COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT

MIDDLESEX, SS. NO. SJC-13197

JOSE RODRIGUEZ,
Plaintiff-Appellant

v.

MASSACHUSETTS PAROLE BOARD,
Defendant-Appellee

ON APPEAL FROM A JUDGMENT OF THE MIDDLESEX SUPERIOR COURT

BRIEF FOR THE COMMITTEE FOR PUBLIC COUNSEL SERVICES AND NORTHEASTERN UNIVERSITY SCHOOL OF LAW PRISONERS' ASSISTANCE PROJECT AS AMICI CURIAE IN SUPPORT OF PLAINTIFF-APPELLANT

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STATEMENT OF INTEREST OF AMICI CURIAE

The **Committee for Public Counsel Services** ("CPCS") was created by the Legislature in 1983 "to plan, oversee, and coordinate the delivery of criminal and certain noncriminal legal services" to indigent parties in the Commonwealth. St. 1983, c. 673, codified in G. L. c. 211D, §1. In that capacity, CPCS appoints, trains, and oversees private counsel in cases where there is a right to counsel for parole matters. The decision in this case will affect the interests of CPCS's present and future clients. Aside from the appointment of counsel for the indigent prisoner, CPCS has no financial interest in the case.

Northeastern University School of Law Prisoners' Assistance Project ("Northeastern PAP" or "the Project") was founded by law students in 1979. The Project trains law students to represent incarcerated people serving parole-eligible life sentences at parole release hearings (both initial and review hearings) and parole revocation hearings. Each year the Project's law students represent approximately twenty prisoners serving parole-eligible life sentences at initial release

hearings, review hearings and revocation hearings. Northeastern PAP and its clients have a strong interest in ensuring that the Massachusetts Parole Board affords incarcerated persons and parolees the substantive and procedural due process to which they are entitled under our federal and state constitutions and in protecting their statutory and regulatory rights afforded to them by Massachusetts law.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

In *Diatchenko v. District Attorney for the Suffolk Dist.*, 471 Mass. 12 (2015) (*Diatchenko II*), this Court recognized that its endorsement of parole as the *sole* mechanism for affording juvenile offenders the "meaningful opportunity to obtain release" required to bring an otherwise unlawful life sentence into constitutional compliance, created a cognizable interest in the outcome of parole proceedings that is fundamentally different from adult parole and sufficient to invoke the protections of the Due Process Clause. *Id.* at 24-29. Consistent with this recognition, the Court declared that juvenile offenders in this context are entitled to procedural due process protections including, at a minimum, a right to the assistance of counsel and to expert witnesses at parole hearings, and a right to judicial review of adverse parole decisions "to ensure that the board exercises its discretionary authority to make a parole decision for a juvenile homicide offender in a constitutional manner . . . ." *Id.* at 29.

In *Deal v. Massachusetts Parole Board*, 484 Mass. 457 (2020), the Court had its first—and to date only—opportunity to consider the analysis by which a reviewing court can "ensure that the board exercises its discretionary authority to make a parole decision for a juvenile homicide offender in a constitutional manner, meaning that the art. 26 right of a juvenile homicide offender to a constitutionally proportionate sentence is not violated." *Diatchenko II*, 471 Mass. at 29. While reiterating that "merely stating that the board considered the *Miller* factors, without more, would constitute a cursory analysis that is incompatible with art. 26[,] *id.* at 462, the Court reached a case-specific determination that inclusion of certain facts in *Deal*'s parole decision supported the conclusion that the Board, at least implicitly, "did consider the *Miller* factors in a noncursory way." *Id.* at 463. Notwithstanding this conclusion, however, the Court advised that in the future:

> [m]aking these connections *explicit, rather than implicit*, will allow the board to make clear to reviewing courts that it gave due consideration to the *Miller* factors.

Id. (emphasis added). To this end, the Court set out a number of "better practices" for use in "future cases" involving juvenile offenders serving life sentences. These included: (1) "specify[ing] the reasons and supporting facts that overcome the *Miller* considerations" where such considerations militate in favor of release; (2) "articulat[ing] the reasons and evidence overcoming the contrary expert opinion" offered by a defense expert; and (3) indicating how such reasons and evidence relied on by the Board to deny parole "bear[] on the applicant's likelihood to recidivate or the compatibility of release with the welfare of society." *Id.* at 464-465.

