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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 OF THE MASSACHUSETTS PAROLE BOARD

MAURA HEALEY
Attorney General

Todd M. Blume, BBO # 674608
Assistant Attorney General
Criminal Bureau
One Ashburton Place
Boston, Massachusetts 02108
(617) 963-2503
email: todd.blume@mass.gov

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QUESTIONS PRESENTED[1]

I. Whether the Superior Court, in denying the Appellant's motion for judgment on the pleadings, correctly determined that the Parole Board's decision denying parole to the Appellant – a juvenile rape offender – was not arbitrary or capricious or an abuse of discretion, where the Board, in making its parole determination, expressly took into consideration the Appellant's youth-related attributes and age, and thus afforded the Appellant a meaningful opportunity to obtain parole release.

II. Whether the Board appropriately used the Level of Service/Case Management Inventory, or "LS/CMI," as a risk-and-needs-assessment tool in determining whether to grant parole to the Appellant, where the motion judge properly determined that the Appellant also committed adult sex offenses and the Appellant has not offered a persuasive basis to conclude that a properly normed assessment would treat this particular Appellant as a person who offended only while a juvenile.

[1] The Appellant raises two issues in his brief that were not presented in the application for direct appellate review. App. Br. 30-36, 43-46.

STATEMENT OF THE CASE

The Appellant, Jose Rodriguez ("Rodriguez"), was convicted of the rape and assault and battery with a dangerous weapon of D.W. in 1977, which stemmed from his jabbing a broken bottle into her neck, throwing her to the ground, putting his jacket over her face, and raping her in the backyard of a house in Brookline. *Commonwealth v. Rodriguez*, 50 Mass. App. Ct. 405, 406 (2000), *rev. denied*, 433 Mass. 1102 (2001); R.A. 21-22; Add. 54.[2] Here, Rodriguez appeals the Middlesex Superior Court's (Wilkins, J.) denial of his motion for judgment on the pleadings, filed in connection with his action in the nature of certiorari, which challenged the Massachusetts Parole Board's (the "Board's") March 26, 2019 hearing and subsequent decision denying Rodriguez's most recent request for parole. R.A. 10, 21, 24, 265, 358, 373.

STATEMENT OF THE FACTS

A. The Governing Juvenile Sex Offense

On September 27, 1976, Rodriguez raped and assaulted a twenty-one-year-old Boston University student, D.W., as she walked home from the Brookline Hills MBTA station. *See Rodriguez,* 50 Mass. App. Ct. at 406. Rodriguez, who was

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[2] Record references will be as follows: Appellant's brief (App. Br. __); Appellant's addendum (Add. __); Appellant's impounded record appendix (R.A. __).

sixteen years old at the time, jabbed a broken bottle into her neck, threw her to the ground, put his jacket over her face, and raped her in the backyard of a nearby house as she was coming home to Brookline from Boston. *Id.*; R.A. 22; Add. 54.[3]

On July 20, 1977, Rodriguez was convicted of rape and assault and battery by means of a dangerous weapon in Norfolk Superior Court. R.A. 21. The Massachusetts Appeals Court ("Appeals Court") reversed the convictions, citing prejudicial error in a portion of the judge's charge, and ordered that a new hearing be held on Rodriguez's motion to suppress items obtained during the search of his apartment by the police. *Commonwealth v. Rodriguez*, 6 Mass. App. Ct. 738 (1978). This Court granted further appellate review, and on June 21, 1979, the judgments were reversed, the verdicts set aside, and the case was remanded to the Superior Court for further proceedings in accordance with the opinion. *Commonwealth v. Rodriguez*, 378 Mass. 296 (1979). On June 29, 1979, Rodriguez was released on bail due to a new trial being ordered, but he did not appear on the date of his scheduled retrial. R.A. 21, 197, 199. Instead, he absconded to California where he remained a fugitive for seven years. R.A. 21; Add. 55.

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[3] An overview of these crimes and Rodriguez's lengthy juvenile criminal history may be found in Rodriguez's record appendix, and will not be repeated here in the interest of economy. R.A. 45-50, 197-200.

B. The Subsequent Adult Sex Offenses

Rodriguez used the alias "Jose Martinez" while in California. R.A. 22; Add. 55. In 1981, he was arraigned for two separate sexual offenses in California when he was 21 years old. R.A. 6, 34, 198; Add. 55. According to a statement from Rodriguez, he was dating the victim in the first offense for a couple of months and forced her to have sex with him. R.A. 198. Regarding the second sexual offense, Rodriguez stated that he followed a girl whom he did not know after he had been out drinking and grabbed her, pulled her into a driveway, and was going to rape her until someone saw him, at which point he ran away. R.A. 198. He pleaded nolo contendere to both charges, and received an eight-year and an eight-year concurrent California State Prison sentence in September of 1982 for Rape with Resistance and Assault with Intent to Rape, respectively. R.A. 107, 197-199. He was paroled from this sentence on November 18, 1985. R.A. 197-199.

Rodriguez never disclosed to his parole officer in California that he was on the run from a rape charge in Massachusetts. R.A. 22. Rather, his parole officer discovered the Massachusetts charges through his fingerprints. R.A. 22, 29. Rodriguez was apprehended on September 2, 1986 in Los Angeles, California, and was extradited back to Massachusetts. R.A. 21, 199. On December 23, 1987, after a retrial in Norfolk Superior Court, Rodriguez was again convicted of rape and

assault and battery with a dangerous weapon. R.A. 21. He was sentenced to life with the possibility of parole for the rape conviction, as well as a concurrent term of eight to ten years in prison for the conviction for assault and battery with a dangerous weapon.[4] R.A. 21.[5]

C. The Requests for Parole

Rodriguez was denied parole after his initial hearing in 2000, as well as after review hearings in 2006 and 2013. R.A. 22; Add. 55. Of relevance here, he had his

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[4] This latter sentence is now expired. R.A. 289.

[5] Following the second jury trial, Rodriguez filed a motion for new trial in 1990, which was denied. *See Commonwealth v. Rodriguez*, 92 Mass. App. Ct. 1115, 2017 WL 5489947 (2017) (former Rule 1:28). The Appeals Court affirmed on direct appeal his convictions and the denial of his motion for a new trial. *Id.*; *see also Rodriguez*, 50 Mass. App. Ct. at 405; R.A. 21-22. Following this affirmance, Rodriguez filed a motion seeking to revise and revoke his prison sentence, arguing that the trial judge improperly considered his California convictions to which he had pleaded nolo contendere. *Rodriguez*, 92 Mass. App. Ct. at 1115. A different Superior Court judge denied the motion but Rodriguez did not appeal. *Id.* Rodriguez then filed a petition for G. L. c. 211, § 3 relief in this Court, which was denied. *Id.* He was also denied federal habeas corpus relief. *Rodriguez v. Spencer*, 412 F.3d 29 (1st Cir. 2005), *cert. denied*, 546 U.S. 1142 (2006); R.A. 22. Rodriguez filed another motion for new trial in November, 2014, which was denied in 2016. *Rodriguez*, 92 Mass. App. Ct. at 1115. Rodriguez appealed, and the Appeals Court affirmed the order denying the motion for new trial on November 16, 2017. *Id.* Further appellate review was denied in February of 2018. *See Commonwealth v. Rodriguez*, 478 Mass. 1109 (2018). In October of 2018, the Supreme Court of the United States denied Rodriguez's petition for writ of certiorari to the Appeals Court. *See Rodriguez v. Massachusetts*, 139 S. Ct. 180 (2018).

fourth parole hearing before the Board on March 26, 2019, when he was 59 years old, after having served 33 years of his sentence. R.A. 22, 24.

At the review hearing, Rodriguez was represented by Attorney Brian Murphy. R.A. 22, 26. Rodriguez began the hearing by apologizing to the victim for her “loss and trauma,” and stating that, “[a]s a juvenile, [he] often would live [his] life with little regard to the consequences of [his] actions.” R.A. 22, 32. He further stated that he began using drugs and alcohol in 1972 “to escape [his] problems, although at that time [he] didn’t see it that way.” R.A. 22, 33.

Board member Tina Hurley began by asking Rodriguez to walk the Board members through what happened on the day of the incident involving D.W.. R.A. 45. Rodriguez stated that he was drinking, broke one of the bottles, and “sought to offend.” R.A. 48. He further stated that he was on an MBTA trolley and as soon as he exited, he saw D.W., who also had been on the trolley, and followed her. R.A. 48-49. He called out to her and threatened her, placed the broken bottle under her neck, and forced her into a backyard, where he raped her. R.A. 48. Rodriguez also admitted to smoking a cigarette after he raped her and taking her pants, the purpose of which was “buying time.” R.A. 48-49. He also acknowledged that D.W. was cut from the bottle used during the attack. R.A. 49. Board member Hurley emphasized that Rodriguez was involved in three sexual assaults over the course of six months

in 1976, and five different violent assaults against women over the course of four to five years, including the governing offense and the California offenses. R.A. 50-53. Rodriguez admitted to never self-disclosing that he was on the run from a rape charge in Massachusetts. R.A. 54.

Board member Hurley then reviewed the course of Rodriguez's sex offender treatment, and asked Rodriguez to verify that he was terminated from the treatment center in December of 2008 for attempting to manipulate group members. R.A. 60-61. When asked whether alcohol and drugs influenced his behavior in all of the sexual assaults, Rodriguez stated that he "didn't offend every time that [he] drank alcohol and did drugs, but every time that [he] offended [he] was on some type of alcohol or drugs." R.A. 62. He further stated that he was "basically addicted to a high[,]" but denied being cited for either drugs or alcohol during his incarceration. R.A. 62-63.

Board member Dr. Charlene Bonner stated that the Board had the benefit of the reports from the treatment panel, and had Rodriguez verify that his expert, Dr. Plaud, would be testifying. R.A. 69. Board member Sheila Dupre focused on the fact that Rodriguez completed an intensive Sex Offender Treatment Program, but struggled to recall his victims. R.A. 69-70. Board member Colette Santa wanted to know when Rodriguez started reconnecting with his mother, and specifically how

their relationship was going to be, as he was planning to live with her if he was paroled. R.A. 70-72.

