Case Number: SU-2019-0459-A
Filed in Supreme Court
Submitted: 4/19/2021 11:55 AM
Envelope: 3060181
Reviewer: Justin Coutu

STATE OF RHODE ISLAND **SUPREME COURT**

CODY ALLEN ZAB

v.

RHODE ISLAND DEPARTMENT OF CORRECTIONS, et al.

SU-2019-0459-A
On appeal from the Superior Court
PM-2017-4195

JOSE R. RIVERA

v.

RHODE ISLAND DEPARTMENT OF CORRECTIONS, , by and through its Director, PATRICIA COYNE-FAGUE In her official capacity only

SU-2019-0462-A
On appeal from the Superior Court
PC-2017-0433

BRIEF OF AMICUS CURIAE AMERICAN CIVIL LIBERTIES UNION OF RHODE ISLAND IN SUPPORT OF PLAINTIFFS-APPELLANTS

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Interest of the American Civil Liberties Union of Rhode Island to Appear as Amicus Curiae

The American Civil Liberties Union of Rhode Island ("ACLU-RI" or "Amicus"), with over 5,000 members, is the Rhode Island affiliate of the American Civil Liberties Union, a nationwide, non-profit, nonpartisan organization. ACLU-RI, like the national organization with which it is affiliated, is dedicated to vindicating the principles of liberty embodied in the Bill of Rights to the United States Constitution, including the rights of incarcerated individuals to due process, equal protection, access to the state and federal courts, and to be free from cruel and unusual punishments. In furtherance of these goals, ACLU-RI cooperating attorneys and the National Prison Project of the ACLU have, over the past 45 years, appeared as both direct counsel and amicus before the federal and state courts of Rhode Island to vindicate the civil rights of incarcerated individuals. *See, e.g., Baxter v. Palmigiano,* 425 U.S. 308 (1976); *Spratt v. Rhode Island Department of Corrections*, 482 F.3d 33 (1st Cir. 2007); *Palmigiano v. Garrahy*, 443 F.Supp. 956 (D.R.I. 1977), *remanded* 599 F.2d 17 (1st Cir. 1979). On the issue presently before the Court, ACLU-RI has supported affirmative litigation challenging the constitutionality of Rhode Island's Civil Death Statute, R.I.G.L. §13-6-1, in *Ferreira v. A.T. Wall*, 2016 WL 8235110 (D.R.I. 2016), and in *Lombardi v. McKee,* C.A. 19-cv-00364-WES, presently pending in the United States District Court for Rhode Island.

ACLU-RI has a strong, documented, and consistent record spanning nearly 50 years of battle to obtain civil rights and access to the courts for incarcerated persons and to prevent inhumane and unconstitutional conditions of confinement in Rhode Island prison facilities.

In this brief, ACLU-RI provides additional historical perspective concerning the adoption and implementation of the Civil Death Statute and its place in Rhode Island and national jurisprudence in support of its argument that the Civil Death Statute contravenes both the United States and Rhode Island Constitutions and therefore requires reversal of the judgments below.

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Introduction

These consolidated appeals present constitutional challenges to the Rhode Island version of the Civil Death Statute, R.I.G.L. §13-6-1. In exploring the historical underpinnings of adoption of a civil death statute in Rhode Island, Amicus concluded that past descriptions of the origins of the statute in Rhode Island are inaccurate.

Rhode Island General Laws §13-6-1 provides as follows:

> Every person imprisoned in the adult correctional institutions for life shall, with respect to all rights of property, to the bond of matrimony and to all civil rights and relations of any nature whatsoever, be deemed to be dead in all respects, as if his or her natural death had taken place at the time of conviction. However, the bond of matrimony shall not be dissolved, nor shall the rights to property or other rights of the husband or wife of the imprisoned person be terminated or impaired, except on the entry of a lawfully obtained decree for divorce.

In *Gallop v. Adult Correctional Institutions,* 182 A.3d 1137, 1141 (R.I. 2018) (*Gallop I*), the Supreme Court briefly reviewed the rationale supporting "civil death" legislation and observed that "Rhode Island adopted its civil death statute in 1909," citing G.L. 1909, chapter 354, §59. In *Gallop I*, the Court declined to address the constitutionality of the Civil Death Statute under the Rhode Island or United States Constitution as not raised by plaintiff, but remanded for the lower court to consider plaintiff's motion to file a second amended complaint. On remand, the lower court denied the motion to file the second amended complaint as untimely. On appeal, in *Gallop v. Adult Correctional Institutions,* 218 A.3d 543 (R.I. 2019) (*Gallop II*), the

Court concluded that the lower court had not abused its discretion in denying the motion to amend, and therefore affirmed without considering state or federal constitutional challenges.

The Court's characterization of the Civil Death Statute as first promulgated in 1909, *Gallop I* at 1141, *Gallop II* at 550, is understandably based upon the legislative history note contained in the official records of the General Laws. But it is incorrect. The legislative note records that the Civil Death Statute was adopted in 1909, amended or revised in 1915, 1923, 1938, and 1956, thus supporting the notion that the General Assembly, commencing in the early 20th century, proactively adopted, reconsidered, and reenacted this penal status. In fact, according to research conducted by Amicus, the first version of "civil death" was enacted in 1852 as part of an act abolishing capital punishment.

