COMMONWEALTH OF MASSACHUSETTS

SUPREME JUDICIAL COURT

SUFFOLK COUNTY NO. SJC-12482

JEFFREY ROBERIO,
PETITIONER-APPELLANT

v.

PAUL TRESELER,
CHAIRMAN, MASSACHUSETTS PAROLE BOARD,
RESPONDENT-APPELLEE

BRIEF AND RECORD APPENDIX FOR THE PETITIONER-APPELLANT ON APPEAL FROM A JUDGMENT OF THE SUFFOLK SUPERIOR COURT

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Table of Contents

Table of Authorities

Cases

Constitutional Provisions

United States Constitution

Massachusetts Declaration of Rights

Statutory Provisions

Other Authorities

Issue Presented

May a juvenile homicide offender denied parole permissibly be subjected to a five-year setback, where the longest setback authorized by the law in place at the time of the governing offense was three years?

Statement of Prior Proceedings and Statement of Facts

Jeffrey Roberio is a juvenile homicide offender, see Diatchenko v. District Attorney for the Suffolk Dist., 471 Mass. 12, 13 & n.3 (2015) (Diatchenko II), who has been imprisoned for thirty-two years following his conviction for first degree murder. Commonwealth v. Roberio, 428 Mass. 278 (1991), S.C., 440 Mass. 245 (2003). At the time of the offense – July 29, 1986 – Roberio was seventeen years old (R. 3).[1/] Roberio was originally sentenced to life without the possibility of parole, as the law then required. Id. He was deemed parole-eligible in 2014 (R. 4), after this Court held in Diatchenko v. District Attorney for the Suffolk Dist., 466 Mass. 655, 667-671 (2013) (Diatchenko I), that sentencing juveniles to die in prison inflicts "cruel or unusual punishment[]" in violation of Article 26 of the Massachusetts Declaration of Rights.

[1/]The record appendix is cited by page number as "(R. __)" and is reproduced, post. The addendum is cited by page number as "(Add. __)."

The Massachusetts Parole Board provided Roberio with a hearing on June 25, 2015 (R. 3). On November 4, 2015, the board issued a decision denying parole and ordering a review "in five years from the date of the hearing" (R. 3), i.e., in June 2020. The maximum "setback" permitted for a lifer denied parole in 1986, when Roberio's offense occurred, was three years. G.L. c.127, §133A, as amended through St. 1982, c.108, §2 (Add. 23-24). The statute was changed in 1996 to permit five-year setbacks. St. 1996, c.43 (Add. 25).

On August 24, 2016, Roberio filed a petition pursuant to G.L. c.231A, seeking a declaration that retroactive application of the five-year setback provision authorized by the 1996 amendment to §133A violated Roberio's state and federal constitutional rights not to be subjected to an ex post facto law (R. 1).[2/] On February 7, 2017, Roberio moved for summary judgment pursuant to Mass. R. Civ. P. 56(c), as amended, 436 Mass. 1404 (2002), and the parole board moved for judgment on the pleadings pursuant to Mass.

[2/]The petition was filed originally in the Supreme Judicial Court for Suffolk County, on May 23, 2016, and was thereafter transferred by that Court (Botsford, J.) to Suffolk Superior Court pursuant to G.L. c.211, §4A. Roberio v. Treseler, SJ-2016-0235 (Aug. 9, 2016) (paper no. 7).

R. Civ. P. 12(c), 365 Mass. 754 (1974) (R. 1). Roberio's motion for summary judgment was supported by two affidavits, which are summarized as follows.

1. The Garin affidavit

Attorney Patricia Garin is an adjunct professor at Northeastern University School of Law, where she has taught prisoners' rights law and supervised clinical law students since 1994 (R. 10 [Affidavit of Attorney Patricia Garin ¶5]). Attorney Garin has over thirty years of experience representing lifers before the Massachusetts Parole Board, and has attended at least 275 lifer hearings since 2000 as counsel for the prisoner, supervisor of a law student, or mentor to an attorney appointed by the Committee for Public Counsel Services (R. 10 [Garin Aff. ¶7]).

Attorney Garin attested that the decision of the Legislature in 1996 to increase the maximum allowable setback for a lifer denied parole from three years to five years was made during a "get-tough-on-crime" era when sentences "were being increased, mandatory minimum sentences were being adopted and imposed, and the treatment of juvenile offenders was greatly harshened" (R. 17 [Testimony of Attorney Patricia Garin before the Joint Committee on the Judiciary Concerning House Bill

4084]).[3/] "Before 1996, lifers denied parole were typically given three-year setbacks" (R. 11 [Garin Aff. ¶9). After the statute was amended, "five-year setbacks soon became the new normal." Id. By 2012, seventy-one percent of lifers denied parole received five-year setbacks (R. 13 [Garin Aff. ¶¶19-20]).