Attorney Murphy then introduced as witnesses Felix Rodriguez, Rodriguez's brother, and Carol Rodriguez, his sister-in-law. R.A. 73-76. Following their testimony, Board member Paul Treseler stated that the Board had Dr. Joseph Plaud's full report, and that both he and Dr. Bonner had read it. R.A. 76. The Board then considered testimony and a psychosexual risk evaluation on Rodriguez from Dr. Plaud. R.A. 77. Dr. Plaud's risk analysis was that, at that time moving forward, Rodriguez was "at a low risk to reoffend in a sexual manner if not further confined to a secure facility[,]" based on his "ongoing sobriety, ongoing behavioral control, treatment participation," and his being "on the cusp of being in the lowest age cohorts with the lowest rates of sexual recidivism." R.A. 77-81. The Board also reviewed an opposition from the Norfolk District Attorney's Office. R.A. 82-84.

After the hearing, the Board members unanimously denied parole, with a review hearing scheduled five years from the date of the hearing. R.A. 21, 22. Consistent with G.L. c. 127, § 130, the Board considered the circumstances of the underlying crime, Rodriguez's juvenile status, the institutional programming Rodriguez had completed (albeit only after several failures over the decades), and

his other convictions for sexual offenses in California. R.A. 22-23. It considered testimony and an evaluation from Dr. Joseph Plaud, and also considered oral testimony both in support of and in opposition to parole. R.A. 22-23. The Board also considered a risk and needs assessment, and whether risk reduction programs could effectively minimize Rodriguez's risk of recidivism. R.A. 23. The Board's Record of Decision stated, in pertinent part, that "[a]fter 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…, we conclude [] that the inmate is not a suitable candidate for parole." R.A. 21. The Board's decision was published on January 29, 2020. R.A. 21. On February 12, 2020, Rodriguez appealed the Board's decision internally, which was denied on March 13, 2020, due to his committing two other sex offenses as an adult in California and his failure to fully disclose the extent of his offending in California while attending the Sex Offender Treatment Program. R.A. 15, 16.

D. The Complaint

On May 6, 2020, Rodriguez filed a Complaint in the Nature of Certiorari pursuant to G.L. c. 249, § 4 in the Middlesex Superior Court, in which he alleged that the Board's January 29, 2020 decision was arbitrary and capricious and

violated his rights under Articles 1, 10, 12, and 26 of the Massachusetts Declaration of Rights, as well as the Eighth and Fourteenth Amendments to the United States Constitution. R.A. 4, 10-20. The Board responded by submitting the Administrative Record pursuant to Superior Court Standing Order 1-96. Add. 54; *Doucette v. Parole Bd.*, 86 Mass. App. Ct. 531, 541 n.10 (2014). Rodriguez then filed a Motion for Judgment on the Pleadings and for Summary Judgment, and the Board filed its own Cross Motion for Judgment on the Pleadings and Opposition to Plaintiff's Motion for Judgment on the Pleadings. R.A. 5, 265-308. Following a hearing on the motions for judgment on the pleadings, Justice Wilkins ("the motion judge") denied Rodriguez's motion and entered final judgment affirming the Board's decision on April 5, 2021. R.A. 6, 314-368; Add. 54-63. As discussed in more detail below, the motion judge determined that the Board's decision denying Rodriguez parole was neither arbitrary and capricious nor an abuse of discretion. Add. 54-63. Rodriguez then filed a motion for reconsideration, which was denied on April 26, 2021. R.A. 6, 369-372.

Rodriguez filed a Notice of Appeal of the Court's denial of his motion for judgment on the pleadings the same day. R.A. 6, 373. His appeal was entered in the Appeals Court on June 10, 2021. R.A. 7. This Court allowed direct appellate review on October 20, 2021.

SUMMARY OF THE ARGUMENT

I. For each applicant that comes before it, the Board is entrusted with the discretion to make a predictive judgment about that applicant's rehabilitation and risk of recidivism. (pp. 22-24). At least when the applicant is a juvenile homicide offender, Article 26 requires that the Board focus on whether that particular juvenile has "demonstrated maturity and rehabilitation," with appropriate attention given to the fact that juvenile offenders are, as a group, generally capable of outgrowing the transient attributes of youth that may have contributed to criminal behavior (the factors laid out in *Miller v. Alabama*, 567 U.S. 460 (2012)).[6] (pp. 24-27). Ultimately, though, the Board is required to deny parole to *any* offender who has not met the statutory standard for release—"that the prisoner will live and remain at liberty without violating the law and that release is not incompatible with the welfare of society." G.L. c. 127, § 130. There is no basis to second-guess the Board's judgment that, despite some progress in his rehabilitation

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[6] The "*Miller* factors" include: "children'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." *Diatchenko v. Dist. Att'y for the Suffolk Dist.*, 471 Mass. 12, 30 (2015) (*Diatchenko II*), quoting *Diatchenko v. Dist. Att'y for the Suffolk Dist.*, 466 Mass. 655, 675 (2013) (*Diatchenko I*) (Lenk, J., concurring) (brackets, quotation marks, and ellipses omitted).

(through completion of the Sex Offender Treatment Program, employment, and religious activities), Rodriguez had not yet achieved that goal, and was thus not yet ready to rejoin society. (pp. 27-31). There is no merit to Rodriguez's argument that the Board failed to consider his present age, and concomitantly, his allegedly lower risk of recidivism because of his advanced age. To the contrary, an examination of the Board's decision shows that it *did* consider his present age and risk of recidivism. (pp. 31-35). The Board's decision denying Rodriguez's parole application was not an abuse of discretion, where the Board based its decision on the statutory standard of rehabilitation and compatibility with the welfare of society, and its consideration of the distinctive attributes of youth was not merely cursory. (pp. 35-42).

II. This Court has not addressed whether the LS/CMI is a valid instrument to use for assessing those who, like Rodriguez, committed crimes as juveniles. (pp. 42-46). It should not do so now, where the motion judge properly determined that it is not clear that a properly normed assessment would treat Rodriguez, with his unique circumstances, as a person who offended only while a juvenile. (pp. 46-47). Should this Court choose to reach the issue, even if the LS/CMI is not designed just for juvenile sex offenders, Rodriguez was charged with other offenses as an adult, and those adult offenses make the instrument more

appropriate when used with him. (pp. 47-49). Rodriguez's remaining challenge to the Board's use of heavily redacted summaries in the LS/CMI fails to state a due process violation. (pp. 49-51). Finally, any argument concerning undue delay in the Board's issuance of his parole decision is waived and, in any event, lacks merit where Rodriguez's allegations cannot maintain a claim for a violation of due process. (pp. 51-53).

ARGUMENT

The Superior Court properly denied Rodriguez's motion for judgment on the pleadings, where Rodriguez failed to demonstrate that the Board's decision denying him parole was arbitrary and capricious. The Board's decision in this case, as written and supported by the record, was within its considerable discretion. Its conclusion that Rodriguez was "not yet rehabilitated" was appropriately informed by due consideration of the transient attributes of juvenile behavior and other pertinent factors, and thus the Superior Court's decision should be affirmed.

I. Standard of Review

Rule 12(c) of the Massachusetts Rules of Civil Procedure provides that, "[a]fter the pleadings are closed but within such time as not to delay the trial, any party may move for judgment on the pleadings." *See Crowell v. Parole Bd.*, 477 Mass. 106, 109 (2017) (explaining that "the only appropriate way for the court to

evaluate [a plaintiff's] claim is through a review of the administrative record upon a motion for judgment on the pleadings").

This Court reviews the Superior Court judge's ruling *de novo*. *See Deal v. Massachusetts Parole Bd.*, 484 Mass. 457, 462 n.4 (2020), citing *Champa v. Weston Pub. Sch.*, 473 Mass. 86, 90 (2015). A motion under Rule 12(c) is "akin" to a motion under Mass. R. Civ. P. 12(b)(6). *Jarosz v. Palmer*, 436 Mass. 526, 530 (2002). "In deciding a rule 12(c) motion, all facts pleaded by the nonmoving party must be accepted as true." *Jarosz*, 436 Mass. at 529-530 (citation omitted).

II. The Superior Court Properly Denied the Motion for Judgment on the Pleadings After Review of the Administrative Record.

In every parole decision, the Board must ultimately determine whether "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." G.L. c. 127, § 130. As the motion judge appropriately recognized, this 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. Add. 58. It 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. *See Deal*, 484 Mass. at 460-461 (2020), citing *Diatchenko I*, 466 Mass. at 669-671;

Add 59. This Court went on to hold that juvenile offenders sentenced to a mandatory term of life in prison are entitled to a "meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation." *Deal*, 484 Mass. at 461, citing *Diatchenko I*, 466 Mass. at 674. *See also Commonwealth v. Okoro*, 471 Mass. 51, 57-58 (2015), quoting *Diatchenko I*, 466 Mass. at 674 ("[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'").

One of the factors the Board considers in making that determination is "the age of the offender at the time of the crime." *Diatchenko I*, 466 Mass. at 674. This requires the Board to give appropriate attention to the fact that juvenile offenders have greater potential to outgrow the "distinctive attributes of youth" as they age. *Diatchenko II*, 471 Mass. at 31, quoting *Miller*, 567 U.S. at 472. In such cases, the Board places diminished reliance on the traditional "penological justifications for imposing life in prison without the possibility of parole—incapacitation, retribution, and deterrence." *Diatchenko I*, 466 Mass. at 670-671, citing *Graham v. Florida*, 560 U.S. 48, 71 (2010) and *Miller*, 567 U.S. at 470-475. By this process, the Board provides each juvenile-offender applicant with the "meaningful

opportunity to obtain release" that Article 26 guarantees. The Board did just that in Rodriguez's case as a juvenile rape offender, and its decision should not be disturbed.

