

COMMONWEALTH OF MASSACHUSETTS

MIDDLESEX, ss.

DAR No. 28453

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JOSE RODRIGUEZ  
Appellant,

v.

MASSACHUSETTS PAROLE BOARD  
Appellee

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APPELLANT'S APPLICATION FOR DIRECT APPELLATE REVIEW  
OF AN ORDER OF THE MIDDLESEX SUPERIOR COURT

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For JOSE RODRIGUEZ:

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BBO # 666171

August 17, 2021

## REQUEST FOR DIRECT APPELLATE REVIEW

Plaintiff-Appellant Jose Rodriguez applies, pursuant to Mass. R. App. P. 11, for direct appellate review of the Middlesex Superior Court's decision denying Mr. Rodriguez's motion for judgment on the pleadings on his Complaint in the Nature of Certiorari brought to challenge the Parole Board's denial of his application for parole. See G.L. c. 249, § 4, *Diatchenko v. Dist. Attorney for the Suffolk Dist.*, 471 Mass. 12 (2015).

As reasons therefor, Mr. Rodriguez states that direct appellate review by the Supreme Judicial Court is necessary to ensure that the Parole Board weighs dynamic risk factors, such as age, in determining whether juvenile lifers are suitable candidates for parole. Without this guidance, the Parole Board may impermissibly—and in violation of a juvenile lifer's constitutional right to a proportionate sentence—base its decision on the nature of the crime and on factors present at the time of sentencing, rather than looking at the juvenile lifer's rehabilitation. That overreliance on static risk factors could convert the juvenile's life-with-parole sentence into a de facto unconstitutional life-without-parole sentence.

## **STATEMENT OF PRIOR PROCEEDINGS**

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

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

Mr. Rodriguez filed a timely notice of appeal.

## **STATEMENT OF FACTS RELEVANT TO THE APPEAL**

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

On September 28, 1976, 16-year-old Jose raped a woman who was walking back home from an MBTA stop. He was convicted the following year of one count of rape (G.L. c. 265, § 22) and one count of assault and

battery with a dangerous weapon (G.L. c. 265 § 15A). He was also adjudicated a sexually dangerous person (“SDP”) and was civilly committed to the Massachusetts Treatment Center. He appealed both his conviction and his civil commitment and, in 1979, the SJC issued rulings that resulted in both the conviction and commitment being overturned and a new trial ordered. Mr. Rodriguez left Massachusetts and a default warrant issued.

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

In 1986, his fingerprints identified him as having an outstanding warrant in Massachusetts, and he was returned to the Commonwealth. At the age of 26, Mr. Rodriguez proceeded to a second trial on the 1976 incident and was again found guilty of rape and assault and battery with a dangerous weapon. He was sentenced to life with the possibility

of parole at 15 years for the rape charge and 8-10 years on the assault and battery charge to be served concurrently with the life sentence. After this conviction, he was not civilly committed as an SDP, but was found to be possibly sexually dangerous and required more evaluation time. That additional evaluation time never transpired and, as a result, he was not adjudicated to be an SDP.

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

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

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

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

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

This evaluation was presented to the Board at Mr. Rodriguez's 2019 hearing. In its record of decision, the Board stated that it

“considered testimony and an evaluation from Dr. Joseph Plaud,” but never stated that it considered Mr. Rodriguez’s age as it related to his likelihood of recidivism. It again gave Mr. Rodriguez a five-year setback.

Mr. Rodriguez sought judicial review of this decision in an action in the nature of certiorari pursuant to G.L. c. 249, § 4. The lower court noted that the record of decision stated that the Board “considered testimony and an evaluation of Dr. Joseph Plaud” and found that that single statement “took account of all factors bearing upon Mr. Rodriguez’s degree of sexual dangerousness, including his personal history of childhood trauma, juvenile decision-making, and the plaintiff’s age at offense and at the hearing.” Appendix at 13.

While the lower court noted that the Board’s record of decision “hardly delves into questions of juvenile offending in detail” and “would likely not survive the level of scrutiny proposed in the *Deal* concurrence,” it held that “the majority did not adopt the approach set forth in the former Chief Justice’s *Deal* concurrence,” that it “had no business going beyond the parameters of judicial review set forth in

*Deal's* majority opinion,” and that “the Decision appears to meet *Deal's* deferential test.” Appendix at 13-14.