Attorney Garin further attested that, even though the parole board has the discretion to hold expedited hearings based on changed circumstances for lifers given a five-year setback, the parole board has never exercised this discretion (R. 12 [Garin Aff. ¶¶15-16]), citing 120 Code Mass. Regs. §§301.01(5), 304.03. The failure to hold such expedited hearings, Attorney Garin attested (see R. 12 [Garin Aff. ¶15]), is contrary to "evidence based practices," which "reduce the amount of time persons spend in prison" by "us[ing] parole hearings to incentivize prisoners to grow and change and progress" (R. 16 [Garin Testimony]). Extending the time period between review hearings, on the other hand, "does exactly the opposite," and results in "longer

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[3/]House Bill 4084 sought to amend §133A to permit ten-year setbacks (R. 11 [Garin Aff. ¶11]). A copy of Attorney Garin's testimony before the Joint Committee on the Judiciary concerning this bill (R. 15-17 [Garin Testimony]) was submitted with her affidavit in support of Roberio's motion for summary judgment (R. 11 [Garin Aff. ¶11]).

periods of incarceration." Id. at 16-17.

2. The Kaban affidavit.

Attorney Barbara Kaban is the former Director of Juvenile Appeals for the Committee for Public Counsel Services and was responsible for assigning counsel to first degree juvenile homicide offenders originally sentenced to life without the possibility of parole who became parole-eligible by virtue of Diatchenko I (which was decided on December 24, 2013), and for monitoring the outcomes of their parole hearings (R. 19 [Affidavit of Attorney Barbara Kaban ¶¶5-8]). Attorney Kaban attested that, as of January 2, 2017, the parole board granted parole to about thirty-eight percent of this cohort (thirteen out of thirty-four) (R. 19-20 [Kaban Aff. ¶10]).

The parole board did not submit any counter affidavits or contest the Garin or Kaban affidavits in any respect.

On July 10, 2017, the Superior Court (Roach, J.) issued a memorandum of decision denying Roberio's motion for summary judgment and allowing the board's motion for judgment on the pleadings (Add. 19-22; R. 2, 22-25). Following the filing of a timely notice of appeal (R. 25) and the allowance of Roberio's

application for direct appellate review, the case was entered in this Court on February 15, 2018.

ARGUMENT

With respect to Roberio and similarly situated juvenile homicide offenders, whose capacity for rehabilitation is constitutionally heightened, retroactive application of the five-year setback provision authorized by the 1996 version of G.L. c.127, §133A, creates a "significant risk" of prolonging the juvenile's life behind bars, in violation of the prohibition against ex post facto laws.

A. Summary

In 1986, when the offense underlying Roberio's life sentence was committed, the law required that a lifer denied parole be provided with a review hearing "at least once in each ensuing three year period." G.L. c.127, §133A, as amended through St. 1982, c.108, §2 (Add. 24). The statute was amended in 1996 to permit five-year setbacks. St. 1996, c.43 (Add. 25). In 2015, after denying Roberio's application for parole, the Massachusetts Parole Board used the 1996 version of §133A to give Roberio a five-year setback (R. 3). The law was therefore "applie[d] to conduct completed before its enactment," and had "a retrospective application to [Roberio]." Clay v. Massachusetts Parole Bd., 475 Mass. 133, 136 (2016) (citation omitted).

Juvenile offenders are "constitutionally

different" from adults not only because their youthfulness diminishes their moral culpability but because it affords them "greater prospects for reform." Diatchenko II, 471 Mass. at 30, quoting Miller v. Alabama, 567 U.S. 460, 471 (2012). See Roper v. Simmons, 543 U.S. 551, 570 (2005) (recognizing that juvenile criminal behavior is typically "fleeting," and "cease[s] with maturity as individual identity becomes settled"), quoting Steinberg & Scott, Less Guilty by Reason of Adolescence: Developmental Immaturity, Diminished Responsibility, and the Juvenile Death Penalty, 58 Am. Psychologist 1009, 1014 (2003). It is thus not surprising that the cohort of which Roberio is a member is found suitable for release on parole almost forty percent of the time (R. 19-20 [Kaban Aff. ¶10]). Compare California Dept. of Corrections v. Morales, 514 U.S. 499, 509 (1995) (finding no ex post facto violation where extended parole review provision applied to class of prisoners whose likelihood of parole was "quite remote"). As applied to juvenile lifers such as Roberio, whose capacity for rehabilitation is constitutionally heightened, a five-year setback creates a "significant risk," Garner v. Jones, 529 U.S. 244, 251 (2000), of prolonging the juvenile's life

behind bars. This risk is aggravated by the total failure of the Massachusetts Parole Board to exercise its discretion to provide lifers subjected to five-year setbacks with expedited review hearings based on changed circumstances (R. 12 [Garin Aff. ¶¶15-16]). See Garner, 529 U.S. at 255 (requisite risk of prolonged incarceration may be demonstrated by evidence of how parole board actually implements new rule).

Accordingly, the five-year setback provision of §133A is an "ex post facto law" that may not be applied to Roberio without violating Article I, §10 of the United States Constitution or, alternatively, the much more robust language of Article 24 of the Massachusetts Declaration of Rights.