Why does that matter? It belies any suggestion that the implementation of a civil death disability by the General Assembly was an addition to the Rhode Island laws reflecting a considered 20th-century adoption and deliberate retention. Instead, the Rhode Island Civil Death Statute appears, much like its state counterparts (which have since been repealed or declared unconstitutional), to be an archaic notion which gained popularity in the second half of the 19th century but which has been all but abandoned by our sister states either through legislative repeal or court determination of unconstitutionality. It was not in place when the Constitution was

adopted in 1842. While its existence was noted by legal scholars in articles discussing civil death statutes over the years, as reviewed below, the Rhode Island Civil Death Statute does not appear to have been enforced in Rhode Island prior to or contemporaneous with the adoption of the 1986 Constitution. Amicus thus respectfully submits that its presence in the statute books does not warrant the conclusion that the framers of our constitution either in 1842 or 1986 considered it consistent with the civil rights and protections declared to govern the State—or considered it at all.

Argument

I. The Rhode Island Civil Death Statute has no history in Rhode Island prior to 1852 and was adopted as part of a "reform" to end capital punishment and thereafter lay dormant outside scholarly articles until the 21st Century.

A. The Rhode Island Civil Death Statute was first adopted in 1852 as part of a "reform" to end capital punishment.

Amicus could find no version of a civil death act in Rhode Island prior to 1852.[1] In 1798, the General Assembly issued the "Public Laws of the State" as revised and enacted at its January 1798 Session.[2] Commencing at page 584, the

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[1] The author was immeasurably assisted by the State Law Librarians, particular Elizabeth Sarkisian, in locating and identifying early legislation. The arguments presented here, however, are solely the author's.

[2] The Public Laws of the State of Rhode Island and Providence Plantations, As revised by a Committee, and finally enacted by the Honourable General Assembly, at their Session in January, 1798.

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compilation included "An Act to reform the penal Laws" beginning with the proviso that "all punishments ought to be proportionate to the offences for which they are inflicted: And whereas the punishments of offences, as now prescribed by law, are in many instances severe and sanguinary." Under the new comprehensive scheme, those convicted of murder in the first degree (including aiders and abettors), petit treason, arson, rape, robbery or burglary, were to "suffer death" by hanging. *Id.* at 584-585, 605, §§2, 5, 6, 7, 59. Other sentences were less severe. A person convicted of forgery or counterfeiting of gold or silver coin or print currency, was subject to a fine, imprisonment, being placed in a public pillory and "while in said pillory, [have] a piece of his ears cut off" and branded with the letter "C." *Id.* at 586-7, §9. Conviction for horse-theft carried a fine, imprisonment and "whipp[ing] not exceeding one hundred stripes." *Id.* at 590, §90.

One provision, which appears consistently throughout all iterations of the laws of the State, starting at least since 1798, provided "[t]hat no conviction or judgment for any crime or offence whatever, which hereafter shall be had or rendered within any of the Courts of this State, shall work corruption of blood or forfeiture of estate."[3] *Id.* at 604, §53. The significance of this observation, it is submitted, is two-fold: first, in tracking later statutory compilations, the prohibition often appears

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[3] This provision now appears in R.I.G.L. §12-19-4.

adjacent to the "civil death" provision, once that provision was adopted and codified; and, second, in demonstrating that notion of "civil death" was not a part of the 1798 Public Laws relating to crime and punishment, or any time prior to 1852.

In colonial times, according to the 1719 publication of the Charter Granted to the Colony of Rhode Island by King Charles II and Acts and Laws of the Colony, "whosoever shall be Convicted of High Treason, Petit Treason, Wilful Murder, or Man-slaughter; shall be Punished for such Offence, according to the State Laws of the Realm of England, with Death; … And shall Forfeit his Lands, Goods, and Chattels, to the Colony, according to His Majesties Charter…"[4] As quoted above, this provision was abandoned no later than 1798.[5] The prohibition of "corruption of blood and forfeiture of estate" now appears at R.I.G.L. §12-19-4.

In 1894, this Court, in *Kenyon v. Saunders,* 18 R.I. 590, 30 A. 470 (1894), discussed the significance of Rhode Island's rejection of the common-law notions of "corruption of blood and forfeiture of estate." The Court observed that "under the common law of England, a person convicted of a felony could not maintain an action" to assert property/inheritance rights arising from the death of his wife. The

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[4] Charter Granted by His Majesty King Charles the Second, to the Colony of Rhode-Island, and Providence-Plantations, in America ((Boston: Printed by J. Allen for N. Boone., 1719).

[5] *See also* United States Constitution, Article III, §3: "The Congress shall have power to declare the Punishment of Treason, but no Attainder of Treason shall work Corruption of Blood, or Forfeiture except during the Life of the Person attainted."

Court further concluded that Rhode Island did not follow the common-law rule, citing the prohibition of corruption of blood or forfeiture of estate (there codified as Pub.St.R.I. c. 248, §34).

> Notwithstanding the difficulties which may attend cases of this kind, such a rule would be contrary to the spirit of the statute, and unsupported by the reason upon which it was originally based. A convict is neither civilly dead nor deprived of his rights of property; and if this be so, he should be entitled to enforce such right when it is necessary to do so."
> *Kenyon, supra* at 471 (citations omitted).

