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OMMONWEALTH OF MASSACHUSETTS

MIDDLESEX, ss. SJC-13197

JOSE RODRIGUEZ
Appellant,

v.

MASSACHUSETTS PAROLE BOARD
Appellee

ON APPEAL FROM AN ORDER
OF THE MIDDLESEX SUPERIOR COURT

BRIEF OF APPELLANT

For JOSE RODRIGUEZ:

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2. Where juvenile lifers have a due process right to judicial review of Parole Board decisions, and where the written Record of Decision contains little or no consideration of various relevant issues, may the Board rely on its internal impounded file that is not in the administrative record to bolster the deficiencies in the written Record of Decision?

3. Where the Legislature has mandated that the Parole Board consider "a risk and needs assessment" in determining whether an individual is a suitable candidate for parole, and where the Board is the

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[1] Throughout the brief the term "juvenile lifer" will refer to individuals who were sentenced to life in prison for offenses that they committed as juveniles.

arbiter of whether a sentence is proportional and, thus, constitutional, must the Board use a risk assessment tool that is appropriate to the offender and the offense, and must the Board provide the details of the risk assessment to the potential parolee so that they may understand their score before appearing in front of the Board and so that a reviewing court can determine whether the Board's use of that tool appropriately safeguarded the juvenile offender's constitutional protections?

4. Where a juvenile lifer has a constitutional right to receive a meaningful opportunity for release based on demonstrated maturity and rehabilitation, did the Parole Board violate Mr. Rodriguez's due process rights by taking ten months to issue its decision denying parole, thereby denying him ten months of time—17% of the length of his setback[2]—to accomplish any rehabilitative steps identified in that decision?

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[2] Throughout the brief, the term "setback" will refer to the period of time, mandated by the Parole Board, that a potential parolee must wait to have a review hearing after being denied parole.

STATEMENT OF THE CASE

PRIOR PROCEEDINGS

On January 29, 2020, the Parole Board denied Mr. Rodriguez's application for parole, giving him the longest possible setback, five years. R.A. 21[3]. Mr. Rodriguez appealed that denial to the Board on February 12, 2020, and the Board denied the appeal a month later, on March 13, 2020. R.A. 15-16.

On May 6, 2020, Mr. Rodriguez appealed the Board's decision in the Middlesex Superior Court by filing a complaint in the nature of certiorari under G.L. c. 249, § 4. R.A. 4, 10. Mr. Rodriguez moved for judgment on the pleadings on January 7, 2021 (R.A. 5, 265), and on April 6, 2021 that motion was denied (R.A. 6, 358, 359).

Mr. Rodriguez filed a timely notice of appeal. R.A. 6, 373.

STATEMENT OF FACTS

Plaintiff Jose Rodriguez is a 61-year-old man who has been incarcerated for the past thirty-eight years for a crime that he committed as a 16-year-old child. R.A. 21-22.

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[3] Citations to the Record Appendix will be to R.A. [page number].

On September 28, 1976, 16-year-old Jose raped a woman who was walking home from an MBTA stop. R.A. 22. He was convicted the following year of one count of rape (G.L. c. 265, § 22) and one count of assault and battery with a dangerous weapon (G.L. c. 265 § 15A). R.A. 21. He appealed and, in 1979, the SJC overturned his conviction and ordered a new trial. R.A. 21. Mr. Rodriguez left Massachusetts and a warrant issued. R.A. 268.

In 1981, under the name of Jose Martinez, Mr. Rodriguez was arrested in California and pleaded nolo contendere to one count of rape and one count of assault with intent to rape. R.A. 21-22. He was sentenced to eight years and served five before being released on parole in 1985. R.A. 107. Shortly thereafter, he met a woman and began living with her in a committed relationship. R.A. 55.

In 1986, he was returned to the Commonwealth on his outstanding warrant. R.A. 107. At the age of 26, Mr. Rodriguez proceeded to a second trial on the 1976 incident and was again found guilty of rape and assault and battery with a dangerous weapon. R.A. 21. He was sentenced to life with the possibility of parole at 15 years for

the rape charge and 8-10 years on the assault and battery charge to be served concurrently with the life sentence. *Id.*

For the past thirty-five years, Mr. Rodriguez has been a model inmate. He has received only 8 disciplinary tickets, none in the last fifteen years. R.A. 115-116. He completed his GED in 1991. R.A. 115. He has completed extensive programming aimed at addressing substance use disorders and anger management. *Id.* He completed the Correctional Recovery Academy ("CRA"), a residential substance use treatment program in 2006. *Id.* He has been a devout Buddhist since before his incarceration. R.A. 114. He is active in Spanish rights groups. R.A. 115.

Mr. Rodriguez also completed the Sex Offender Training Program, graduating in May 2013. He participated in the Sex Offender Maintenance Program from 2014 until the program was terminated in 2017. *Id.*

According to the Department of Correction's risk assessment tool, Mr. Rodriguez is at low risk for violence. *Id.*

Mr. Rodriguez has been seen by the Parole Board four times. R.A. 22. Each time, he received a five-year setback. *Id.*

In preparation for his most recent Parole Board hearing, Mr. Rodriguez was evaluated by Joseph Plaud, Ph.D. R.A. 191. Dr. Plaud concluded that Mr. Rodriguez was at low risk for reoffense based significantly on Mr. Rodriguez's age: at that time, just shy of 60 years old. R.A. 193. Dr. Plaud found that Mr. Rodriguez "does not present as an individual who has a disordered pattern of sexual arousal" and that his criminal behavior was not driven by any sexually based mental disorder or paraphilia. R.A. 192. Dr. Plaud noted that seven different studies have shown that for individuals like Mr. Rodriguez, whose crimes were not motivated by paraphilia, the risk of recidivism plummets at age 60. R.A. 193. Accordingly, he concluded that "Mr. Rodriguez is currently not a significant risk to public safety regarding sexual recidivism." R.A. 194.

This evaluation was presented to the Board at Mr. Rodriguez's 2019 hearing. R.A. 121. In its Record of Decision, issued ten months after that hearing (R.A. 21), the Board stated that it "considered testimony and an evaluation from Dr. Joseph Plaud" (R.A. 22-23), but never stated that it considered Mr. Rodriguez's age as it related to his

likelihood of recidivism (R.A. 21-23). It again gave Mr. Rodriguez a five-year setback. R.A. 21.

Mr. Rodriguez sought judicial review of this decision in an action in the nature of certiorari pursuant to G.L. c. 249, § 4. R.A. 4. The lower court noted that the Record of Decision stated that the Board "considered testimony and an evaluation of Dr. Joseph Plaud" and found that that single statement "took account of all factors bearing upon Mr. Rodriguez's degree of sexual dangerousness, including his personal history of childhood trauma, juvenile decision-making, and the plaintiff's age at offense and at the hearing." R.A. 365.

While the lower court noted that the Board's Record of Decision "hardly delves into questions of juvenile offending in detail" and "would likely not survive the level of scrutiny proposed in the *Deal* concurrence," it held that "the majority did not adopt the approach set forth in the former Chief Justice's *Deal* concurrence," that it "had no business going beyond the parameters of judicial review set forth in *Deal*'s majority opinion," and that "the Decision appears to meet *Deal*'s deferential test." R.A. 365-366.

The lower court further found that it had "limited power to set aside or modify the Decision in a certiorari action" and may only do so if an individual's "substantial rights may have been prejudiced because the agency decision is arbitrary and capricious." R.A. 367.

The lower court held that the Board's use of its risk and needs assessment was not arbitrary and capricious because "the Board articulated a number of major considerations that led to its decision" and therefore, "any failure to mention or consider minor points did not prejudice Mr. Rodriguez's substantial rights." *Id.* It noted that even if Mr. Rodriguez had "done everything he could to rehabilitate himself, '[n]o prisoner shall be granted a parole permit merely as a reward for good conduct . . ..'" *Id.* (quoting G.L. c. 127 § 130).

STANDARDS OF REVIEW

The Parole Board's failure to consider a juvenile offender's current advanced age in assessing his risk of recidivism.

This issue was preserved. In his complaint at paragraphs 28 and 33, and count 6, Mr. Rodriguez described the Parole Board's failure to account for his age in its decision. R.A. 15, 18-19. And in his motion for judgment on the pleadings, he reiterated that argument in Argument

Section I(B) (R.A. 270, 279-284) and again at the hearing on the motion (R.A. 319).

Accordingly, the trial court's decision should be reviewed by the court de novo, *Deal v. Massachusetts Parole Bd.*, 484 Mass. 457, 462 n.4 (2020), and the Parole Board's decision should be reviewed for abuse of discretion, *Diatchenko v. Dist. Attorney for Suffolk Dist.*, 471 Mass. 12, 31 (2015) ("*Diatchenko II*").

The Parole Board's improper supplementing its Record of Decision.

This issue was preserved. In his complaint at paragraphs 32 through 36, and counts 1 through 3 (R.A. 15-17), and in his Motion for Judgment on the Pleadings (R.A. 265-267, 276, 281), Mr. Rodriguez described the Parole Board's cursory consideration of factors mandated by the SJC and, in response, the Board relied on considerations not described in the Record of Decision (R.A. 301, 304-305). At the hearing on Plaintiff's motion in the lower court, the court raised the issue of whether the Board may rely on evidence not in the Record of Decision. R.A. 330-332.

Accordingly, the trial court's decision should be reviewed by the court de novo, *Deal*, 484 Mass. at 462 n.4, and the Parole Board's

decision should be reviewed for abuse of discretion, *Diatchenko II,* 471 Mass. at 31.

The Parole Board's use of a tool not meant for juveniles, the LS/CMI, to assess the risk of recidivism for juvenile offenders and the failure to provide details of that assessment to potential parolees.