Here, nearly two years after *Deal* was decided, the Board's current arguments on appeal betray a disinterest in acknowledging—let alone voluntarily employing—the decisional "better practices" suggested in *Deal.*[1] Throughout its

[1] The "Decision" section of Mr. Rodriguez's denial is verbatim is most material respects to the "boilerplate" language criticized in Chief Justice Gants' concurring opinion in *Deal. Deal*, 484 Mass. at 466-467, n. 1. While this might be due, in part, to the fact it issued before *Deal* was decided, the Board's arguments on appeal in *this* case acknowledge no problem with continuing with this approach.

brief, the Board persists in a view of its own unfettered discretion, based largely on pre-*Diatchenko* caselaw, that ignores both the admonitions regarding "better practices" in *Deal* and constitutional implications of the Board's role as the *de facto* guarantor of constitutional rights in juvenile lifer cases.

As the Board would have it, a juvenile lifer, like any other parole applicant, remains entitled to "only a 'summary statement' of reasons" for an adverse parole decision [Def. Br. at 32], which may or may not contain discussion of important or determinative factors, but nevertheless must be affirmed whenever "the administrative record" (the contents of which are determined by the Board in certiorari actions, *see* Mass. Super. Ct. Standing Order 1-96) "contains grounds for concluding that the Board considered the correct factors in reaching its decision." [Def. Br. at 34]. In practical terms, the Board continues, as in *Deal*, to provide juvenile lifers largely conclusory and perfunctory justifications for its adverse decisions, and to leave to a reviewing court, typically some years after the hearing, to deduce and articulate for the first

time why and how the Board's action can be viewed as providing the non-cursory analysis required by art. 26.

The Board's continued recalcitrance with respect to providing explicit, meaningful, and individualized explanations for its adverse juvenile lifer parole decisions is constitutionally untenable, particularly given the fundamental interests at stake in juvenile lifer parole proceedings. In order to assure the appearance, as well as the existence, of fairness, the Court should take this opportunity to declare that minimal due process considerations *require* the Board to provide juvenile lifers a written explanation of the reasons for the denial of parole that comports with the "better practices" outlined in *Deal*. In the words of the *Deal* majority, where the *Miller* factors or unrebutted expert opinion testimony militates in favor of release, the Board must explicitly specify "the reasons and supporting facts" that overcome these considerations, and indicate how those reasons "bear on the applicant's likelihood to recidivate or the compatibility of release with the welfare of society." The right to such an explanation--like the rights to

counsel, to expert witnesses and to judicial review recognized in *Diatchenko II*--should and must be regarded as a discrete component of constitutional due process "procedurally required in order to protect a juvenile homicide offender's *expectation* of 'a meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation.'" *Diatchenko II*, 471 Mass. at 27 (quoting *Graham*, 560 U.S. at 75) (emphasis added).

In other circumstances where, as here, a constitutionally cognizable interest in the outcome of parole proceedings has been recognized, Courts have typically and routinely have recognized that an explanation that illuminates "the evidence relied upon and the reasons for" an adverse parole decision is a minimum Due Process protection. Such requirement serves multiple salutary purposes, including facilitating judicial review, guarding against arbitrary decision-making and apprising prisoners of how they might, by improving their prison behavior or taking steps with respect to some other factor in doubt, better their chances for release. Each of these

purposes is particularly salient to parole release determinations. And all are crucially necessary to ensure that juvenile lifers, and in particular juvenile offenders like Mr. Rodriguez whose sentences for conduct committed as a child have extended into retirement age, are not erroneously deprived of their constitutional right to a "meaningful opportunity to obtain release."

ARGUMENT

I. AN EXPLICIT, MEANINGFUL, AND INDIVIDUALIZED EXPLANATION FOR AN ADVERSE PAROLE DECISION, COMPORTING WITH THE "BETTER PRACTICES" OUTLINED IN *DEAL*, SHOULD BE RECOGNIZED AS A COMPONENT OF CONSTITUTIONAL DUE PROCESS PROCEDURALLY REQUIRED TO PROTECT A JUVENILE HOMICIDE OFFENDER'S EXPECTATION OF "A MEANINGFUL OPPORTUNITY TO OBTAIN RELEASE."

A. *Under The Eighth and Fourteenth Amendments and art. 26 of the Massachusetts Declaration of Rights Juvenile Offenders Are Guaranteed A "Meaningful Opportunity For Release Based On Demonstrated Maturity And Rehabilitation", Regardless of the Nature or Severity of Their Crimes.*

For the cohort of prisoners serving life sentences based on juvenile conduct, the availability of a "realistic" and "meaningful opportunity for release based on demonstrated

maturity and rehabilitation" is the *sin qua non* of a constitutionally proportionate sentence under the Eighth and Fourteenth Amendments to the United States Constitution and art. 26 of the Massachusetts Declaration of Rights. *See Graham v. Florida*, 560 U.S. 48, 74 (2010); *Diatchenko v. District Attorney for the Suffolk Dist.*, 466 Mass. 655, 674 (2013) (*Diatchenko I*). If no meaningful and realistic process is provided, the juvenile has not been afforded the genuine opportunity for release that the State and Federal Constitution require.