Rhode Island's early rejection of the English common law approach to civil death is consistent with other states. "In the absence of statute, the concept of civil death has generally been denied in this country." *Whitson v. Baker*, 463 So. 2d 146, 148 (Ala. 1985) (citations omitted). *See also Platner v. Sherwood*, 6 Johns.Ch. 118, 2 N.Y.Ch.Ann. 73, 1822 WL 1717 (N.Y.Ch.1822) (discussing New York's adoption of a civil death provision in 1799 prompted by its 1796 provisions creating life sentence in lieu of death in certain instances). *See generally* Special Project, *History and Theory of Civil Disabilities*, 23 Vand.L.Rev. 931, 950 (1970) ("civil death was declared not to exist in the absence of an express statute"; collecting cases, footnote omitted); Note, *Civil Death Statutes--Medieval Fiction in a Modern World*, 50 Harv.L.Rev. 968, 969-970 (1937)("in the absence of statute American courts have refused to recognize civil death, even as a consequence of the death sentence"; collecting cases; footnotes omitted); Saunders, *Civil Death—A New Look at an*

Ancient Doctrine, 11 William & Mary L. Rev. 988, 990 (1970) ("Civil death and the other incidents of attainder were never a part of the common law recognized in the United States, and in the absence of statute, courts have refused to recognize them as an incident of conviction;" collecting cases, footnote omitted).

In the January 1838 session, the General Assembly enacted "An act concerning crimes and punishments," effective May 15, 1838 (chapter 11). In chapter 8, §1, the Act specified that "[n]o conviction or sentence for any offence whatever, shall hereafter work corruption of blood or forfeiture of estate." Section 9 of chapter 8 specified that any sentence of death would be carried out by hanging. In chapter 9, the General Assembly made provision concerning a convict's ability to convey or inherit an estate. Section 43 of Chapter 9 of the Act prohibited a person sentenced to the state prison from making a will or conveying property during the imprisonment. Section 44 made provision for appointment of an administrator and distribution of the estate of a person imprisoned for seven years or more, including life, to settle the estate and support the prisoner's family. "But in case of imprisonment for life, such prisoner's estate shall be divided among his heirs at law and distributed in the same way as though he were dead." Comparable provisions appear to the present, in R.I.G.L. §§13-6-3 through 13-6-7.

By 1838, Rhode Island had limited capital crimes to murder and arson.[6]

Shortly after the promulgation of Rhode Island's first Constitution, the General Assembly directed the creation of a digest of laws.[7] The 1844 Digest of Public Laws contains a comprehensive Act concerning crimes and punishments and carries forward each of the foregoing provisions adopted in 1838.[8] Once again, there is no provision comparable to the current Civil Death Statute.

In 1852, the General Assembly abolished capital punishment and first established "civil death":

> AN ACT to abolish capital punishment, and to provide for the more effectual punishment of crime.
>
> It is enacted by the General Assembly as follows:
>
> SECTION 1. The punishment of death is hereby abolished.
>
> SEC. 2. Any person convicted of any crime punishable with death by the laws now in force in this State, shall be confined in the State prison,

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[6] 1838 Act, chapter 2 §1 (murder); chapter 3 § 1 (arson, which carried a range of punishment from a term of not less than 10 years, to life imprisonment or death).

[7] The laws concerning Crimes and Punishments appear at page 373 and following.

[8] Thus, §115 of the 1844 Act concerning Crimes and Punishments incorporates chapter 8 §1, of the 1838 Act that "No conviction or sentence for any offence whatever shall hereafter work corruption of blood, or forfeiture of estate," §179 (1844) incorporates chapter 9 §43 (1838), that "No person who shall be sentenced to imprisonment in the state prison shall have any power, during his imprisonment, to make any will or conveyance of his property, or of any part thereof," and §180 (1844) incorporates chapter 9 §44 (1838).

> at labor, for the period of his or her natural life.
>
> SEC. 3. On the conviction of any person for a crime now punishable by law with death, he or she, shall thereupon with respect to all rights of property, to the bond of matrimony, and all civil rights and relations of whatever nature, be deemed to be dead in all respects, as if his or her natural death had taken place at the time of such conviction.
>
> SEC. 4. Hereafter no person convicted of any crime now punishable with death, or other crime for which the punishment is now, by law imprisonment for a term of not less than five years, shall be pardoned or released from prison, except by a concurrent recorded vote of three-fourths of all the members elected to each house of the General Assembly, and approved by the Governor. And all challenges to jurors except for cause, in the trial of any criminal case, are hereby abolished. So much of any act as is inconsistent herewith is repealed.
> Acts and Resolves Passed January Session, 1852.

In the law digest adopted in 1857, the new Civil Death Statute appeared immediately following the ever-present prohibition against "corruption of blood or forfeiture of estate" in 1857 Revised Statutes, Title XXXI, chapter 222, §§ 35-36 as follows:

> Sec. 35. No conviction or sentence for any offence whatever shall work corruption of blood or forfeiture of estate.
>
> Sec. 36. Every person convicted of murder or arson shall there upon, with respect to all rights of property, to the bond of matrimony, and to all civil rights and relations, of whatever nature, be deemed to be dead in all respects, as if his or her natural death had taken place at the time of such conviction.

The language in the 1857 revision reflected the reality in Rhode Island that the only "crime[s] now punishable by law with death" in 1852 were murder and arson. Provisions identical to the 1857 revision appear in the law digests of 1872,

in Title XXXI, chapter 236, §§34-35,[9] of 1882, in Title XXXI, chapter 248, §§34-35,[10] and of 1896, in Title XXXI, chapter 285, §§35-36,[11] as these provisions are carried forward in the updated digests without change. In fact, the identical language appeared in the 1909 Revision, as discussed below.

