STATE OF RHODE ISLAND

PROVIDENCE, SC SUPERIOR COURT

JOAO NEVES

v. PM-2022-0259

STATE OF RHODE ISLAND

PABLO ORTEGA

v. PM-2022-0260

STATE OF RHODE ISLAND

KEITH NUNES

v. PM-2022-0901

STATE OF RHODE ISLAND

MEMORANDUM OF LAW IN SUPPORT OF THE STATE'S CROSS MOTION FOR SUMMARY JUDGMENT

Now comes the Respondent State of Rhode Island with its memorandum of law in support of its motion for summary judgment pursuant to R.I.G.L. §10-9.1-6(c) and Super. Ct. R. Civ. P. 56. The State respectfully requests that this Court deny petitioner's application and enter judgment for the State. The State relies on the facts to which it admits in its answers to Petitioners' Application for Post-Conviction Relief ("Petitions") in each of the above captioned cases. The State asserts that the statutes cited in the Petition speak for themselves.

For the purposes of this motion, the State also agrees that, at some point after 2007, the Department of Corrections changed its method of calculating parole eligibility for inmates serving life sentences and a consecutive term of years and determined that inmates must be paroled from

the life sentence to the consecutive sentence. The State also agrees that all three Petitioners (1) received life sentences plus consecutive terms of years and (2) have been paroled from their life sentences to their consecutive sentences.

STANDARD OF REVIEW

Petitioners seek relief under G.L. § 10-9.1-1 *et. seq*. entitled Post-Conviction Remedy. Specifically, Petitioners seeks redress under § 10-9.1-1(5), which provides that individuals may move for post-conviction relief based on a claim "[t]hat his or her sentence has expired, his or her probation, parole, or unconditional release unlawfully revoked, or he or she is otherwise unlawfully held in custody or other restraint."

Pursuant to G.L. § 10-9.1-6(c), "[t]he court may grant a motion by either party for summary disposition of [a PCR application] when it appears from the pleadings, depositions, answers to interrogatories, and admissions and agreements of fact, together with any affidavits submitted, that there is no genuine issue of material fact and the moving party is entitled to a judgment as a matter of law." Our Supreme Court has held that

> [A] summary dismissal under § 10-9.1-6(c) 'closely resembles a grant of summary judgment under Rule 56 of the Superior Court Rules of Civil Procedure, and the standards for granting a § 10-9.1-6(c) [summary dismissal] are identical to those utilized in passing on a summary judgment motion. Critically, summary dismissal is improper if a genuine issue of material fact exists. *Reyes v. State,* 141 A.3d 644, 662 (R.I. 2016) (quoting *Palmigiano v. State,* 387 A.2d 1382, 1384-85 (R.I. 1978)).

In reviewing such a motion, the court does not pass upon the weight or the credibility of the evidence but must consider the affidavits and other pleadings in a light most favorable to the party opposing the motion. *Palmisciano v. Burrillville Racing Ass'n,* 603 A.2d 317, 320 (R.I. 1992).

FACTS AND TRAVEL

PETITIONER NEVES

Petitioner Neves was charged with one count of first-degree murder pursuant to R.I.G.L. § 11-23-1 for an offense committed on January 15, 1999. The case was indicted on January 21, 2000 as case P1-2000-0180A. (*See* Docket P1-2000-0180A) In the days leading up to the murder on January 15, 1999, Petitioner also committed five separate robberies in the city of Providence. Two were committed on January 8, one on January 9, and two on January 11, and Neves was charged with those robberies in four separate cases. (*See* Dockets P1-2000-0540A, P1-2000-0541A, P1-2000-0542A, P1-2000-0543A). On February 4, 2000, Petitioner appeared before Associate Justice Krause and pled guilty to the murder charge in P1-2000-0180A. He received a single life sentence with the possibility of parole. On the same date, Petitioner waived indictment on all the robbery charges and entered guilty pleas. He was sentenced to ten years at the ACI on each robbery to be served concurrently with one another but consecutively to the sentence for the murder.

Petitioner initially appeared before the Parole Board on August 1, 2019, on his life sentence, as soon as he was eligible for parole from a life sentence for a 1999 murder. *See* R.I.G.L. § 13-8-13. The Board issued a parole permit granting him parole to his consecutive ten-year sentence on August 1, 2021. Petitioner must serve one third of the consecutive ten-year sentence, or three years and four months, before he is eligible for parole from the A.C.I. He is scheduled to appear before the Board on December 1, 2024. (*See* Ex. 1) Petitioner filed the instant application for post-conviction relief on January 14, 2022.