The constitutional requirement that juvenile offenders be afforded a "meaningful opportunity for release," regardless of the nature or severity of their crimes, derives from a series of decisions by the Supreme Court and this Court establishing and expanding on the proposition that children, given their diminished culpability and amenability to rehabilitation are categorically "different" from adults, and thus require different, more protective procedures surrounding criminal sentencing. *See Roper v. Simmons*, 543 U.S. 551 (2005); *Graham*, 560 U.S. at 73; *Miller v. Alabama*, 567 U.S. 460, 471 (2012), *Montgomery v.*

Louisiana, 136 S. Ct. 718 (2016); *Diatchenko I*, 466 Mass. at 658-659; *Commonwealth v. Okoro*, 471 Mass. 51, 57 (2015). [2] Procedures that fail to account for these mitigating qualities of youth violate a "foundational principle" of the Eighth Amendment: "imposition of a State's most severe penalties on

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[2] In *Graham*, the Supreme Court held that the Eighth Amendment "prohibits the imposition of a life without parole sentence on a juvenile offender who did not commit homicide." 560 U.S. at 82. The Court reasoned that such a sentence "improperly denies the juvenile offender a chance to demonstrate growth and maturity." *Id.* at 73. While a state need not guarantee release, it must provide a "realistic" and "meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation." *Id*. at 75; 82.

In *Miller v. Alabama*, 567 U.S. 460 (2012), the Court expanded on *Graham*, holding that "mandatory life-without-parole sentences for juveniles" convicted of homicide "violate the Eighth Amendment." 567 U.S. at 470. The Court repeated *Graham*'s injunction that in order to comply with the Eighth Amendment states must provide "some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation." *Id.* at 479. And it emphasized that "appropriate occasions for sentencing juveniles" to life without parole "will be uncommon." *Id.* The Court reiterated this emphasis in *Montgomery*, observing that true life without parole for juveniles should be inapplicable to the "vast majority of juvenile offenders[,]" 136 S.Ct. at 734, and that States must allow the vast majority the "opportunity to show their crime did not reflect irreparable corruption," in which case "their hope for some years of life outside prison walls must be restored." *Id.* at 736-37.

juvenile offenders cannot proceed as though they were not children." *Id.* at 474. While these rulings do not *guarantee* any individual offender eventual release, they do communicate a clear understanding that for the "vast majority" of people who committed crimes as children, the crime will be the result of transient immaturity, and life in prison would be a disproportionate punishment. *Montgomery*, 136 S. Ct. at 734.

In *Diatchenko I*, this Court "fully accepted the critical tenet ... that 'children are constitutionally different from adults for purposes of sentencing,' with 'diminished culpability and greater prospects for reform.'" *Okoro*, 471 Mass. at 57 (2015) (quoting *Diatchenko I,* 466 Mass. at 658-659). The Court held that the protections of art. 26 extend beyond Eighth Amendment protections in this context, such that the imposition of a life sentence on juvenile homicide offenders—whether mandatory or discretionary—"violates art. 26 because it is an unconstitutionally disproportionate punishment when viewed in the context of the unique characteristics of juvenile offenders." *Diatchenko I,* 466 Mass. at 658-659. The Court further

determined the constitutional prohibition against juvenile life without parole sentences (and concomitant entitlement to a "meaningful opportunity for release") must be applied retroactively as a matter of state law. *Id*.

The effect of these holdings was to render scores of life without parole sentences then being served by juvenile offenders facially unconstitutional. In fashioning a remedy, however, the Court rejected the idea that judicial resentencing was necessarily required to redress these constitutional violations. *Id.* at 674. Rather, the Court reasoned that "[t]he unconstitutionality of [a juvenile life without parole sentence] arises not from the imposition of a sentence of life in prison, but from the absolute denial of any possibility of parole." *Id.* at 671. Therefore, the Court indicated:

> it is the purview of the Massachusetts parole board to evaluate the circumstances surrounding the commission of the crime, including the age of the offender, together with all relevant information pertaining to the offender's character and actions during the intervening years since conviction. *By this process, a juvenile homicide offender will be afforded a meaningful opportunity* to be considered for parole suitability.

Diatchenko I, 466 Mass. at 674 (emphasis added). *See also Okoro*, 471 Mass. at 57-58 ("[I]t will be for the parole board . . . to take into account 'the unique characteristics' of such offenders that make them constitutionally distinct from adults and to ensure that such offenders are afforded a 'meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation'").