Against this backdrop, it becomes clear that the "official" legislative history appearing in the reporter's "credits" for R.I.G.L. §13-6-1 is inaccurate. The current revision provides the history as follows: "G.L. 1909, ch. 354, § 59; P.L. 1915, ch. 1261, § 1; G.L. 1923, ch. 407, § 59; G.L. 1938, ch. 624, § 1; P.L. 1956, ch. 3721, § 1." But when we examine General Laws of 1909, we find in Title XXXVII, chapter 354, §§ 35 and 36, which are identical to the language in the 1896 digest, as well as an explicit reference to the 1896 General Laws, as follows:

> SEC. 35. No conviction or sentence for any offence whatsoever shall work corruption of blood or forfeiture of estate.
>
> SEC. 36. Every person convicted of murder or arson shall thereupon, with respect to all rights of property, to the bond of matrimony and to all civil rights and relations, of any nature whatsoever, be deemed to be dead in all respects, as if his or her natural death had taken place at the time of such conviction.

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[9] General Statutes of the State of Rhode Island and Providence Plantations: To Which Are Prefixed the Constitutions of the United States and of the State (1872).

[10] Public Statutes of the State of Rhode Island and Providence Plantations: To Which Are Prefixed the Constitutions of the United States and of the State (1882).

[11] General Laws of the State of Rhode Island and Providence Plantations: To Which Are Prefixed the Constitutions of the United States and of the State (1896).

General Laws of Rhode Island: Revision of 1909 (1909).[12]

Thus it is respectfully submitted that Rhode Island's Civil Death Statute was first promulgated in 1852, as part of an act abolishing the death penalty, and not in 1909.

In 1915, the General Assembly amended the civil death provision in Public Law 1915, chapter 1261, §1 to amend Chapter 354 ("Of proceedings in criminal cases"), in two ways. The new civil death provision no longer spoke of "murder or arson"[13] but now referenced "imprison[ment] in the state's prison for life," and added the proviso that marriage bonds and property should not be impaired except upon the action of the convict's spouse on divorce. The comparable provisions read:

> Sec. 58. No conviction or sentence for any offence whatsoever shall work corruption of blood or forfeiture of estate.
>
> Sec. 59. Every person imprisoned in the state's prison for life shall thereupon, with respect to all rights of property, to the bond of matrimony and to all civil rights and relations, of any nature whatsoever, be deemed to be dead in all respects, as if his or her natural death has taken place at the time of such conviction: *Provided, however*, that the bond of matrimony shall not thereby be dissolved, nor shall the rights to property or other rights of the husband or wife of the person so imprisoned be thereby terminated or impaired except on the entry of a decree for divorce lawfully obtained.

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[12] Section 59 of that Title XXXVII chapter 354 relates to "costs, as part of sentence." Reference to §§35 and 36 also appears in *Anderson v. Salant,* 38 R.I. 463, 96 A. 425, 429 (1916).

[13] Of the two appellants, Zab is serving a life sentence for murder, while Rivera is serving a life sentence for multiple sexual assaults.

Public Laws 1915, chapter 1261, §1.

The 1923 language appears, without further amendment, in the General Laws of Rhode Island: Revision of 1923 (1923), Title XL, chapter 407, §59. In the 1938 Revision to the General Laws, the identical language appears in Title LXX, chapter 624, §1.[14]

The next, and last, change appears in the 1956 Revision of the General Laws, in response to P.L. 1956, ch. 3721, §1. This Public Law, in §44, directed that all references to the state prison or other jails in the future "shall mean, and be construed to mean the adult correctional institutions of the state of Rhode Island." As a result, the Civil Death Statute now reads "Every person imprisoned in the adult correctional institutions for life" and is otherwise unchanged.[15]

B. The Rhode Island Civil Death Statute has no history of enforcement before the end of the 20th Century.

Amicus was unable to locate a single reported decision interpreting or applying the disabilities of Rhode Island's Civil Death Statute from its inception in 1852 until the Court's 1980 decision in *Bogosian v. Vaccaro,* 422 A.2d 1253 (R.I.

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[14] The provision prohibiting "corruption of blood or forfeiture of estate" was relocated in the 1938 Revision to chapter 625 §58 and now appears, without modification, as R.I.G.L. §12-19-4.

[15] *See, e.g., State v. Gadson,* 2013 WL 1789483, at *7 (R.I.Super.2013) (discussing revisions to General Laws to reflect the reorganization of the state corrections system without otherwise changing the substance of existing law).

1980), where the Court discussed the provision but did not apply it.[16] In *Vaccaro*, the life inmate sought to assert §13-6-1 as a defense to avoid liability to pay a real estate brokerage commission. The trial court had rejected the defense on the basis that the Civil Death Statute was a limitation on the inmate's rights and could not be used to his advantage. This Court affirmed on the basis that the inmate's "civil death" was not in place at the time of contract, but only upon entry of a "final judgment of conviction." *Vaccaro, supra,* 422 A.2d at 1254.

The next reported reference appears *In re Micaela C.,* 769 A.2d 600 (R.I. 2001). There, a life prisoner appealed "from a Family Court decree terminating his parental rights." *Id.* at 601. Initially, the Court ordered the life inmate "to show cause why his appeal should not be dismissed pursuant to G.L. 1956 §13-6-1—the civil death statute." The inmate, through court-appointed counsel, submitted a memorandum in which it was presented, in detail, that §13-6-1 was unconstitutional under the United States and Rhode Island Constitutions In a separate Order, the Court found that "cause had been shown" without specifically referencing or addressing any of the constitutional arguments presented by the life inmate. The Court proceeded to resolve the issue on the same standards applied to all other persons, without regard to the Civil Death Statute.