This issue was preserved. In Section I(B) of his motion for judgment on the pleadings, Mr. Rodriguez argued that the risk assessment tool used by the Parole Board, the LS/CMI was not appropriate to juvenile sex offenders. R.A. 282-284. He also discussed the issue at length at the hearing on that motion. R.A. 337-348.

Accordingly, the trial court's decision should be reviewed by the court de novo, *Deal*, 484 Mass. at 462 n.4, and the Parole Board's decision should be reviewed for abuse of discretion, *Diatchenko II,* 471 Mass. at 31.

Unreasonable delay in issuance of parole decision

The issue of undue delay in the Parole Board's issuance of Mr. Rodriguez's parole decision was not presented to the lower court, but should be addressed by this court in the interest of justice and because public interest warrants consideration.

While "[o]bjections, issues, or claims—however meritorious—that have not been raised at the trial level are deemed generally to have

been waived on appeal," *Palmer v. Murphy*, 42 Mass. App. Ct. 334, 339 (1997), courts will nevertheless review issues raised for the first time on appeal where "justice weighs in favor of considering the issue," *Cruz v. Comm'r. of Pub. Welfare*, 395 Mass. 107, 112 (1985). Here, justice weighs in favor of considering the issue.

This case, unlike most civil appeals, implicates the plaintiff's constitutional right: his right to a meaningful opportunity for release on parole. *Diatchenko II*, 471 Mass. at 29. In that sense, this case is much more like a criminal appeal and, as in a criminal appeal, this issue should be reviewed for a substantial risk of miscarriage of justice. *Commonwealth v. Walker*, 443 Mass. 867, 871 (2005).

Moreover, this issue impacts every juvenile lifer who appears before the Parole Board. Despite statutory language that contemplates a decision within 60 days (G.L. c. 127, § 133A) and despite the Parole Board's regulations, which call for the written record denying parole to be issued within 21 days of the Board's decision (120 Code Mass. Reg. 301.08) the Board routinely takes close to or over a full year to issue its decision denying parole (https://www.mass.gov/lists/life-sentence-record-of-decisions-rods). This lengthy delay robs the potential parolee

of valuable time to accomplish the rehabilitative steps identified by the Parole Board. Yet, the issue persistently evades review: a potential parolee who has received their decision no longer has any need to raise the issue; and a potential parolee awaiting a decision may not choose to bring suit against the same agency that is currently holding their life in the balance.

Because this issue is of crucial importance to every juvenile lifer who appears before the Parole Board, it should be addressed in the public interest and in the interests of justice.

SUMMARY OF THE ARGUMENT

While "[n]o prisoner shall be granted a parole permit merely as a reward for good conduct," parole *shall* be granted if "there is a reasonable probability that, if the prisoner is released with appropriate conditions and community supervision, the prisoner will live and remain at liberty without violating the law." G.L. c. 127, § 130. In other words, the Parole Board is not tasked with determining whether an individual has received a suitable punishment for their crime; it is tasked only with determining whether the individual's release "is not incompatible with the welfare of society." *Id.* (Infra pp. 20-22.)

When the potential parolee is an individual sentenced to life in prison for an offense committed as a juvenile, the Parole Board's determination takes on a "constitutional dimension." *Diatchenko II*, 471 Mass. at 29. This is because "juvenile offenders are 'constitutionally different from adults.'" *Diatchenko v. Dist. Attorney for Suffolk Dist.*, 466 Mass. 655, 669-670 (2013) ("*Diatchenko I*") (quoting *Miller v. Alabama*, 567 U.S. 460, 471 (2012)). They have both "diminished culpability," and "greater prospects for reform," making them "less deserving of the most severe punishments." *Diatchenko I*, 466 Mass. at 670. And while a sentencing court may be able to assess a juvenile's "diminished culpability," it cannot predict whether a juvenile will realize their "greater prospects for reform." While the offender is still a juvenile, the court "cannot ascertain, with any reasonable degree of certainty, whether imposition of this most severe punishment is warranted." *Id.* at 670-671. Thus, every juvenile offender must have the opportunity to be considered for parole suitability. *Id.* (Infra pp. 20-22.)

This leaves the Parole Board as the entity that must safeguard these juvenile lifers' art. 26 right to punishment that is "'graduated to both the offender and the offense,'" *Commonwealth v. Perez*, 477 Mass.

677, 683 (2017) ("*Perez I*") (quoting *Miller*, 567 U.S. at 469). The implication is that the Board, after many years of a prison sentence have elapsed, can ascertain that which the sentencing judge could not: whether the juvenile has realized their "greater prospects for reform." (Infra pp. 20-22.)

This is a weighty task and must be treated as such. It requires the Board to consider all relevant dynamic risk factors. (Infra pp. 22-30.) It requires the Board to limit its use of risk assessments to those which are appropriate to the offender and the offense. (Infra pp. 36-43.) And it requires the Board to timely publish a record (infra pp. 43-46) that fully explains its decision (infra pp. 30-35). The Board did none of these things in Mr. Rodriguez's case.

In its Record of Decision, the Board failed to consider the single most important factor governing Mr. Rodriguez's likelihood of recidivism: his advanced age. (Infra pp. 22-28.) Despite the importance of that factor, the Board did not mention it at all in its Record of Decision. (Infra pp. 22-28.) And it barely mentioned Mr. Rodriguez's other dynamic risk factors. (Infra pp. 28-30.) It did not explain why Mr. Rodriguez "has yet to demonstrate a level of rehabilitative progress

that would make his release compatible with the welfare of society." R.A. 23. (Infra pp. 28-30.)

In fact, in the lower court, the Board argued that the Record of Decision is only a fraction of what it considered, which, if true, renders the Record of Decision insufficient to allow for judicial review at all. (Infra pp. 30-36.)

The Board also relied on a risk and needs assessment, the LS/CMI, which not only heavily weighs static risk factors, but also fails to account for juvenile offenders' reduced culpability. (Infra pp. 38-41.) Yet the potential parolee has no meaningful opportunity to challenge—or even to understand—their score because the Board provides only a heavily redacted copy. (Infra pp. 41-43.)

And the Board took ten full months to issue this cursory decision, denying Mr. Rodriguez of valuable time—17% of his setback period—to take whatever steps the Parole Board identified to bring himself closer to parole at his next opportunity. (Infra pp. 43-46.)

These actions were arbitrary and capricious and require review.

ARGUMENT

When a juvenile lifer appears before the Parole Board seeking release on parole, the Board's job—deciding whether to grant parole—takes on a significance that is not present in any other Parole Board determinations. In juvenile lifer decisions, the Parole Board is the guardian of constitutional rights, a significantly more serious task than it has in non-lifer cases, which have no cognizable rights attached to them. When the potential parolee is a juvenile lifer, the Parole Board literally holds these individuals' lives in its hands.

These considerations are all the more important where the juvenile lifer was convicted of a nonhomicide crime. While a nonhomicide crime "may be devastating in [its] harm . . . [,] 'in terms of moral depravity and of the injury to the person and to the public,' . . . [it] cannot be compared to murder in [its] 'severity and irrevocability.'" *Graham v. Florida*, 560 U.S. 48, 69 (2010) (quoting *Kennedy v. Louisiana*, 554 U.S. 407, 438 (2008)). Despite this bright line separating homicide offenders from nonhomicide offenders, nonhomicide lifers often receive the same sentence as an individual convicted of second-degree murder. This fact makes the Parole Board's determination in

those cases even more important to ensure the proportionality of the nonhomicide offender's sentence.

Despite the gravity of this decision, in this case, the Parole Board failed to consider the single most important factor impacting Mr. Rodriguez's likelihood of recidivism, his advanced age. It failed to fully detail its reasons for denying parole in its Record of Decision. It based its decision on a risk and needs assessment that categorizes as higher risk the same factors that the SJC has said render juvenile offenders less culpable than their adult counterparts. And it did not issue a decision for ten months, notwithstanding its own regulation that call for a record to issue within twenty-one days of the Board reaching a decision (120 Code Mass. Reg. 301.08) and the governing statute that contemplates a decision within 60 days of the hearing (G.L. c. 127, § 133A).

These actions belie the seriousness of the Board's task.

I. In deciding whether to grant parole, the Board must consider the individual's dynamic risk factors—such as current age—in order to account for the juvenile's "greater prospects for reform."

A. The Board gave no consideration to Mr. Rodriguez's most significant protective factor, his advanced age.

The Board must determine whether there is "a reasonable probability that, if such offender is released, the offender will live and remain at liberty without violating the law [such that] release is not incompatible with the welfare of society." 120 Code Mass. Regs. § 300.04. See G.L. c. 127 § 130. Because, for juvenile lifers, this determination implicates the proportionality—and, thus, the constitutionality—of continued incarceration, the SJC requires the Board to consider factors laid out in *Miller v. Alabama*, 567 U.S. 460 (2012). *Diatchenko v. Dist. Attorney for Suffolk Dist.* 471 Mass. 12, 23 (2015) ("*Diatchenko II*"). See *Perez I*, 477 Mass. at 686.

But the *Miller* factors are just the beginning of a juvenile's story. Because they were developed for sentencing, they speak to circumstances of the juvenile's life at the time of the offense and sentencing. They recognize that juveniles have "greater prospects for reform," but cannot predict whether an individual offender will realize

those prospects. They cannot speak to the juvenile's growth and change over the years. "Simply put, because the brain of a juvenile is not fully developed, either structurally or functionally, by the age of eighteen, a judge cannot find with confidence that a particular offender, at that point in time, is irretrievably depraved." *Diatchenko I*, 466 Mass. at 670.

Instead, the Parole Board is left to make that determination after the juvenile has spent many years in prison.

To do that, the Board cannot remain rooted in the past, basing its decision on the seriousness of the offense. It must consider the individual's dynamic risk factors (e.g., advancing age, rehabilitative progress and programming, completion of sex offender treatment program), not just the static risk factors present at the time of sentencing. Failure to consider these dynamic risk factors undermines the underpinnings of the Court's holdings in *Diatchenko I* and *II*.