B. Juvenile Offenders Possess A Constitutionally Cognizable Interest In Parole Proceedings Requiring Due Process Protections.

Two terms later, the Court decided *Diatchenko v. District Attorney for the Suffolk District*, 471 Mass. 12 (2015) (*Diatchenko II*). In *Diatchenko II*, the Court acknowledged that its earlier endorsement of parole as the *sole* mechanism for providing the "meaningful opportunity to obtain release" required to bring an otherwise unlawful juvenile life sentence into constitutional compliance, gave juvenile offenders a cognizable constitutional interest in the outcome of parole proceedings fundamentally different than adult parole applicants and sufficient to invoke the protections of the Due Process Clause. *Id.* at 18. Post-

Diatchenko I, a parole opportunity for juvenile offenders is qualitatively different from a parole opportunity for adult offenders. The latter is generally regarded a mere matter of legislative grace that the state has no obligation to provide. *See Greenholtz v. Inmates of Neb. Penal & Correctional Complex*, 442 U.S. 1, 7 (1979); *Martin v. State Board of Parole*, 350 Mass. 210, 213 (1966). The former is a legal requirement meant and required to bring an otherwise unlawful sentence into constitutional compliance. The Court explained:

> In this context, where the meaningful opportunity for release through parole is necessary in order to conform the juvenile homicide offender's mandatory life sentence to the requirements of art. 26, the parole process takes on a constitutional dimension that does not exist for other offenders whose sentences include parole eligibility.

Id. at 18-19. Consequently:

> [b]ecause ... a parole hearing for a juvenile homicide offender[] is required in order to ensure that an offender's life sentence conforms to the proportionality requirements of art. 26, the proceeding is not available solely at the discretion of the State. Rather, it is constitutionally mandated, and as such, it requires certain protections not guaranteed in all postconviction procedures.

Id. at 27.

Having recognized the unique "constitutional dimension" of juvenile parole hearings and juvenile offenders' concomitant constitutional interest in their administration, the Court turned to the question of what "due process protections" are "procedurally required in order to protect a juvenile homicide offender's *expectation* of 'a meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation.'" *Id.* at 27 (quoting *Graham*, 560 U.S. at 75) (emphasis added).

Notably, the juvenile parole applicants in *Diatchenko II* only asked the Court to consider three such procedural protections: access to court appointed counsel, access to (and funds for) expert witnesses, and an opportunity for judicial review of the parole board's decision. *Id.* at 14. The Court "agree[d] in substance" with each of the juvenile parole applicants' due process arguments. *Id.* With respect to counsel, the Court recognized that a parole hearing for a juvenile homicide offender serving a mandatory life sentence is "far more complex than it is in the case of an adult offender because

of 'the unique characteristics' of juvenile offenders." *Id.* at 23 (quoting *Diatchenko I*, 466 Mass. at 674). In light of this complexity, "and in light of the fact that the offender's opportunity for release is critical to the constitutionality of the sentence, [the Court] conclude[d] that this opportunity is not likely to be 'meaningful' as required by art. 26 without access to counsel." *Id.* at 24.

As to expert witnesses, the Court recognized that because an expert's assistance may be necessary "to effectively … explain the effects of the individual's neurobiological immaturity and other personal circumstances at the time of the crime, and how this information relates to the individual's present capacity and future risk of reoffending[,]" a trial judge must have discretion to approve expert funds where "the judge concludes that the assistance of the expert is reasonably necessary to protect the juvenile homicide offender's meaningful opportunity for release." *Id.* at 27-28.

Finally, the Court agreed that juvenile parole hearings must be subject to judicial review. In so holding, the Court

emphasized again the "constitutional dimension" of juvenile parole hearings due to fact that "the availability of a meaningful opportunity for release on parole is what makes the juvenile's mandatory life sentence constitutionally proportionate." *Id.* at 29. In light of this fact, "the court must be allowed to ensure that the 'right of a juvenile homicide offender to a constitutionally proportionate sentence is not violated.'" *Id.* Although "the decision whether to grant parole to a particular juvenile homicide offender is a discretionary determination by the board," it remains the obligation of the reviewing court "to ensure that the board exercises its discretionary authority to make a parole decision for a juvenile homicide offender in a constitutional manner." *Id.* at 30.