PETITIONER ORTEGA

Petitioner was indicted on March 1, 2002, in case P1-2002-0678AG charging him with one count of first-degree murder pursuant to R.I.G.L. § 11-23-1; one count of conspiracy pursuant to R.I.G.L. § 11-1-6; and, one count of discharging a firearm during a crime of violence pursuant to R.I.G.L. § 11-47-3.2(a). (*See* Docket P1-2002-0678AG). The events leading to these charges occurred on November 14, 2001. On March 20, 2002, Petitioner entered guilty pleas to murder and conspiracy and the State dismissed the firearm charge. Associate Justice Edwin Gale sentenced Petitioner to life for the murder and to five years for the conspiracy consecutive to the life sentence.

Petitioner appeared before the Parole Board on November 1, 2021, as soon as he was eligible for parole from a life sentence for a 1999 murder under R.I.G.L. § 13-8-13, and a parole permit was issued on December 10, 2021, paroling him to the consecutive five-year sentence. Petitioner must serve one-third of the five-year sentence before being eligible for parole or one year and eight months. Petitioner is scheduled to go before the Board on August 1, 2023. (*See* Ex. 2) Petitioner filed the instant application for post-conviction relief on January 14, 2022.

PETITIONER NUNES

Petitioner was indicted on September 1, 1999, in case P1-1999-2961AG which charged him with one count of murder pursuant to R.I.G.L. § 11-23-1, one count of conspiracy pursuant to R.I.G.L. § 11-1-6; one count of assault with intent to murder pursuant to R.I.G.L. § 11-5-1; three counts of felony assault pursuant to R.I.G.L. § 11-5-2; one count of carrying a pistol while committing a crime of violence pursuant to R.I.G.L. § 11-47-3.1; one count of carrying a pistol without a license pursuant to R.I.G.L. § 11-47-8; and one count of disorderly conduct pursuant to R.I.G.L. § 11-45-1. The events leading to these charges occurred on June 13, 1999. (*See* Docket P1-1999-2961AG).

A jury trial commenced before Associate Justice Krause on April 10, 2000. The jury found Petitioner guilty of murder, assault with intent to commit murder, three counts of felony assault, carrying a pistol without a license, and a drive by shooting. The charges of disorderly conduct, conspiracy and carrying a firearm during a crime of violence were dismissed. Petitioner was sentenced to life for the murder, ten-year sentences on the felony assault counts and the carrying a pistol without a license, each of which run concurrent with one another but consecutive to the life sentence. Petitioner received a ten-year suspended sentence on the drive by shooting charge to be consecutive to all other counts.

Petitioner was initially seen by the Parole Board on June 1, 2019, as soon as he was eligible for parole from a life sentence for a 1999 murder, and a parole permit was issued on June 17, 2019 which paroled him to the consecutive ten-year sentence on July 17, 2019. He is next scheduled to appear before the Board on November 1, 2022, after he has served the required three years and four months of the ten-year sentence. (*See* Ex. 3). Petitioner filed the instant application for post-conviction relief on February 15, 2022.

All three Petitioners allege, that under the terms of R.I.G.L. §§ 13-8-10 & 13-8-13, their life sentences and the consecutive terms of years should be "aggregated" such that they are eligible to be paroled "to the street" after serving the minimum term of eligibility on the life sentences and one third of the term of the consecutive sentence. In the case for each Petitioner, the minimum term to serve on their life sentences is twenty years in accordance with R.I.G.L. § 13-8-13(a)(3). The Petitioners also allege that due to the fact that they were each younger than twenty-two when they committed their crimes, they should be eligible for parole "to the street" after serving only twenty years, regardless of any consecutive sentences because they are considered "youthful

offenders" under R.I.G.L. § 13-8-13(e), entitled "Life prisoners and prisoners with lengthy sentences." Section (e) reads as follows:

> Any person sentenced for any offense committed prior to his or her twenty-second birthday, other than a person serving life without parole, shall be eligible for parole review and a parole permit may be issued after the person has served no fewer than twenty (20) years' imprisonment unless the person is entitled to earlier parole eligibility pursuant to any other provisions of law. This subsection shall be given prospective and retroactive effect for all offenses occurring on or after January 1, 1991.