For Juvenile nonhomicide offenders, the Supreme Judicial Court has expressly precluded sentencing courts from concluding that a juvenile offender is irretrievably depraved based only on their offense. In *Perez I*, the SJC held that, absent extraordinary circumstances,

nonhomicide offenders must become parole eligible after no longer than 15 years. 477 Mass. at 686. When that case was remanded, the sentencing court held that the severity of the defendant's offense constituted the extraordinary circumstances that would permit a longer parole ineligibility period. *Commonwealth v. Perez*, 480 Mass. 562, 566-567 (2018) ("*Perez II*"). On appeal from that decision, in *Perez II*, the SJC clarified that the offense alone, even if heinous, is not a sufficient basis for extending the parole ineligibility period. *Perez II*, 480 Mass. at 569. Instead, "both the crime *and* the juvenile's circumstances must be extraordinary to justify a longer parole eligibility period." *Id.* (emphasis added). Even where the crime is vicious, the sentencing court still must look to the personal characteristics of the offender. *Id.*

If a sentencing court may not sentence a juvenile to life in prison without the possibility of parole solely on the basis of the nature of the crime, the Parole Board may not continue to keep the juvenile in prison for life on that basis, either. *Perez II*, 480 Mass. at 569. And when the Board ignores dynamic risk factors, it impermissibly does what the SJC has precluded the sentencing court from doing: it condemns the juvenile to a life behind bars based on factors present at the time of sentencing.

See *id.* ("criminal conduct alone is not sufficient to justify a greater parole eligibility period than is available for murder").

Here, it appears that over the past 20 years, the Board has done exactly that. Despite marked improvement and an increased commitment to rehabilitative programming over the past twenty years, Mr. Rodriguez has received the maximum setback period of five years after every hearing.

In its most recent decision, the Board made clear that it ignored parts of Mr. Rodriguez's decreased risk: it failed to even mention the impact that Mr. Rodriguez's most important dynamic risk factor, his advanced age, had on his risk of recidivism. Mr. Rodriguez presented substantial evidence that his age—then, almost 60 years old—was a "very significant protective factor" on his likelihood of recidivism. R.A. 193. Despite that, nowhere in the Record of Decision does the Board mention the impact of Mr. Rodriguez's current age on his risk of recidivism. R.A. 21-23.

The SJC has addressed this same issue in the case of another administrative agency tasked with predicting recidivism: the Sex Offender Registry Board ("SORB"). While SORB need not accept "the

opinion of a witness testifying on behalf of a sex offender [] even where the board does not present any contrary evidence," *Deal v Massachusetts Parole Board*, 484 Mass. 457, 464 (2020) (quoting *Doe No. 68549 v. Sex Offender Registry Board*, 470 Mass. 102, 112 (2014)), it must consider evidence that bears on the offender's likelihood of recidivism. In *Doe No. 151564 v. Sex Offender Registry Board*, 456 Mass. 612, 621 (2010), Doe "presented evidence of numerous scientific and statistical studies, published during the last decade, that conclude that age is an important factor in determining the risk of [sexual offense] recidivism and that such risk diminishes significantly as an offender ages." The SJC held that, where Doe was 61 years old, past the age when sexual recidivism begins "diminish[ing] significantly," SORB's failure to consider that dynamic risk factor was arbitrary and capricious. *Id.* at 622.

So too here. Despite this evidence, which is germane to the Board's ultimate task—predicting whether an individual's release would be compatible with the welfare of society—in its Record of Decision, the Board never mentioned the impact that Mr. Rodriguez's current age has on his risk of recidivism. That failure is arbitrary and

capricious when done by SORB and it is no less so when done by the Parole Board.

And what Mr. Rodriguez is asking the Board to do is different than what the plaintiff was asking for in *Deal v. Massachusetts Parole Board*, 484 Mass. 457 (2020) [4]. In *Deal*, the issue was the expert's ultimate opinion "that Deal would be a low risk to recidivate." *Id.* at 464. Here, on the other hand, Mr. Rodriguez is not asking the Board to necessarily accept Dr. Plaud's ultimate conclusion. Rather, Mr. Rodriguez is asking the Board to consider the scientific evidence that Dr. Plaud brought to bear. While the Board need not accept an expert's ultimate opinion, the Parole Board, like SORB, cannot disregard scientific evidence bearing on risk of recidivism that the expert identifies. The Parole Board's failure to consider this evidence in Mr. Rodriguez's case was arbitrary and capricious and constituted an abuse of discretion.

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[4] Because the *Deal* decision was published after the date of Mr. Rodriguez's Record of Decision, it is not clear that the holding binds court in this case, but even if it is not binding, it is instructive.

B. The Parole Board gave insufficient consideration to Mr. Rodriguez's other rehabilitative efforts

The Record of Decision at issue in *Deal* provides guidance as to the level of detail about a potential parolee's rehabilitative progress that the Record of Decision should contain. In the *Deal* Record of Decision, the Board identified much, if not all, of Mr. Deal's programming, noting that "[w]hile incarcerated, Mr. Deal participated in such programs as Microsoft Office, Telecommunications, Life Skills, and Alternative to Violence. He is very active with religious activities and is currently employed full time doing laundry." Exhibit A, Timothy Deal Record of Decision, dated July 25, 2017.

Here, on the other hand, Mr. Rodriguez's Record of Decision does not mention his completion of several programs, and it minimized his participation in the programs that it did mention.

The Board's treatment of Mr. Rodriguez's accomplishment in completing the sex offender treatment program is emblematic of its overall failure to acknowledge his progress. Rather than encourage his rehabilitative progress by commending this completion, the Board focused on the stumbles that he took along the way: "although Mr. Rodriguez completed the Sex Offender Treatment Program, he had

some difficulties during the process" (R.A. 22) and "[h]e has completed SOTP (Sex Offender Treatment Program), but only after several failures over the decades" (R.A. 23). Rather than applaud his progress, the Board apparently punished him for not being better from the start. It appears that the Board would be satisfied only if Mr. Rodriguez had been perfect from the beginning. But, by definition, rehabilitation occurs when someone is not perfect from the beginning. The way the Board treated Mr. Rodriguez's ability to persevere in changing himself despite stumbles along the path illustrates the Board's failure to look to progress and dynamic risk factors, preferring to stay rooted in Mr. Rodriguez's past offenses. This failure was arbitrary and capricious.

II. On judicial review, the Parole Board may not bolster its insufficient Record of Decision by telling the court to inspect the entire parole file, including information not included in its Record of Decision or even in the administrative record.

In its opposition and in the hearing on Mr. Rodriguez's motion for judgment on the pleadings, the Board sought to bolster its insufficient Record of Decision by arguing that "the Record of Decision is just a summary" (R.A. 331) and that "[e]ven if the Record of Decision did not specifically . . . recite *all* information relevant to the *Miller/Diatchenko*

factors, it does not mean that the Board did not consider what is required of it" (R.A. 301 (emphasis in original)).

This cannot be. As the lower court recognized, "the fact that something appears in the record does not mean that the Board adopted it." R.A. 330. Thus, the Board's argument amounts, "Trust us." This violates the Board's governing statute and the constitution.

The Parole Board's Record of Decision for a juvenile lifer must be the comprehensive statement of reasons why it denied parole. At the outset, the Board's governing statute, G.L. c. 127, § 130 requires the decision to "indicat[e] the reasons for the decision." The Parole Board recognizes as much when it certifies that the written decision "is the decision and reasons of the Massachusetts Parole Board regarding the above referenced hearing." R.A. 23. And it repeated that requirement in its opposition in the lower court, stating that "the Parole Board must provide Petitioner with written notice of the decision *and the reasons therefor*." R.A. 301 (emphasis added). No further reasoning should be necessary.

But in addition to this statutory requirement, if the Parole Board could rely on anything in the record—a record which is not a part of the

administrative record on appeal—it would entirely evade judicial review, in violation of a juvenile lifer's constitutional right to due process. In *Diatchenko II*, the SJC held that "the parole process takes on a constitutional dimension" for juvenile lifers. 471 Mass. at 19-20. That constitutional dimension gives rise to procedural due process, including the right to judicial review. *Id.* at 20-28.

The purpose of this judicial review is "to ensure that the board exercises its discretionary authority to make a parole decision for a juvenile [lifer] in a constitutional manner, meaning that the art. 26 right of a juvenile [lifer] to a constitutionally proportionate sentence is not violated." *Id.* at 29. A court must determine "whether the board abused its discretion in the manner in which it considered and dealt with 'the distinctive attributes of youth [that] diminish the penological justifications for imposing the harshest sentences on juvenile offenders,' as they relate to the particular circumstances of the juvenile homicide offender seeking parole." *Id.* at 31 (quoting *Miller*, 132 U.S. at 472).

It would be impossible for a reviewing court to make that determination if the Board hid behind an unreviewable file and did not provide its reasons in its records of decision.

Other agencies explicitly have a comprehensive writing requirement detailed in section 11 of the Administrative Procedures Act, G.L. c. 30A, § 11. While Parole Board decisions are not governed by that section, it is instructive. That section requires an agency to issue its decisions in writing, "accompanied by a statement of reasons for the decision, including determination of each issue of fact or law necessary to decision." G.L. c. 30A, § 11(8). "The [written decision] requirement exists so that a reviewing court 'may exercise its appellate function to determine whether the findings of the agency are supported by the evidence and whether given these findings, the agency correctly applied the law to the facts so found.'" *Retirement Bd. Of Somerville v. Contributory Retirement Appeal Bd.*, 38 Mass. App. Ct. 673, 678 (1995) (quoting *Maryland Cas. Co. v. Commissioner of Ins.*, 372 Mass. 554, 566-567 (1977)).