A. This Court's Review is Highly Deferential to the Board's Decision.

At least as to juvenile homicide offenders, the Board provides the constitutionally guaranteed "meaningful opportunity to obtain release" as long as the Board has given the offender a chance to "demonstrate[] maturity and rehabilitation," and, in reaching a decision, has duly considered the *Miller* factors. *Diatchenko II*, 471 Mass. at 20, n. 15, quoting *Diatchenko I* and *Miller*. *See Montgomery v. Louisiana*, 577 U.S. 190, 212 (2016) ("Those prisoners who have shown an inability to reform will continue to serve life sentences. The opportunity for release will be afforded to those who demonstrate the truth of *Miller's* central intuition—that children who commit even heinous crimes are capable of change."). *Diatchenko II* established that the existing understanding of the abuse of discretion standard should be used in the context of reviewing juvenile-life-sentence parole decisions.[7] As *Diatchenko II* held, "[b]ecause the decision whether to grant parole to a particular juvenile homicide offender is a discretionary determination by the

[7] Even as the *Diatchenko II* Court held that the parole process takes on a "constitutional dimension" for juvenile homicide offenders, 471 Mass. at 19, it did not conclude that any higher standard of review was appropriate or necessary.

board, an abuse of discretion standard is appropriate." 471 Mass. at 31 (internal citations and quotations omitted). Also in *Diatchenko II*, this Court chose to require judicial review by a petition for relief in the nature of certiorari, which is a "limited procedure reserved for correction of substantial errors of law apparent on the record created before a judicial or quasi judicial tribunal." *School Comm. of Hudson v. Board of Educ.*, 448 Mass. 565, 575-576 (2007). To obtain relief, a petitioner must demonstrate "a substantial injury or injustice arising from the proceeding under review." *Id. See* G.L. c. 249, § 4.

The Board's decisions in this context are reviewed deferentially:

> The question for the reviewing judge will be 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 offender," as they relate to the particular circumstances of the juvenile homicide offender seeking parole.

Diatchenko II, 471 Mass. at 31, quoting *Miller*, 567 U.S. at 472-473. "[A] denial of a parole application by the board will constitute an abuse of discretion only if the board essentially failed to take these factors into account, or did so in a cursory way." *Id.*

In this context, the abuse of discretion standard measures whether the Board's decision was "arbitrary and capricious." *Id.* ""A decision is not arbitrary and capricious unless there is no ground which 'reasonable [persons] might deem

proper' to support it.''" *Garrity v. Conservation Comm'n of Hingham*, 462 Mass. 779, 792 (2012), quoting, with alteration, *T.D.J. Dev. Corp. v. Conservation Comm'n*, 36 Mass. App. Ct. 124, 129 (1994), quoting from *Cotter v. Chelsea*, 329 Mass. 314, 318 (1952). The party challenging the agency's decision "bears the burden of establishing that the [agency] acted arbitrarily and capriciously." *Id.* In reviewing an agency's decision, the court must "give great deference to the [agency's] expertise and experience in areas where the Legislature has delegated to it decision-making authority." *Teamsters Joint Council No. 10 v. Director of Dep't of Labor & Workforce Dev.*, 447 Mass. 100, 106 (2006).

Diatchenko II took pains to emphasize how limited judicial review of Board decisions would be under this deferential standard. "Nothing in [that] opinion [was] intended to suggest that a judge or a court has the authority to decide whether a particular juvenile homicide offender is entitled to release on parole; judicial review is limited to the question whether the board has 'constitutionally exercised' its discretion." 471 Mass. at 21 n.16. Moreover, the Court said that the judiciary must not attempt to "substitute a judge's or an appellate court's opinion for the board's judgment on whether a particular juvenile homicide offender merits parole, because this would usurp impermissibly the role of the board." *Id.* at 33. Such tightly circumscribed review is in accord with a long line of cases which

recognize the Board's unique expertise in making fact-intensive, predictive judgments about each prisoner's state of rehabilitation in prison and risk of recidivism if released. *See*, *e.g.*, *Commonwealth v. Amirault*, 415 Mass. 112, 117 (1993) ("The judiciary may not act as a super-parole board."); *Crowell*, 477 Mass. at 112 ("No prisoner is entitled to parole, and we give the board's determination considerable deference[,]" citing, inter alia, *Deal*, 475 Mass. at 322 (internal quotation marks omitted)). *See also Forsyth Sch. for Dental Hygienists v. Bd. of Registration in Dentistry*, 404 Mass. 211, 218 (1989) (explaining that, "the [relevant] test is not whether we would reach the same result as the board[; r]ather, the decision of the board can be disturbed only if it is based on a legally untenable ground or is unreasonable, whimsical, capricious, or arbitrary"); *Doucette*, 86 Mass. App. Ct. at 541 n.9 (parole decisions must be reviewed with "considerable deference" pursuant to the arbitrary and capricious standard).

Here, for the reasons explained below, this Court should conclude that the motion judge applied the appropriate standards, and correctly determined that the Board's decision was not arbitrary and capricious or an abuse of discretion.

B. Case Law, Statutes, and Regulations Guide the Board in Deciding Whether to Grant Parole.

Rodriguez first contends that the Board failed to consider what he identifies as the single most important factor impacting his likelihood of recidivism, namely

his advanced age, and failed to fully detail its reasons for denying parole in its Record of Decision. App. Br. 22. Though Rodriguez suggests that the *Miller* factors are merely sentencing factors that permit the Board's inquiry to remain "rooted in the past," App. Br. 23-24, he fails to explain why that is so, and no such reason is apparent to the Board. Indeed, assessing whether a would-be parolee has *demonstrated* maturity and rehabilitation necessarily involves an inquiry over time and into the individual's present circumstances. As discussed below, the Board has broad discretionary authority in the factors in can consider when making this determination.

The Board's discretionary authority in parole determinations is in part contingent on the consideration of specific factors deemed relevant by the legislature. *See* G.L. c. 127, § 30 ("In making this [parole determination], the [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 . . . [and] . . . whether risk reduction programs . . . would minimize the probability of the prisoner re-offending once released.").

The legislature also requires that certain information from court, probation, and correction officials be made available to the Board. G.L. c. 127, § 135 provides, in relevant part, as follows:

> Such information shall include a complete statement of the crime for which [the prisoner] is then sentenced, the circumstances of such crime, the nature of his sentence, the court in which he was sentenced, the name of the judge and district attorney, and copies of such probation reports as may have been made, as well as reports as to the prisoner's social, physical, mental and psychiatric condition and history.

In certain circumstances, the victims, witnesses, and law enforcement officials involved in the prisoner's underlying prosecution are afforded the right to appear before the Board and give testimony and/or make written recommendations. G.L. c. 127, §§ 133A, 133C, 133E. Also, pursuant to 120 CMR 300.05, "if available and relevant," the Board may consider:

> (a) reports and recommendations from parole staff;
> (b) official reports of the inmate's prior criminal record, including a report or record of earlier probation and parole experiences;
> (c) any pending cases;
> (d) presentence investigation reports;
> (e) official reports of the nature and circumstances of the offense including, but not limited to, police reports, grand jury minutes, decisions of the Massachusetts Appeals Court or the Supreme Judicial Court, and transcripts of the trial or of the sentencing hearing;
> (f) statements by any victim of the offense for which the offender is imprisoned about the financial, social, psychological, and emotional harm done to or loss suffered by such victim;
> (g) reports of physical, medical, mental, or psychiatric examination of the inmate;
> (h) any information that the inmate may wish to provide the parole hearing panel including letters of support from family, friends, community leaders, and parole release plans; and
> (i) information provided by the custodial authority, including, but not limited to, disciplinary reports, classification reports, work evaluations, and educational and rehabilitation program achievements.

The legislature has also been careful not to place limitations on the availability of information to Board members. *See* G.L. c. 127, § 30 (authorizing Board members to consider confidential information from open criminal and civil investigations).

In cases such as this one, where the offender was a juvenile at the time of the crime, the Board must also, as mentioned above, take into consideration "distinctive characteristics of youth," such as their "lack of maturity and . . . underdeveloped sense of responsibility leading to recklessness, impulsivity, and heedless risk-taking"; "[their] vulnerab[ility] . . . to negative influences and outside pressures, including from their family and peers"; "[their] limited control over their own environment"; "[their] lack [of] ability to extricate themselves from horrific, crime producing settings"; and, finally, *their capacity to change as they get older*. *Diatchenko I*, 466 Mass. at 660, quoting *Miller*, 567 U.S. at 477 (internal quotations and citations omitted); *see also Diatchenko II*, 471 Mass. at 30. This Court has extended these same procedural protections to juveniles convicted of second-degree murder. *See Okoro*, 471 Mass. at 62-63. However, it has also made clear that its requiring the consideration of such factors, as they relate to individuals who committed murders when they were juveniles, should not be construed to mean that such offenders should necessarily be paroled. *Diatchenko I*, 466 Mass. at 674. "The severity of [the] crime cannot be minimized even if

committed by a juvenile offender." *Id.* Again, such offenders are merely entitled to a "meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation." *Id.*

C. The Record Demonstrates that the Board Did Consider Rodriguez's Age and Risk of Recidivism.

Contrary to Rodriguez's assertions, the record here demonstrates that the Board considered his present age and risk of recidivism. As discussed, in this case one of the items before the Board was Dr. Plaud's psychosexual evaluation report, which he completed when Rodriguez was 59. R.A. 191-206. Rodriguez was referred to Dr. Plaud for an appraisal of his current sexual offense/recidivism risk. R.A. 191. Dr. Plaud found that Rodriguez's current age was a very significant factor moving forward in time. R.A. 193. He concluded that Rodriguez was not a significant risk to public safety regarding his sexual recidivism at that time. R.A. 194.[8] The Board's Record of Decision explicitly states that "[t]he Board also considered testimony and an evaluation from Dr. Joseph Plaud." R.A. 22, 23.[9] As such, the Board's decision shows that it *did* consider his present age and risk of

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[8] Dr. Plaud's conclusion coincides with the general conclusion that risk of sexual recidivism diminishes as a function of increasing age at time of release for rapists. R.A. 224-239, 242-253.