The Petitioners' claims have no merit. The State asserts that the Petitioners' argument pertaining to aggregation of sentences under the Parole statutes, R.I.G.L. §§ 13-8-1 – 13-8-35, is not yet and will never become ripe for judicial review. Even if the Department of Corrections erred in not "aggregating" the petitioners' sentences for purposes of determining parole eligibility, none of the three Petitioners would be immediately eligible for parole from the A.C.I., and two of the Petitioners, Ortega and Nunes, will be eligible for parole from the A.C.I. at the same time that they would if the D.O.C. had "aggregated" their sentences to determine parole eligibility. This point is acknowledged by Petitioners in their memorandum. (Pet. Mem. at 14) The State will therefore focus on the issue of the "youthful offender" statute - § 13-8-13(e).

LEGAL ARGUMENT

I. The Youthful Offender Act, R.I.G.L. § 13-8-13(e), and Its Application to Petitioners

The issue before the Court is whether the Petitioners should be granted immediate release on parole having served the minimum twenty years of their respective sentences, regardless of the consecutive sentences imposed in their cases, pursuant to R.I.G.L. § 13-8-13(e). The Court in making this determination must decide whether a statute "has a plain meaning and is, as such,

unambiguous." *State v. Diamante*, 83 A.3d 546, 550 (R.I. 2014). If the language of a statute is clear and unambiguous, this Court simply gives the words of the statute their plain and ordinary meanings and its "interpretative task is done." *Id.*; *see also State v. Gibson*, 182 A.3d 540, 547 (R.I. 2018); *State v. Santos*, 870 A.2d 1029, 1031-32 (R.I. 2005); *Accent Store Design, Inc. v. Marathon House, Inc.*, 674 A.2d 1223, 1226 (R.I. 1996). This is so "because '[the] ultimate goal is to give effect to the General Assembly's intent,' and [this Court has] repeatedly observed that the plain language of a statute is the 'best indicator of [legislative] intent.'" *Diamante*, 83 A.3d at 550 (quoting *Olamuyiwa v. Zebra Atlantek, Inc.*, 45 A.3d 527, 534 (R.I. 2012)); *see also State v. Burke*, 811 A.2d 1158, 1167 (R.I. 2002).

The language of R.I.G.L. § 13-8-13(e) is clear and unambiguous, stating:

> Any person sentenced for any offense committed prior to his or her twenty-second birthday, other than a person serving life without parole, shall be eligible for parole review and a parole permit may be issued after the person has served no fewer than twenty (20) years' imprisonment unless the person is entitled to earlier parole eligibility pursuant to any other provisions of law. This subsection shall be given prospective and retroactive effect for all offenses occurring on or after January 1, 1991.

Of particular importance when considering the statute is the legislature's use of the term "any offense" and not specifically stating "offenses" in the plural. Each of the Petitioners committed and were convicted of multiple offenses for which they received consecutive sentences. There is no other way to interpret this language as meaning anything other than "an offense" in the singular. Had the Legislature intended the Department of Corrections to consider the multiple sentences of a youthful offender they could have and should have used the term "offense or offenses." This distinction is also apparent when reviewing other changes to Title 13, Chapter 8 of the General Laws which were enacted simultaneously to § 13-8-13(e). Of particular note is the addition of

R.I.G.L. § 13-8-14.2, Special Parole Considerations for Persons Convicted as Juveniles. Section (a) reads as follows:

> When a person who is serving a sentence imposed as the result of *an offense or offenses* committed when he or she was less than eighteen years of age *becomes eligible for parole pursuant to applicable provisions of law*, the parole board shall ensure that he or she is provided a meaningful opportunity to obtain release and shall adopt rules and guidelines to do so, consistent with existing law. (emphasis added).