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[16] As noted above, the Court mentioned the Civil Death Statute in passing in *Anderson v. Salant, supra,* 38 R.I. 463, in the course of determining that requiring a convict to perform labor under contract to a third party did not amount to slavery.

In *Laurence v. Rhode Island Department of Corrections,* 68 A.3d 543 (R.I.2013), the Court considered and vacated the order of the Superior Court limiting the life inmate from filing *pro se* actions in Superior Court as impermissibly infringing upon his right of access to the courts because the order "does not comport with this Court's precedent and fails to include the protections afforded to plaintiff by" the Court's decisions in *State v. D'Amario,* 725 A.2d 276 (R.I.1999) and *Cok v. Read,* 770 A.2d 441 (R.I.2001). The Court observed that inmate Laurence was serving a sentence of life without parole and was a "frequent litigator" in the state and federal courts, including repeat presentations of previously rejected claims. A review of the cited cases discloses post-conviction claims, federal civil rights claims, as well as common law claims such as attorney malpractice and negligence. There is no reference to the Civil Death Statute, which would seem to apply to Laurence based upon the Court's later decision in *Gallop I.*[17]

This Court's decision in *Gallop I* appears to be the first time that the Court has applied the Civil Death Statute to foreclose a life inmate's asserted legal claim. In *Gallop I,* life inmate Gallop sustained an injury while he was a pretrial detainee.

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[17] Amicus does not suggest that the failure to address Laurence's status under the Civil Death Statute is determinative of the proper application or consideration of the Act, but as underscoring the importance, as recognized by this Court, of a litigant's right of access to the courts, and to note that the Civil Death Statute was not invoked by anyone despite Laurence's arguably abusive overuse of the courts. *Cf. Marzett v. Letendre,* --A.3d--, 2021 WL 908487 at *3 (R.I.2021)("this Court speaks through its opinions on specific matters and not through its silence.")

Gallop asserted claims for personal injury arising out of negligence, *Gallop I* at 1144, of the individual defendants, who were alleged to act within the scope of their employment by the defendant Department of Corrections and against the prisoner who attacked him. On the eve of trial, the trial justice *sua sponte* raised the Civil Death Statute, prompting the State defendants to move to dismiss the complaint on that basis.

The Court in *Gallop I* determined that, under the Civil Death Statute, "persons serving a life sentence are prohibited from asserting civil actions. Section 13-6-1." *Gallop I* at 1143. The Court declined to read any exception into the Act beyond the expressly enumerated exceptions. *Id.* at 1141.

It is important to note that neither the trial court nor this Court ever considered the constitutionality of the Civil Death Statute under either the Rhode Island or United States Constitutions, instead limiting the focus to construing the Civil Death Statute alone.

In *Zab v. Rhode Island*, 2018 WL 2023510, *2 (D.R.I.2018), the State argued that notwithstanding the categorical language of the Civil Death Statute, it "cannot reasonably be interpreted as precluding inmates serving life sentences at the Adult Correctional Institutions ... from seeking post-conviction relief" in the state courts under R.I. Gen. Laws §§10-9.1-1 to 10-9.1-9. The federal court did not reach the issue, issuing its decision on other grounds.

In *Zab v. Zab,* 203 A.3d 1175, 1176 (R.I.2019), Zab, one of the parties here, participated in a marriage ceremony while a life inmate, then obtained a divorce by default and then, years later, sought "expungement" of the marriage on the grounds that the Civil Death Statute prevented him from marrying in the first place. Both parties were *pro se,* and Zab's former wife appears to have declined to participate at each stage. Relying on *Gallop I,* this Court held that the only issue to be considered was whether Zab was "civilly dead" under the Act. So finding, this Court concluded that Zab had "no legal right" to be heard on the issue either in the Family Court or before the Supreme Court.

Amicus could not locate any other decisions of this Court applying or interpreting the Rhode Island Civil Death Statute.[18]

II. The doctrine of statutory Civil Death has been repudiated throughout the country by court decision or legislative repeal or both, leaving Rhode Island alone in maintaining the punishment of civil death for life convicts.

In 1937, according to an article in the Harvard Law Review, there were 18 states, including Rhode Island, which imposed what the author—even then—called the anomalous and outdated punishment of "civil death" upon life convicts.

> With living men regarded as dead, dead men returning to life, and the same man considered alive for one purpose but dead for another, the realm of legal fiction acquires a touch of the supernatural under the paradoxical doctrine of civil death. Civil death is the status of a person who has been deprived of all civil rights. Eighteen American

[18] Since *Gallop I*, the State has routinely asserted the Civil Death Statute as a defense to life prisoner actions in the lower courts.

> jurisdictions still impose that penalty on life convicts by statutes which have survived a long history to fill an anomalous role in modern penal systems.
> *Civil Death Statutes—Medieval Fiction In A Modern World, supra* at 968 (footnote omitted).

By 1970, that number was down to 14. Saunders, *supra* at 988. In a review of the case law, the author described these laws and their actual and/or theoretical applications as "an outmoded legal fiction" and "archaic." *Id.* at 1001.