[9] As a result, any claim that the Board did not "consider the scientific evidence that Dr. Plaud brought to bear" must fail. App. Br. 28.

recidivism; it simply did not find that evidence persuasive enough to overcome its other stated concerns that led it to deny parole. The Board was not required to accept Dr. Plaud's opinion. *Deal*, 484 Mass. at 464.

Rodriguez claims that the Board failed to mention the impact that his most important dynamic risk factor, his advanced age, had on his recidivism. App. Br at 26-27. He further alleges that the Record of Decision was arbitrary and capricious insofar as it did not mention the completion of several programs and it minimized his participation in the programs that it did mention, specifically his completion of the Sex Offender Treatment Program. App. Br. 29-30. But the Board's enabling statute and its regulations require no specific level of detail in its written decisions. Instead, the statute requires only a "summary statement" of reasons for the Board's decision. G.L. c. 127, § 130 ("The record of the board's decision shall contain a summary statement of the case indicating the reasons for [its] 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."); 120 CMR 301.08 ("When release on parole is denied, Parole Board members shall provide the inmate with a written summary of the reasons supporting the decision of the full Parole Board . . .

within 21 calendar days after a decision has been rendered.”). Here, Rodriguez received the requisite summary and notice. R.A. 21-23, 302; *Deal*, 484 Mass. at 462-464 (2020) (finding no merit to claim that the Board did not consider *Miller/Diatchenko* factors in parole determination because of single mention in decision, where Board referenced facts related to factors elsewhere in decision). He has offered no persuasive reason for this Court to turn its back on the standard set forth in *Diatchenko II* and *Deal*.[10]

Contrary to the above authority, Rodriguez next takes issue with the Board’s characterization of its Record of Decision as a “summary,” and claims that the Board must fully and comprehensively memorialize its reasons for denying parole in its written Record of Decision. R.A. 331; App. Br. 30-36.[11] Specifically, he

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[10] Rodriguez further claims that when the Board ignores dynamic risk factors, it effectively condemns the juvenile to a life behind bars based on factors present at the time of sentencing. App. Br. 25, 26. But, as the motion judge found, the Board did no such thing. Add. 63.

[11] Rodriguez further argues that Rule 30A requires comprehensive explanations from other agencies, specifically a written decision accompanied by a statement of reasons for the decision, including a determination of each issue of fact or law necessary to the decision. App. Br. 33. However, the Legislature has specifically exempted the Parole Board from chapter 30A review. G.L. c. 30A, § 1 (definition of “Agency” includes “any department, board, commission, division or authority of the state government or subdivision of any of the foregoing . . . but does not include . . . the parole board”). And, in any event, this Court has deferred to an agency’s judgment where its statement of reasons contained enough detail to

(footnote continued)

suggests that the Board took the position that it could "hid[e] behind an unreviewable file," not provide reasons in its Records of Decision, seek to "indiscriminately bolster its Record of Decision with information in its file," and "effectively shield[] itself from judicial review." App. Br. 30, 32-34, 36. This is a misrepresentation of what the Board argued below. R.A. 289 (noting what the Administrative Record in this matter consists of), 301. With the exception of the DVD-R recording of the March 2019 parole review hearing, all of the items listed as being included in the Administrative Record are included in Rodriguez's impounded record appendix. *See* R.A.

In the deferential mode of judicial review applicable to parole decisions, a court should not overturn the Board's discretionary decision if the administrative record contains grounds for concluding that the Board considered the correct factors in reaching its decision. *Cf. Attorney Gen. v. Comm'r of Ins.*, 450 Mass. 311, 323 (2008) (party failed to show that substantial rights were prejudiced where "important" factor was not discussed in agency decision, but "[t]he record reflects

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confirm that it considered the right factors—even if the agency did not discuss those factors with specificity. *Cf.*, *e.g.*, *Massachusetts Elec. Co. v. Dep't of Pub. Utils.*, 469 Mass. 553, 576 (2014) (under chapter 30A standard, "although [agency's] orders must be detailed enough to permit meaningful judicial review, [agency] is not required specifically to discuss the [relevant] factors in its order so long as the order demonstrates that [it] has duly considered them").

that the commissioner considered the statutory requirements"); *Catlin v. Bd. of Registration of Architects*, 414 Mass. 1, 6 (1992) ("[T]he choice by the board or, indeed, by a court not to refer in a decision to a particular piece of evidence does not imply the failure to consider that evidence when ruling on the issue."). Here, in the context of parole decisions involving juvenile rape offenders, the record can provide context to support the Board's summary statement of reasons for denying parole. As shown below, it does so in this very case.

In light of the above, Rodriguez's approach to judicial review of Parole Board decisions is at odds with a practical implementation of the abuse-of-discretion standard described in *Diatchenko II*, and affirmed by this Court in *Deal*. It must therefore be rejected.

D. The Board's Decision and the Administrative Record Confirm that the Board Properly Considered the *Miller* Factors, Including Rodriguez's Youthful Status at the Time of the Crime, When Evaluating Rodriguez's Request for Parole.

In this case, the Board's decision states (and the record supports) that it denied parole because Rodriguez was "not yet rehabilitated" and his release was not compatible with the welfare of society, and it considered the *Miller* factors. Add. 58-60. In reaching its decision, the Board fully "considered and dealt with" the "distinctive attributes of youth" and dynamic risk factors in reaching its judgment that Rodriguez did not merit release on parole.

The Board heard evidence both in support of and in opposition to Rodriguez's request for parole. While "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," *Deal*, 484 Mass. at 462, citing *Diatchenko II*, 471 Mass. at 31; Add 59, that is not what happened here. As the motion judge properly determined, "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." Add. 60. *See Deal*, 484 Mass. at 462. Indeed, as discussed below, the Administrative Record demonstrates that the Board properly took into account Rodriguez's status as a juvenile when the crime was committed and engaged in the type of consideration and analysis discussed in *Diatchenko I*, 466 Mass. at 660, and *Diatchenko II*, 471 Mass. at 33.

First, the decision expressly states that age-related considerations were taken seriously. R.A. 21 ("After careful consideration of all relevant facts, including . . . the age of the inmate at the time of offense…"); R.A. 23 ("After applying this standard to the circumstances of Mr. Rodriguez's case,…"); Add. 56 (Board "takes into consideration the attributes of youth that distinguish juvenile homicide offenders from similarly situated adult offenders[,]" citing *Diatchenko II*, 471 Mass. at 30, and *Okoro*, 471 Mass. at 51). The Board paid close attention to age-

related factors throughout the parole process. The Board explicitly discussed key facts of the petitioner's upbringing in its decision, as follows:

> [Rodriguez] added that, as a juvenile, he lived his life with little regard for the consequences of his actions. 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.

R.A. 22; Add. 60. As the Board argued before the motion judge, this discussion of his juvenile status at the time of the offense includes the manner in which he was living his life; his substance abuse when he was trying to escape his problems; the emotional and mental health struggles he faced as a child; and the victimization and bullying he experienced. R.A. 331. This was followed by the Board's stating that it "considered testimony and an evaluation from Dr. Joseph Plaud," whose expert analysis took account of all factors bearing upon Rodriguez's degree of sexual dangerousness, including his personal history of childhood trauma, juvenile decision-making, and Rodriguez's age at the time of the offense and at the hearing. R.A. 22-23; Add. 60.

In the Record of Decision at issue in *Deal*, the Board noted that it "considered testimony" from a forensic psychologist and that it "considered a risk and needs assessment," without discussing what the expert and risk assessment found or explaining why those findings were not enough to warrant parole. *Deal*,

484 Mass. at 464; Add. 51. This Court found that, "[b]y denying parole on the grounds that Deal '[had] not demonstrated a level of rehabilitative progress that would make his release compatible with the welfare of society,' the necessary implication is that, in the board's view, Deal's incomplete rehabilitation contradicted the risk assessment and the forensic psychologist's conclusion that Deal would be a low risk to recidivate." *Id.* at 464.

So too here. Along with the facts and circumstances just described, the Board "considered a risk and needs assessment, and whether risk reduction programs could effectively minimize Mr. Rodriguez's risk of recidivism." R.A. 23. "Although the board did not explicitly state the connection, these facts clearly relate to [Rodriguez's] 'vulnerability to negative influences and outside pressures, including from [his] family and peers' and his 'limited control over [his] own environment.'" *Deal*, 484 Mass. at 462, quoting *Diatchenko II*, 472 Mass. at 30, citing *Miller*, 567 U.S. at 471 (alteration and quotation omitted); Add. 60. They also relate to his "lack of maturity…leading to recklessness, impulsivity, and heedless risk-taking." *Id.* Further, the Board's decision noted its consideration of Rodriguez's "institutional record," which included his completion of the Sex Offender Treatment Program "only after several failures over the decades[,]" as well as Rodriguez's participation in employment and religious activities while

incarcerated, each of which pertains to Rodriguez's "unique capacity to change as [he] grow[s] older." R.A. 23; *Deal*, 484 Mass. at 462. "Although the board's decision did not designate each fact to a particular attribute of youth, the decision's inclusion of these facts supports the board's certification that it did consider the *Miller* factors in a noncursory way." *Id.* at 462-463.

In addition to the above, Rodriguez admitted at the review hearing that while he was on parole in California, he used a different name and never disclosed that he was on the run for a rape charge in Massachusetts. R.A. 22. The Board also considered, and informed Rodriguez at the review hearing that it was troubled by the fact that he could not remember the names of some of his victims, could not recall details of some of his offenses, and could not provide a clear explanation around what motivated certain behaviors at the time of his crimes. R.A. 49-70; 305. The Board was also concerned about the stability of his potential home environment. R.A. 71.

Rodriguez may counter that there is nothing more he can do to obtain parole, as he has made marked improvement but has still received the maximum setback period of five years after every hearing. App. Br. 26. However, *Deal* reiterated that the standard the Board is to apply when making parole decisions is whether the Board is of the opinion 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.'" *Id.* at 459, citing G.L. c. 127, § 130. A prisoner may not be granted parole simply because he has exhibited good conduct. G. L. c. 127, § 130; R.A. 62. It is also not mandated to grant Rodriguez parole simply because he has completed the Sex Offender Treatment Program. Rather, the Board must consider *all* of the relevant factors after a review of Rodriguez's record. R.A. 306.