B. The majority opinions in Morales and Garner should be rejected as a matter of State constitutional law.[4/]

It would seem obvious that increasing the interval between parole release hearings "almost inevitably delay[s] the grant of parole in some cases." Morales, 514 U.S. at 525 (Stevens, J., dissenting). Legislators decrease the frequency of such hearings for the very

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[4/]Roberio's state constitutional claim was raised below but the Superior Court did not address it.

purpose of "increas[ing] time served in prison." Garner, 529 U.S. at 261 (Souter, J., dissenting). In Massachusetts, after §133A was amended to permit setbacks of up to five years, the parole board promulgated regulations which presume that five-year setbacks are the norm, "except where the [board] . . . act[s] to cause a review at an earlier time." 120 Code Mass. Regs. §301.01(5). Sure enough, by 2012, "seven out of ten lifers denied parole . . . received the maximum [five-year] setback allowed by law" (R. 13 [Garin Aff. ¶20]).

Even though "common sense" suggests that a parole board "acting with a purpose to get tough [will] succeed in doing just that," Garner, 529 U.S. at 261, 262 (Souter, J., dissenting), the majority opinions in Morales and Garner pretend otherwise in rejecting challenges to the retroactive application of laws extending the allowable interval between parole hearings brought under the ex post facto clause of the United States Constitution. In Morales, the Court considered whether the ex post facto clause was violated by retroactive application of a law permitting California's parole board to delay for up to two years the parole review hearing of a prisoner who had been

convicted of "more than one offense which involves the taking of a life" if the board found that it was "not reasonable to expect that parole would be granted at a hearing during the following years and states the bases for the finding." Morales, 514 U.S. at 503 (quoting California law in question). Over Justice Stevens' cogent dissent (which was joined by Justice Souter), the Morales majority concluded that the new law created "only the most speculative and attenuated possibility" of increasing the amount of time that Morales would spend behind bars because, as someone who had killed more than once, Morales was a member of a class for whom the likelihood of parole was "quite remote," id. at 509, and because the record suggested that a prisoner in Morales's position could seek an "expedited [review] hearing." Id. at 514.

In Garner, the Court considered whether the ex post facto clause was violated by Georgia's retroactive application of a provision extending the allowable interval between parole hearings from three years to eight years. 529 U.S. at 247. After holding that the test is whether the new parole rule creates a "significant risk" of prolonging incarceration, id. at 251, the Court stated that this risk may either be

"inherent" in the framework of the new rule itself or shown "by evidence drawn from the rule's practical implementation by the agency charged with exercising discretion." Id. at 255. In a six-to-three decision (with Justice Souter, joined by Justices Stevens and Ginsburg, dissenting), the Court held that the requisite degree of risk had not been demonstrated in light of the "broad discretion" given to Georgia's parole board to provide prisoners with expedited review hearings, and because the case was before the Court on the "premise" that Georgia's board exercised this discretion on the basis of an individualized "assessment of each inmate's likelihood of release between reconsideration dates." Id. at 256.

Morales and Garner are not persuasive. On its face, an extension of the allowable interval between parole review hearings creates a "substantial risk of increased punishment." Garner, 529 U.S. at 261 (Souter, J., dissenting). The majority opinions in Morales and Garner get to a contrary conclusion through tortuous reasoning that ignores the framers' core concern — "fundamental fairness," Peugh v. United States, 569 U.S. 530, 544 (2013) (citation omitted) — and that has effectively removed a steady wave of "get

tough" state-law changes to parole statutes from the purview of the ex post facto clause of the United States Constitution.[5/] As Justice Harlan noted: "[T]he policy of the prohibition against ex post facto legislation . . . rest[s] on the apprehension that the legislature, in imposing penalties on past conduct, . . . may be acting with a purpose not to prevent dangerous conduct generally but to impose by legislation a penalty against specific persons or classes of persons." Morales, 514 U.S. at 520 (Stevens, J., dissenting), quoting James v. United States, 366 U.S. 213, 247 n.3 (1961) (Harlan, J., concurring in part and dissenting in part). Massachusetts prisoners serving life sentences with the possibility of parole do not enjoy great political support in the General Court. "Bills seeking to extend the setback period for lifers are filed in the Legislature almost every year" (R. 11 [Garin Aff. ¶10]). The Court should therefore declare that the retroactive application of the 1996 version of §133A in this case violates the Declaration of Rights's prohibition on ex post facto laws, whether or not the

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[5/]See, e.g., Gilman v. Brown, 814 F.3d 1007, 1014-1022 (9th Cir. 2016); Hill v. Walker, 241 Ill.2d 479, 490-494 (Ill. 2011); Dyer v. Bowlen, 465 F.3d 280, 283-292 (6th Cir. 2006).

Supreme Court would so conclude as a matter of federal constitutional law.