The lower court further found that it had “limited power to set aside or modify the Decision in a certiorari action” and may only do so if an individual’s “substantial rights may have been prejudiced because the agency decision is arbitrary and capricious.” Appendix 15. The lower court held that the Board’s use of its risk and needs assessment was not arbitrary and capricious because “the Board articulated a number of major considerations that led to its decision” and therefore, “any failure to mention or consider minor points did not prejudice Mr. Rodriguez’s substantial rights.” *Id.* It noted that even if Mr. Rodriguez had “done everything he could to rehabilitate himself, [n]o prisoner shall be granted a parole permit merely as a reward for good conduct . . . .” *Id.* (quoting G.L. c. 127 § 130).

### **STATEMENT OF ISSUES RAISED BY THE APPEAL**

1. Where this Court has held that art. 26 requires a juvenile offender to be afforded a meaningful opportunity for release based on demonstrated maturity and rehabilitation, does the Parole Board’s

failure to consider the individual's current age and its impact on likelihood of recidivism amount to an unconstitutional abuse of discretion?

This issue was preserved. In his complaint at paragraphs 28 and 33, and count 6, Mr. Rodriguez described the Parole Board's failure to account for his age in its decision. And in his motion for judgment on the pleadings, he reiterated that argument in Argument Section I(B) and again repeatedly at the hearing on the motion. Accordingly, the trial court's decision should be reviewed by the court de novo. *Deal v. Massachusetts Parole Board*, 484 Mass. 457, 462 n.4 (2020).

2. Where the Legislature has mandated that the Parole Board consider "a risk and needs assessment" in determining whether an individual is a suitable candidate for parole, and where the Board is the arbiter of whether a sentence is proportional and, thus, constitutional, must the Board use a risk assessment tool that is appropriate to the offender and the offense, and must the Board provide the details of the risk assessment to the potential parolee so that they may understand their score before appearing in front of the Board and so that a

reviewing court can determine whether the Board’s use of that tool appropriately safeguarded the juvenile offender’s constitutional protections?

This issue was preserved. In Section IV(B) of his motion for judgment on the pleadings, Mr. Rodriguez argued that the risk assessment tool used by the Parole Board, the LS/CMI was not appropriate to juvenile sex offenders. He also discussed the issue at length at the hearing on that motion. Accordingly, the trial court’s decision should be reviewed by the court de novo. *Deal*, 484 Mass. at 462 n.4.

## ARGUMENT

Courts have repeatedly recognized that “juvenile offenders are ‘constitutionally different from adults.’” *Diatchenko v. Dist. Attorney for Suffolk Dist.* 466 Mass. 655, 669-670 (2013) (“*Diatchenko I*”) (quoting *Miller v. Alabama*, 567 U.S. 460, 471 (2012)). They have based this holding on two well-recognized qualities of juveniles: “diminished culpability,” and “greater prospects for reform.” *Diatchenko I*, 466 Mass. at 660.

While the sentencing court may be able to assess a juvenile’s “diminished culpability,” it cannot predict whether a juvenile will realize the “greater prospects for reform.” Thus, it “cannot ascertain, with any reasonable degree of certainty, whether imposition of this most severe punishment is warranted.” *Id.* at 670. Accordingly, to satisfy art. 26’s requirement that “punishment for crime should be graduated to both the offender and the offense,” *Commonwealth v. Perez*, 477 Mass. 677, 683 (2017) (“*Perez I*”) (quoting *Miller*, 567 U.S. at 469), all juvenile offenders must have the opportunity to be considered for parole suitability, *Diatchenko I*, 466 Mass. at 671. The implication is that the Board, after many years of a prison sentence have elapsed, can ascertain that which the sentencing judge could not: whether the juvenile has reformed.

To make that determination, the Board must consider all relevant factors weighing on the individual’s rehabilitation.

Here, the Board did two things that impermissibly shifted the focus to past behavior rather than rehabilitation: it ignored evidence that Mr. Rodriguez’s age greatly reduced his risk of recidivism; and it

relied on its risk assessment tool, the LS/CMI, which heavily weighs static risk factors (immutable factors present at the time of the offense) without fully accounting for dynamic risk factors demonstrating rehabilitation.

**I. In making its decision, the Board must consider the individual’s dynamic risk factors—such as current age—in order to account for the juvenile’s “greater prospects for reform.”**

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

But the *Miller* factors are just the beginning of a juvenile’s story. Because they were developed for sentencing, they speak to

circumstances of the juvenile’s life at the time of the offense and sentencing. They recognize that juveniles have “greater prospects for reform,” but cannot predict whether an individual offender will realize those prospects.

