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Reviewer: Victoria H

STATE OF RHODE ISLAND **PROVIDENCE, SC.**		**SUPERIOR COURT**
JOAO NEVES	:	
	:	
v.	:	**PM-2022-0259**
	:	
THE STATE OF RHODE ISLAND	:	
PABLO ORTEGA	:	
	:	
v.	:	**PM-2022-0260**
	:	
THE STATE OF RHODE ISLAND	:	
KEITH NUNES	:	
	:	
v.	:	**PM-2022-0901**
	:	
STATE OF RHODE ISLAND	:	

MEMORANDUM FOR THE RHODE ISLAND PAROLE BOARD AS AMICUS CURIAE

At the suggestion of the Court, the Rhode Island Parole Board, respectfully submits this Memorandum as *amicus curiae* in these consolidated post-conviction relief cases.

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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 December 5, 2015)

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 comprised 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 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 as a social work. R.I. Gen. Laws § 13-8-2.

The Parole Board is established within the Department of Corrections ("DOC" or "Department")—although not subject to the Department's jurisdiction and 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 Department of Corrections. R.I. Gen. Laws §13-8-23(1) (director of

corrections 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 Petitioners and by the DOC in these consolidated cases involve the interpretation and application of the Rhode Island parole statutes to Petitioners' sentences, particularly statutes involving how initial parole eligibility is calculated on life plus consecutive term sentences and the recently enacted Youthful Offender Act. Petitioners claim that they are being unlawfully detained in prison despite their eligibility for parole and are entitled to immediate release to the community under conditions set by the Parole Board. Neves PCR, p. 1; Ortega PCR, p. 1; Nunes PCR, p. 1.

Despite not specifically naming the Parole Board as a party, Petitioners assert that the Parole Board is as responsible as the DOC for their unlawful detainment, alleging the Board "has declined to substitute its judgment concerning parole eligibility dates for that of RIDOC even when RIDOC has taken inconsistent and arbitrary position thereon" and that doing so constitutes an abdication of the Board's authority under section 13-8-8. Neves PCR ¶ ¶ 24-25, Ortega PCR ¶¶ 26-34, Nunes PCR ¶¶21-22.

The Parole Board is dedicated to carrying out its legislative duties faithfully according to 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 alleviate 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 hold import to the Parole Board and its stakeholders: inmates, victims, and the public alike.

II. BACKGROUND FACTS AND TRAVEL

Facts salient to the position of Amicus and agreed up by the parties through Petitioners' Verified Applications for Post-Conviction Relief and the State's Answers are as follows:

1. Joao Neves, Pablo Ortega and Keith Nunes 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 November 14, 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]
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 Board heard and considered each Petitioner on the respective eligibility date determined by the DOC.[4]

[1] Neves PCR ¶¶ 1-4, 8, 11; Ortega PCR ¶¶ 1-5, 8, 10; Nunes PCR ¶¶ 1-4, 8.
[2] Ortega PCR ¶ 4, Nunes PCR ¶ 4.
[3] Neves PCR ¶ 4.
[4] Nunes PCR Ex. 3, 6; Ortega PCR Ex. 2; Neves PCR Ex. 2, 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."[5]
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."[6]
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 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."[7]

III. ARGUMENT

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)

[5] Neves PCR Ex. 3. Neves signed a parole permit on August 31, 2021. Appendix.
[6] Nunes PCR Ex. 3. Nunes signed a parole permit on September 6, 2019. Appendix.
[7] Ortega PCR Ex 2. Ortega signed a parole permit on December 9, 2021. Appendix.

makes plain that DOC determines eligibility for parole, and the Parole 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

> 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 (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.
>
> (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. Parole eligibility for life and lengthy sentences or when a prisoner is subject to more than one court-imposed sentence, is contained in section 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 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) (resolution of statutory questions of law to be resolved by the courts, not parole board).

The same analysis and principles hold true concerning the limitations of the Parole Board to interpret the Youthful Offender Act as it relates to Petitioners' sentences. The Board lacks the authority to determine parole eligibility, *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.

Petitioners assert that the Board has "acquiesced in and accepted" the Department of Corrections' interpretation of the Act and "abdicat[ed] its exercise of control pursuant to R.I.G.L sec. 13-8-8." Neves PCR, ¶¶ 25, 50; Ortega PCR, ¶¶ 26, 34; Nunes PCR, ¶¶ 22, 41. The Petitioners also state that the Parole Board "has declined to substitute its judgment concerning parole eligibility dates for that of RIDOC." Neves PCR, ¶ 24; Nunes PCR, ¶ 21. These arguments presume that if the Parole Board had the authority to reject the Department of Corrections' interpretation of the Act, it would necessarily adopt Petitioners' interpretation but, more importantly, Petitioners' arguments disregard the case law, *supra*, which clearly outline several limitations to the Board's delegated statutory authority in the realm of determining parole eligibility.[8]

[8] Within their claims, Petitioners assert the phrase "at liberty" within the parole statutes can only mean release to the community and "not simply to start serving another sentence at the ACI." Pet. Mem. 17. The Rhode Island Supreme Court has looked at the meaning of "to be at liberty" within the parole context in *Curtis v. State*, 996 A.2d 601, 604 (R.I. 2010). There, an inmate who was granted parole challenged restrictions placed by the parole board to hold the inmate in community confinement. In ruling for the board, the Rhode Island Supreme Court stated

IV. CONCLUSION

The Parole Board has not failed to act or abdicated its authority. The Board does not have the 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 defers to the Court as the final arbiter on questions of law and statutory and constitutional construction.

For the reasons set forth above, the Court should find that the Parole Board has not abdicated its responsibilities and should exercise its authority to interpret the statutes in dispute and resolve this pending matter in the interests of justice.

> [T]hus, it is clear that a permit "to be at liberty on parole" is subject to whatever reasonable conditions the parole board may prescribe. * * * [W]e need not examine contemporary notions of liberty and contrast them with the realities of community confinement. Clearly, the meaning of liberty within the parole context cannot be construed as an absolute liberty or an absolute freedom. Rather, liberty within the parole context is qualified by such terms and conditions as the parole board sees fit.

Curtis, 996 A.2d at 604. The Parole Board notes that several prisoners are serving multiple court-imposed sentences that include sentences outside of the Board's control (e.g., habitual sentences deemed non-parolable or sentences of less than six months) or sentences subsequently imposed for crimes committed in prison which may have a separate parole eligibility date. In such cases, the Board has routinely granted parole from one parole-eligible sentence to the next (non-parolable) sentence. This sentence structure can often occur within the same Information or Indictment for crimes committed on the same date. When this sentence structure and grant of parole occurs, a parole permit is issued to the inmate, s/he is not released to the community, rather the inmate begins serving the consecutive, non-parolable sentence while still incarcerated and under the conditional terms of the permit to, *inter alia*, keep the peace and be of good behavior.

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Respectfully submitted,

RHODE ISLAND PAROLE BOARD AS *AMICUS CURIAE*

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CERTIFICATE OF SERVICE

I hereby certify that on March 29, 2022, I electronically filed and served this document through the Rhode Island Judiciary's Electronic Filing System, and it is available for viewing and/or downloading from the electronic filing system.

/s/ Dana Diaz