This Court has "often" exercised its "inherent authority" to afford greater protection of individual rights under the Declaration of Rights than is available under corresponding provisions of the Federal Constitution. Diatchenko I, 466 Mass. at 668 (collecting cases). Although the Court has not previously "differentiated the ex post facto provision of the Massachusetts Declaration of Rights from that of the Federal Constitution," Dutil, petitioner, 437 Mass. 9, 19 n.8 (2002), neither has it previously been confronted with the retroactive imposition of a get-tough amendment to §133A that puts off for five years the parole review hearing of a juvenile lifer whose capacity for rehabilitation is constitutionally heightened, see Deal v. Commissioner of Correction, 478 Mass. 332, 342 n.12 (2017), and who was imprisoned for decades under an unconstitutional sentence that deprived him of any hope for release. Providing juvenile homicide offenders with greater protection under the Declaration of Rights than may be required under federal law in this regard is consistent with the essential point of Diatchenko II – that given such

offenders' diminished culpability and heightened capacity for reform, the authority of a parole board to extend a juvenile's mandatory life sentence is constrained by principles safeguarding fundamental fairness. See Diatchenko II, 471 Mass. at 19 (parole process for juvenile homicide offenders "takes on a constitutional dimension" that does not exist with respect to other parole-eligible prisoners). See also Diatchenko I, 466 Mass. at 675 (Lenk, J., concurring). In light of the Supreme Court's disregard for the ex post facto rights of parole-eligible prisoners, the language of Article 24 – which is far more descriptive than its federal counterpart[6/] – should be construed to protect juvenile homicide offenders like Roberio from the obvious and significant risk that they "will in fact serve longer sentences," Garner, 529 U.S. at 263 (Souter, J., dissenting) due to legislative extension of the allowable interval between parole

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[6/]Article I, §10 of the United States Constitution states simply that "[n]o State shall . . . pass any . . . ex post facto Law." Article 24 of the Declaration of Rights, on the other hand, provides as follows:

> Laws made to punish for actions done before the existence of such laws, and which have not been declared crimes by preceding laws, are unjust, oppressive, and inconsistent with the fundamental principles of a free government.

review hearings.[7/]

C. The uncontested evidence before the Superior Court on summary judgment demonstrates that Roberio is entitled to relief even under Morales and Garner.

The prisoner in Morales lost before the Supreme Court because he was a member of a class of prisoners — those who had been convicted of two or more murders — whose probability of parole was "quite remote" to begin with. Morales, 514 U.S. at 510. In contrast, the undisputed evidence before the Superior Court on summary judgment here showed that juvenile homicide offenders like Roberio are granted parole almost forty percent of the time (R. 19-20 [Kaban Aff. ¶10]).[8/] The

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[7/]Although this Court has heretofore treated Article 24 of the Declaration of Rights as coextensive with the ex post facto clause of the Federal Constitution, see, e.g., Police Dept. of Salem v. Sullivan, 460 Mass. 637, 644 n.11 (2011), Commonwealth v. Cory, 454 Mass. 559, 564 n.9 (2009), Roberio finds no case that explains why.

[8/]In Clay, the Court stated that the amendment to §133A there in issue impacted a class of individuals — prisoners "sentenced to life in prison" — for whom the probability of release on parole was "very low." 475 Mass. at 139. The data to which the Court looked in reaching this conclusion sheds no light on the release rate for juvenile homicide offenders (who did not exist as a class until December 24, 2013, when Diatchenko I was decided). See id. at n.7 (citing to parole board's annual reports regarding parole hearings in cases involving life sentences for 2011, 2012, and 2013). As

(FOOTNOTE CONTINUED ON NEXT PAGE)

prisoner in Garner lost based on the Court's assumption – rebuttable "by evidence drawn from the [new] rule's practical implementation by the agency charged with exercising discretion," Garner, 529 U.S. at 255 – that Georgia's parole board granted expedited review hearings "in accordance with its assessment of each inmate's likelihood of release between reconsideration dates." Id. at 256. Here, on the other hand, the undisputed evidence is that Massachusetts' parole board *never* exercises its discretion to provide expedited hearings based on changed circumstances to lifers given a five-year setback, that seventy percent of lifers denied parole get the full five-year setback, and that the reduced frequency of parole hearings caused by the 1996 amendment has resulted in longer periods of incarceration (R. 12-13 [Garin Aff. ¶¶16, 20]; R. 17 [Garin Testimony]).

This Court reviews the ruling below "de novo." Crowell v. Massachusetts Parole Board, 477 Mass. 106, 108 (2017). The evidence submitted by Roberio in

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[8/](FOOTNOTE CONTINUED FROM PREVIOUS PAGE) noted, the evidence here is that Roberio is a member of a cohort of juvenile lifers with a release rate of thirty-eight percent (R. 19-20 [Kaban Aff. ¶10]). This is more than twice the release rate of the lifers examined by the Court in Clay. See 474 Mass. at 139 n.7 (looking at parole board data involving a total of seventy-seven lifers, fourteen of whom were paroled, for an overall release rate of eighteen percent).

support of summary judgment must be taken in the "light most favorable" to him. DiLiddo v. Oxford Street Realty, Inc., 450 Mass. 66, 70 (2007). Thus viewed, the same factors that resulted in the Supreme Court's rejection of the ex post facto claims in Morales and Garner show that application of the five-year setback provision in this case created a "significant risk" of prolonging Roberio's life behind bars.[9/] Roberio is therefore entitled to relief even if the majority opinions in those cases define the outer reach of the right of a juvenile homicide offender not to be subjected to ex post facto laws under Article 24 of the Declaration of Rights.