The same is true for review of Parole Board decisions. Judicial review of parole decisions proceeds by action in the nature of certiorari (G.L. c. 249, § 4) which, like judicial review under the Administrative Procedures Act is "confined to the record" with limited ability for additional testimony (G.L. c. 30A, § 14(5)). Where judicial review is

limited to the written record, that record must be comprehensive if the judicial review is to have any meaning.

The SJC implicitly agreed that the Board's reasons must be fully detailed in its written record in the one case where this issue has been discussed, *Deal v. Massachusetts Parole Board*, 484 Mass. 457 (2020). In *Deal*, the SJC limited itself to "review of the board's *written decision*" to determine whether the Parole Board adequately protected that plaintiff's constitutional rights. *Id.* at 462-463 (emphasis added).

The Parole Board's arguments in the lower court illustrate problems that would arise if the Board could indiscriminately bolster its Record of Decision with information in its file. The Parole Board's file is extensive and is not a part of the administrative record. Reliance on some aspects of the file would cause constitutional concerns. For instance, in its filing in the Superior Court, the Parole Board stated that "[t]he Board considered that before and after the governing offense, the Plaintiff committed at least four additional sexual assaults" (R.A. 304) and that "the Board considered, and informed the Plaintiff it was troubled by the fact that he could not remember the names of some of his victims, could not recall details of some offenses, and could not

provide a clear explanation around what motivated certain behaviors at the time of his crimes" (R.A. 305).

This was not discussed in Mr. Rodriguez's Record of Decision, which raises unreviewable due process concerns. First, these "additional sexual assaults" presumably referred to two cases that Board Member Hurley discussed at Mr. Rodriguez's hearing: a case "that was a not guilty after trial" and another case that "was dismissed." R.A. 40-41. While it may be permissible for a Board member to question a potential parolee about acquitted conduct to aid in understanding the nature of the accusation, if the Board had denied parole based on this apparently acquitted conduct, that would raise significant due process concerns.

Moreover, the perfunctory nature Mr. Rodriguez's Record of Decision renders review of this issue impossible, which would be an independent due process violation. Because none of the conduct was discussed in the Record of Decision or in the administrative record, it is unclear how Mr. Rodriguez would have suspected that the Parole Board improperly relied on this conduct. And even if he did know, the administrative record does not contain, for instance, hearing transcripts, police reports, witness statements, or even dockets from

those cases. This absence of any record evidence of these allegations means that there is no way for a reviewing court to assess whether those allegations—which Mr. Rodriguez denied at his hearing and which the Board acknowledged did not result in convictions (R.A. at 40-41)—have merit.

Similarly, the file contains information about Mr. Rodriguez's "numerous" appeals. R.A. 107. If the Board had denied Mr. Rodriguez parole based on the exercise of his constitutional right to appeal, that, too, would raise due process concerns. But, again, because the Board did not discuss this in its Record of Decision, it is unreviewable.

In short, by hiding behind an unreviewable file, the Parole Board is effectively shielding itself from judicial review. For due process guarantee of judicial review process to be anything other than an illusion, the Parole Board must fully memorialize its reasons for denying parole in its written Record of Decision.

III. In fulfilling its statutory mandate to consider a risk and needs assessment, the Board must utilize a risk and needs assessment tool that is appropriate to both the offender and the offense and, to comport with due process, the individual must have full access to his risk and needs assessment scores in order to challenge the validity of the tool.

In 2012, the Legislature first required the Board to consider the results of a risk assessment tool for each prisoner seeking parole. G.L. c. 127, § 130, as amended by St. 2012, c. 192, § 36. In so doing, the Legislature credited relevant scientific research that found that "[f]ormal research-based and validated assessment tools are the foundation needed to assess risk and needs" and that "[e]ffective parole decisions begin with using a reliable and valid risk and needs assessment,"[5] rather than relying on the Board's subjective determinations.

This legislative mandate would be meaningless, however, if the risk assessment tool that the Board uses is not appropriate for the

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[5] Campbell, Nancy, National Institute of Corrections, *Comprehensive Framework for Paroling Authorities in an Era of Evidenced Based Practices* (2008), available at https://nicic.gov/comprehensive-framework-paroling-authorities-era-evidence-based-practice (last visited August 9, 2021) at 34-35.

offender or for the offense. See *Doe No 3839 v. Sex Offender Registry Bd.*, 472 Mass. 492, 499 n.9 (2015) (requiring SORB to apply standards that "reflect accurately the current state of knowledge," where "scientific knowledge in a field is rapidly evolving").

Here, the risk assessment tool that the Board used is the LS/CMI (Level of Service/Case Management Inventory). R.A. 304. But this tool has at least two problems in this case.

A. The Parole Board should not use the LS/CMI to determine juvenile offenders' risk of recidivism.

The LS/CMI is not an appropriate tool for the Parole Board's assessment of recidivism risk in juvenile offenders because it effectively punishes the very aspects of juvenile offending that the SJC has held make juveniles "constitutionally different" and preclude the imposition of a life-without-parole sentence for juvenile offenders. *Diatchenko I*, 466 Mass. at 660. For example, the SJC has held that juvenile offenders have diminished culpability in part because they are unable extricate themselves from horrific, crime-producing family situations. *Id*. Yet the same juvenile offender will receive a higher LS/CMI score when they finally extricating themself from that horrific, crime-producing family situation: estrangement from family increases the LS/CMI score.

Similarly, the SJC has held that juvenile offenders have a greater potential for reform (*id.)*, but the LS/CMI is heavily weighted toward static risk factors. Juvenile lifers will receive high scores in areas such as criminal history based on the severity of their offense for the rest of their lives; no amount of rehabilitation can reduce this score.

Put differently: the SJC has identified factors that render a juvenile offender less deserving of the harshest punishments, but the Parole Board's risk assessment tool leads to harsher punishments (parole denials) based on some of those very same factors.

Indeed, the Board itself conceded that the LS/CMI is "not typically designed just for juvenile sex offenders," and that it "could be criticized" for the fact that "there is a difference in recidivism [between juvenile sex offenders and other types of offenders] that's not supported by the data that went into the tool." R.A. 342-343. Nevertheless, it defended its use of the tool, noting that "there isn't a [court] decision regarding the propriety of the LS/CMI" (R.A. 343) and contending that the fact that it does not account for juvenile sex offenders' lower rate of recidivism "doesn't mean . . . that it doesn't serve a purpose" (R.A. 341). In fact, that is exactly what it means. When "[t]he Board also benefitted from

review of the LS/CMI risk/needs assessment" (R.A. 304), and that assessment prolongs incarceration for the same reasons that the SJC says mitigate culpability, reliance on that instrument is arbitrary and capricious.

Nor does Mr. Rodriguez's age of offending in California relieve the Parole Board of its obligation to use an assessment that is appropriate to juvenile sex offenders. Mr. Rodriguez is incarcerated for a crime that he committed as a juvenile. He received a life sentence for a crime that he committed as a juvenile. The Parole Board is tasked with safeguarding the constitutionality of the punishment for that juvenile offense and must account for the distinctive attributes of youth that were present when he committed that offense. The LS/CMI factors undermine that consideration. While the California offenses, committed while Mr. Rodriguez was 21 years old, may be relevant to his rehabilitative progress, they do not impact the Parole Board's duty to safeguard the constitutionality of the sentence for the governing juvenile offense. Any assessment that the Board conducts may not undermine the mandates of *Diatchenko*, which recognize the mitigating effect of many of the same factors that the LS/CMI punishes.

Because the LS/CMI increases an individual's risk level based on some of the same factors that the SJC has held should reduce a juvenile's culpability, use of the LS/CMI for juvenile offenders violates juveniles' due process right to a meaningful opportunity for release.

B. The Parole Board provides only heavily redacted summaries of the LS/CMI to potential parolees, depriving them of the ability to challenge the test results.

Compounding the problem, a potential parolee receives only a redacted summary of the LS/CMI, which entirely forecloses the individual from understanding what factors went into the ultimate score, violating their right to due process. R.A. 104-109.

For instance, if the evaluator used an override in determining the individual's score, that fact would impact the validity of the tool, most frequently by overestimating the individual's risk level.[6] Yet individuals are not told whether an override code was used.

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[6] J. Stephen Wormith, Sarah Hogg & Lina Guzzo, The Predictive Validity of a General Risk/Needs Assessment Inventory on Sexual Offender Recidivism and an Exploration of the Professional Override, 39 Criminal Justice and Behavior 1511-1538 (Dec. 2012), https://journals.sagepub.com/doi/10.1177/0093854812455741 (last visited August 2, 2021).

This is especially problematic for sex offenders. At least one study has shown that while use of override codes decreases the validity of the LS/CMI for all offenders, "the decrease [in validity] caused by the use of the override was larger for the sexual offender sample."[7] In fact, the deviation was so significant that, "when the validity of the LS/CMI was examined for sex offenders on whom the override provision was applied, the predictive relationship was eliminated."[8] The authors speculate that this could be due to overuse of these override codes in the sex offender population because of the examiners' "own particular 'theories' about sex offender risk,"[9] possibly because of an "unspecified sense of uneasiness that leads assessors to increase sexual offenders' risk level."[10]

Similarly, the redactions make understanding the score difficult or impossible. For instance, it appears that Mr. Rodriguez received a higher score for exercising his constitutional right to appeal his convictions. R.A. 107. It also gave him a high score for "staying away

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[7] *Id.* at 1529-1530.
[8] *Id.* at 1530.
[9] *Id.*
[10] *Id.* at 1531.

from those inmates who are trouble." *Id*. It is entirely unclear how avoiding "inmates who are trouble" should lead to a "High" score. Yet, that is the only information that Mr. Rodriguez received. He has no basis to determine whether the tool was properly administered or scored. This means that, again, the Parole Board's decision is shielded from judicial review through reliance on an unreviewable tool.