In *Deal v. Massachusetts Parole Board*, 484 Mass. 457 (2020), the Court had its first opportunity to apply the standards of judicial review announced in *Diatchenko II* to an individual parole determination. The Court considered whether a parole decision comprised principally of "boilerplate" language (used indiscriminately in nearly all juvenile lifer cases), that contained

only a perfunctory discussion of both the *Miller* factors and the testimony of the juvenile parole applicant's expert witness, provided adequate assurance that the Board meaningfully considered the diminished culpability and amenability to rehabilitation of juvenile offenders as constitutionally required. *Id.* at 461-463.

While "agree[ing] with the plaintiff and the concurrence that merely stating that the board considered the *Miller* factors, without more, would constitute a cursory analysis that is incompatible with art. 26[,]" the majority in *Deal* concluded the Board had not abused its discretion because "the decision's inclusion of [certain case specific] facts support[ed] the board's certification that it did consider the *Miller* factors in a noncursory way." *Id.* at 463. See *Diatchenko II*, 471 Mass. (abuse of discretion where Board fails to take *Miller* factors into account, or does so only "in a cursory way."). Nevertheless, the Court advised that in the future:

> Making these connections *explicit, rather than implicit*, will allow the board to make clear to reviewing courts that it gave due consideration to the *Miller* factors.

Id. (emphasis added).

To this end, the *Deal* majority identified a number of "better practices" for use in "future cases." For instance, the majority asserted:

> Where ... evidence relevant to the *Miller* factors militates in favor of release but the board nevertheless denies parole, the *better practice* would be to specify the reasons and supporting facts that overcome the *Miller* considerations.

Id. at 464. (emphasis added).

Likewise,

> where the board bases its denial of parole on a determination that the applicant's version of events is not plausible, the board should indicate both why that version is not plausible and how that implausibility bears on the applicant's likelihood to recidivate or the compatibility of release with the welfare of society.

Id. at 464-465.

Finally, where the unrebutted expert opinion of a witness testifying on behalf of an offender is nevertheless rejected by the Board,

> the *better practice* ... would be to articulate the reasons and evidence overcoming the contrary expert opinion.

Id. at 464 (emphasis added).

The *Deal* majority was clear that each of these "better practices" was aimed at addressing the concerns raised in a concurring opinion authored by the late Chief Justice Gants. Chief Justice Gants, joined by Justice Lenk, explained at length and in detail why the only practicable way to ensure that the Board's discretionary authority has been exercised in a constitutional manner is to require the Board "to *demonstrate through its findings* that it gave meaningful individualized consideration to the *Miller* factors and the likelihood that age and maturity will diminish these attributes of youth and reduce the risk of recidivism." *Id.* at 466 (C.J. Gants concurring, with whom Lenk, J., joins) (emphasis added).

The facts of this case and the Board's arguments on appeal demonstrate that *Deal's* remonstrations regarding "better practices" and the concerns set out in Chief Justice Gants concurring opinion have fallen on deaf ears. For this reason, the Court should take this opportunity to declare that a written explanation of the reasons for the denial of parole

which comports with such "better practices" is not only the best evidence that the Board has exercised its discretion in a "constitutional manner", but also must be regarded--like the rights to counsel, to expert witnesses and to judicial review recognized in Diatchenko II-- as a discrete component of constitutional due process "procedurally required in order to protect a juvenile homicide offender's *expectation* of 'a meaningful opportunity to obtain release ....'" Diatchenko II, 471 Mass. at 27 (quoting Graham, 560 U.S. at 75) (emphasis added).

C. An Explanation For An Adverse Parole Decision That Comports With The "Better Practices" Outlined In Deal Is An Appropriate And Necessary Component Of Constitutional Due Process Required To Protect A Juvenile Homicide Offender's Expectation Of "A Meaningful Opportunity To Obtain Release."

In other circumstances where a cognizable constitutional interest in the outcome of parole proceedings is recognized, courts routinely and consistently hold that minimum due process protections require a written or oral statement that illuminates "the evidence relied upon and the reasons for" an adverse parole decision. *See e.g. Swarthout v. Cooke*, 562 U.S. 216,

220 (2011) (where state creates a liberty interest in parole, due process satisfied where prisoners, *inter alia,* "were notified as to the reasons why parole was denied."); *Franklin v. Shields*, 569 F.2d 784, 797 (4th Cir. 1977) (holding "that the due process clause requires the Board to furnish a written statement of its reasons for denying parole"); *Childs v. U.S. Bd. of Parole*, 511 F.2d 1270, 1285 (D.C. Cir. 1974) (same); *Solomon v. Elsea*, 676 F.2d 282, 286, (7th Cir. 1982) ("a statement of reasons should be sufficient to enable a reviewing body to determine whether parole has been denied for an impermissible reason or for no reason at all."). *Cf. Morrissey v. Brewer*, 408 U.S. 471, 489 (1972) (revocation of parole); *Doucette v. Massachusetts Parole Bd.*, 86 Mass. App. Ct. 531, 539 (2014) (same).