Conclusion

By exposing Roberio to a "significant risk" of prolonged incarceration, the retroactive imposition of §133A's five-year setback provision offends

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[9/]The Superior Court rejected Roberio's ex post facto claim after concluding that, under Clay, Roberio had not shown it to be "certain and demonstrable" that his incarceration would be prolonged due to retroactive application of the 1996 version of §133A (R. 24), citing Clay, 475 Mass. at 135. This was error. It is true that the facts of Clay showed that, "but for" retroactive application of the supermajority provision of §133A, "Clay would have been granted parole," and that the prolonging of Clay's incarceration was therefore not just a risk but "a reality." 475 Mass. at 140. But the standard under Clay is whether the risk is "significant," id. at 136, quoting Garner, 529 U.S. at 251, not whether it is "certain and demonstrable."

"fundamental justice," Peugh v. United States, 569 U.S. at 550 (citation omitted), and disparages the "central intuition" of Miller v. Alabama, 567 U.S. 460 (2012), "that children who commit even heinous crimes are capable of change." Montgomery v. Louisiana, 136 S. Ct. 718, 736 (2016). Accordingly, the orders denying Roberio's motion for summary judgment and allowing the parole board's motion for judgment on the pleadings should be vacated and a judgment should be entered declaring that Roberio may not be subjected to more than a three-year setback.

Respectfully submitted,

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September, 2018.

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss

SUPERIOR COURT
1684CV02622-A

JEFFREY ROBERIO,

Plaintiff

v.

PAUL TRESELER, in his capacity as Chair, Massachusetts Parole Board,

Defendant

MEMORANDUM OF DECISION AND ORDER ON CROSS-MOTIONS FOR JUDGMENT ON THE PLEADINGS

Introduction

Plaintiff Jeffrey Roberio is a "juvenile homicide offender" sentenced to life imprisonment.[1] He seeks relief pursuant to G.L. c. 231A and G.L. c. 249, section 4 from a decision by the Massachusetts Parole Board unanimously denying his application for parole. Diatchenko v. District Attorney for Suffolk District, 471 Mass. 12, 30-32 (2015)(Diatchenko II). Plaintiff also challenges the portion of the decision setting a five-year review date, and seeks a review in fewer than five years.

The parties agree on the applicable law. A civil action in the nature of certiorari is the appropriate form of judicial review available for parole decisions by the Board. Diatchenko II, at 30-31; Doucette v. Massachusetts Parole Bd., 86 Mass. App. Ct. 531, 540 (2014)(decisions of the Board not subject to review under G.L. c. 30A); Averett v. Commissioner of Correction, 25

[1] In August of 1987, Mr. Roberio was convicted of the first degree murder of Lewis Jennings. Roberio was seventeen years old at the time of the killing. He was initially sentenced to life in prison without the possibility of parole, pursuant to then-applicable law. Commonwealth v. Roberio, 428 Mass. 278 (1991); 440 Mass. 245 (2003). Following the decision in Diatchenko v. District Attorney for the Suffolk District, 466 Mass. 655 (2013)(Diatchenko I), he was resentenced to life in prison with the possibility of parole after fifteen years, which in Mr. Roberio's case made him immediately eligible to be considered for parole. Diatchenko II, 471 Mass. at 16.

For the Board in its discretion and experience to be wary of Roberio's subjective assessment and pronouncement that he meets the qualifications for parole, for example, "because I don't drink," is not arbitrary and capricious. Likewise, for the Board to have weighed certain of the Miller factors (including those addressed by the expert opinion) differently than counsel believes they should be weighed does not mean the Board "rejected" the Miller factors, and does not unconstitutionally deprive Roberio of a meaningful opportunity to obtain release. Nor can I agree that the Board was duty-bound to explain in its Decision why the necessary programming could not occur on parole. Plaintiff's Motions at page 18. As I view this record, the Board "carried out its responsibility to take into account the [age] attributes or factors . . . in making its decision," Diatchenko II, at 30, and accordingly Roberio's Motions on Count I of his Petition are **DENIED**.

Count II - The Five-Year "Setback"

The Board's Decision provides that "the review will be in five years, during which time Roberio should engage in rehabilitative programming that addresses substance abuse, anger, violence, and any potential mental health issues that may impair his ability to function as a law abiding citizen in society." Decision at page 6. Count II of Roberio's Petition for Relief seeks a declaration that he is entitled to a review hearing within three years (by June 24, 2018) instead of five. The parties do not agree on the legal analysis applicable to this claim.

Plaintiff's argument is that at the time of Mr. Jennings' murder in 1986, people serving life sentences who were denied parole were entitled to receive a review hearing every three years. The Legislature changed the law in 1996 to permit five-year so-called setbacks. G.L. c. 127, section 133A. Roberio concludes that application of the five-year rule to him violates his "constitutional right to be protected from the operation of ex post facto laws," relying on Clay v.