As discussed, it is evident from the record that the Board properly considered the *Miller* factors, including Rodriguez's status as a juvenile at the time of the offense. However, the Board also found it notable that Rodriguez continued to sexually offend as an adult. R.A. 23. This was entirely permissible. Importantly, the fact that the Board must consider the "distinctive attributes of youth" when deciding whether to parole a juvenile homicide offender does not mean "that the board's decision [must] rise or fall on those factors." *Deal*, 484 Mass. at 463. For example, *Deal* made clear the fact that a prisoner has finally taken responsibility for the crime he committed does not mean that the Board, in making a parole determination, cannot continue to take into consideration a prisoner's years of denial about his guilt. *Id.* "The *Miller* factors, although an important consideration,

may or may not play a determinative role in the board's decision depending on the circumstances of a particular applicant." *Id.* at 464. In denying Rodriguez's parole application, the Board determined that his incomplete rehabilitation, as evidenced in part by his history of sexual assault cases, outweighed any favorable *Miller* or age-related evidence. *Id.*

In short, it is evident from the record of the proceeding and the Board's decision that, in making its determination as to whether Rodriguez should be granted parole, the Board properly considered his status as a juvenile at the time he committed the rape and the *Miller/Diatchenko* factors. The Board did what the *Diatchenko II* Court said it must do—it afforded Rodriguez a "meaningful opportunity to obtain release based on *demonstrated maturity and rehabilitation*," 471 Mass. at 33 (emphasis added). The decision should therefore be upheld.

If this Court disagrees, the only appropriate remedy would be a remand to the Board so that it may issue a revised decision that more directly reflects the serious, careful consideration it did give to the juvenile-related evidence in this case. Although the *Diatchenko II* Court provided that a "a remand to the board for rehearing would be appropriate" if a decision violated the abuse of discretion standard, 471 Mass. at 31, this Court clearly may, and should if necessary, order a remedy tailored to the scope of the requested relief. *See Costello v. Department of*

Public Utilities, 391 Mass. 527, 533-535 (1984) (court found that agency's statement of its reasons for decision was inadequate to enable appellate review, prompting it to remand case to agency for additional findings from existing record); *Registrar of Motor Vehicles v. Bd. of Appeal on Motor Vehicle Liab. Policies & Bonds*, 382 Mass. 580, 591 (1981) (where appellant challenged inadequacy of board's statement of reasons for its decision, court ordered remand to Superior Court and explained that the "preferable procedure would have been for the [appellant] to move . . . for a remand to the board for an adequate statement of reasons").

III. The Board Benefitted from Review of the LS/CMI Risk-and-Needs-Assessment Tool in Determining Whether to Grant Parole to Rodriguez.

This Court recognized in *Deal* that

> [T]he board may grant parole only where it finds, "*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."

Id. at 459, citing G.L. c. 127, § 130 (emphasis added). Here, the Board stated in its Record of Decision that it had "considered a risk and needs assessment, and whether risk reduction programs could effectively minimize Mr. Rodriguez's risk

of recidivism," and "appl[ied] this standard to the circumstances of Mr. Rodriguez's case[.]" R.A. 23.

The risk-and-needs-assessment tool the Board refers to is the LS/CMI ("Level of Service/Case Management Inventory), the propriety of which has not been addressed by this Court. R.A. 343. Rodriguez argues that there are two problems with the Board's using such a tool in this case, specifically (1) the Board should not use the LS/CMI to determine juvenile offenders' risk of recidivism; and (2) the Board provides only heavily redacted summaries of the LS/CMI to potential parolees, which deprives them of the ability to challenge the assessment's results. App. Br. 38-43. These claims are unavailing, as discussed below.

A. The LS/CMI.

The LS/CMI "goes beyond traditional risk and needs by including other clinically relevant factors and incorporating a case management portion."[12] It

[12] 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 January 16, 2022). Although the contents of this study, which include a more detailed explanation of how the LS/CMI is conducted, are not found within Rodriguez's record appendix, he cites to and relies upon this study in his brief. App. Br. 41-42. The Board will do the same to respond to his arguments. *Cf.*, *e.g.*, *Reliance Ins. Co. v. City of Boston*, 71 Mass. App. Ct. 550, 555 (2008) (court may take judicial notice of public records).

includes general risk/needs assessment (Section 1) consisting of 43 items, each of which is scored in a dichotomous fashion (0 = not present, 1 = present). *Id.* at 1517. The items are organized into the so-called central eight subscales: Criminal History (8 items), Education/Employment (9 items), Family/Marital (4 items), Leisure/Recreation (2 items), Companions (4 items), Procriminal Attitude/Orientation (4 items), Substance Abuse (8 items), and Antisocial Pattern (4 items). *Id.*; R.A. 106-107. Any of the central eight subscales that is problem-free or serves to "protect" the offender from other sources of risk may be declared a "strength" by the assessor. *Id.* at 1517. A total strength score is derived from the simple summation of strengths across the central eight domains. *Id.*

These items are totaled to create eight domain scores and a total general risk/need score, which is then used to determine the offender's initial risk level on a 5-point ordinal scale ranging from very low risk to very high risk. *Id.* at 1518; R.A. 107. The initial risk level may be "overridden" in either direction (i.e., from a lower to higher risk level or from a higher to a lower risk level) to create a final risk level. *Id.* at 1518. An "override score" is calculated by subtracting the initial risk level score from the final risk level score. *Id.* The scoring manual encourages assessors to exercise the override function sparingly, and they are also instructed to

consider other sections of the LS/CMI for aggravating and mitigating factors (*e.g.*, strengths) that might suggest an adjustment to the score-based risk level. *Id.*

The LS/CMI, thus, "identifies an individual's risk to recidivate, as well as reviews criminogenic needs [i.e., the risk of returning to prison] which may be incorporated into the parolee's case plan." R.A. 106-107; 282.[13] By completing an assessment of criminogenic factors (i.e., risk factors highly associated with criminal conduct), which include the aforementioned central eight subscales, the Board's use of the LS/CMI is not tied to static factors, contrary to Rodriguez's assertions. R.A. 107. *See also People v. Mizner*, No. H043681, 2017 WL 4804263, at *4 (Cal. Ct. App. Oct. 25, 2017) (unpublished) ("Dr. Barron also administered the 'Level of Service/Case Management Inventory' (LS/CMI), which examined risks, both static, historical factors and dynamic factors, to estimate recidivism rates."); Catherine M. Wilson et. al., *Predictive Validity of Dynamic Factors: Assessing Violence Risk in Forensic Psychiatric Inpatients*, 37 Law & Hum. Behav. 377, 378 (2013) ("Accordingly, many risk assessment tools, such as the HCR-20 (Webster et al., 1997), START (Webster et al., 2009), the Brset Violence Checklist (Almvik & Woods, 1999), and the Level of Service/Case Management

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[13] Massachusetts Parole Board 2018 Annual Statistical Report, found at https://www.mass.gov/doc/2018-annual-statistical-report/download (last visited January 9, 2022).

Inventory (Andrews et al., 2004), include dynamic risk factors in addition to static risk factors.”).

B. Rodriguez Committed Two Adult Sex Offenses and Therefore His Case Does Not Present the Question of Whether the LS/CMI is a Suitable Risk-and-Needs Assessment Tool for Offenders Who Committed Their Offenses as Juveniles.

Rodriguez claims that this Court can and should use this case as a vehicle to hold that the LS/CMI is not an appropriate or “properly normed” (i.e., has actuarial validity) risk-and-needs-assessment tool for the Board to use in deciding whether to grant parole to an inmate who committed his offense as a juvenile. App. Br. 38. He is mistaken.

1. Because Rodriguez Committed Offenses As An Adult, His Arguments Regarding the Use of the LS/CMI for “Juvenile Offenders” are Unavailing in the Context of His Particular Case.

As the motion judge properly determined, Rodriguez’s argument concerning the use of the LS/CMI for “juvenile offenders” is beset by a fundamental foundational problem: Rodriguez committed additional sex crimes as an adult while he was hiding from Massachusetts authorities in California. Add. 59. So, he stands on very different footing from a “juvenile offender” who remains incarcerated from the time he committed the governing offense in his youth.

Rodriguez does not argue that the LS/CMI is an invalid risk-and-needs assessment tool for would-be parolees who commit offenses as adults.[14] And his general arguments about "juvenile offenders" do not explain why a properly normed assessment would treat him, with his unique circumstances, as a person who offended only while a juvenile. Add. 59-60. As noted, the motion judge specifically made this point in affirming the Board's denial of parole. Add. 61. The motion judge's conclusion is borne out by the "Comments" to the "Criminal History" subscale of the LS/CMI, most of which relate to Rodriguez's adult sex offenses in California, as well as by the Board's clearly describing and placing a considerable amount of weight on these offenses in its decision. R.A. 23, 107; Add. 59. Because Rodriguez has not demonstrated that the LS/CMI is an invalid risk-and-needs assessment tool for use in the particular circumstances of his case, his argument concerning it should not be a basis to overturn the Board's decision.