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

To do that, the Board must consider the individual’s dynamic risk factors (e.g., advancing age, rehabilitative progress and programming, completion of sex offender treatment program), not just the static risk factors present at the time of sentencing. Failure to consider these dynamic risk factors undermines the underpinnings of the Court’s holdings in *Diatchenko I* and *II*. The very reason that a sentencing court may not sentence a juvenile to life in prison without the possibility of parole is that the commission of even a horrific crime is not determinative evidence of an irretrievably depraved individual who may never be safely released into society. *Commonwealth v. Perez*, 480 Mass. 562, 569 (2018) (“*Perez II*”).

If the Board ignores dynamic risk factors, it impermissibly does what this Court has precluded the sentencing court from doing: condemning the juvenile to a life behind bars based on factors present at the time of sentencing. See *id.* (“criminal conduct alone is not sufficient to justify a greater parole eligibility period than is available for murder”).

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

In this decision, the Board made clear that it ignored parts of Mr. Rodriguez’s decreased risk by failing to consider Mr. Rodriguez’s most important dynamic risk factor, his advanced age. Mr. Rodriguez presented substantial evidence that his age—then, almost 60 years old—was a “very significant protective factor” on his likelihood of recidivism. Plaud Report at 3.

This Court has addressed this same issue in the case of another administrative agency tasked with predicting recidivism: the Sex

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

So too here. Despite this evidence, which is germane to the Board’s ultimate task—predicting whether an individual’s release

would be compatible with the welfare of society—the Board never mentioned Mr. Rodriguez’s current age in its decision.

Nor is the mere statement that “[t]he Board also considered testimony and an evaluation from Dr. Joseph Plaud” (2020 Record of Decision at 2-3) sufficient. Unlike in *Deal v. Massachusetts Parole Board*, 484 Mass. 457, 462-463 (2020), where the relevant factors were discussed in Deal’s record of decision (albeit without specifically tying those factors to the *Miller* factors),<sup>1</sup> here, Mr. Rodriguez’s record of decision does not contain any discussion of several relevant factors. It does not mention his completion of several programs, and minimized his participation in the programs that it did mention (“He has completed

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<sup>1</sup> In the *Deal* record of decision, the Board noted that, “[w]hile incarcerated, Mr. Deal participated in such programs as Microsoft Office, Telecommunications, Life Skills, and Alternative to Violence. He is very active with religious activities and is currently employed full time doing laundry.” Exhibit A, Timothy Deal Record of Decision, dated July 25, 2017. The Court looked to statements like this, and concluded that, the Board adequately considered the plaintiff’s level of risk even though, in so doing, the Board implicitly rejected the conclusions of the plaintiff’s experts. *Id.* at 464.

SOTP (Sex Offender Treatment Program), but only after several failures over the decades.”).

Moreover, even if the Board nominally considered the factors detailed in *Diatchenko II*, it wholly failed to consider Mr. Rodriguez’s advanced age. While the Board argued at the lower court hearing that “the record of decision is just a summary” (Transcript of Motion for Judgment on the Pleadings dated March 11, 2021 (“Hearing Transcript”) at 18), and that the Board considered everything in Mr. Rodriguez’s file, the lower court correctly noted that *Deal* looked only to factors expressly detailed in the record of decision because of “a basic principle in administrative law that agencies have to make findings on the issues that are important to their decision” (Hearing Transcript at 20) and “the fact that something appears in the record does not mean that the Board adopted it” (*id.* at 17).

While the Board need not accept Dr. Plaud’s opinion, the Board’s failure to even consider the scientific evidence that he brought to bear was arbitrary and capricious and constituted an abuse of discretion.

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

In 2012, the Legislature first required the Board to consider the results of a risk assessment tool for each prisoner seeking parole. G.L. c. 127, § 130, as amended by St. 2012, c. 192, § 36. In so doing, the Legislature credited relevant scientific research that found that “[f]ormal research-based and validated assessment tools are the foundation needed to assess risk and needs” and that “[e]ffective parole decisions begin with using a reliable and valid risk and needs assessment,”<sup>2</sup> rather than relying on the Board’s subjective determinations.