Over the next several decades, state civil death statutes were either repealed[19] or declared unconstitutional leaving, it is submitted, Rhode Island as the only state with a civil death statute.[20]

Courts have struck down civil death statutes on both federal and state constitutional grounds. *See generally* Mushlin, *Rights of Prisoners, supra* §16:2 at n. 26 (collecting cases). For example, in *Thompson v. Bond,* 421 F.Supp. 878 (W.D.Mo.1976), the court described the scope of Missouri's civil death act—which had actually been enforced in Missouri in earlier times—as "destroy[ing] or

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[19] By 1990, ten states had repealed their civil death laws. 3 Mushlin, *Rights of Prisoners* §16:2. Civil death laws and n.11 (5th ed. 2020)

[20] In *Gallop I, supra* at 1141, the Court stated that New York still retains its civil death statute. However, under the cited New York statute, both by decision, *Bilello v. A. J. Eckert Co.,* 346 N.Y.S.2d 2, 42 A.D.2d 243 (App.Div.3d.1973), and statute, McKinney's Civil Rights Law § 79-a(2), a life sentence does not "suspend the right or capacity of any person so sentenced to commence, prosecute or defend an action or proceeding in any court within this state or before a body or officer exercising judicial, quasi-judicial or administrative functions within this state."

suspend[ing] a prisoner's right to enter into any contract or judicially enforceable instrument," preventing a prisoner from "fil[ing] any civil action in the courts, other than those related to the validity or constitutionality of his confinement," and barring "lawsuits of a personal nature not affecting real and personal property, such as … a personal injury action." *Id.* at 881 (citations omitted). The court found that Missouri's civil death act denied the inmates' right both to due process and to access to the courts as guaranteed by the right to petition the government under the First Amendment. *Id.* at 881-885.

In *Davis v. Pullium,* 484 P.2d 1306 (Okla.1971), the Oklahoma Supreme Court determined that application of its civil death statute to extinguish the life convict's right to sue violated Art.2, §6 of the Oklahoma Constitution.[21] The life convict had been paroled and was injured while employed at a service station.

> While a convicted felon may be disenfranchised, denied the right to hold office or otherwise not allow to participate in matters of government, or to enjoy the full fruits of citizenship, he nevertheless cannot be regarded as human waste. Constitutionally, he still enjoys matters of self-preservation. Actions affecting his existence, safety and personal liberties are natural rights which are fully and perpetually protected.

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[21] Art.2 §6 provides: "[t]he courts of justice of the State shall be open to every person, and speedy and certain remedy afforded for every wrong and for every injury to person, property, or reputation; and right and justice shall be administrated without sale, denial, delay or prejudice." Oklahoma's civil death act then provided: "[a] person sentenced to imprisonment in the state prison for life, is thereby deemed civil dead." Title 21 O.S. 1961, §66, *quoted in Davis, supra* at 1307. This provision was later repealed. *Mehdipour v. Wise*, 65 P.3d 271, 274 (Okla.2003).

> *Davis v. Pulliam, supra* at 1308 (correction of typographical error omitted).

In *Mehdipour v. Wise*, 65 P.3d 271 (Okla.2003), the Oklahoma Supreme Court made clear that its decision in *Davis* did not turn on, nor was it limited to, paroled life convicts.

> The Court's decision was not based on plaintiff's status as a parolee rather than as a prisoner. The Court spoke strongly of the preposterous situations which would result from treating persons who are very much alive and entitled to legal recognition and protection, as if they were "civilly dead" for all purposes, including filing a civil action.
> *Id.* at 274.

In *Chesapeake Utilities Corp. v. Hopkins*, 340 A.2d 154, 155-156 (Del. 1975), the Delaware Supreme Court observed that recognition of the doctrine of civil death was incompatible with Art.1, §9 of the Delaware Constitution.[22] *See also McCuison v. Wanicka,* 483 So.2d 489 (Fla.Dist.Ct.App.1986) (declaring Florida's recently enacted civil death act unconstitutional in restricting access to the courts under both the First Amendment and the Florida Constitution Art. 1, §21).

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[22] "All courts shall be open; and every man for an injury done him in his reputation, person, movable or immovable possessions, shall have remedy by the due course of law, and justice administered according to the very right of the cause and the law of the land, without sale, denial, or unreasonable delay or expense…", Delaware Constitution, Art.1 §9, *quoted in Chesapeake Utilities, supra* at 155. Article 1, §5 of the Rhode Island Constitution establishes a similar right. See *infra*.

III. The Rhode Island Civil Death Statute is unconstitutional under both the United States and Rhode Island Constitutions.

It is not the goal of this amicus brief to present an argument on each of the many grounds on which this Court must conclude that the Civil Death Statute is unconstitutional. We leave that to Plaintiffs-Appellants.

However, in addition to presenting an historical review of the adoption, existence, and application of the Civil Death Statute in support of the position of Plaintiffs-Appellants, Amicus proposes to focus on a few additional points.

A. The Rhode Island Civil Death Statute violates the Supremacy Clause of the United States Constitution.

In *Gallop I,* the Court concluded that the Civil Death Statute is clear and unambiguous. Gallop's claim was extinguished upon conviction and his access to pursue a claim in the Superior Court forever foreclosed.

The Civil Death Statute has no severability provision. Taken on its face, a life convict either has no claim to enforce his civil rights or has no capacity to sue, or perhaps both.

The Court acknowledged that constitutional challenges were not presented in *Gallop I* and rejected a belated effort to raise them in *Gallop II.* That is not the case here; the constitutional challenges are squarely presented and preserved. But the Court has already provided its statutory interpretation of the Civil Death Statute in *Gallop I,* which appears to leave no room to reinterpret or construe the Civil Death

Statute as applicable only to claims arising under the laws of the State of Rhode Island.