Without more information about their score, the potential parolee cannot assess the validity of this tool that the Parole Board uses to determine whether they can safely be paroled. This violates the potential parolee's right to due process.

IV. The length of time that elapsed between Mr. Rodriguez's hearing and the issuance of his Record of Decision violated due process by denying him ten months to implement any rehabilitative steps identified by the Parole Board.

A delay in issuing a parole decision constitutes a due process violation where it is "fundamentally unfair" and results in prejudice. *Doucette v. Massachusetts Parole Bd.*, 86 Mass. App. Ct. 531, 537 (2014).

Massachusetts General Laws c. 127 section 133A requires that a juvenile lifer receive their initial parole hearing "within 60 days" of the individual's earliest possible parole release date. In setting this

timeline, the Legislature presumably assumed that the Board would issue its decision during that 60-day timeframe so that if the individual received a positive parole vote, they could be released on their parole eligibility date. And the Board's regulations call for the written record of a denial to be issued within 21 days of the Board making its decision. 120 Code Mass. Reg. 301.08.

Yet the length of time between a parole hearing and the issuance of the Record of Decision can be many month or even more than a year. Life Sentence Records of Decision, available at https://www.mass.gov/lists/life-sentence-record-of-decisions-rods. For an incarcerated individual, this can feel like an eternity.

But beyond the anxiety that this delay causes potential parolees, it is also fundamentally unfair and materially prejudicial. A juvenile lifer who is denied parole may be given anywhere from a one- to five-year "setback" before their next parole hearing. The potential parolee should use that setback time to focus on rehabilitation and to address any concerns raised by the Parole Board. But when the Board takes a significant portion of that setback time to issue its decision, it deprives

the potential parolee of valuable feedback that they could use to prepare themselves for their next parole hearing.

This is especially problematic because any suggestions from the Parole Board can be difficult and time-consuming for a potential parolee to implement within the prison system. If, for example, the Board identified programming that the individual must complete before it would grant parole, it could take that individual months or longer to even get on the Department of Correction's waitlist for that program, let alone to make their way through the waitlist, and to ultimately complete the programming.

And there is no justification for the delay, given the cursory nature of the decisions, which are largely rote recitations of boilerplate language. See *Deal*, 484 Mass. at 467, n.1 (Gants, J. concurring) (identifying large portion of boilerplate language in Board's Record of Decision).

In this case, Mr. Rodriguez received a relatively fast decision from the Parole Board, 10 months, and received the longest possible setback period, five years. This means that 17% of the time that he could have spent working on any issues identified by the Parole Board were instead

wasted. It is easy to see how this delay could squander an even greater portion of the time before the potential parolee's next hearing where the Board took even longer to issue the decision and/or where the potential parolee received a shorter setback.

The delay is unnecessary, it is fundamentally unfair, it prejudices potential parolees like Mr. Rodriguez, and, accordingly, it violates due process.

CONCLUSION

For the foregoing reasons, the Court should grant Mr. Rodriguez the meaningful opportunity for release based on demonstrated rehabilitation and maturity to which he is constitutionally entitled by reversing the judgment of the Superior Court, vacating the decision denying Mr. Rodriguez's parole application, and remanding the application to the Parole Board:

- For a rehearing that accounts for his current age and other dynamic risk factors and relies on a valid and transparent risk and needs assessment;
- For the timely issuance of a written record that fully details its reasons for its decision; and/or

- For any other relief that this court deems just.

Respectfully submitted,

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By his attorney:

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Exhibit A

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Charles D. Baker
Governor

Karyn Polito
Lieutenant Governor

Daniel Bennett
Secretary

Paul M. Treseler
Chairman

Michael J. Callahan
Executive Director

DECISION

IN THE MATTER OF

TIMOTHY DEAL

W84556

TYPE OF HEARING: **Initial Hearing**

DATE OF HEARING: **December 15, 2016**

DATE OF DECISION: **July 25, 2017**

PARTICIPATING BOARD MEMBERS: Paul M. Treseler, Dr. Charlene Bonner, Tonomey Coleman, Sheila Dupre, Tina Hurley, Lucy Soto-Abbe

DECISION OF THE BOARD: After careful consideration of all relevant facts, including the nature of the underlying offense, the age of the inmate at the time of offense, criminal record, institutional record, the inmate's testimony at the hearing, and the views of the public as expressed at the hearing or in written submissions to the Board, we conclude that the inmate is not a suitable candidate for parole. Parole is denied with a review scheduled in four years from the date of the hearing.[1]

I. STATEMENT OF THE CASE

On November 23, 2004, in Suffolk Superior Court, Timothy Deal was found guilty of the second-degree murder of 26-year-old William M. Woods after a trial by jury. He was sentenced to life in prison with the possibility of parole.

Mr. Deal and Mr. Woods had been next door neighbors in Dorchester. In September 2001, Mr. Woods (facing charges for multiple drug offenses) agreed to provide information to the Boston Police Department on Mr. Deal's drug-related activities. Mr. Woods purchased marijuana from Mr. Deal in a controlled buy, which led to the issuance of a warrant to search Mr. Deal's home. The search pursuant to this warrant led to the arrest of Mr. Deal and his brother on multiple drug and firearm charges.

[1] Five of the six Board Members voted to schedule a review hearing for parole in four years. One Board Member voted to schedule a review hearing in three years.

On the evening of January 14, 2002, Mr. Woods was in his home with a friend, his brother, and his mother. Mr. Deal, then 17-years-old, and a companion came up the front porch steps and went into the house. Mr. Woods' friend recognized both men and greeted them, but neither responded. Mr. Woods' friend soon heard shouting and objects falling from inside the house. Shortly after, Mr. Deal and his companion emerged, running from the house. Mr. Woods' friend went inside and observed Mr. Woods' bedroom in shambles, the television knocked to the floor, and a trail of blood leading into the bathroom. There, Mr. Woods was hunched over the toilet, bleeding from multiple stab wounds to his chest and back. He succumbed to his wounds in the hospital later that evening. Mr. Deal was arrested on January 30, 2002. Two days later, he telephoned Mr. Woods' mother and stated that the victim was a "snitch."

II. PAROLE HEARING ON DECEMBER 15, 2016

Mr. Deal, now 32-years-old, appeared before the Parole Board for an initial hearing on December 15, 2016, and was represented by Attorney Barbara Kaban. In his opening statement to the Board, Mr. Deal apologized for taking Mr. Woods' life and expressed his remorse. Mr. Deal discussed his lifestyle in the years leading up to the murder, stating that he grew up with his mother, brother, and sister in Dorchester. He said that his mother had a steady job, and provided for the family, until her company closed down and the family started to face financial hardships. At some point, Mr. Deal began to struggle with classes and changed schools. He was introduced to the street lifestyle by his brother, who was involved with drugs and other crimes.

The Board questioned Mr. Deal as to the underlying facts of the crime and how his actions resulted in the murder of Mr. Woods. Mr. Deal explained that he and his brother had been arrested on drug and firearm charges after Mr. Woods informed police of their activities. When he approached Mr. Woods about his involvement with police, Mr. Woods denied the allegations. However, it resulted in a loss of friendship between the two individuals. On the day of the murder, Mr. Deal claims that a fight ensued at Mr. Woods' house, but he cannot remember what triggered the argument between them. The fight started when he grabbed a knife from a friend's clip, and both individuals started swinging at each other. Mr. Deal said that he was not intentionally trying to stab and kill Mr. Woods, but that he was unsure of where he hit him. Mr. Deal said that the fight ended after approximately 10 seconds, when his friend yelled, "Stop, before you kill him." Mr. Deal then left the house, not knowing the extent of Mr. Woods' injuries. The Board noted its concern as to whether the fight was in retaliation for Mr. Woods being an informant for the police, but Mr. Deal stated that it was not.

The Board expressed its concern for the lack of explanation about the murder in Mr. Deal's autobiography, including why it took so long for Mr. Deal to give a full interpretation of the facts from his point of view. Mr. Deal explained that he wrote a separate statement of facts regarding the murder. He did not include it in his autobiography, as he understood it to be a separate document. The Board asked Mr. Deal when he started to fully accept and explain the facts of this case, questioning why he waited 10 years before telling anyone. Mr. Deal explained that he was honest about the facts of the murder with his family and only talked about the murder 10 years later, after trying to get into a specific program. Mr. Deal explained that he was never asked about the underlying facts of the murder. Rather, he always accepted what he did, but wished he told the facts to an authority figure sooner. The Board also

questioned the communications between Mr. Deal and Mr. Woods' mother, describing those communications as odd. Mr. Deal explained that he told Mr. Woods' mother that Mr. Woods was a snitch, in order to inform her of what went on, without going into too much detail about Mr. Woods being an informant.

While incarcerated, Mr. Deal participated in such programs as Microsoft Office, Telecommunications, Life Skills, and Alternative to Violence. He is very active with religious activities and is currently employed full time doing laundry.

The Board considered oral testimony from Mr. Deal's wife, mother, and brother, who expressed support for parole. The Board considered testimony from Dr. Ira Parker, a forensic psychologist, who presented his findings at Mr. Deal's request. The Board also considered the testimony of the victim's mother on audio recording before her passing, who expressed support for Mr. Deal's parole. The Board considered the testimony of Suffolk County Assistant District Attorney Charles Bartoloni, who spoke in opposition to parole.

III. DECISION

The Board is of the opinion that Mr. Deal has not demonstrated a level of rehabilitative progress that would make his release compatible with the welfare of society. The Board recommends that Mr. Deal partake in more programming, such as Criminal Thinking and Restorative Justice. The Board believes that the version of the offense given by Mr. Deal is not plausible. A longer period of positive institutional adjustment and programming would be beneficial to Mr. Deal's rehabilitation. The Board considered all factors relevant to the Diatchenko decision in making this determination.