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<sup>2</sup> Campbell, Nancy, National Institute of Corrections, *Comprehensive Framework for Paroling Authorities in an Era of Evidenced Based Practices* (2008), available at <https://nicic.gov/comprehensive-framework-paroling-authorities-era-evidence-based-practice> (last visited August 9, 2021) at 34-35.

This legislative mandate would be meaningless, however, if the risk assessment tool that the Board uses is not appropriate for the offender or for the offense. See *Doe No 3839 v. Sex Offender Registry Bd.*, 472 Mass. 492, 499 n.9 (2015) (requiring SORB to apply standards that “reflect accurately the current state of knowledge,” where “scientific knowledge in a field is rapidly evolving”).

Here, the risk assessment tool that the Board used is the LS/CMI (Level of Service/Case Management Inventory). Hearing Transcript at 25. But this tool has at least three problems in this case.

First, the Board itself conceded that the LS/CMI is “not typically designed just for juvenile sex offenders,” and that it “could be criticized” for the fact that “there is a difference in recidivism [between juvenile sex offenders and other types of offenders] that’s not supported by the data that went into the tool.” Hearing Transcript at 29. Nevertheless, it defended its use of the tool, noting that “there isn’t a [court] decision regarding the propriety of the LS/CMI” (Hearing Transcript at 30) and contending that the fact that it does not account for juvenile sex

offenders' lower rate of recidivism "doesn't mean . . . that it doesn't serve a purpose" (Hearing Transcript at 28).

Second, the LS/CMI score is heavily weighted toward static risk factors. As is the case for most juvenile lifers, Mr. Rodriguez received a high score for his criminal history. Commitment Summary. This factor will never change and will always continue to drive up his LS/CMI score no matter how much he realizes his "greater prospect for reform."

Third, potential parolees receive only redacted summaries of the LS/CMI, which entirely foreclose the individual from understanding what factors went into the ultimate score, violating the individual's right to due process. Commitment Summary. For instance, if the evaluator used an override in determining the individual's score, that fact would impact the validity of the tool.<sup>3</sup> Yet individuals are not told whether an override code was used. Similarly, the notes provided give

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<sup>3</sup> J. Stephen Wormith, Sarah Hogg & Lina Guzzo, *The Predictive Validity of a General Risk/Needs Assessment Inventory on Sexual Offender Recidivism and an Exploration of the Professional Override*, 39 *Criminal Justice and Behavior* 1511-1538 (Dec. 2012), <https://journals.sagepub.com/doi/10.1177/0093854812455741> (last visited August 2, 2021).

little insight regarding the score. For instance, it appears that he received a higher score for exercising his constitutional right to appeal his convictions. Commitment Summary at 4. It also gave him a high score for “staying away from those inmates who are trouble.” *Id.* It is entirely unclear how avoiding “inmates who are trouble” should lead to a “High” score. Yet, that is the only information that Mr. Rodriguez received.

The Board’s blind reliance on this tool without consideration of the offender or the offense is arbitrary and capricious. *Doe No. 151564*, 456 Mass. at 621. Failure to use an appropriate risk assessment tool is a violation of the Board’s duties under G.L. c. 127, § 130, violates Mr. Rodriguez’s due process rights, and constitutes an abuse of discretion.

### **REASONS DIRECT REVIEW IS APPROPRIATE**

The two issues presented in this application both pertain to whether the Board may ground its decision in decades-old behavior or whether, to ensure that a juvenile offender’s life sentence does not become constitutionally disproportionate, it must also consider current

factors scientifically proven to bear on the risk of recidivism. Because, for juvenile lifers, Board decisions have a constitutional dimension, these issues are both critically important to ensure that such juveniles are not effectively sentenced to life without the possibility of parole, in violation of art. 26's prohibition on cruel or unusual punishment.

Respectfully submitted,

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By his attorney:

/s/Melissa Allen Celli

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

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

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

I further certify that the foregoing brief complies with the applicable length limitation in Mass. R. A. P. 20 because it is produced in the proportional font Century Schoolbook at size 14 points and contains 2000 total non-excluded words, as determined by the Word Count feature of Microsoft Word.