As a component of Due Process, requiring a meaningful individualized explanation for an adverse decision serves multiple salutary purposes, each of which tend to reduce the risk of erroneous deprivation. First, as *Deal* itself suggests, requiring an "explicit, rather than implicit" explanation of the reasons for denying parole will greatly facilitate proper judicial

review of the Board's decision. *Deal,* 484 Mass. at 463. The Board's current practice, as illustrated here and previously in *Deal*, is to provide often conclusory and perfunctory justifications for its adverse decisions, and then leave it to a reviewing court to deduce and articulate, in the first instance, why and how the Board's action might be interpreted as providing the non-cursory analysis required by art. 26. This needlessly opaque process is made all the more so by the Board's insistence that the reviewing court consider not only facts set out in the Board's written decision, but facts appearing anywhere in the often voluminous administrative record. [Appellee's Brief at 34].

Plainly, requiring the Parole Board to provide appropriate explication in the first instance provides a better basis for review to determine if its decision rests on permissible grounds supported by the evidence. *See* Russell, S. F., *Review for Release: Juvenile Offenders, State Parole Practices, and the Eighth Amendment*, 89 Ind. L.J. 373, 428 (2014) ("Part of what makes a process meaningful is the ability to force decision makers to

justify their decisions and to be able to challenge these decisions before another body"). *Cf. Haymes v. Regan*, 525 F.2d 540, 544 (2d Cir. 1975) ("To satisfy fundamental due process requirements and render unnecessary the disclosure of release criteria, the statement of reasons should enable the reviewing body to determine whether parole has been denied for an impermissible reason, or indeed, for no reason at all.").

A meaningful individualized explanation of the reasons for denying parole also serves purposes other than facilitating judicial review, which are peculiarly appropriate for parole release determinations. As a general matter, "[p]rocedural due process tests whether governmental action depriving a person of life, liberty, or property has been implemented in a fair manner." *Vasquez v. Commonwealth*, 481 Mass. 747, 757 (2019). To this end, "the provision for a written record helps to insure that administrators, faced with possible scrutiny by state officials and the public, and perhaps even the courts, where fundamental constitutional rights may have been abridged, will act fairly." *Wolff v. McDonnell*, 418 U.S. 539, 563 (1974). By

making its reasons explicit and public, the Board is encouraged to consider only relevant, constitutionally permissible material and to make principled decisions. *See United States ex rel. Johnson v. Chairman of New York State Bd. of Parole*, 500 F.2d 925, 931 (2nd. Cir. 1974) (quoting Frankel, Criminal Sentences 40-41 (1973)) ("[a] reasons requirement "promotes thought by the decider," and compels him "to cover the relevant points" and "eschew irrelevancies").

Simply put, the Board should be required to "think out loud" and expressly state its reasons. Doing so would diminish the risk of arbitrary decisionmaking and erroneous deprivation of the interest at stake. To the extent it is claimed such requirements would be too burdensome in the parole context, "[t]he short answer to that argument is that it is not burdensome to give reasons when reasons exist." *Board of Regents v. Roth*, 408 U.S. 564, 591 (1972) (Marshall, J., dissenting).

Apart from safeguarding against denials of parole that are arbitrary or based on impermissible factors, "a reasons

requirement can serve the important function of promoting rehabilitation by relieving prisoners' frustrations and letting them know how they might, by improving their prison behavior or taking steps with respect to some other factor in doubt, better their chances for release." Donna Chu, *Due Process and the Parole Release Decision*, 66 Ky. L.J. 405, 418 (1977). See *Franklin v. Shields*, 569 F.2d at 800 (en banc) (finding a statement of reasons a due process requirement in part because the Board communicates the reason for its denial as a guide to the prisoner for his future behavior).

This dignitary interest in informing individuals of the nature and grounds of a parole denial is particularly salient in the cases of juvenile lifer whose "meaningful opportunity for release based on demonstrated maturity and rehabilitation" is an ongoing consideration. In this context, providing the reasons and essential facts underlying *prior* adverse decisions is paramount to ensuring that *future* opportunities are "meaningful." *Accord, Franklin v. Shields*, 569 F.2d at 792 (quoting K. Davis, Discretionary Justice: A Preliminary Inquiry

132 (1969)) ("[o]ne can imagine nothing more cruel, inhuman, and frustrating than serving a prison term without knowledge of what will be measured and the rules determining whether one is ready for release.'").