2. In Any Event, Rodriguez's Adult Sex Offenses Make the LS/CMI More Appropriate when Used with Him.

Even if the LS/CMI may not be the best-supported instrument for assessing the likelihood of sexual recidivism in offenders who committed their offenses as

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[14] To the contrary, it appears to be a tool that is used for various criminal justice purposes in jurisdictions around the nation. *See*, *e.g.*, *State v. Wilson*, 787 S.E.2d 559, 563 (W. Va. 2016); *State v. Garcia*, 936 N.W.2d 1, 12 (Neb. App. Ct. 2019); *In re Busch*, 246 Cal. App. 4th 953, 963 (2016).

juveniles,[15] that does not mean that it did not serve a valid purpose when it was used in connection with the Board's decision as to whether Rodriguez should be released on parole. R.A. 341-342. Indeed, the record shows that the Board benefitted from review of the LS/CMI in Rodriguez's case. R.A. 106-107. The Commitment Summary discussed not just the nature of his offenses, but also his institutional adjustment, family support system, and mental health factors, all of

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[15] Before the Superior Court, the Board acknowledged that the LS/CMI "is not typically designed just for juvenile sex offenders," and that it "could be criticized" for using data that does not support a difference in recidivism. R.A. 342. The record appendix states that, according to Rodriguez, "researchers advised that the 'best-supported instruments' for assessing the likelihood of sexual recidivism include 'the Static-99… and adding the items scores from the SVR-20." R.A. 284 (citation omitted). However, according to Dr. Plaud there may be limitations with these instruments as well. For example, in Dr. Plaud's Psychosexual Evaluation Report, Rodriguez's statistical risk to re-offend in a sexual manner was computed utilizing the Static-99R. R.A. 202. In explaining his score, Dr. Plaud stated that "the significance of Static-99R scores lies in the comparative group-based recidivism estimates associated with particular score-wise values[,]" and that, "[u]nfortunately there has been a level of subjectivity introduced into the translation of score-wise values." R.A. 202. The Sexual Violence Risk-20 (SVR-20) "provides for a research-based structured methodology designed to evaluate 20 factors or areas of functioning in those who have either been convicted or alleged to have committed a sexual offense." R.A. 203. In Rodriguez's case, there was evidence for the potential for eight risk factors which focus on "*past, static* psychosocial adjustment factors," R.A. 204-205 (emphasis added), which is one of Rodriguez's criticisms of the LS/CMI.

which evaluate whether Rodriguez is going to be a success when he is released to the community. R.A. 107, 341-342.[16]

Rodriguez's further challenges the redacted summaries of the LS/CMI. App. Br. 41. He claims that the redactions make understanding the score "difficult or impossible[,]" and in Rodriguez's case, give him no basis to determine whether the tool was properly administered or scored. App. Br. 42, 43. Here, the Board's Commitment Summary shows that while certain portions of it are redacted, the information pertaining to the LS/CMI Risk Assessment, which includes the "Bar Chart" and "Strength and Comments/Notes," are not redacted. R.A. 106-107. The contents of some of the information that is redacted can be ascertained by looking at their non-redacted respective headings. R.A. 104-109. And much of the redacted

[16] Rodriguez points out that the evaluator's use of an override in determining the individual's score would decrease the validity of the LS/CMI for sex offenders by overestimating the individual's risk level. App. Br. 41-42, citing 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). While the study concluded that the use of a professional override with the LS/CMI led to a slight, but systematic, deterioration in the predictive validity of the LS/CMI, Rodriguez ignores that those very same authors also concluded that the reasons for not using tests like the LS/CMI were largely unfounded, with considerable evidence to the contrary. *Id.* at 1512-1513, 1534. The authors also found evidence supporting the relevance of the LS/CMI in sex offender risk assessment. *Id.* at 1529. Thus, the results of this study also support the position that the LS/CMI has some value as applied to Rodriguez *since he committed sex offenses as an adult*. Add. 61.

information pertains to Rodriguez's own identification information and criminal history, of which he is aware. R.A. 104-106. In any event, the factors that went into the ultimate score are expressly laid out. R.A. 106-107.

Rodriguez also contends that these redacted summaries foreclose the potential parolee from understanding what factors went into the ultimate score to assess the validity of the tool, which violates a potential parolee's right to due process. App. Br. 41, 43. The due process test requires a "balancing of the individual interest at stake and the risk of an erroneous deprivation of liberty or property under the procedures that the State seeks to use against the governmental interest in achieving its goals." *Doe v. Attorney General*, 426 Mass. 136, 140 (1997), citing *Aime v. Commonwealth*, 414 Mass. 667, 675 (1993). In order to show a violation of due process, an individual must first demonstrate that he has a constitutionally protected liberty interest. *Doe*, 426 Mass. at 140.

Here, while Rodriguez is entitled to a *meaningful opportunity* for parole consideration under the *Miller* factors, he does not have a constitutionally protected liberty interest in parole and therefore cannot show that his due process rights were violated. *Id.*; R.A. 347-348. The United States Supreme Court has ruled that the language of a State statute may create a legitimate expectation of parole which invokes due process protections. *See Commonwealth v. Hogan*, 17 Mass.

App. Ct. 186, 191 (1983), *review denied*, 391 Mass. 1101 (1984). However, G.L. c. 127, § 133 "does not create an expectation of parole or parole eligibility but provides only that '[p]arole permits *may* be granted by the parole board to prisoners' (emphasis added) who have met the requisite conditions." *Id.* Massachusetts statutes give wide discretion to the Board regarding procedure and in making parole determinations. *See* G.L. c. 27, § 5; *see also Greenman v. Massachusetts Parole Bd.*, 405 Mass. 384, 387 (1989); *Stewart v. Chairman of Massachusetts Parole Bd.*, 35 Mass. App. Ct. 843, 848 (1994). Indeed, "[n]either the state nor the federal court sit as a court of review over a parole board." *Martineau v. Perrin*, 601 F.2d 1201, 1208 (1st Cir. 1979).[17] Therefore, as Rodriguez has no constitutionally protected liberty interest in parole, his claims cannot rise to the level of a due process violation. *See* App. Br.; *Doe*, 426 Mass. at 140.

Finally, Rodriguez claims that the length of time that elapsed between his hearing and the issuance of his Record of Decision violated due process by

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[17] True, "[o]nce an agency has seen fit to promulgate regulations, it must comply with those regulations. Agency regulations have the force of law." *Royce v. Commissioner of Corr.*, 390 Mass. 425, 427 (1983) (internal quotations omitted). Here, pursuant to 120 Code Mass. Regs. § 301.04, the Board will disclose all non-confidential information to the inmate upon written request 30 days before his hearing. Rodriguez, however, made no such request. R.A. 283-284.

denying him ten months to implement any rehabilitative steps identified by the Board. App. Br. 43-46. Rodriguez concedes that his argument concerning undue delay in the Board's issuance of his parole decision was not presented to the lower court, and as such it is waived. App. Br. 15. *See also Commonwealth v. Crawford*, 430 Mass. 683, 689 (2000) (test for waiver is whether the theory on which the defendant's argument rests has been sufficiently developed to put him on notice that the issue is a live issue that could have been raised). Nevertheless, Rodriguez argues that justice weighs in favor of this Court considering the issue. App. Br. 15-17. Should this Court choose to do so, which it should not, Rodriguez's claim is meritless.

In *Doucette*, the Appeals Court conducted certiorari review of a decision of the Board denying a request for parole. The *Doucette* court explained that the "[d]elay between a revocation hearing and the distribution of a written decision is not a per se due process violation." *Id.* at 537 (citations omitted). Rather, "[a] delay constitutes a due process violation only if it is 'fundamentally unfair[,]'" and "[a] showing of prejudice is required." *Id.* (citations omitted).

Here, the Board's regulations require that it send a written notice and summary of reasons within twenty-one days of the decision. *Id.* at 538. The Record of Decision was published on January 29, 2020, over ten months or 319 days after

the March 26, 2019 review hearing (compared to 177 days in *Doucette*). R.A. 21. As in *Doucette*, Rodriguez has not pointed to any discernable prejudice. *Id.* at 538. Being incarcerated, causing anxiety, and "depriv[ing] [Rodriguez] of valuable feedback that [he] could use to prepare [] for [his] next parole hearing" does not "amount to legal prejudice that permits a conclusion that a due process violation…occurred." *Id.*, quoting *Commonwealth v. Blake,* 454 Mass. 267, 280 (2009) (Ireland, J., concurring) (defendant had not shown legally cognizable prejudice regarding alleged due process violation as a result of a thirteen-month advisement period, where the case was not impaired by reason of the delay and the defendant was not deprived of any right to be temporarily released from the treatment center during the time he awaited the judge's decision.). This Court should affirm the judgment of the Superior Court.

CONCLUSION

For the foregoing reasons, the order denying the Appellant's motion for judgment on the pleadings should be affirmed.

Respectfully submitted,

MAURA HEALEY
ATTORNEY GENERAL

/s/ Todd M. Blume
Todd M. Blume
Assistant Attorney General
Criminal Bureau
One Ashburton Place
Boston, Massachusetts 02108
(617) 963-2503
BBO # 674608
todd.blume@mass.gov

Date: January 18, 2022

CERTIFICATE OF COMPLIANCE

I, Todd M. Blume, hereby certify that the foregoing brief complies with all of the rules of court that pertain to the filing of briefs, including, but not limited to, the requirements imposed by Rules 16 and 20 of the Massachusetts Rules of Appellate Procedure. The brief complies with the applicable length limit in Rule 20 because it contains 10,911 words in 14-point Times New Roman font (not including the portions of the brief excluded under Rule 20), as counted in Microsoft Word (version: Word 2016).

/s/ Todd M. Blume
Todd M. Blume
Assistant Attorney General

CERTIFICATE OF SERVICE

I hereby certify that on January 18, 2022, I filed a true copy of this brief on the Supreme Judicial Court's electronic filing system, thereby causing a true copy thereof to be served upon Melissa Allen Celli, Esq., counsel for the petitioner in this appeal.