The applicable standard used by the Board to assess a candidate for parole is: "Parole Board Members shall only grant a parole permit if they are of the opinion that there is a reasonable probability that, if such offender is released, the offender will live and remain at liberty without violating the law and that release is not incompatible with the welfare of society." 120 C.M.R. 300.04. In the context of an offender convicted of first or second degree murder, who was a juvenile at the time the offense was committed, the Board takes into consideration the attributes of youth that distinguish juvenile homicide offenders from similarly situated adult offenders. Consideration of these factors ensures that the parole candidate, who was a juvenile at the time they committed murder, has "a real chance to demonstrate maturity and rehabilitation." *Diatchenko v. District Attorney for the Suffolk District*, 471 Mass. 12, 30 (2015); See also *Commonwealth v. Okoro*, 471 Mass. 51 (2015).

The factors considered by the Board include the offender's "lack of maturity and an underdeveloped sense of responsibility, leading to recklessness, impulsivity, and heedless risk-taking; vulnerability to negative influences and outside pressures, including from their family and peers; limited control over their own environment; lack of the ability to extricate themselves from horrific, crime-producing settings; and unique capacity to change as they grow older." *Id.* The Board has also considered a risk and needs assessment, and whether risk reduction programs could effectively minimize Mr. Deal's risk of recidivism. After applying this standard to the circumstances of Mr. Deal's case, the Board is of the opinion that Mr. Deal is not yet rehabilitated, and his release is not compatible with the welfare of society. Mr. Deal, therefore, does not merit parole at this time.

Mr. Deal's next appearance before the Board will take place in four years from the date of this hearing. During the interim, the Board encourages Mr. Deal to continue working towards his full rehabilitation.

I certify that this is the decision and reasons of the Massachusetts Parole Board regarding the above referenced hearing. Pursuant to G.L. c. 127, § 130, I further certify that all voting Board Members have reviewed the applicant's entire criminal record. This signature does not indicate authorship of the decision.

Gloriann Moroney, General Counsel

7/25/17
Date

ADDENDUM

16

COMMONWEALTH OF MASSACHUSETTS

MIDDLESEX, ss.

SUPERIOR COURT
CIVIL ACTION
NO. 20-1099-B

JOSE RODRIGUEZ,
Plaintiff,

vs.

MASSACHUSETTS PAROLE BOARD,
Defendant.

MEMORANDUM OF DECISION AND ORDER ON PLAINTIFF'S MOTION FOR JUDGMENT ON THE PLEADINGS

The plaintiff, Jose Rodriguez ("Mr. Rodriguez") has filed an action in the nature of certiorari, G.L. c. 249, § 4, challenginga final decision ("Decision") of the Massachusetts Parole Board ("Board"). The Board filed the Administrative Record on June 7, 2016, pursuant to Standing Order 1-96. Doucette v. Parole Board of Massachusetts, 86 Mass. App. Ct. 531, 541 n. 10 (2014). Mr. Rodriguez filed a Motion for Judgment on the Pleadings ("Motion"), which the Board opposed

After review of the administrative record, the Motion and memoranda and upon consideration of oral arguments, the Motion is **DENIED**.

BACKGROUND

Mr. Rodriguez committed his index offense at the age of 16 on September 27, 1976. He grabbed the female victim, a twenty-one year old student at Boston University, as she walked home from the Brookline Hills MBTA station, jabbed a broken bottle into her neck, put his jacket over her face, and raped her in the backyard of a nearby house. See Commonwealth v. Rodriguez, 50 Mass. App. Ct. 405, 406 (2000), rev. denied, 433 Mass. 1102 (2001).

The Board's Decision found the following material facts, among others:

On July 20, 1977, Mr. Rodriguez was convicted of rape and assault and battery by means of a dangerous weapon. The Supreme Judicial Court reversed the conviction and ordered a new trail. Commonwealth v. Rodriguez, 378 Mass. 296 (1979). The court released Mr. Rodriguez on bail, but he did not appear for his re-trial. Instead, he fled to California for seven years until extradited to Massachusetts. At his retrial in 1987, he was convicted of the same charges and was sentenced to life in prison with the possibility of parole for rape and a concurrent term of 8 to 10 years for assault and battery by means of a dangerous weapon.

While in California, he used the alias Jose Martinez. He was arrested for assault with intent to rape on June 30, 1981 and for rape and assault with intent to commit rape on August 13, 1982. At the time of those offenses, he was 21 and 22, respectively.

After incarceration in Massachusetts, Mr. Rodriguez had his initial parole hearing in 2000, with review hearings in 2006 and 2013. At the time of the most recent hearing, he had served 33 years of his sentence in Massachusetts.

The Board reviewed the course of Mr. Rodriguez's sex offender treatment, which he completed, "after several failures over the decades," after which he entered the maintenance phase. It also reviewed in detail the nature of his offenses, letters in support from his family and examining psychologist, as well as opposition from the Norfolk District Attorneys Office.

The Board's Decision, dated January 29, 2020 ("Decision") states in part:

> [Mr. Rodriguez] has made progress in his rehabilitation, but has yet to demonstrate a level of rehabilitative progress that would make his release compatible with the welfare of society.

> . . . In the context of an offender convicted of first or second degree murder, who was a juvenile at the time the offense was committed, the Board takes into consideration the attributes of youth that distinguish juvenile homicide offenders from similarly situated adult offenders. Consideration of these factors ensures that the parole candidate, who was a juvenile at the time they committed murder has "a real chance to demonstrate maturity and rehabilitation.' Diatchenko v. District Attorney for the Suffolk District, 471 Mass. 12, 30 (2015); See also Commonwealth v. Okoro, 471 Mass. 51 (2015.
>
> The factors considered by the Board include the offender's "lack of maturity and an underdeveloped sense of responsibility, leading to recklessness, impulsivity, and heedless risk-taking; vulnerability to negative influences and outside pressures, including from their family and peers; limited control over their own environment; lack of the ability to extricate themselves from horrific, crime-producing settings; and unique capacity to change as they grow older." *Id.* As noted in this matter, Mr. Rodriguez is a juvenile offender serving a life sentence for rape. The Board has considered a risk and needs assessment, and whether risk reduction programs could effectively minimize Mr. Rodriguez's risk of recidivism. After applying this standard to the circumstances of Mr. Rodriguez's case, the Board is of the opinion that Jose Rodriguez is not yet rehabilitated and his release is not compatible with the welfare of society. Mr. Rodriguez, therefore, does not merit parole at this time.

The Board therefore scheduled Mr. Rodriguez's next appearance to occur in five years from the date of the hearing on January 29, 2020.

DISCUSSION

I.

Controlling authority establishes this Court's jurisdiction to conduct review in the nature of certiorari upon the full administrative record:

> Decisions of the board are not subject to review under G. L. c. 30A. See G. L. c. 30A, § 1C. Certiorari review is available where there is (1) a judicial or quasi judicial proceeding (2) from which there is no other reasonably adequate remedy (3) to correct substantial error of law apparent on the record (4) that has resulted in manifest injustice to the plaintiff or an adverse impact on the real interests of the general public. State Bd. of Retirement v. Woodward, 446 Mass. 698 , 703-704 (2006). See, e.g., Ciampi v. Commissioner of Correction, 452 Mass. 162, 163 (2008) (certiorari action to challenge validity of Department of Correction regulations and disciplinary actions taken pursuant to the regulations).

Doucette v. Massachusetts Parole Board, 86 Mass. App. Ct. 531, 540 (2015). The Court in Doucette, indeed, conducted certiorari review on the record of a decision of the Parole Board denying a request for parole. This Court's role is clear:

> On certiorari review, the Superior Court's role is to examine the record ... and to 'correct substantial errors of law apparent on the record adversely affecting material rights.' Firearms Records Bureau v. Simkin, 466 Mass. 168, 180 (2013), quoting from Cambridge Hous. Authy. v. Civil Serv. Commn., 7 Mass. App. Ct. 586 , 587 (1979). In cases reviewing the decisions of administrative bodies which, like the parole board, are accorded considerable deference, see Barriere v. Hubbard, 47 Mass. App. Ct. 79 , 83 (1999), the arbitrary and capricious standard of review applies. [Note 9] See Doe v. Superintendent of Schs. of Stoughton, 437 Mass. 1 , 5 (2002); Firearms Records Bureau v. Simkin, 466 Mass. at 179. See also 2 Cohen, Law of Probation and Parole § 29:17, at 29-18 (2d ed. 1999) (most courts subscribe to the view that a parole board['s] decisions are entitled to great deference by the courts).

Doucette, 86 Mass. App. Ct. at 540-541 (footnote omitted). See Diatchenko v. District Attorney for the Suffolk District, 417 Mass. 12, 31 (2015).

Under the "arbitrary and capricious" test, "[t]he process by which the information is gathered, identified, and applied to the statutory standards under [governing law] must be logical, and not arbitrary or capricious." Allen v. Boston Housing Authority, 450 Mass. 242, 254 (2009), quoting Sierra Club v. Commissioner of the Dep't of Envtl. Mgt., 439 Mass. 738, 749 (2003); Receiver of the Boston Hous. Auth. v. Commissioner of Labor & Indus., 396 Mass. 50, 58 (1985); Long v. Comm'r of Pub. Safety, 26 Mass. App. Ct. 61, 65 (1988) (citation omitted) (an unreasoned decision willfully made "'without consideration and in disregard of facts and circumstances.'"). "[A]n abuse of discretion" exists where the decisionmaker "made 'a clear error of judgment in weighing' the factors relevant to the decision, (citation omitted), such that the decision falls outside the range of reasonable alternatives."). L. L. v. Commonwealth, 470 Mass. 169, 185 n. 27 (2014).