/s/Melissa Allen Celli  
Melissa Allen Celli

# Exhibit A



The Commonwealth of Massachusetts  
Executive Office of Public Safety and Security



PAROLE BOARD

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Natick, Massachusetts 01760

Charles D. Baker  
Governor

Karyn Polito  
Lieutenant Governor

Daniel Bennett  
Secretary

Telephone # (508) 650-4500

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Paul M. Treseler  
Chairman

Michael J. Callahan  
Executive Director

**DECISION**

**IN THE MATTER OF**

**TIMOTHY DEAL**

**W84556**

**TYPE OF HEARING:** Initial Hearing

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

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

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

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

**I. STATEMENT OF THE CASE**

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

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

<sup>1</sup> Five of the six Board Members voted to schedule a review hearing for parole in four years. One Board Member voted to schedule a review hearing in three years.

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

## **II. PAROLE HEARING ON DECEMBER 15, 2016**

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

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

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

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

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

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

### **III. DECISION**

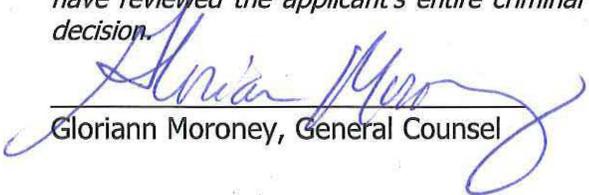
The Board is of the opinion that Mr. Deal has not demonstrated a level of rehabilitative progress that would make his release compatible with the welfare of society. The Board recommends that Mr. Deal partake in more programming, such as Criminal Thinking and Restorative Justice. The Board believes that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

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

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

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

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

  
Gloriann Moroney, General Counsel

7/25/17  
Date

COMMONWEALTH OF MASSACHUSETTS

MIDDLESEX, ss.

DAR No. \_\_\_\_\_

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JOSE RODRIGUEZ  
Appellant,

v.

MASSACHUSETTS PAROLE BOARD  
Appellee

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APPENDIX TO  
APPELLANT'S APPLICATION FOR DIRECT APPELLATE REVIEW  
OF THE ORDER OF THE MIDDLESEX SUPERIOR COURT

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For JOSE RODRIGUEZ:

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August 17, 2021

## 2081CV01099 Rodriguez, Jose vs. Massachusetts Parole Board

- Case Type:
- Administrative Civil Actions
- Case Status:
- Open
- File Date
- 05/06/2020
- DCM Track:
- X - Accelerated
- Initiating Action:
- Appeal from Administrative Agency G.L. c. 30A
- Status Date:
- 05/06/2020
- Case Judge:
- 
- Next Event:
- 

[All Information](#)
[Party](#)
[Event](#)
[Tickler](#)
[Docket](#)
[Disposition](#)

### Party Information

**Rodriguez, Jose**  
- Plaintiff

Alias

#### Party Attorney

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**Massachusetts Parole Board**  
- Defendant

Alias

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### Events

<u>Date</u>	<u>Session</u>	<u>Location</u>	<u>Type</u>	<u>Event Judge</u>	<u>Result</u>
11/17/2020 02:30 PM	Civil B Rm 720	Courtroom 720	Motion Hearing		Held via Video/Teleconference

<u>Date</u>	<u>Session</u>	<u>Location</u>	<u>Type</u>	<u>Event Judge</u>	<u>Result</u>
03/11/2021 11:00 AM	Civil B Rm 720		Hearing for Judgment on Pleading	Wilkins, Hon. Douglas H	Held - Under advisement

**Ticklers**

<u>Tickler</u>	<u>Start Date</u>	<u>Due Date</u>	<u>Days Due</u>	<u>Completed Date</u>
Service	05/06/2020	08/04/2020	90	10/09/2020
Judgment	05/06/2020	05/06/2021	365	04/06/2021
Status Review	10/19/2020	10/30/2020	11	10/23/2020
Under Advisement	03/11/2021	04/10/2021	30	04/05/2021

