OMMONWEALTH OF MASSACHUSETTS

MIDDLESEX, ss. SJC-13197

JOSE RODRIGUEZ
Appellant,

v.

MASSACHUSETTS PAROLE BOARD
Appellee

ON APPEAL FROM AN ORDER
OF THE MIDDLESEX SUPERIOR COURT

REPLY BRIEF OF APPELLANT

For JOSE RODRIGUEZ:

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The Parole Board's opposition illustrates the problems with the Board's decision-making process for juvenile offenders: the opacity of the process precludes meaningful judicial review and inhibits juvenile lifers' ability to adequately prepare for their parole hearings.

I. While the Parole Board has broad discretion, it must explain the bases for its decisions in written records of decision in order to withstand constitutional scrutiny.

The Board appropriately notes that it is afforded broad discretion, but that discretion is not limitless. Indeed "this court has never held that art. 30 precludes any type of judicial review of parole board decision." *Diatchenko v. Dist. Attorney for Suffolk Dist.*, 471 Mass. 12, 28 (2015) ("*Diatchenko II*").

Yet, the Board seeks to evade this review. The Board takes the position that "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." Opposition at 34. Taken to its extreme, the Board's position is that its written decision could state only "Parole denied, review in 5 years" so long as its counsel could later point to some information in the

voluminous administrative record suggesting that it "considered the correct factors in reaching its decision." *Id.* This cannot be.

This Court has repeatedly stated that if the Board "essentially failed to take [the *Miller*] factors into account or did so in a cursory way," it violates a potential parolee's constitutional rights. *Diatchenko II* at 31; *Deal v. Massachusetts Parole Board*, 484 Mass. 457, 462 (2020). If "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, then certainly the sort of summary written decision that the Parole Board advocates cannot comport with the Board's constitutional mandate for juvenile offenders.

While the majority decision in *Deal* did not require the same level of analysis that the concurrence would have required, even the majority made clear that the Board must justify its actions in its written record of decision. *Deal*, 484 Mass. at 457 ("[U]pon review of the board's *written decision*, 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.") (emphasis added). This must be so. A potential parolee

should not have to bring a lawsuit—the only way for the individual to obtain the administrative record—in order to figure out the basis for the Board's decision.

Moreover, the Board's statement that "all of the items listed as being included in the Administrative Record are included in Rodriguez's impounded record appendix" (Opposition at 34) misses the mark. While the record appendix may include the entire administrative record, it does not include the entire parole file available to the Board when deciding whether to grant parole. The Board should not be permitted to retroactively cherry pick bits and pieces of its voluminous file to support its decision, while excluding other materials that undercut its decision.[1]

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[1] Not only *can* the Parole Board shield its file from judicial review, it actively takes steps to do just that. In a case pending in the Suffolk Superior Court, a potential parolee brought an action in the nature of certiorari and sought to expand the administrative record to include parts of the plaintiff's parole file in order to give the Court a full picture of the information on which the Parole Board based its decision. *Hoffman v. Massachusetts Parole Board*, Suffolk Superior Court No. 2084-CV-02514-E, Plaintiff's Motion to Expand the Administrative Record. The Parole Board opposed that motion, arguing that the Superior Court had no ability to review the facts on which it based its decision. *Hoffman v. Massachusetts Parole Board*, Suffolk Superior Court No. 2084-CV-02514-E, Defendant's Memorandum in Support of its Opposition to Expand the Administrative Record.

This would be the definition of evading judicial review: if the Board could choose to present in its administrative record only information that supported its decision without presenting any of the information that might weigh in favor of granting parole, a reviewing court would have no ability to know whether the Board's actions were arbitrary and capricious.

The practical implications of such an opaque decision-making process are evidenced throughout the Parole Board's opposition:

- The Board notes that it "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." Opposition at 39. In support of this, the Board cites a lengthy discussion at the hearing, where Board Member Hurley questioned Mr. Rodriguez about other alleged sex offenses, without any indication of where these allegations came from, and without any recognition that some of these allegations never resulted in charges and others resulted in not guilty (or not delinquent) verdicts.