It is evident that the Legislature was more than aware of the effects of the distinction between "an offense" and "an offense or offenses" for the purposes of these enactments. It is well established that imposing consecutive sentences is within the discretion of the trial justice. This is particularly true when there is more than one victim during a single course of action. *State v. Chase*, 9 A. 3d 1248, 1256 (R.I. 2010). This would be the scenario Justice Krause faced in Petitioner Nunes' case as he was charged with multiple counts of felony assault for firing his weapon into a group of people. *State v. Nunes,* 788 A.2d 460, 462 (R.I. 2002). The judge imposed the consecutive ten-year sentence to account for those victims as well as the murder victim. Petitioner Neves' case is an even better example of the intent of the consecutive sentences as his plea agreements included multiple offenses over multiple days with multiple victims in addition to his life sentence. (*See* Dockets P1-2000-0540A, P1-2000-0541A, P1-2000-0542A, P1-2000-0543A).

Petitioner's argument runs afoul of the Legislature's mandating consecutive sentences for certain offenses. It is well established that "the Legislature is presumed to know the State of the existing law when it enacts or amends a statute." *State v. Sivo,* 925 A.2d 901, 916-17 (R.I. 2007)(quoting *State v. DelBonis,* 862 A.2d 760, 768-69 (R.I. 2004). For example R.I.G.L. § 11-47-3.2 Using a Firearm While Committing a Crime of Violence specifically states in subsection

(c) **"**[t]he penalties defined in subsection (b) of this section shall run consecutively, and not concurrently, to any other sentence imposed and, *notwithstanding the provisions of chapter 8 of title 13*, the person shall not be afforded the benefits of deferment of sentence or parole; provided, that a person sentenced to life under subdivision (b)(3) or (b)(4) of this section may be granted parole." (emphasis added) Thus the use of the term "any offense" in R.I.G.L. § 13-8-13(e) limits the provision to "an offense" which indicates that the offender be paroled to the consecutive sentence.

Petitioners argue that there is no conflict between the earlier enacted provisions of R.I.G.L. § 13-8-13 and the newly added section (e) because "adult life sentences are subject to the same aggregation standards (just longer)" [and] "even if aggregation were not to apply for adult offenders, subsection (e) makes it clear that it does for youthful offenders." (Pet. Mem. at 28) This argument assumes that the Legislature intended subsection (e) to apply to multiple sentences. This is in opposite of the clear an unambiguous wording of the statute which states "an offense." The Petitioners make an assumption not supported by the law.

II. Reliance on U.S. Supreme Court Cases is Distinguishable to the Instant Case

Petitioners rely on three United States Supreme Court cases to demonstrate the rationale behind Youthful Offender statutes in general and to buttress their argument that R.I.G.L. § 13-8-13(e) mandates that offenders must be paroled "to the street" in the first instance regardless of consecutive sentences imposed. While the State does not disagree with the rationale for treating youthful offenders differently which has been set forth by the Court in the cases cited, it disagrees that the rules set forth in those cases are analogous to the instant case.

Petitioners cite *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), which all make holdings on sentencing and punishment of juveniles where statutes mandated particular punishments. None of the statutes under which Petitioners were sentenced contained any of the mandates included in the statutes addressed in these three cases.

The Court in *Roper* held that the Eighth and Fourteenth Amendments to the United States Constitution "forbid imposition of the death penalty on offenders who were under the age of 18 when their crimes were committed." 543 U.S. at 578. Rhode Island does not have a death penalty statute thus the application of this holding is not relevant to Petitioners' cases.

The Court in *Graham* held that "[t]he Constitution prohibits the imposition of a life without parole sentence on a juvenile offender who did not commit homicide." 560 U.S. at 81. The Rhode Island General Laws prohibit the imposition of a life without parole sentence for crimes other than murder and, in any event, none of the Petitioners in these cases was sentenced to life without parole. (*See* §§ 12-19.2-1, 11-23-2, and 11-23-2.1) *Graham* is inapplicable to Petitioners' cases.

The Court in *Miller* held that

> *Graham, Roper,* and our individualized sentencing decisions make clear that a judge or a jury must have the opportunity to consider mitigating circumstances before imposing the harshest possible penalty for juveniles. By requiring that all children convicted of homicide receive lifetime incarceration without the possibility of parole, regardless of their age and age related characteristics and the nature of their crimes, the mandatory-sentencing schemes before us violate this principle of proportionality, and so the Eighth Amendment's ban on cruel and unusual punishment.

567 U.S. at 489.

Once again this situation is not one faced by these Petitioners and is inapplicable as none was sentenced to life without parole.