See Frawley v. Cambridge, 473 Mass. 716, 720 (2016) ("lacks any rational explanation that reasonable persons might support . . .") These are extremely deferential tests.

In this case, the statutory standards appear in G. L. c. 127, § 130, which authorizes parole "if the board is of the opinion, after consideration of a risk and needs assessment, that there is a reasonable probability that, if such prisoner is released with appropriate conditions and community supervision, the prisoner will live and remain at liberty without violating the law and that release is not incompatible with the welfare of society." See also 120 CMR 300.04(1). The Board expressly applied that standard. See Decision at 6.

II.

"[P]arole is at the discretion of Parole Board." Commonwealth v. Hogan, 17 Mass. App. Ct. 186, rev. denied, 391 Mass. 1101 (1983). See also Stewart v. Chairman of Massachusetts Parole Board, 35 Mass. App. Ct. 843, 848 (1994) ("The parole board has broad discretion in determining when to grant parole and is not limited, in making its predictive judgment about the inmate, as to the number and kind of witnesses from whom it will hear evidence."). However, the Parole Board must act rationally and must account for Mr. Rodriguez's status as a juvenile at the time of his index offense (though not at the time of the two subsequent California sexual assaults). In the Background section, above, the court has quoted the portion of the Decision that discusses the juvenile offender issue here.

The Supreme Judicial Court has addressed the constraints the Board faces in dealing with juvenile offenders who are sentenced to life in prison, at least in the homicide context:

> [The Supreme Judicial Court has] held that juvenile offenders who have been convicted of murder in the first degree may not be sentenced to life in prison without the possibility of parole. Diatchenko I, 466 Mass. at 669-671. We went on to hold that juvenile offenders sentenced to a mandatory term of life in prison, (i.e., those convicted of murder in the first or second degree) are entitled to a "meaningful opportunity to obtain release [on parole] based on demonstrated maturity and rehabilitation" (citation omitted). Id. at 674. See Commonwealth v. Okoro, 471 Mass. 51, 62-63 (2015); G. L. c. 119, § 72B. We further held that a **"meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation" means that the board must consider the "distinctive attributes of youth" in determining whether the juvenile is likely to reoffend.** Diatchenko II, 471 Mass. at 23.
>
> In addition, although in the normal course parole decisions are not subject to judicial review, Cole, 468 Mass. at 302-303, we have determined that **to ensure that juvenile homicide offenders receive a meaningful opportunity for parole, they are entitled to judicial review of board decisions on their parole applications under the abuse of discretion standard.** [Note omitted] Diatchenko II, 471 Mass. at 14, 31. "In this context, **a denial of a parole application by the board will constitute an abuse of discretion only if the board essentially failed to take [the Miller] factors into account, or did so in a cursory way.**" [Note omitted] Id. at 31.

Deal v. Massachusetts Parole Board, 484 Mass. 457, 460-461 (2020) (emphasis added). The Court stated that "merely stating that the board considered the Miller factors, without more, would constitute a cursory analysis that is incompatible with art. 26 of the Massachusetts Declaration of Rights."

Mr. Rodriguez asserts that the Board took account of the relevant factors only "in a cursory way." Among other things, he challenges the failure to use a risk assessment that is "normed" – i.e. has actuarial validity – for juvenile offenders. Of course, Mr. Rodriguez also committed serious sexual offenses in California at the age of 21 and 22, which the Board clearly described and, upon which, as the plaintiffs memo says (at 7), the Board "placed a considerable amount of weight." It is not clear that a properly-normed assessment would treat him as a person who offended only while a juvenile. Cf.

803 Code Mass. Regs. 1.33 (multiple risk factors for sex offenders that apply to adults who "only sex offense(s) were committed as juveniles").[1] That consideration aside, the Supreme Judicial Court has not endorsed the deep level of judicial scrutiny that Mr. Rodriguez seeks.

Here, as in Deal, 484 Mass. at 462, "it is clear that the board's single mention of the Miller factors was not the beginning and end of the board's consideration of those factors." The Board noted (Decision at 2):

> [Mr. Rodriguez] added that, as a juvenile, he lived his life with little regard for the consequences of his action. He explained that he began using drugs and alcohol in 1972 to escape his problems, but, at the time, he "didn't see it that way." He said that as a child, he had an inability to cope with feelings of rejection and abandonment. Further, he spoke of his own victimization when he was bullied.

The Board also stated (at 2-3) that it "considered testimony and an evaluation from Dr. Joseph Plaud," whose expert analysis took account of all factors bearing upon Mr. Rodriguez's degree of sexual dangerousness, including his personal history of childhood trauma, juvenile decision-making, and the plaintiff's age at offense and at the hearing. Here, as in Deal, these facts relate to Mr. Rodriguez's "vulnerability to negative influences and outside pressures" and his "limited control over [his] own environment." Deal, 484 Mass. at 462 (citations omitted." These facts also relate to Mr. Rodriguez's "lack of maturity . . . leading to recklessness, impulsivity, and heedless risk-taking." Id.

To be sure, the Decision hardly delves into questions of juvenile offending in detail. It would likely not survive the level of scrutiny proposed in the Deal concurrence,

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[1] For instance the Sex Offender Registry Board applies to "adults whose only sex offense(s) were committed as a juvenile, the high-risk factor set forth in 803 Code Mass. Regs. 1.33(2) (repetitive and compulsive behavior – particularly where "an offender . . . engages in sexual misconduct after having been charged with or convicted of a sex offense" -- "is associated with a high risk of re-offense").

which stated that "we would expect meaningful individualized findings that are far less conclusory and perfunctory than here." 484 Mass. at 457 (Gants, C.J., concurring). Moreover, the "decision" section in this case has the same boilerplate identified by the concurring justices. Id. at n. 1. However, because the majority did not adopt the approach set forth in the former Chief Justice's Deal concurrence (joined by former Justice Lenk), the Decision appears to meet Deal's deferential test. And, where Mr. Rodriguez also offended sexually twice as an adult in California after being caught, charged, tried and even convicted (albeit later vacated) in Massachusetts, the concurrence does not necessarily suggest that even the two judges who joined in it would impose stricter requirements on the Board here.[2] This court has no business going beyond the parameters of judicial review set forth in Deal's majority opinion.

III.

Mr. Rodriguez makes some additional arguments. As he points out, G.L. c. 127, § 130 says that parole "shall be granted only . . . after consideration of a risk and needs assessment" and that, in making its determination, "the parole board shall consider whether, during the period of incarceration, the prisoner has participated in available work opportunities and education or treatment programs and demonstrated good behavior. The board shall also consider whether risk reduction programs made available through collaboration with criminal justice agencies would minimize the probability of the prisoner re-offending once released." This language is not, itself, a standard of

[2] The presence of two adult sex offenses also seriously undermines the argument for precluding the Board from using the LS/CMI as to this plaintiff. See Plaintiff's Mem. at 18-20. Given the adult sex offenses, this challenge is a broader challenge to the Board's judgment concerning the exercise of its discretion in considering parole applications for sex offenders generally. No appellate authority suggests that the court has authority to question that discretionary call.

decision. It only dictates the factors that go into the decision. More importantly, the Board's decision specifically refers to a "risk and needs assessment."

Moreover, even if Mr. Rodriguez were correct on these points, this Court has limited power to set aside or modify the Decision in a certiorari action. See Cumberland Farms v. Planning Board of Bourne, 56 Mass. App. Ct. 605 (2002). See also G. L. c. 30A, § 14(7).[3] It may do so if his substantial rights may have been prejudiced because the agency decision is arbitrary and capricious. G. L. c. 30A, § 14(7)(c)-(g). Where the Board articulated a number of major considerations that led to its decision, any failure to mention or consider minor points did not prejudice Mr. Rodriguez's substantial rights. While he argues that he has done everything he could do to rehabilitate himself, "[n]o prisoner shall be granted a parole permit merely as a reward for good conduct . . .." G. L. c. 127, § 130.

For all these reasons, the Board's decision passes the arbitrary and capricious test. This Court must decline the invitation to delve deeper into the wisdom of the Decision. See Commonwealth v. Amirault, 415 Mass. 112, 117 (1998) ("The judiciary may not act as a super-parole board."). Nor will the Court impose additional administrative law requirements upon the Board – such as a mandate for "detailed" written findings on each statutory factor – in the absence of Legislative action. See Grocery Mfrs. of America, Inc. v. Department of Pub. Health, 379 Mass. 70, 79-80 (1999) (inappropriate to "impose procedural requirements on administrative agencies in addition to those imposed by" the Legislature), citing Vermont Yankee Nuclear Power Corp. v. Natural Res. Def. Council, Inc., 435 U.S. 519, 524-525 (1978). Finally, the Court does not accept the premise of

[3] While G.L. c. 30A does not apply here, essentially the same principles do control. See Doucette v. Massachusetts Parole Board, 86 Mass. App. Ct. 531, 541 n.9 (2015).

Rodriguez's argument that the Board effectively sentenced him to life imprisonment without possibility of parole. It extended the possibility of parole in five years and told Mr. Rodriguez that he "should continue working towards his full rehabilitation" during those five years.

CONCLUSION

For the above reasons, the plaintiff's Motion for Judgment on the Pleadings is DENIED. FINAL JUDGMENT SHALL ENTER AFFIRMING THE BOARD'S DECISION.

Douglas H. Wilkins
Justice of the Superior Court

Dated: April 5, 2021

M.G.L.A. Const. Pt. 1, Art. 12

Art. XII. Regulation of prosecutions; right of trial by jury in criminal cases

Currentness

Art. XII. No subject shall be held to answer for any crimes or offence, until the same is fully and plainly, substantially and formally, described to him; or be compelled to accuse, or furnish evidence against himself. And every subject shall have a right to produce all proofs, that may be favorable to him; to meet the witnesses against him face to face, and to be fully heard in his defence by himself, or his council, at his election. And no subject shall be arrested, imprisoned, despoiled, or deprived of his property, immunities, or privileges, put out of the protection of the law, exiled, or deprived of his life, liberty, or estate, but by the judgment of his peers, or the law of the land. And the legislature shall not make any law, that shall subject any person to a capital or infamous punishment, excepting for the government of the army and navy, without trial by jury.