Massachusetts Parole Bd., 475 Mass. 133, 135 (2016). Plaintiff's Motions at page 23. The basis for this conclusion is that, since juveniles are constitutionally different from adults due to their greater prospects for reform, Diatchenko II, 471 Mass. at 30, use of an extended setback for them creates a significant risk of prolonging their incarceration, citing Commonwealth v. Brown, 466 Mass. 676, 689 n.10 (2013). Roberio also argues that his capacity to petition for an earlier hearing -- or the Board's own discretion to review earlier -- are theoretical only, because that never, in practice, occurs; according to Plaintiff's (uncontradicted) evidence, the Board virtually never conducts an early review. 120 Code Mass. Regs. Sections 301.01(5) and 304.03; Plaintiff's Motions at pages 27-28; Plaintiff's Reply at pages 4-5.

The Board in turn maintains that the statute does not operate retroactively, because it does not apply to events that occurred before its enactment, citing Commonwealth v. Corey, 454 Mass. 559, 564 (2009). Defendant's Cross-Motion at page 13. It argues that here, the 1996 amendment to G.L. c. 127 section 133A "did not change or alter any decisions made in the past," id., because Roberio had no right or expectation whatsoever in 1996 to be considered for parole. It was not until long after the date of the statutory amendment, that is, until the Diatchenko I decision in 2013, that he first received this opportunity. Moreover, this particular amendment did not change either parole eligibility dates or the standard for determining parole. Contrast Commonwealth v. Gabriel, 89 Mass. App.Ct. 1124 (2016)(Rule 1:28 decision)(change in setback not an increase in punishment), with Commonwealth v. Brown, 466 Mass. 676, 689 n. 10 (2013)(extending the initial date for parole eligibility changed a penalty and inflicted a greater punishment). Finally, the Board argues Diatchenko II held that children are constitutionally different from adults "for purposes of sentencing," and G.L. c 127 section 133A impacts neither sentencing nor parole eligibility.

By my reading the Board has the better part of the law on this point. The Brown footnote explicitly addresses "the possible penalty for a crime committed when an earlier version of the statute was in effect," and laws that "change[ ] the punishment and inflict[ ] a greater punishment." Brown, 466 Mass. at 689 n.10. That is not the case here. More significantly, the recent Clay decision addressed a substantive legislative change to the nature of the Board vote required to grant parole. In Mr. Clay's case, he obtained an affirmative (though split) Board vote, in numbers which would have been sufficient to grant him parole under prior statute, but were insufficient under the new law. The SJC in its analysis distinguished between an increase in punishment that is certain and demonstrable, and one that is speculative and conjectural. It held that the circumstances of Mr. Clay's petition entailed a certain and demonstrable increase in punishment to him. In contrast, under all of the circumstances of Mr. Roberio's petition presented on this record, his claim to an increase in punishment falls into the category of the speculative and conjectural. Accordingly, Count II of his Petition is also **DENIED**.

Conclusion

For all of the reasons stated:

- **Plaintiff's Motions for Judgment on the Pleadings and for Summary Judgment (Paper 11) on Counts I and II of the Petition are each DENIED;**
- **Defendant's Cross-Motion for Judgment on the Pleadings (Paper 12) is ALLOWED; and**
- **The Parole Board did not violate the Plaintiff's constitutional, statutory, or regulatory rights.**

SO ORDERED.

Dated: July 7, 2017

Christine M. Roach

1994 EDITION

OF THE

GENERAL LAWS OF MASSACHUSETTS

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BY

THE GENERAL COURT

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Speaker of the House of Representatives

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CHAPTERS 113–137

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tences of imprisonment in the state prison shall not be suspended in whole or in part.

127:133A. Eligibility for parole; notice and hearing; parole permits; revision of terms and conditions; revocation; arrest.

Section 133A. 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, and except prisoners serving a life sentence for murder in the first degree, shall be eligible for parole, and the parole board shall, within sixty days before the expiration of fifteen years of such sentence, conduct a public hearing before the full membership.

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. If a victim is deceased at the time any parole hearing is scheduled on the said sentence under this chapter, the deceased victim may be represented by his relatives in the following order: mother, father, spouse, child, grandchild, brother or sister, niece or nephew.

After such hearing the parole board may, by a vote of a majority 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 three 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 a majority 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.

127:133B. Parole of prisoners declared to be habitual criminals; conditions; revision; revocation.

Section 133B. In the case of every prisoner sentenced under the provisions of section twenty-five of chapter two hundred and seventy-nine except for those persons sentenced to a term of imprisonment as

1996 Mass. Legis. Serv. Ch. 43 (H.B. 1894) (WEST)

MASSACHUSETTS 1996 LEGISLATIVE SERVICE

General Court, 1996 Second Annual Session

Additions and deletions are not identified in this document.

CHAPTER 43

H.B. No. 1894
CRIMINAL PROCEDURE—ELIGIBILITY FOR PAROLE

AN ACT relative to eligibility for parole.

Be it enacted by the Senate and House of Representatives in General Court assembled, and by the authority of the same, as follows:

<< MA ST 127 § 133A >>

Section 133A of chapter 127 of the General Laws, as appearing in the 1994 Official Edition, is hereby amended by striking out, in line 24, the word "three" and inserting in place thereof the following word:— five.

Approved March 19, 1996.

MA LEGIS 43 (1996)

End of Document

United States Constitution

Article 1, Section 10

> No State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility.