**Docket Information**

<u>Docket Date</u>	<u>Docket Text</u>	<u>File Ref Nbr.</u>	<u>Image Avail.</u>
05/06/2020	Attorney appearance electronically filed.		<a href="#">Image</a>
05/06/2020	Case assigned to: DCM Track X - Accelerated was added on 05/06/2020		
05/06/2020	Complaint electronically filed.	1	<a href="#">Image</a>
05/06/2020	Civil action cover sheet filed.	2	<a href="#">Image</a>
07/28/2020	Plaintiff Jose Rodriguez's Motion to Extend time for service on Defendant, Massachusetts Parole Board	3	<a href="#">Image</a>
07/29/2020	Endorsement on Motion to extend time for service of process by 60 days (#3.0): After review ALLOWED for an additional 60 days. Dated 7/29/2020		<a href="#">Image</a>
08/24/2020	Service Returned for Defendant Massachusetts Parole Board: Service made in hand;  7/29/2020. 12 Mercer Road Natick MA 01760	4	<a href="#">Image</a>
10/06/2020	Default (1-88): Defendant Massachusetts Parole Board: Defaulted under time standards;	5	<a href="#">Image</a>
10/19/2020	Defendant Massachusetts Parole Board's Motion to Vacate Default Judgment	6	<a href="#">Image</a>
10/19/2020	Attorney appearance On this date Courtney Elaine Doherty, Esq. added as Private Counsel for Defendant Massachusetts Parole Board		<a href="#">Image</a>
10/19/2020	Affidavit of Courtney E. Doherty in support of Defendant's Motion to vacate Default Judgment	6.1	<a href="#">Image</a>
10/19/2020	ORDER: VACATING The Order of Dismissal (1-88) issued on 10/6/20 (pleading #5) is hereby VACATED, as it was entered in error. Dated 10/19/2020	7	<a href="#">Image</a>
10/23/2020	Administrative record as DVD R. disc filed:	8	
10/23/2020	Defendant, Plaintiff Massachusetts Parole Board, Jose Rodriguez's Joint Motion to Impound	9	<a href="#">Image</a>
10/23/2020	Affidavit of Counsel, Courtney E. Doherty in support of Joint Motion to Impound	9.1	<a href="#">Image</a>
10/29/2020	The following form was generated:  Notice to Appear Sent On: 10/29/2020 08:26:34 Notice Sent To: Brian E Murphy, Esq. Murphy & Rudolf LLP 1 Mercantile St Suite 740, Worcester, MA		

<a href="#">Docket Date</a>	<a href="#">Docket Text</a>	<a href="#">File Ref Nbr.</a>	<a href="#">Image Avail.</a>
	01608 Notice Sent To: Courtney Elaine Doherty, Esq. Massachusetts Parole Board 12 Mercer Rd, Natick, MA 01760		
11/03/2020	Plaintiff Jose Rodriguez's Assented to Motion for extension of time to file judgment on the pleadings and summary judgment11/17/2020 02:30 PM Motion Hearing	10	<a href="#">Image</a>
11/04/2020	Endorsement on Motion to extend time for Filing Judgment on the Pleadings and Summary Judgment until 12/7/2020 (#10.0): After review and without opposition ALLOWED Dated 11/4/2020		<a href="#">Image</a>
11/05/2020	Plaintiff Jose Rodriguez's Assented to Motion to expand administrative record	11	<a href="#">Image</a>
11/05/2020	Exhibits/Appendix for paper #11		<a href="#">Image</a>
11/17/2020	Event Result:: Motion Hearing scheduled on: 11/17/2020 02:30 PM Has been: Held via Video Conference Hon. Patrick Haggan, Presiding Staff: Debra J Newman, Assistant Clerk		
11/17/2020	Endorsement on Motion to Impound ( joint) (#9.0): ALLOWED After review and hearing the joint motion is allowed Judge: Haggan, Hon. Patrick		<a href="#">Image</a>
11/17/2020	ORDER: Order of Impoundment Judge: Haggan, Hon. Patrick	12	<a href="#">Image</a>
01/07/2021	Plaintiff Jose Rodriguez's Motion for Judgment on the Pleadings and for Summary Judgment	13	<a href="#">Image</a>
01/07/2021	Defendant Massachusetts Parole Board's Cross Motion for Judgment on the Pleadings and Opposition to Plaintiff's Motion for Judgment on the Pleadings	14	<a href="#">Image</a>
01/08/2021	The following form was generated:  Notice to Appear Sent On: 01/08/2021 08:39:38 Notice Sent To: Brian E Murphy, Esq. Murphy & Rudolf LLP 1 Mercantile St Suite 740, Worcester, MA 01608 Notice Sent To: Courtney Elaine Doherty, Esq. Massachusetts Parole Board 12 Mercer Rd, Natick, MA 01760		
01/13/2021	Plaintiff Jose Rodriguez's Reply to defendant's cross-motion for judgment on the pleadings	15	<a href="#">Image</a>
03/11/2021	Habeas corpus issued as to Jose Rodriguez at MCI - Norfolk for 03/11/2021 11:00 AM Hearing for Judgment on Pleading. Zoom invite : please log on @11:00  Join ZoomGov Meeting https://www.zoomgov.com/j/1604218469?pwd=UVpnaTRZRzJb3ZUQ2JlMlZlZlRkUT09  Meeting ID: 160 421 8469 Passcode: 886436  One tap mobile +16692545252,,1604218469#,,,,*886436# US (San Jose) +16468287666,,1604218469#,,,,*886436# US (New York)  Dial by your location +1 669 254 5252 US (San Jose) +1 646 828 7666 US (New York) +1 669 216 1590 US (San Jose) +1 551 285 1373 US Meeting ID: 160 421 8469 Passcode: 886436		

