentence is served." Brief of Respondents at 44-45. That is not true with respect to individuals serving mandatory consecutive and nonparolable sentences under R.I.

Gen. Laws § 11-47-3.2, however. In those cases, the judgments of conviction specifically require that the individuals serve the mandatory consecutive sentences at the A.C.I. because § 11-47-3.2 states that anyone convicted of violating that statute "shall not be afforded the benefits of deferment of sentence or parole . . . ." R.I. Gen. Laws § 11-47-3.2(a) & R.I. Gen. Laws § 11-47-3.2(c). At the very least, applying § 13-8-13(e) to those individuals would modify or nullify the judgments of conviction in those cases by making the nonparolable sentences parolable.

Second, Neves, Nunes, Ortega, and Monteiro cite to a number of "*Miller*-fix" cases as support for their position that applying § 13-8-13(e) to individuals serving life and consecutive terms of years does not violate separation of powers principles. *See* Brief of Respondents at 45-52. Their reliance on those cases is misplaced for one simple reason: The underlying sentences in those cases were or were thought to be unconstitutional under *Miller* and its progeny. The legislatures therefore did not violate any separation of powers principles because the sentences that had been imposed in those cases were invalid and the legislation was necessary to bring them in conformity with the United States Supreme Court's decision in *Miller*—that is, to "fix" the constitutional infirmity—a practice that the Supreme Court specifically endorsed in *Montgomery v. Louisiana*, 577 U.S. 190 (2016). *See id.* at 212 ("A State may remedy a *Miller* violation by permitting juvenile homicide offenders to be considered for parole, rather than by

resentencing them."). There is no argument here that the sentences that Neves, Nunes, Ortega, and Monteiro received are unconstitutional.

VI. There Is No Evidence That Neves, Nunes, Ortega, And Monteiro Were Subjected To Charge And Sentence Stacking.

Finally, there is no support for amici's claim that Neves, Nunes, Ortega, and Monteiro have "been subjected to charge and sentence stacking." Brief Of The *Amici Curiae* Juvenile Law Center, The Sentencing Project, The Gault Center, National Association Of Criminal Defense Lawyers, And Prison Policy Initiative In Support Of Respondents Joao Neves, Keith Nunes, Pablo Ortega, And Mario Monteiro filed on Feb. 16, 2024, at 19-28 ("JLC Amicus Brief"). They certainly do not address how that is the case with respect to Neves, who was sentenced to life for a January 15, 1999, murder that he admitted committing, *see* Docket: P1-2000-0539A at 1, and to six concurrent sentences for five first-degree robberies and one assault with intent to commit robbery that he admitted committing at least four days earlier, on January 8, 9, and 11, 1999, *see* Docket: P1-2000-0543A at 1; Docket: P1-2000-0542A at 1; Docket: P1-2000-0541A at 1; Docket: P1-2000-0540A at 1. Nor do those amici explain how this is the case with respect to Monteiro, who is serving two mandatory consecutive life sentences pursuant to R.I. Gen. Laws § 11-47-3.2.

To be clear, the State's interpretation of § 13-8-13(e) is predicated on the plain language of the statute, in particular, the use of the singular "offense," and

other related principles of statutory interpretation. The State's sole motivation is to effectuate the intent of the General Assembly as evidenced by the plain language of the statute, nothing more.

CONCLUSION

For the reasons discussed above, this Court should vacate the Superior Court's decisions, orders, and judgments granting Neves's, Nunes's, Ortega's, and Monteiro's PCR applications.

Respectfully submitted,

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/s/ Christopher R. Bush
/s/ Judy Davis

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CERTIFICATE OF WORD COUNT & COMPLIANCE WITH RULE 18(B)

1. This reply brief contains 3,212 words, excluding the parts exempted from the word count by Rule 18(b).

2. This reply brief complies with the font, spacing, and type size requirements stated in Rule 18(b).

/s/ Christopher R. Bush

CERTIFICATE OF SERVICE

I certify that on March 11, 2024, I filed this brief through the electronic filing system and served copies through that system on Lynette Labinger, Esq.; Lisa Holley, Esq.; and Sonja Deyoe, Esq. This document is available for viewing and/or downloading from the Rhode Island Judiciary's Electronic Filing System.

/s/ Christopher R. Bush