Massachusetts Declaration of Rights

Article 24

> Laws made to punish for actions done before the existence of such laws, and which have not been declared crimes by preceding laws, are unjust, oppressive, and inconsistent with the fundamental principles of a free government.

Code of Massachusetts Regulations

120 Code Mass. Regs. §301.01

* * *

(5) In cases involving inmates serving life sentences with parole eligibility, a parole review hearing occurs five years after the initial parole release hearing, except where the Parole Board members act to cause a review at an earlier time. The time period for the next hearing is calculated from the date of the hearing itself, not from the date the Parole Board renders a Record of Decision.

120 Code Mass. Regs, §304.03

(1) An inmate may petition a hearing panel, in writing, for reconsideration of a decision to deny, rescind, or revoke parole, or to grant parole subject to special conditions.

Such petition may not be submitted earlier than 90 days after the date the inmate receives notification of the hearing panel decision, except when such petition is submitted at the same time as an appeal pursuant to 120 CMR 304.02. The petition for reconsideration must state specific facts which justify reconsideration based on one or more of the following grounds:

(a) There is a material change in personal or other circumstances which requires a different decision.

(b) The tasks mandated by the parole hearing panel have been accomplished.

(c) Especially mitigating circumstances justify a different decision.

(d) There are compelling reasons why a more lenient decision should be rendered.

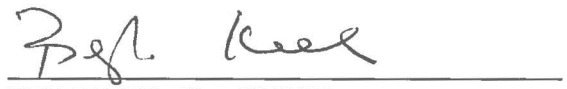
(2) The petitioner may not base a petition for reconsideration on the same grounds previously rejected by a reconsideration hearing panel, or an appeal pursuant to 120 CMR 304.02.

(3) The procedure for reconsideration of parole release decisions is the same as that for the appeal process described in 120 CMR 304.02.

(4) The hearing panel that decided the case will decide the request for reconsideration.

Certificate of Compliance

I certify that this brief complies with the rules of court that pertain to the filing of briefs.



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Record Appendix

Table of Contents

1684CV02622 Roberio, Jeffrey S vs. Paul M Tressler As Chairperson of Massachusetts Parole Board

Case Type	Administrative Civil Actions	Initiating Action:	Certiorari Action, G. L. c. 249 § 4
Case Status	Closed	Status Date:	07/19/2017
File Date	08/24/2016	Case Judge:	
DCM Track:	X - Accelerated	Next Event:	

All Information | Party | Event | Tickler | Docket | Disposition

Docket Information

Docket Date	Docket Text	File Ref Nbr.	Image Avail.
08/24/2016	Case assigned to: DCM Track X - Accelerated was added on 08/24/2016		
08/24/2016	Case transferred from another court. ORDER transferring case to Superior Court Department of the Triall Court for the County of Suffolk for disposition	1	
08/24/2016	Original civil complaint filed.	3	
08/24/2016	Civil action cover sheet filed. n/a	4	
08/31/2016	Jeffrey S Roberio's Request for leave to waive filing fee Applies To: Roberio, Jeffrey S (Plaintiff)	2	
09/02/2016	Defendant Paul M Tressler As Chairperson of Massachusetts Parole Board's Motion to extend time for filing ANSWER to the complaint to & including 11/7/16	5	
09/06/2016	Received from Defendant Paul M Tressler As Chairperson of Massachusetts Parole Board: Answered; (Administrative Record of Proceedings filed) consists of: a) Affidavit of the keeper of the records; b) DVD copy of the sound and video recording of Mr. Roberio's June 25, 2015 parole hearing; c) Copy of the 6 page Record of Decision rendered by the Parole Board regarding Mr. Roberio's June 25th hearing.	6	
09/08/2016	Endorsement on Motion to (#5.0): ALLOWED enlarge time to file responsive pleading Notice sent 9/9/16		
11/15/2016	Plaintiff Jeffrey S Roberio's Motion for briefing schedule & ALLOWED Notice Sent 11/21/16	7	
11/21/2016	Plaintiff Jeffrey S Roberio's Motion for briefing schedule (w/o opposition)	8	
11/29/2016	Endorsement on Motion for Briefing Schedule (Unopposed) (#8.0): ALLOWED Dated: 11/23/16 Notice sent 11/2916		
12/29/2016	General correspondence regarding The Court received a letter from the plff's counsel seeking permission to file a 30-page memorandum filed o n 12/27/16 & ALLOWED on 12/28/16. Notices mailed 12/29/16	9	
02/02/2017	General correspondence regarding Transcript of Parole Hearing of Jeffrey Roberio June 25, 2015	10	
02/07/2017	Plaintiff Jeffrey S Roberio's Motion for judgment on the pleadings MRCP 12(c) and for Summary Judgment	11	
02/07/2017	Defendant Paul M Tressler As Chairperson of Massachusetts Parole Board's Cross Motion for Judgment on the Pleadings (with opposition)	12	
04/25/2017	Event Result: The following event: Rule 56 Hearing scheduled for 04/25/2017 02:00 PM has been resulted as follows: Result: Rescheduled Reason: Transferred to another session		
04/28/2017	Plaintiff Jeffrey S Roberio's Motion to amend the relief requested as to count two (w/o opposition)	13	