D. *A Meaningful Individualized Explanation For An Adverse Parole Decision Is Especially Crucial To Guarantee The Liberty Interests Of Juvenile Offenders Like Mr. Rodriguez, Whose Sentences For Conduct Committed As A Child Have Extended Into Old Age.*

Offenders over the age of 60, like Mr. Rodriguez, whose offenses of conviction were committed as a juvenile, are members of two distinct cohorts with statistically positive chances for reform and rehabilitation. The first is the cohort of juvenile offenders whom this Court has recognized are categorically "different from adults" in part because they have "diminished culpability and greater prospects for reform." Such offenders have "heightened capacity for change" because "a child's character is not as 'well formed' as an adult's; his traits are 'less fixed' and his actions less likely to be 'evidence of irretrievabl[e] deprav[ity].'" *Diatchenko I*, 466 Mass. at 670 (2013); *Miller*, 567 U.S. 471. This recognition is borne out by

research that shows that almost all adolescents and emerging adults who engage in antisocial or violent conduct desist simply as a by-product of the maturation process. See Steinberg et al., *Psychosocial Maturity and Desistance from Crime in a Sample of Serious Juvenile Offenders*, DOJ, Juvenile Justice Bulletin (Mar. 2015); see also K. Monahan, et at., *Psychosocial (im)maturity from adolescence to early adulthood: Distinguishing between adolescence-limited and persisting antisocial behavior*, Development and Psychopathology, 25 (2013) (observing that "desistance from antisocial behavior is viewed as the product of psychosocial maturation, including increases in the ability to control impulses, consider the implications of one's actions on others, delay gratification in the service of longer term goals, and resist the influences of peers").

The second cohort is that of prisoners seeking release after the age of sixty. According to a study conducted in June 2017 for the Massachusetts Department of Correction men over 60 have among the lowest rate of recidivism (10%) of all male age groups. See Rhiana Kohl, Ph.D., Three Year Recidivism

Rates: 2013 Release Cohort, at p. 8 (June 2017) (available at https://www.mass.gov/files/documents/2017/10/16/Recidivism_Rates_2013_Releases_3Year.pdf) (noting that "[t]hese findings remain consistent with research that older inmates are less likely to recidivate."). By way of comparison, the highest rate of recidivism among males (47%) is seen in prisoners released between the ages of 18-24. *Id.* Studies of federal offenders have shown a similar statistical pattern. See U.S. Sentencing Comm'n, The Effects Of Aging On Recidivism Among Federal Offenders 3, 22-27 (2017) (indicating that "[o]lder offenders were substantially less likely than younger offenders to recidivate following release" and that previously convicted felons over fifty pose little threat.).

These statistical findings comport with a vast and growing body of empirical evidence showing that individuals not only desist from *adolescent* offending as a result of natural psychosocial development but also more generally "age out" of criminal behavior entirely as a natural consequence of advancing age. See M. Eve Hanan, *Incapacitating Errors:*

Sentencing and the Science of Change, 97 Denv L. Rev. 151, 180 (2019) (citing social science data showing that "criminal behavior tends to decrease in the second half of life"). Indeed, this age-crime relationship has been characterized as "one of the most robust and stable empirical findings of criminological research." Patrick Lussier & Jay Healey, *Rediscovering Quetelet, Again: The "Aging" Offender and the Prediction of Reoffending in a Sample of Adult Sex Offenders*, 26 JUST. Q. 827, 828, 850 (2009) (citations omitted) (describing one study of individuals imprisoned for sexual offenses in which researchers concluded that age at release, *by itself*, was about as accurate a predictor of recidivism as was a score on the Static-99, a leading risk-assessment instrument). This empirical evidence suggests strongly that "eventual desistance from crime is the norm, even among those characterized as high-rate, chronic offenders." Bianca E. Bersani & Elaine Eggleston Doherty, *Desistance from Offending in the Twenty-First Century*, 2018 ANN. REV. CRIMINOLOGY 311, 313, and it is to be expected, then, that older prisoners will generally be safer to release than younger.

While the Parole Board is not bound, constitutionally or otherwise, to treat the *Miller* factors or other expert empirical evidence as *determinative* in its ultimate parole decision, both remain "important consideration[s]" in every juvenile parole case. *Deal,* 484 Mass. at 464. In cases like Mr. Rodriguez's, where both of these "important consideration[s]" so strongly militate in favor of release, the risk that a summary parole denial is the result of something other than a "meaningful opportunity to obtain release" is inevitably enhanced, as is the need for an explicit, individualized explanation of "the reasons and supporting facts that overcome" these considerations to guard against this risk. *Id.* at 464 (the better practice is to "specify" and "articulate" the reasons and evidence that, in the Board's view overcome "the *Miller* factors" and "contrary expert opinion").