/s/ Todd M. Blume
Todd M. Blume
Assistant Attorney General

STATUTORY ADDENDUM

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CODE OF MASSACHUSETTS REGULATIONS

TITLE 120 PAROLE BOARD

CHAPTER 300.05 Information Considered in Parole Release Decisions

(1) In making a parole or re-parole determination, the parole hearing panel shall consider a risk and needs assessment, whether the inmate has participated in available work opportunities and education or treatment programs, and has demonstrated good behavior. M.G.L. c. 127, § 130. The Parole Board may also consider, if available and relevant, information such as:
(a) reports and recommendations from parole staff;
(b) official reports of the inmate's prior criminal record, including a report or record of earlier probation and parole experiences;
(c) any pending cases;
(d) presentence investigation reports;
(e) official reports of the nature and circumstances of the offense including, but not limited to, police reports, grand jury minutes, decisions of the Massachusetts Appeals Court or the Supreme Judicial Court, and transcripts of the trial or of the sentencing hearing;
(f) statements by any victim of the offense for which the offender is imprisoned about the financial, social, psychological, and emotional harm done to or loss suffered by such victim;
(g) reports of physical, medical, mental, or psychiatric examination of the inmate;
(h) any information that the inmate may wish to provide the parole hearing panel including letters of support from family, friends, community leaders, and parole release plans; and
(i) information provided by the custodial authority, including, but not limited to, disciplinary reports, classification reports, work evaluations, and educational and rehabilitation program achievements.
(2) Individuals including, but not limited to, the inmate, sentencing judges, defense attorneys and prosecutors, who wish to provide relevant information to the parole hearing panel should submit such information to the Parole Board with the inmate's identification clearly indicated by full name, and data such as date of birth, social security number, indictment number, or commitment number. No recommendation as to the suitability for parole release may be considered as binding upon Parole

Board members' discretionary authority to grant or deny parole. Parole Board members may exclude information that is unreliable, irrelevant or repetitious.
(3) Prior to making any release decision, the Parole Board may schedule a mental health evaluation for an inmate and Parole Board members may consider the results thereof in making a parole release decision.
The Massachusetts Administrative Code titles are current through Register No. 1458, dated December 10, 2021. Some sections may be more current; see credits for details.
Mass. Regs. Code tit. 120, § 300.05, 120 MA ADC 300.05

CHAPTER 301.04 Pre-hearing Interview and File Review

The Parole Board shall disclose to an inmate information in that inmate's file pursuant to 120 CMR 500.00: *Dissemination of CORI, Evaluative Information, and Intelligence Information* provided the inmate requests such disclosure in writing at least 30 days prior to any scheduled release or review hearing. Information deemed confidential by the Parole Board will not be disclosed. M.G.L. c. 127, § 130. Any disclosure of other information will be in a form determined to be appropriate by the Parole Board consistent with M.G.L. c. 6, § 172; c. 66; and c. 66A. The Parole Board may orally summarize available police, court, and institutional data likely to be considered by the parole hearing panel during the initial release hearing or any review hearing.
The Massachusetts Administrative Code titles are current through Register No. 1458, dated December 10, 2021. Some sections may be more current; see credits for details.
Mass. Regs. Code tit. 120, § 301.04, 120 MA ADC 301.04

CHAPTER 301.08 Reasons for Parole Denial

When release on parole is denied, Parole Board members shall provide the inmate with a written summary of the reasons supporting the decision of the full Parole Board or parole hearing panel. Parole Board members shall provide the inmate such written notice within 21 calendar days after a decision has been rendered.

The Massachusetts Administrative Code titles are current through Register No. 1458, dated December 10, 2021. Some sections may be more current; see credits for details.
Mass. Regs. Code tit. 120, § 301.08, 120 MA ADC 301.08

MASSACHUSETTS GENERAL LAWS

CHAPTER 27 DEPARTMENT OF CORRECTION

SECTION 5 Parole board; powers and duties

The parole board shall (a) within its jurisdiction, as defined in section one hundred and twenty-eight of chapter one hundred and twenty-seven, determine which prisoners in the correctional institutions of the commonwealth or in jails or houses of correction may be released on parole, and when and under what conditions, and the power within such jurisdiction to grant a parole permit to any prisoner, and to revoke, revise, alter or amend the same, and the terms and conditions on which it was granted shall remain in the parole board until the expiration of the maximum term of the sentence or sentences for the service of which such prisoner was committed, or until the date which has been determined by deductions from the maximum term of his sentence or sentences for good conduct, or unless otherwise terminated; (b) supervise all prisoners released on parole permits granted by it, make such investigations as may be necessary in connection therewith, determine whether violation of parole terms and conditions exist in specific cases, decide the action to be taken with reference thereto, and aid paroled prisoners to secure employment; (c) be the advisory board of pardons with the power and duties in relation thereto set forth in section one hundred and fifty-four of chapter one hundred and twenty-seven; (d) supervise all prisoners pardoned on parole conditions, and report to the governor violations by any such prisoner of the parole conditions applicable to his pardon; (e) make rules relative to the performance of its duties, the calling and conduct of meetings and for the conduct of its employees in the performance of their duties; (f) print its rules and the statutes relating to its powers and duties, in convenient form, from time to time, and annually during the month of January mail or deliver one copy thereof to each justice of the superior and district courts, each sheriff and to the master, keeper or principal officer of each penal institution in the commonwealth, and two hundred copies thereof to the

board of probation; (g) make an annual report to the commissioner; (h) employ subject to appropriation and the requirements of chapter thirty and chapter thirty-one an executive secretary and such hearing officers, clerks, attorneys, and other employees and consultants as the work of the parole board may require.
Any three members of the board may be appointed by the chairman to act as the parole board for the purpose of granting or revocation of paroles; provided, however, that for the purpose of considering hearing officer recommendations to the board under paragraph (b) of section one hundred and thirty-four of chapter one hundred and twenty-seven, any single member of the board may be so appointed. The chairman may also designate any member to act in his absence as the executive and administrative head of the board.

CHAPTER 30A STATE ADMINISTRATIVE PROCEDURE

SECTION 1 Definitions

For the purposes of this chapter--
(1) "Adjudicatory proceeding" means a proceeding before an agency in which the legal rights, duties or privileges of specifically named persons are required by constitutional right or by any provision of the General Laws to be determined after opportunity for an agency hearing. Without enlarging the scope of this definition, adjudicatory proceeding does not include (a) proceedings solely to determine whether the agency shall institute or recommend institution of proceedings in a court; or (b) proceedings for the arbitration of labor disputes voluntarily submitted by the parties to such disputes; or (c) proceedings for the disposition of grievances of employees of the commonwealth; or (d) proceedings to classify or reclassify, or to allocate or reallocate, appointive offices and positions in the government of the commonwealth; or (e) proceedings to determine the equalized valuations of the several cities and towns; or (f) proceedings for the determination of wages under section twenty-six T of chapter one hundred and twenty-one.
(2) "Agency", any department, board, commission, division or authority of the state government or subdivision of any of the foregoing, or official of the state government, authorized by law to make regulations or to conduct adjudicatory proceedings, but does not include the following: the legislative and judicial departments; the governor and council; military or naval boards, commissions or officials; the department of correction; the department of youth services; the parole

board; the division of dispute resolution of the division of industrial accidents; the personnel administrator; the civil service commission; and the appellate tax board.
(3) “Party” to an adjudicatory proceeding means:-- (a) the specifically named persons whose legal rights, duties or privileges are being determined in the proceeding; and (b) any other person who as a matter of constitutional right or by any provision of the General Laws is entitled to participate fully in the proceeding, and who upon notice as required in paragraph (1) of section eleven makes an appearance; and (c) any other person allowed by the agency to intervene as a party. Agencies may by regulation not inconsistent with this section further define the classes of persons who may become parties.
(4) “Person” includes all political subdivisions of the commonwealth.
(4A) “Proposed regulation”, a proposal by an agency to adopt, amend or repeal an existing regulation.
(5) “Regulation” includes the whole or any part of every rule, regulation, standard or other requirement of general application and future effect, including the amendment or repeal thereof, adopted by an agency to implement or interpret the law enforced or administered by it, but does not include (a) advisory rulings issued under section eight; or (b) regulations concerning only the internal management or discipline of the adopting agency or any other agency, and not substantially affecting the rights of or the procedures available to the public or that portion of the public affected by the agency's activities; or (d) regulations relating to the use of the public works, including streets and highways, when the substance of such regulations is indicated to the public by means of signs or signals; or (e) decisions issued in adjudicatory proceedings.
(5A) “Small business”, a business entity or agriculture operation, including its affiliates, that: (i) is independently owned and operated; (ii) has a principal place of business in the commonwealth; and (iii) would be defined as a “small business” under applicable federal law, as established in the United States Code and promulgated from time to time by the United States Small Business Administration.
(6) “Substantial evidence” means such evidence as a reasonable mind might accept as adequate to support a conclusion.

CHAPTER 127 OFFICERS AND INMATES OF PENAL AND REFORMATORY INSTITUTIONS. PAROLES AND PARDONS

SECTION 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

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 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.

SECTION 133 Granting of parole permits by board; eligibility and requisites

Parole permits may be granted by the parole board to prisoners subject to its jurisdiction at such time as the board in each case may determine; provided, however, that no prisoner sentenced to the state prison shall be eligible for such permit until such prisoner shall have served the minimum term of sentence, pursuant to section twenty-four of chapter two hundred and seventy-nine, as such minimum term of sentence may be reduced by deductions allowed under section one hundred and twenty-nine D. Where an inmate is serving two or more consecutive or concurrent state prison sentences, a single parole eligibility shall be established for all such sentences. Prisoners who are granted parole permits shall remain subject to the jurisdiction of the board until the expiration of the maximum term of sentence or, if a prisoner has two or more sentences to be served otherwise than concurrently, until the aggregate maximum term of such sentence, unless earlier terminated by the board under the provisions of section one hundred

thirty A. Sentences of imprisonment in the state prison shall not be suspended in whole or in part.

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

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 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.

SECTION 133C Representation of deceased victims at hearing by family members

The family members of a deceased victim may represent the victim at any parole hearing for a prisoner serving a sentence for a crime which resulted in the death of such victim or for a crime for which a prisoner is serving a sentence for life in a correctional institution of the commonwealth, 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 prisoners confined to the hospital at the Massachusetts Correctional Institution, Bridgewater. For the purposes of this section, family members shall include: parent, stepparent or guardian of the victim, spouse or

person with whom the victim lived and in a relationship similar to marriage, child, stepchild, grandchild, grandparent, sibling, aunt, uncle, niece, nephew and guardian of the minor child or stepchild of the victim.