Under controlling decisions of the United States Supreme Court, the courts of the State of Rhode Island are not, and cannot be, closed to life inmates' claims brought under the Constitution and laws of the United States, including 42 U.S.C.§1983. Both the state District Court and the Superior Court (depending on jurisdictional amount and whether equitable relief is sought) have original jurisdiction to hear such claims. The Civil Death Statute cannot be asserted to create procedural or substantive barriers to pursuit of federal claims without contravening the Supremacy Clause of the United States Constitution, Art.VI, cl.2. *Haywood v. Drown*, 556 U.S. 729 (2008); *Howlett v. Rose,* 496 U.S. 356 (1990).

Accordingly, the Court must conclude that the Civil Death Statute contravenes the Supremacy Clause of the United States Constitution and cannot be enforced.

B. The Court should consider and apply the more expansive protections of the Rhode Island Constitution.

Amicus urges the Court to take this opportunity to evaluate the constitutional claims as a matter of the Rhode Island Constitution. As the Court observed in *Pimental v. Department of Transportation,* 561 A.2d 1348, 1350 (R.I.1989), the state courts are the "final interpreters of state law" and may determine that the State Constitution affords greater protection to its citizens and residents than comparable, or even identical, language in the federal Constitution. Despite its decision in

Pimental, this Court has rarely departed from federal standards, as then announced by the United States Supreme Court, in construing the Rhode Island Constitution, even where the Court has characterized the federal jurisprudence that it is trying to follow to be "divergent at best and outright contradictory at worst." *McKinney v. State,* 843 A.2d 463, 466 (R.I.2004).

With the latest shift in the makeup of the bench of the United States Supreme Court, one can expect many more twists and turns at the federal level, without advancing or articulating a body of consistent constitutional principles.

Development of jurisprudence of state constitutional grounds for decision also serves larger judicial interests:

> Third, by turning first to our own constitution we can develop a body of independent jurisprudence that will assist this court and the bar of our state in understanding how that constitution will be applied. Fourth, we will be able to assist other states that have similar constitutional provisions develop a principled, responsible body of law that will not appear to have been constructed to meet the whim of the moment.
> *State v. Coe*, 679 P.2d 353, 359 (Wash.1984) (interpreting the Washington Constitution free speech provision to afford greater rights against a prior restraint than the First Amendment).

In *State v. Myers,* 115 R.I. 583 (R.I.1976), this Court recognized the importance of setting its own course by interpreting the requirements of the Rhode Island Constitution's confrontation clause instead of trying "to forecast how the [U.S. Supreme] Court will ultimately decide" the issue. "But that exercise would at best be speculative, and might result, as it has in the past, in our adopting a view at

variance with that ultimately selected by the [U.S.] Supreme Court." *Myers, supra* at 588-589 (citation omitted).

The 1986 Constitutional Convention also recognized the importance of the state Constitution's "Declaration of Rights" as an independent source of individual liberties. That year, the Convention proposed, and the voters approved, adding a new provision to the Rhode Island Constitution under "Rights Not Enumerated": "The rights guaranteed by this constitution are not dependent on those guaranteed by the constitution of the United States." This provision now appears as the second sentence of Article 1, §24.

C. Before reaching federal constitutional requirements, the Court should invalidate the Civil Death Statute as violative of Article 1, §5 of the Rhode Island Constitution.

Article 1, §5 of the Rhode Island Constitution provides:

> § 5. Entitlement to remedies for injuries and wrongs--Right to justice
>
> Every person within this state ought to find a certain remedy, by having recourse to the laws, for all injuries or wrongs which may be received in one's person, property, or character. Every person ought to obtain right and justice freely, and without purchase, completely and without denial; promptly and without delay; conformably to the laws.

This provision, which also appeared in the Constitution in 1842, declares that "every person" is protected by its terms. In contrast to that expansive language, in Article 2, §1, the Constitution declares that "[n]o person who is incarcerated in a correctional facility upon a felony conviction shall be permitted to vote until such

person is discharged from the facility. Upon discharge, such person's right to vote shall be restored."

It is certainly more tortured to construe the broad language of Article 1, §5 to *sub silentio* exclude persons "incarcerated in a correctional facility" from its facially broad protection than it is to conclude that the Civil Death Statute--which does just that—violates that mandate.

And as we have seen from the review of the legislation and legal applications of the Civil Death Act, throughout its history on the books in Rhode Island, its constitutionality has never been assessed.

While the Court has made clear that Article 1, §5 is not self-executing, and does not preclude the legislature from establishing such things as filing fees or statutes of limitations, "[t]he total denial of access to the courts for adjudication of a claim even before it arises, however, most certainly 'flies in the face of the constitutional command found in art. 1, § 5,' *Lemoine v. Martineau*, 115 R.I. at 240, 342 A.2d at 621, and to hold otherwise would be to render this constitutional protection worthless." *Kennedy v. Cumberland Eng'g Co.*, 471 A.2d 195, 198 (R.I. 1984).

As discussed above, *supra* at 20-21 and nn. 21-22, state courts in many other jurisdictions, including Florida and Oklahoma, have relied upon comparable provisions in their respective state constitutions to determine that their state's civil

death statute disability was unconstitutional as a matter of state law. This Court should do the same.

D. The Civil Death Statute violates the Eighth Amendment to the United States Constitution and Article 1, § 8 of the Rhode Island Constitution.

Amicus respectfully submits that the Civil Death Statute satisfies neither the Eighth Amendment to the United States Constitution nor Rhode Island Constitution Article 1, §8. In *McKinney v. State, supra*, this Court concluded that the two standards were identical and that it would follow the jurisprudence of the United States Supreme Court, while at that same time describing that jurisprudence "as divergent at best and outright contradictory at worst." *Id.* at 466.