CONCLUSION

The State avers that there are no material facts in dispute and therefore asks this Court to rule as a matter of law that R.I.G.L. § 13-8-13(e) only applies to "an offense" and thus Petitioners must be paroled to their consecutive sentence as determined by the Department of Corrections. We request that Petitioners' applications for post-conviction relief by denied.

Respectfully submitted,

STATE OF RHODE ISLAND

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CERTIFICATION OF SERVICE

I certify that I filed a true copy with the courts electronic filing system and e-mailed a copy of the within memorandum to Attorneys for Petitioners, Lynette Labinger, Sonja Deyoe, and Lisa Holley, on this 21st day of March, 2022.

/s/ Judy Davis

EXHIBIT 1

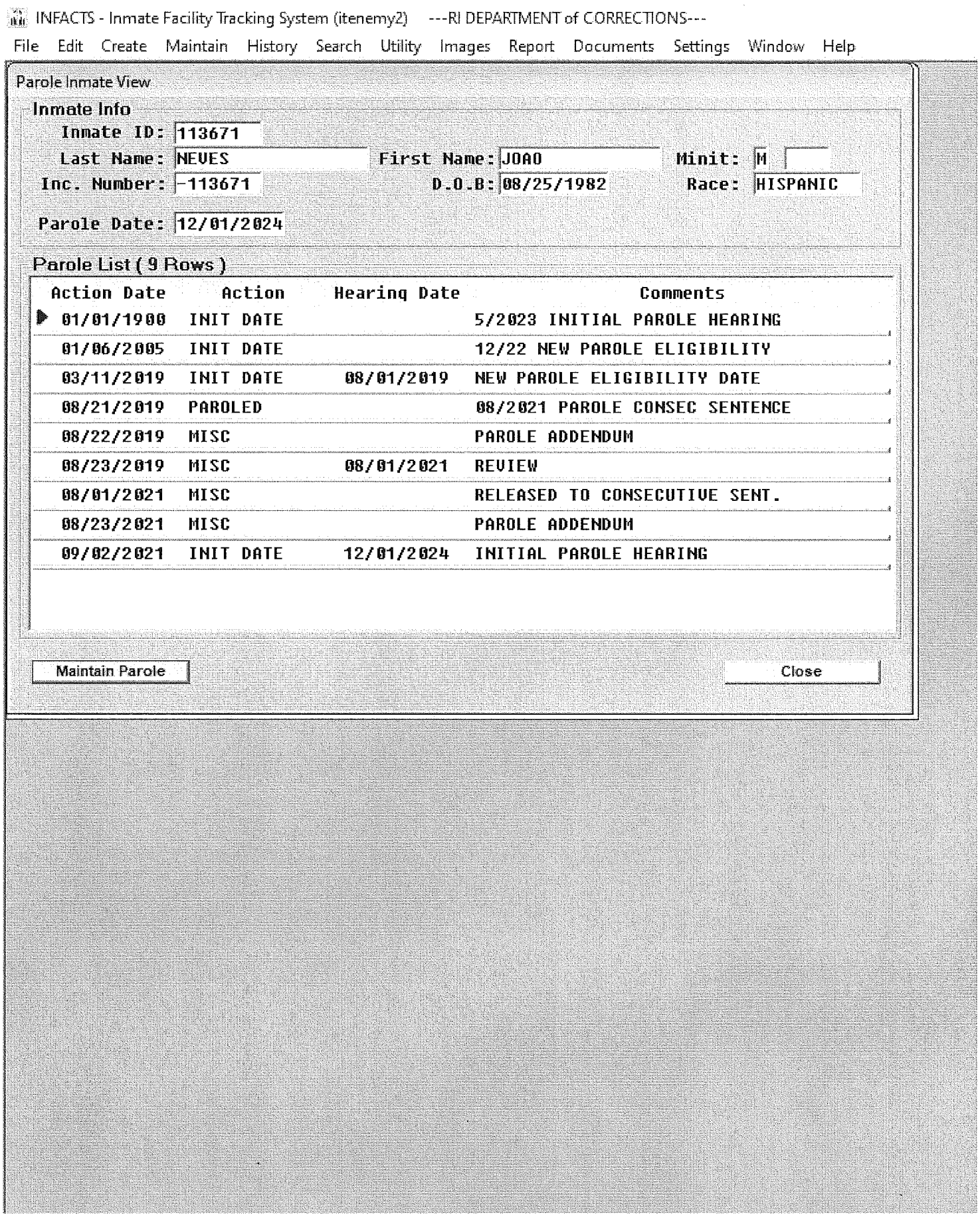

EXHIBIT 2

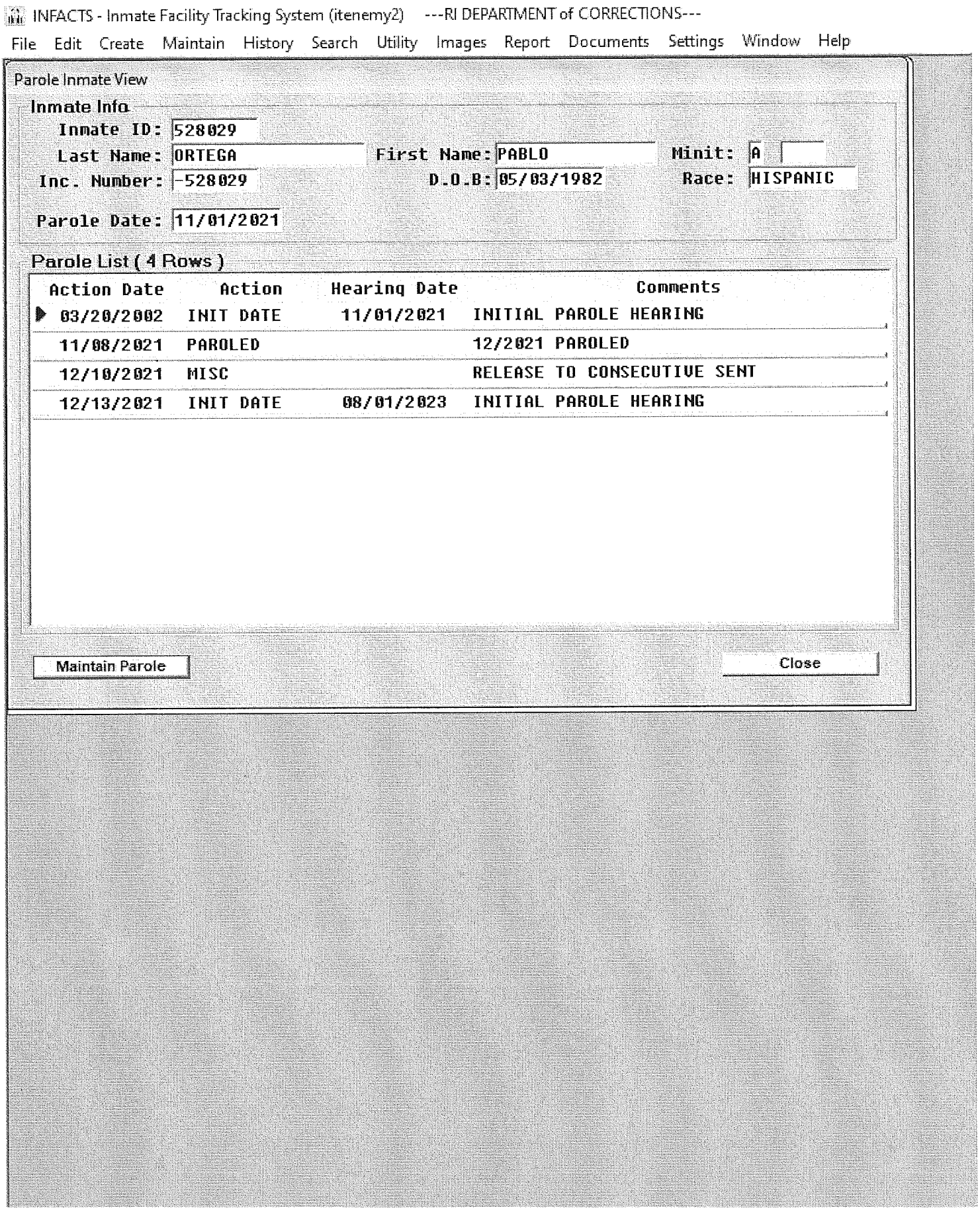

EXHIBIT 3

Case Number: PM-2022-00260
Filed in Providence/Bristol County Superior Court
Submitted: 3/21/2022 12:06 PM
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Reviewer: Carol M.