Indeed, while the Parole Board states as fact in its brief that Mr. 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" (Opposition at 14-15), in the hearing in the Superior Court, the Parole Board's attorney acknowledged that these alleged offenses were not convictions, but were only "two *alleged* sexual assaults prior to the governing offense" (R.A. 324 (emphasis added)). In short, there is nothing in the administrative record to substantiate these allegations. Nevertheless, the Board now relies on them as a reason to uphold its decision denying Mr. Rodriguez parole.[2]

- The Board said, "assessing whether a would-be parolee has *demonstrated* maturity and rehabilitation necessarily involves an

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[2] Moreover, a potential parolee's inability to remember details of actions that took place when he was a juvenile should not forever bar his ability to get parole. If memories were not properly encoded or stored at the time of the event, no amount of remorse or rehabilitation can bring those memories back decades later. See The Derek Bok Center for Teaching & Learning, "*How Memory Works*," available at https://bokcenter.harvard.edu/how-memory-works (last visited 2/2/2022). Juvenile offenders should not be forever incarcerated for a failure to remember the details of events that occurred decades earlier when they were children or adolescents.

inquiry over time and into the individual's present circumstances" (Opposition at 28), but the record of decision does not discuss this inquiry over time and into the individual's present circumstances. Instead, it stated only that it considered his "unique *capacity* to change" (R.A. 23 (emphasis added)) not any discussion of whether he actually had changed. The difference between those two considerations is the crux of Mr. Rodriguez's argument: the recognition that Mr. Rodriguez, as a juvenile offender, had the *capacity* to change does not at all indicate whether the Board considered whether, during the intervening years, he, in fact, did change.

- The Board says that the single statement that "[t]he Board also considered testimony and an evaluation from Dr. Joseph Plaud . . . shows that it *did* consider [Mr. Rodriguez's] present age and risk of recidivism." Opposition at 31-32. As explained in Mr. Rodriguez's opening brief (at 23-28), that single statement gives no indication that the Board considered the scientific substance of the report and provides no insight as to the substance of that lengthy report, nor why it rejected that scientific substance. While the Board now

maintains that it considered Mr. Rodriguez's advanced age and "simply did not find that evidence persuasive enough to overcome the other stated concerns that led it to deny parole" (Opposition at 31-32), in its written decision, it neither considered Mr. Rodriguez's age nor explicated any countervailing concerns. Mr. Rodriguez had to bring a lawsuit against the Parole Board for the Board to provide any meaningful justification for its decision.

- The Board implies that the reason that it did not provide Mr. Rodriguez with an unredacted copy of his LS/CMI score is because he "made no such request." Opposition at 51. It then cites two pages of the Record Appendix that have no bearing on this issue. To the contrary, the fact that Mr. Rodriguez's parole attorney has a copy of nearly 700 pages of Mr. Rodriguez's parole file including a cover letter stating that the records were being provided "[p]er your recent request to receive records from Mr. Rodriguez's master parole file," indicates that such a request was, in fact, made. But because the administrative record and, accordingly, the record appendix contains only a fraction of the information in the parole

file, the Court could not know what sort of written request was made.

Mr. Rodriguez received a life sentence for a nonhomicide offense that occurred when he was a juvenile. Such severe sentences—the most severe sentences available to juvenile offenders—are rarely imposed for nonhomicide offenses. Survey of Superior Court Sentencing Practices, FY 2018, available at https://www.mass.gov/doc/survey-of-superior-court-sentencing-practices-fy-2018/download at 9 (last visited 2/2/2022) (reporting that in Fiscal Year 2018, of 54 defendants given life sentences, only one was convicted of a nonmurder offense). As the Supreme Court has recognized, "defendants who do not kill, intend to kill, or foresee that life will be taken are categorically less deserving of the most serious forms of punishment than are murderers." *Graham v. Florida*, 560 U.S. 48, 69 (2010). The fact that Mr. Rodriguez received such a sentence indicates that the sentencing judge found his crime to be "extraordinary" and "comparable to murder." *Commonwealth v. Perez*, 480 Mass. 562, 570 (2018) ("*Perez II*"). To merit a life sentence, by definition, a nonhomicide crime must be the kind of crime that would cause many people to viscerally label the offender as irretrievably