<a href="#">Docket Date</a>	<a href="#">Docket Text</a>	<a href="#">File Ref Nbr.</a>	<a href="#">Image Avail.</a>
03/11/2021	Matter taken under advisement: Hearing for Judgment on Pleading scheduled on: 03/11/2021 11:00 AM Has been: Held - Under advisement Comments: defendant on screen Hon. Douglas H Wilkins, Presiding Staff. Debra J Newman, Assistant Clerk		
04/06/2021	Endorsement on Motion for judgment on the pleadings MRCP 12(c) After hearing (#13.0): DENIED See Memo of this date. Dated 4/5/2021 Judge: Wilkins, Hon. Douglas H		<a href="#">Image</a>
04/06/2021	Endorsement on Motion for judgment on the pleadings MRCP 12(c) After hearing, Cross-Motion (#14.0): ALLOWED Dated 4/5/2021 Judge: Wilkins, Hon. Douglas H		<a href="#">Image</a>
04/06/2021	MEMORANDUM & ORDER:  OF DECISION ON PLAINTIFF'S MOTION FOR JUDGMENT ON THE PLEADINGS: (which see 10 pages scanned) CONCLUSION: For the above reasons, the plaintiff's Motion for Judgment on the Pleadings is DENIED. FINAL JUDGMENT SHALL ENTER AFFIRMING THE BOARD'S DECISION. (Douglas H. Wilkins, J.) Dated 4/5/2021 Judge: Wilkins, Hon. Douglas H	16	<a href="#">Image</a>
04/06/2021	JUDGMENT on the Pleadings entered:  After hearing and consideration thereof,  It is ORDERED and ADJUDGED: That the plaintiff's complaint be and hereby is DISMISSED and the Board's Decision is AFFIRMED.	17	<a href="#">Image</a>
04/15/2021	Plaintiff Jose Rodriguez's Motion for Reconsideration of Ruling on Plaintiff's Motion for Judgment on the Pleadings Dated 04/05/2021	18	<a href="#">Image</a>
04/26/2021	Endorsement on Motion for reconsideration of Ruling on Plaintiff's Motion for Judgment on the pleadings dated 04/05/2021 (#17.0): DENIED DENIED, except that the Court deletes the phrase and"22, respectively from the final sentence of the third full paragraph on page 2 of its memorandum of decision. Unless the SJC adopts a special rule for offenders at age 21, the boards decision was lawful. Judge: Wilkins, Hon. Douglas H	19	<a href="#">Image</a>
05/28/2021	Notice of Appeal: Defendant gives this honorable Court notice of his appeal of the court's denial of his Motion for Judgment on the Pleadings.  Applies To: Murphy, Esq., Brian E (Attorney) on behalf of Rodriguez, Jose (Plaintiff)	20	<a href="#">Image</a>
05/28/2021	Notice of assembly of record sent to Counsel	21	<a href="#">Image</a>
05/28/2021	Notice to Clerk of the Appeals Court of Assembly of Record	22	<a href="#">Image</a>
05/28/2021	Appeal: Statement of the Case on Appeal (Cover Sheet).		
06/01/2021	Attorney appearance On this date Melissa Allen Celli, Esq. added for Plaintiff Jose Rodriguez		<a href="#">Image</a>
06/07/2021	Plaintiff Jose Rodriguez's Motion to withdraw.( counsel for plaintiff )	23	<a href="#">Image</a>
06/09/2021	Applies To: Murphy, Esq., Brian E (Attorney) on behalf of Rodriguez, Jose (Plaintiff)  Endorsement on Motion to Withdraw as Counsel by Brian E. Murphy, Esq. for the plaintiff (#23.0): ALLOWED Dated 6/9/2021 Judge: Wilkins, Hon. Douglas H		<a href="#">Image</a>

<u>Docket Date</u>	<i>Docket Text</i>	<u>File Ref Nbr.</u>	<i>Image Avail.</i>
06/09/2021	Attorney appearance On this date Brian E Murphy, Esq. dismissed/withdrawn for Plaintiff Jose Rodriguez		
06/10/2021	Appeal entered in Appeals Court on 06/10/2021 docket number A.C. 2021-P-0516	24	<a href="#">Image</a>

**Case Disposition**

<u>Disposition</u>	<u>Date</u>	<u>Case Judge</u>
Judgment after Finding on Motion	04/06/2021	

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COMMONWEALTH OF MASSACHUSETTS

MIDDLESEX, ss.