SECTION 133E Victims of violent crime or sex offenses; certification by department of criminal justice information services; testimony at parole hearing

Victims, and parents or legal guardians of minor victims, of a violent crime or a sex offense for which a sentence was imposed, who have been certified by the department of criminal justice information services in accordance with section 172 of chapter 6 and section 3 of chapter 258B, may testify in person at the parole hearing of the perpetrator of the crime of which they were victims, or submit written testimony to the parole board.
For the purpose of this section, "sex offense" and "violent crime" shall be defined as follows:
"Sex offense", an indecent assault and battery on a child under 14 under section 13B of chapter 265; aggravated indecent assault and battery on a child under 14 under section 13B ½ of said chapter 265; a repeat offense under section 13B ¾ of said chapter 265; indecent assault and battery on a mentally retarded person under section 13F of said chapter 265; indecent assault and battery on a person age14 or over under section 13H of said chapter 265; rape under section 22 of said chapter 265; rape of a child under 16 with force under section 22A of said chapter 265; aggravated rape of a child under 16 with force under section 22B of said chapter 265; a repeat offense under section 22C of said chapter 265; rape and abuse of a child under section 23 of said chapter 265; aggravated rape and abuse of a child under section 23A of said chapter 265; a repeat offense under section 23B of said chapter 265; assault with intent to commit rape under section 24 of said chapter 265; assault of a child with intent to commit rape under section 24B of said chapter 265; kidnapping of a child under section 26 of said chapter 265; enticing away a person for prostitution or sexual intercourse under section 2 of chapter 272; drugging persons for sexual intercourse under section 3 of said chapter 272; inducing a minor into prostitution under section 4A of said chapter 272; living off or sharing earnings of a minor prostitute under section 4B of said chapter 272; incestuous marriage or intercourse under section 17 of said chapter 272; disseminating to a minor matter harmful to a minor under section 28 of said chapter 272; posing or exhibiting a child in a state of nudity under section 29A of

said chapter 272; dissemination of visual material of a child in a state of nudity or sexual conduct under section 29B of said chapter 272; unnatural and lascivious acts with a child under 16 under section 35A of said chapter 272; aggravated rape under section 39 of chapter 277; and any attempt to commit a violation of any of the aforementioned sections pursuant to section 6 of chapter 274.
"Violent crime", any crime (a) for which an individual has been sentenced to imprisonment of 1 year or more, and (b) that: (i) has as an element the use, attempted use or threatened use of physical force or a deadly weapon against the person of another; (ii) is burglary, extortion, arson or kidnapping; (iii) involves the use of explosives; or (iv) otherwise involves conduct that presents a serious risk of physical injury to another.

SECTION 135 Furnishing information to parole board; filing information; statement; contents; availability; duty of clerk of court and probation officer

The commissioner or the jailer, superintendent or keeper of a jail or house of correction shall furnish to the parole board all information in his possession relating to any prisoner whose case is under consideration. As each prisoner is received in the correctional institutions of the commonwealth or in the jails or houses of correction, it shall be the duty of the commissioner of correction or of the jailer, superintendent or keeper, while the case is still recent, to cause to be obtained and filed information as complete as may be obtainable at that time with regard to such prisoner. Such information shall include a complete statement of the crime for which he is then sentenced, the circumstances of such crime, the nature of his sentence, the court in which he was sentenced, the name of the judge and district attorney, and copies of such probation reports as may have been made, as well as reports as to the prisoner's social, physical, mental and psychiatric condition and history. It shall be the duty of the clerk of the court and of all probation officers and other appropriate officials to send such information as may be in their possession or under their control to the commissioner or the jailer, superintendent or keeper of a jail or house of correction, upon request. The commissioner or the jailer, superintendent or keeper of a jail or house of correction shall also at that time obtain and file a copy of the complete criminal record of such prisoner, so far as reasonably available, including any juvenile court record that may exist. When all such existing available records have been assembled, they

shall be made available to the parole board so as to be readily accessible when the parole or pardon of such prisoner is being considered.

CHAPTER 211 THE SUPREME JUDICIAL COURT

SECTION 3 Superintendence of inferior courts; power to issue writs and process

The supreme judicial court shall have general superintendence of all courts of inferior jurisdiction to correct and prevent errors and abuses therein if no other remedy is expressly provided; and it may issue all writs and processes to such courts and to corporations and individuals which may be necessary to the furtherance of justice and to the regular execution of the laws.
In addition to the foregoing, the justices of the supreme judicial court shall also have general superintendence of the administration of all courts of inferior jurisdiction, including, without limitation, the prompt hearing and disposition of matters pending therein, and the functions set forth in section 3C; and it may issue such writs, summonses and other processes and such orders, directions and rules as may be necessary or desirable for the furtherance of justice, the regular execution of the laws, the improvement of the administration of such courts, and the securing of their proper and efficient administration; provided, however, that general superintendence shall not include the authority to supersede any general or special law unless the supreme judicial court, acting under its original or appellate jurisdiction finds such law to be unconstitutional in any case or controversy. Nothing herein contained shall affect existing law governing the selection of officers of the courts, or limit the existing authority of the officers thereof to appoint administrative personnel.

CHAPTER 249 AUDITA QUERELA, CERTIORARI, MANDAMUS AND QUO WARRANTO

SECTION 4 Action in the nature of certiorari; limitation; joinder of party defendant; injunction; judgment

A civil action in the nature of certiorari to correct errors in proceedings which are not according to the course of the common law, which proceedings are not

otherwise reviewable by motion or by appeal, may be brought in the supreme judicial or superior court or, if the matter involves any right, title or interest in land, or arises under or involves the subdivision control law, the zoning act or municipal zoning, or subdivision ordinances, by-laws or regulations, in the land court or, if the matter involves fence viewers, in the district court. Such action shall be commenced within sixty days next after the proceeding complained of. Where such an action is brought against a body or officer exercising judicial or quasi-judicial functions to prevent the body or officer from proceeding in favor of another party, or is brought with relation to proceedings already taken, such other party may be joined as a party defendant by the plaintiff or on motion of the defendant body or officer or by application to intervene. Such other party may file a separate answer or adopt the pleadings of the body or officer. The court may at any time after the commencement of the action issue an injunction and order the record of the proceedings complained of brought before it. The court may enter judgment quashing or affirming such proceedings or such other judgment as justice may require.

MASSACHUSETTS RULES OF CIVIL PROCEDURE

Rule 12 Defenses and Objections--When and How Presented--by Pleading or Motion--Motion for Judgment On Pleadings

(a) When Presented.
(1) After service upon him of any pleading requiring a responsive pleading, a party shall serve such responsive pleading within 20 days unless otherwise directed by order of the court.
(2) The service of a motion permitted under this rule alters this period of time as follows, unless a different time is fixed by order of the court: (i) if the court denies the motion or postpones its disposition until the trial on the merits, the responsive pleading shall be served within 10 days after notice of the court's action; (ii) if the court grants a motion for a more definite statement, the responsive pleading shall be served within 10 days after the service of the more definite statement.
(b) How Presented. Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion:
(1) Lack of jurisdiction over the subject matter;
(2) Lack of jurisdiction over the person;

(3) Improper venue;
(4) Insufficiency of process;
(5) Insufficiency of service of process;
(6) Failure to state a claim upon which relief can be granted.
(7) Failure to join a party under Rule 19;
(8) Misnomer of a party;
(9) Pendency of a prior action in a court of the Commonwealth;
(10) Improper amount of damages in the Superior Court as set forth in G.L. c. 212, § 3 or in the District Court as set forth in G.L. c. 218, § 19.

A motion making any of these defenses shall be made before pleading if a further pleading is permitted. No defense or objection is waived by being joined with one or more other defenses or objections in a responsive pleading or motion. If a pleading sets forth a claim for relief to which the adverse party is not required to serve a responsive pleading, he may assert at the trial any defense in law or fact to that claim for relief. If, on any motion asserting the defense numbered (6), to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56. A motion, answer, or reply presenting the defense numbered (6) shall include a short, concise statement of the grounds on which such defense is based.

(c) Motion for Judgment on the Pleadings. After the pleadings are closed but within such time as not to delay the trial, any party may move for judgment on the pleadings. If, on a motion for judgment on the pleadings, matters outside the pleadings are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

(d) Preliminary Hearings. The defenses specifically enumerated (1)-(10) in subdivision (b) of this rule, whether made in a pleading or by motion, and the motion for judgment mentioned in subdivision (c) of this rule shall be heard and determined before trial on application of any party, unless the court orders that the hearing and determination thereof be deferred until the trial.

(e) Motion for More Definite Statement. If a pleading to which a responsive pleading is permitted is so vague or ambiguous that a party cannot reasonably be required to frame a responsive pleading, he may move for a more definite

statement before interposing his responsive pleading. The motion shall point out the defects complained of and the details desired. If the motion is granted and the order of the court is not obeyed within 10 days after notice of the order or within such time as the court may fix, the court may strike the pleading to which the motion was directed or make such order as it deems just.

(f) Motion to Strike. Upon motion made by a party before responding to a pleading or, if no responsive pleading is permitted by these rules, upon motion made by a party within 20 days after the service of the pleading upon him or upon the court's own initiative at any time, the court may after hearing order stricken from any pleading any insufficient defense, or any redundant, immaterial, impertinent, or scandalous matter.

(g) Consolidation of Defenses in Motion. A party who makes a motion under this rule may join with it any other motions herein provided for and then available to him. If a party makes a motion under this rule but omits therefrom any defense or objection then available to him which this rule permits to be raised by motion, he shall not thereafter make a motion based on the defense or objection so omitted, except a motion as provided in subdivision (h)(2) hereof on any of the grounds there stated.

(h) Waiver or Preservation of Certain Defenses.

(1) A defense of lack of jurisdiction over the person, improper venue, insufficiency of process, insufficiency of service of process, misnomer of a party, pendency of a prior action, or improper amount of damages is waived (A) if omitted from a motion in the circumstances described in subdivision (g), or (B) if it is neither made by motion under this rule nor included in a responsive pleading or an amendment thereof permitted by Rule 15(a) to be made as a matter of course.

(2) A defense of failure to state a claim upon which relief can be granted, a defense of failure to join a party indispensable under Rule 19, and an objection of failure to state a legal defense to a claim may be made in any pleading permitted or ordered under Rule 7(a), or by motion for judgment on the pleadings, or at the trial on the merits.

(3) Whenever it appears by suggestion of a party or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action.