The Court followed its reasoning in *McKinney* in 2007, in *State v. Monteiro,* 924 A.2d 784, 793-796 (R.I.2007), where the Court rejected constitutional challenges, based upon the Eighth Amendment and the Rhode Island Constitution, in affirming the imposition of two mandatory consecutive life sentences upon the defendant for crimes committed as a 17-year old juvenile offender. In contrast, subsequent decisions of the United States Supreme in such cases as *Miller v. Alabama,* 567 U.S. 460 (2012), and *Montgomery v. Louisiana,* 136 S.Ct. 718 (2016), call into question the continued viability of that approach.

As the Court has previously acknowledged, the jurisprudence of the United States Supreme Court in this area is often conflicting. This Court has acknowledged

that the language of the state and federal constitutional prohibitions are not identical. The United States Supreme Court has interpreted the Eighth Amendment to prohibit punishments that are "grossly out of proportion to the severity of the crime." *Coker v. Georgia,* 433 U.S. 584, 592 (1977), quoted in *McKinney, supra* at 467. Article 1, §8 of the Rhode Island Constitution affirmatively provides that "all punishments ought to be proportioned to the offense."

At a minimum, Rhode Island must apply the federal standard. But Rhode Island is free to interpret the Rhode Island Constitutional mandate as more demanding of "proportionality" independent of the federal corollary, and should do so.

Under federal jurisprudence, it is clear that the appropriate measurement of the Eighth Amendment is not based on what was acceptable "punishment" upon the adoption of the Constitution and the Eighth Amendment in 1791 (around the time that Rhode Island approved whipping, branding, mutilation of body parts as well as capital punishment for a host of crimes), but rather by today's standards. "The Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society." *Trop v. Dulles,* 356 U.S. 86, 101 (1958).

> Over time, the Court interpreted the Eighth Amendment to bar certain uses of the death penalty under its evolving standards of decency doctrine. Such barred uses include proscriptions against implementing mandatory death sentences, executing juvenile offenders and intellectually disabled offenders, imposing death sentences in non-homicide cases of child rape and rape, and permitting the death penalty

> in some felony murder cases.
> Berry, *Cruel State Punishments,* 98 N.C.L.Rev. 1201, 1203-1204 (2020) (footnotes omitted).

In *Roper v. Simmons*, 543 U.S. 551 (2005), the United States Supreme Court, citing *Trop* for the proposition that the Court would consider the standards and laws of other countries as well as national practices, determined that the imposition of the death penalty upon a juvenile offender constituted cruel and unusual punishment. The Court acknowledged that it reached this conclusion based on "evidence of national consensus against the death penalty for juveniles," *id.* at 564, even though it had rejected the same conclusion in *Stanford v. Kentucky,* 492 U.S. 361 (1989), some fifteen years earlier. *Roper, supra* at 562.

As discussed above, "civil death" was not a punishment in place in 1798 or 1842—although there were surely many more harsh and other punishments then that are today considered barbaric. But as we fast-forward to 2021, Rhode Island appears to stand alone among the 50 states in inflicting "civil death" to extinguish all civil rights and relations of any nature and all rights of property, thereby establishing that "evidence of national consensus," *Roper, supra,* that this archaic form of punishment violates both the Eighth Amendment and Article 1, §8.

E. The Civil Death Statute should be invalidated in its entirety.

In the matters at bar, two life inmates seek redress for personal injuries sustained after their conviction, during their incarceration. In *Gallop I,* the life

inmate was foreclosed from suit for injuries sustained before his conviction. In *Davis v. Pulliam, supra,* the life convict had been paroled and was injured while employed at a service station.

How does one apply the *Gallop* analysis to appellants Zab and Rivera? Is it that, in the eyes of the law of the State of Rhode Island, they are incapable of being harmed in th0ire person or property, that they are recognized to have claims which the courts cannot hear, or that they lack to capacity to sue, or all of the above? How does one apply the *Gallop* analysis to life inmates who are paroled to the community, but still in the custody of the Department of Corrections? Are they restored to civil status upon release? Or do they continue to suffer the same disability, meaning that they have no recourse in the courts if an employer refuses to pay wages, if a landlord uses self-help to evict them, or if they are injured in a traffic accident or on the job? If the life convict is deemed to spring back to life upon parole, then what happens when an inmate who is serving a life sentence is injured while in prison, and is then paroled? Is he allowed to bring that claim? What happens to a life inmate whose claim is extinguished by the Act, but whose conviction is later vacated upon exoneration?[23]

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[23] This scenario is hopefully rare, but not unimaginable. Jeffrey Scott Hornoff was convicted and served over six years on a life sentence, *State v. Hornoff,* 760 A.2d 927 (R.I.2000), before the real murderer stepped forward and confessed. *Hornoff v. City of Warwick Police Dept.*, 2004 WL 144115 (R.I. Super.2004).

In the absence of a definitive ruling now, squarely addressing and rejecting the constitutionality of the Civil Death Statute, these are all questions that the Court will be called upon to visit and revisit, because the *Gallop I* decision has licensed the government and private actors to avoid any analysis of their liability to a human being by denying his humanity.

Conclusion

Amicus respectfully prays that the Court declare the Civil Death Statute, R.I.G.L. §13-6-1, unconstitutional and unenforceable in all respects and to reverse and remand the consolidated appeals to the Superior Court.

Respectfully submitted,

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1. This brief contains 7,871words, excluding the parts exempted from the word count by Rule 18(b).

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/s/ Lynette Labinger
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