SUPERIOR COURT  
CIVIL ACTION  
NO. 20-1099-B

JOSE RODRIGUEZ,  
Plaintiff,

vs.

MASSACHUSETTS PAROLE BOARD,  
Defendant.

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

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

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

**BACKGROUND**

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

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

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

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

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

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

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

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

... In the context of an offender convicted of first or second degree murder, who was a juvenile at the time the offense was committed, the Board takes into consideration the attributes of youth that distinguish juvenile homicide offenders from similarly situated adult offenders. Consideration of these factors ensures that the parole candidate, who was a juvenile at the time they committed murder has “a real chance to demonstrate maturity and rehabilitation.” Diatchenko v. District Attorney for the Suffolk District, 471 Mass. 12, 30 (2015); See also Commonwealth v. Okoro, 471 Mass. 51 (2015).

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

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

## DISCUSSION

### I.

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

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

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

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

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

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

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

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

## II.

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

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

[The Supreme Judicial Court has] held that juvenile offenders who have been convicted of murder in the first degree may not be sentenced to life in prison without the possibility of parole. Diatchenko I, 466 Mass. at 669-671. We went on to hold that juvenile offenders sentenced to a mandatory term of life in prison, (i.e., those convicted of murder in the first or second degree) are entitled to a "meaningful opportunity to obtain release [on parole] based on demonstrated maturity and rehabilitation" (citation omitted). *Id.* at 674. See Commonwealth v. Okoro, 471 Mass. 51, 62-63 (2015); G. L. c. 119, § 72B. We further held that a **"meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation" means that the board must consider the "distinctive attributes of youth" in determining whether the juvenile is likely to reoffend.** Diatchenko II, 471 Mass. at 23.

In addition, although in the normal course parole decisions are not subject to judicial review, Cole, 468 Mass. at 302-303, we have determined that **to ensure that juvenile homicide offenders receive a meaningful opportunity for parole, they are entitled to judicial review of board decisions on their parole applications under the abuse of discretion standard.** [Note omitted] Diatchenko II, 471 Mass. at 14, 31. "In this context, **a denial of a parole application by the board will constitute an abuse of discretion only if the board essentially failed to take [the Miller] factors into account, or did so in a cursory way.**" [Note omitted] *Id.* at 31.

Deal v. Massachusetts Parole Board, 484 Mass. 457, 460-461 (2020) (emphasis added).

The Court stated that "merely stating that the board considered the Miller factors, without more, would constitute a cursory analysis that is incompatible with art. 26 of the Massachusetts Declaration of Rights."

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

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

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

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

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

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

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

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

### III.

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

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

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

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

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

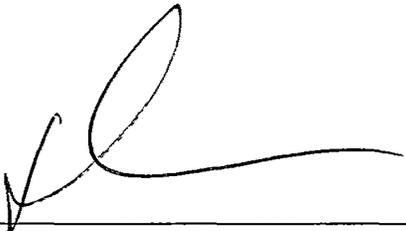
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<sup>3</sup> While G.L. c. 30A does not apply here, essentially the same principles do control. See Doucette v. Massachusetts Parole Board, 86 Mass. App. Ct. 531, 541 n.9 (2015).

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

### **CONCLUSION**

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



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Douglas H. Wilkins  
Justice of the Superior Court

Dated: April 5, 2021

COMMONWEALTH OF MASSACHUSETTS

MIDDLESEX, ss.

DAR No. \_\_\_\_\_

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JOSE RODRIGUEZ  
Appellant,

v.

MASSACHUSETTS PAROLE BOARD  
Appellee

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**Certificate of Service**

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

- (1) Motion to accept late-filed application for direct appellate review with supporting affidavit of counsel;
- (2) Application for direct appellate review with appendix.

/s/Melissa Allen Celli

Melissa Allen Celli

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August 17, 2021