Finally, it must be acknowledged that the practical consequences of an erroneous deprivation of a "meaningful opportunity to obtain release" are different and far more profound for offenders, like Mr. Rodriguez, who are over the

age of 60. As a cohort, people who spend most of their lives in prison have shortened life expectancies. See, e.g., *United States v. Taveras*, 436 F.Supp.2d 493, 500 (E.D.N.Y. 2006) ("Life expectancy within federal prison is considerably shortened" as compared to that of general population). For this reason, the United States Sentencing Commission treats "a sentence length of 470 months [thirty-nine years and two months] or longer" as one "in which a de facto life sentence had been imposed." United States Sentencing Comm'n, *Life Sentences in the Federal System* (February 2015) at 10 & n.52. This treatment is based on "the average life expectancy of federal criminal offenders," which is *sixty-four* for persons incarcerated at a median age at sentencing of twenty-five. *Id.*; *American Civil Liberties Union of Michigan, Note: Michigan Life Expectancy Data for Youth Serving Natural Life Sentences* (2013) ("*ACLU Note*") at 1. One study of over 400 prisoners found that life expectancy for adults given life without parole sentences was just over fifty-eight, and for persons who began their sentences as juveniles that figure declined to just over fifty. *ACLU Note* at 2 & n.1.

These figures are not comprehensive, and it is impossible to say how the life span of a particular juvenile, including Mr. Rodriguez, will measure against the probabilities they depict. Nevertheless, it appears beyond dispute that long-term prisoners live significantly shorter lives than those of the general population, and persons who serve thirty or forty years beginning as teenagers live shorter still. Any analysis of the level of explanatory detail required to ensure that a elderly juvenile offender's denial and five-year "setback" (i.e. the minimum period of time before a subsequent parole opportunity will be afforded) was, in fact, the product of a "meaningful opportunity for release" must proceed mindful of the statistical probability that such a person is not likely to live much more than five years, and could easily die before that.

CONCLUSION

For the foregoing reasons, the Court should take this opportunity to declare that minimal due process considerations require the Board to provide juvenile lifers a written explanation of the reasons for the denial of parole that

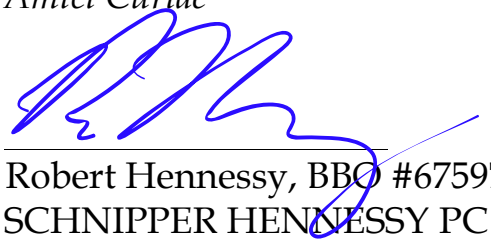
comports with the "better practices" that it outlined in *Deal*. The right to such an explanation, like the rights to counsel, to expert witnesses and to judicial review recognized in *Diatchenko II*, should and must be regarded as a discrete component of constitutional due process "procedurally required in order to protect a juvenile homicide offender's expectation of 'a meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation.'" *Diatchenko II*, 471 Mass. at 27 (quoting *Graham*, 560 U.S. at 75) (emphasis added).

Respectfully Submitted,

COMMITTEE FOR PUBLIC COUNSEL SERVICES, PRIVATE COUNSEL DIVISION

NORTHEASTERN UNIVERSITY SCHOOL OF LAW PRISONERS' ASSISTANCE PROJECT

Amici Curiae



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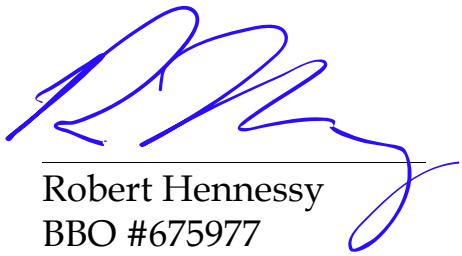
CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies pursuant to Mass. R. App. P. 16(k) that the foregoing brief complies with the rules of the Court pertaining to the preparation and filing of briefs, including but not limited to: Rules 16(a)(13) and (e); Rule 18; Rule 20; and Rule 21.

This brief complies with the typeface and type-volume requirements of Mass. R. App. P. 20 (a)(2)(C) because it has been prepared in a proportionally spaced type face, Book Antiqua, using Microsoft Word in size 14 font, and contains **5,752** words (according to Microsoft Word's word count feature), excluding the parts of the brief exempted by Mass. R. App. P. 20 (a)(2)(B).



February 21, 2022

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on February 21, 2022, a true copy of the foregoing Amicus Brief was filed through the Tyler Host system will be served electronically through that system on all Users and paper copies will be sent to those indicated as Non-Registered Participants, if any.

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