Notes of Decisions (8183)

M.G.L.A. Const. Pt. 1, Art. 12, MA CONST Pt. 1, Art. 12
Current through amendments approved February 1, 2021

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KeyCite Yellow Flag - Negative Treatment
Proposed Legislation

Massachusetts General Laws Annotated
Part I. Administration of the Government (Ch. 1-182)
Title XVIII. Prisons, Imprisonment, Paroles and Pardons (Ch. 124-127)
Chapter 127. Officers and Inmates of Penal and Reformatory Institutions. Paroles and Pardons (Refs & Annos)

M.G.L.A. 127 § 130

§ 130. Granting of parole permits; record of decision; jurisdiction of parole board over parolee; terms and conditions including payment of child support due under support order; certificate of termination of sentence; alcohol and drug free housing requirement

Effective: January 13, 2019
Currentness

No prisoner shall be granted a parole permit merely as a reward for good conduct. Permits shall be granted only if the board is of the opinion, after consideration of a risk and needs assessment, that there is a reasonable probability that, if the prisoner is released with appropriate conditions and community supervision, the prisoner will live and remain at liberty without violating the law and that release is not incompatible with the welfare of society. In making this determination, the parole board shall consider whether, during the period of incarceration, the prisoner has participated in available work opportunities and education or treatment programs and demonstrated good behavior. The board shall also consider whether risk reduction programs, made available through collaboration with criminal justice agencies would minimize the probability of the prisoner re-offending once released. The record of the board's decision shall contain a summary statement of the case indicating the reasons for the decision, including written certification that each board member voting on the issue of granting a parole permit has reviewed the entire criminal record of the applicant, as well as the number of members voting in favor of granting a parole permit and the number of members voting against granting a parole permit. Said record of decision shall become a public record and shall be available to the public except for such portion thereof which contains information upon which said decision was made which said information the board determines is actually necessary to keep confidential to protect the security of a criminal or civil investigation, to protect anyone from physical harm or to protect the source of any information; provided, however, that it was obtained under a promise of confidentiality. All such confidential information shall be segregated from the record of decision and shall not be available to the public. Said confidential information may remain secret only as long as publication may defeat the lawful purposes of this section for confidentiality hereunder, but no longer. A prisoner to whom a parole permit is granted shall be allowed to go upon parole outside prison walls and inclosure upon such terms and conditions as the parole board shall prescribe, but shall remain, while thus on parole, subject to the jurisdiction of such board until the expiration of the term of imprisonment to which he has been sentenced or until the date which has been determined by deductions from the maximum term of his sentence or sentences for good conduct and any further deductions for compliance credits granted pursuant to section 130C, provided that such combined deductions shall not exceed 35 per cent of the term of imprisonment to which the prisoner has been sentenced, or until such earlier date as the board shall determine that it is in the public interest for such prisoner to be granted a certificate of termination of sentence. In every case, such terms and conditions shall include payment of any child support due under a support order, as defined in section 1A of chapter 119A, including payment toward any arrearage of support that accrues or has accrued or compliance with any payment plan between the prisoner and the IV-D agency as set forth in chapter 119A, provided, however, that the board shall not revise, alter, amend or revoke any term or condition related to payment of child support unless the parole permit itself is revoked. If the terms and conditions prescribed by the board include residence

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in alcohol and drug free housing, the board shall refer and require that the prisoner to whom the permit is granted reside in alcohol and drug free housing that is certified under section 18A of chapter 17 in order to satisfy those terms and conditions.

Credits

Added by St.1941, c. 690, § 2. Amended by St.1946, c. 543, § 2; St.1948, c. 450, § 2; St.1955, c. 770, § 67; St.1980, c. 155, § 2; St.1989, c. 268, § 2; St.1998, c. 64, § 180; St.2012, c. 192, § 36, eff. Aug. 2, 2012; St.2014, c. 165, § 157, eff. June 1, 2015; St.2018, c. 72, § 6, eff. Jan. 13, 2019.

Notes of Decisions (51)

M.G.L.A. 127 § 130, MA ST 127 § 130
Current through Chapter 26 of the 2021 1st Annual Session.

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Chapter 127. Officers and Inmates of Penal and Reformatory Institutions. Paroles and Pardons (Refs & Annos)

M.G.L.A. 127 § 133A

§ 133A. Eligibility for parole; notice and hearing; parole permits; revision of terms and conditions; revocation; arrest; right to counsel and funds for expert

Effective: April 13, 2018
Currentness

Every prisoner who is serving a sentence for life in a correctional institution of the commonwealth, except prisoners confined to the hospital at the Massachusetts Correctional Institution, Bridgewater, except prisoners serving a life sentence for murder in the first degree who had attained the age of 18 years at the time of the murder and except prisoners serving more than 1 life sentence arising out of separate and distinct incidents that occurred at different times, where the second offense occurred subsequent to the first conviction, shall be eligible for parole at the expiration of the minimum term fixed by the court under section 24 of chapter 279. The parole board shall, within 60 days before the expiration of such minimum term, conduct a public hearing before the full membership unless a member of the board is determined to be unavailable as provided in this section. Notwithstanding the previous sentence, the board may postpone a hearing until 30 days before the expiration of such minimum term, if the interests of justice so require and upon publishing written findings of the necessity for such postponement. For the purposes of this section, the term unavailable shall mean that a board member has a conflict of interest to the extent that he cannot render a fair and impartial decision or that the appearance of a board member would be unduly burdensome because of illness, incapacitation, or other circumstance. Whether a member is unavailable for the purposes of this section shall be determined by the chair. Board members shall appear unless said chair determines them to be unavailable. Under no circumstances shall a parole hearing proceed pursuant to this section unless a majority of the board is present at the public hearing. Unless a board member is unavailable due to a conflict of interest, any board member who was not present at the public hearing shall review the record of the public hearing and shall vote in the matter.

Said board shall at least thirty days before such hearing notify in writing the attorney general, the district attorney in whose district sentence was imposed, the chief of police or head of the organized police department of the municipality in which the crime was committed and the victims of the crime for which sentence was imposed, and said officials and victims may appear in person or be represented or make written recommendations to the board, but failure of any or all of said officials to appear or make recommendations shall not delay the paroling procedure; provided, however, that no hearing shall take place until the parole board has certified in writing that it has complied with the notification requirements of this paragraph, a copy of which shall be included in the record of such proceeding; and provided further, that this paragraph shall also apply to any parole hearing for an applicant who was convicted of a crime listed in clause (i) of subsection (b) of section 25 of chapter 279 and sentenced and committed to prison for 5 or more years for such crime and does not show that a pardon has been issued for the crime.

After such hearing the parole board may, by a vote of two-thirds of its members, grant to such prisoner a parole permit to be at liberty upon such terms and conditions as it may prescribe for the unexpired term of his sentence. If such permit is not granted, the parole board shall, at least once in each ensuing five year period, consider carefully and thoroughly the merits of

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each such case on the question of releasing such prisoner on parole, and may, by a vote of two-thirds of its members, grant such parole permit.

Such terms and conditions may be revised, altered and amended, and may be revoked, by the parole board at any time. The violation by the holder of such permit or any of its terms or conditions, or of any law of the commonwealth, may render such permit void, and thereupon, or if such permit has been revoked, the parole board may order his arrest and his return to prison, in accordance with the provisions of section one hundred and forty-nine.

If a prisoner is indigent and is serving a life sentence for an offense that was committed before the prisoner reached 18 years of age, the prisoner shall have the right to have appointed counsel at the parole hearing and shall have the right to funds for experts pursuant to chapter 261.

Credits

Added by St.1955, c. 770, § 70. Amended by St.1956, c. 731, § 9; St.1965, c. 766, § 1; St.1973, c. 278; St.1982, c. 108, § 2; St.1996, c. 43; St.1997, c. 217, § 1; St.2000, c. 159, § 230; St.2012, c. 192, §§ 37 to 39, eff. Aug. 2, 2012 St.2014, c. 189, § 3, eff. July 25, 2014; St.2018, c. 69, § 98, eff. April 13, 2018.

Notes of Decisions (26)

M.G.L.A. 127 § 133A, MA ST 127 § 133A
Current through Chapter 26 of the 2021 1st Annual Session.

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CERTIFICATE OF COMPLIANCE
Pursuant to Rule 16(k) of the
Massachusetts Rules of Appellate Procedure

I, Melissa Allen Celli, hereby certify that the foregoing brief complies with the rules of court that pertain to the filing of briefs, including, but not limited to:

Mass. R. A. P. 16 (a)(13) (addendum);
Mass. R. A. P. 16 (e) (references to the record);
Mass. R. A. P. 18 (appendix to the briefs);
Mass. R. A. P. 20 (form and length of briefs, appendices, and other documents); and
Mass. R. A. P. 21 (redaction).

I further certify that the foregoing brief complies with the applicable length limitation in Mass. R. A. P. 20 because it is produced in the proportional font Century Schoolbook at size 14 points and contains 7559 total non-excluded words, as determined by the Word Count feature of Microsoft Word.

/s/Melissa Allen Celli
Melissa Allen Celli

Certificate of Service

I, Melissa Allen Celli, hereby certify that I will cause the following pleadings to be served on the Defendant Massachusetts Parole Board by emailing PDF copies of each document to Shara Benedetti at shara.benedetti@state.ma.us and by serving via the eFiling system counsel of record, Todd Blume:

(1) Plaintiff's Brief and Record Appendix

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November 23, 2021