depraved, even though this label ignores the capacity of adolescents, like Mr. Rodriguez, to change over the course of their lifetimes. This understandable visceral reaction leads to the risk that the Parole Board will continue to deny Mr. Rodriguez parole based on the severity of his offense without carefully scrutinizing his subsequent rehabilitation. The Parole Board has repeatedly given Mr. Rodriguez five-year setbacks without any substantive explanation about why, despite Mr. Rodriguez's increased demonstration of rehabilitation, including a perfect disciplinary record in recent years and successful completion of sex offender treatment and other programming. The Board's repeated denial parole and repeated grant of five-year setbacks without any indication of what Mr. Rodriguez could do to further demonstrate his rehabilitation could be evidence that visceral reactions to his offense are governing the decisions. And its failure to justify these denials with meaningful written decisions means that these visceral reactions will be left unchecked.

II. Juvenile lifers have a constitutionally protected liberty interest in a meaningful opportunity for parole.

The Parole Board correctly notes that, "to show a violation of due process, an individual must first demonstrate that he has a

constitutionally protected liberty interest," but then it improperly concludes that no liberty interest is at stake because "while Rodriguez is entitled to a *meaningful opportunity* for parole consideration . . . he does not have a constitutionally protected liberty interest in parole." Opposition at 50 (emphasis in original). In fact, the *meaningful opportunity* itself is the liberty interest at stake.

This court has explained that "[i]n general, there is no constitutionally protected liberty interest in a grant of parole," but that in some circumstances a statute may give rise to such a right. *Diatchenko II*, 471 Mass. at 18. The Court then concluded that, while G.L. c. 127, § 130 "does not create an expectation of release through parole," juvenile lifer's constitutional right to a meaningful opportunity for parole gives the parole process "a constitutional dimension that does not exist for other offenders whose sentences include parole eligibility." *Diatchenko II*, 471 Mass. at 18-19. It is this right to a meaningful opportunity for parole that gives rise to the due process protection, not, as the Parole Board argued, any liberty interest in a grant of parole.

To ensure a meaningful opportunity for parole, Mr. Rodriguez must have the ability to understand his LS/CMI score in order to

prepare for his parole hearing. Even though "some of the information that is redacted can be ascertained by looking at their non-redacted respective headings . . . [a]nd much of the redacted information pertains to [Mr.] Rodriguez's own identification information and criminal history, of which he is aware" (Opposition at 49-50), the heavy redactions preclude any sort of understanding of the ultimate score. While of course Mr. Rodriguez knows his own criminal history, the Board's redactions prevent him from knowing what aspects of that history went into his ultimate score. And while the Board states that "the factors that went into the ultimate score are expressly laid out," the mere fact that some numbers are unredacted does not change the fact that the redactions render impossible the task of having any meaningful understanding of how the score was derived. See Brief at 41-43.

A juvenile lifer has a constitutionally protected right to a meaningful opportunity for release. Part of that right is the right to judicial review to ensure that the Parole Board has constitutionally exercised its discretion. Those rights would be rendered meaningless if the Parole Board could make its decisions arbitrarily and without

justification. Accordingly, the Parole Board must explain its reasoning and cannot shield itself from review by relying on secret information that the judge and the juvenile lifer are forbidden to see.

CONCLUSION

For the foregoing reasons, the Court should grant Mr. Rodriguez the relief requested in his opening brief.

Respectfully submitted,

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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 2276 total non-excluded words, as determined by the Word Count feature of Microsoft Word.

/s/Melissa Allen Celli
Melissa Allen Celli

Certificate of Service

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

(1) Plaintiff's Reply Brief

(2) Plaintiff's Assented To Motion to Accept Late-Filed Reply Brief

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