Docket Date	Docket Text	File Ref Nbr.	Image Avail.
05/02/2017	Event Result: The following event: Hearing for Judgment on Pleading scheduled for 06/06/2017 02:00 PM has been resulted as follows: Result: Rescheduled Reason: Joint request of parties		
05/08/2017	Endorsement on Motion to amend the relief requested as to Count Two (#13.0): ALLOWED Dated: 5/2/17 Notice sent 5/8/17		Image
05/24/2017	Matter taken under advisement The following event: Hearing for Judgment on Pleading scheduled for 05/24/2017 02:00 PM has been resulted as follows: Result: Held - Under advisement		
07/10/2017	Endorsement on Motion for judgment on the pleadings MRCP 12(c) (#11.0): and for summary judgment DENIED Following hearing, motion DENIED. Please see memorandum of Decision of this date. Dated: 7/7/17 Notice sent 7/10/17 Applies To: Roberio, Jeffrey S (Plaintiff)		Image
07/10/2017	Endorsement on Motion for judgment on the pleadings MRCP 12(c) (#12.0): ALLOWED Following hearing, Cross-Motion ALLOWED. Please see Memorandum of Decision of this date. Dated: 7/7/17 Notice sent 7/10/17		Image
07/10/2017	MEMORANDUM & ORDER: OF DECISIN ON CROSS-MOTIONS FOR JUDGMENT ON THE PLEADINGS: Conclusion - For all of the reasons stated: Plaintiff's Motions for Judgment on the Pleadings and for Summary Judgment (Paper 11) on Counts I and II of the Petition are each DENIED; Defendant's Cross-Motion for Judgment on the Pleadings (Paper 12) is ALLOWED; and The Parole Board did not violate the Plaintiff's constitutional, statutory, or regulatory rights. Dated: July 7, 2017 Notice sent 7/10/17	14	Image
07/19/2017	JUDGMENT on the Pleadings entered: After hearing and consideration thereof; It is ORDERED and ADJUDGED: The Parole Board did not violate the Plaintiff's constitutional, statutory or regulatory rights. entered on docket pursuant to Mass R Civ P 58(a) and notice sent to parties pursuant to Mass R Civ P 77(d) Applies To: Roberio, Jeffrey S (Plaintiff); Paul M Tressler As Chairperson of Massachusetts Parole Board (Defendant)	14	Image
07/19/2017	Disposed for statistical purposes		
07/26/2017	Notice of appeal filed. Notice sent 7/27/17 Applies To: Roberio, Jeffrey S (Plaintiff)	15	Image
08/30/2017	General correspondence regarding Notice re: copy of Mass. R.A.P. 8(b)(1) and 18(b) and request to assemble record. Plaintiff will not be ordering transcripts. Originals were mailed on or about August 7, 2017 but were not received.	16	Image
09/07/2017	Appeal: notice of assembly of record		
10/02/2017	Notice of docket entry received from Appeals Court In accordance with Massachusetts Rule of Appellate Procedure 10 (a) (3), please note that the above-referenced case (2017-P-1250) was entered in this Court on September 25, 2017.	17	Image

The Commonwealth of Massachusetts
Executive Office of Public Safety and Security
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Governor

Karyn Polito
Lieutenant Governor

Daniel Bennett
Secretary

Paul M. Treseler
Chairman

DECISION

IN THE MATTER OF

JEFFREY ROBERIO

W43885

TYPE OF HEARING: **Initial Hearing**

DATE OF HEARING: **June 25, 2015**

DATE OF DECISION: **November 4, 2015**

PARTICIPATING BOARD MEMBERS: Charlene Bonner, Tonomey Coleman, Sheila Dupre, Lee Gartenberg, Ina Howard-Hogan, 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 the 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 by unanimous vote that the inmate is not a suitable candidate for parole. Parole is denied with a review in five years from the date of the hearing.

I. STATEMENT OF THE CASE

On August 11, 1987, a Plymouth County Superior Court jury found Jeffrey Roberio guilty of first degree murder, and the court sentenced him to life in prison without the possibility of parole. Roberio was 17-years-old at the time of the offense. The jury also found Roberio guilty of armed robbery, for which he was sentenced to serve a concurrent life sentence. Thereafter, Roberio filed a motion for a new trial which claimed that his trial attorney was ineffective by failing to investigate and raise an insanity defense. In 1998, the Supreme Judicial Court reversed the conviction and remanded the case for retrial, ruling that the question of Roberio's sanity was a question for the jury. *Commonwealth v. Roberio*, 428 Mass. 278 (1998). Roberio was allowed to present the insanity defense to a jury on retrial in January 2000. Nevertheless, he was again convicted of first degree murder and armed robbery. The convictions were subsequently affirmed on appeal. *Commonwealth v. Roberio*, 440 Mass. 245 (2003).

On December 24, 2013, the Massachusetts Supreme Judicial Court (SJC) issued a decision (*Diatchenko v. District Attorney for the Suffolk District & Others*, 466 Mass. 655 (2013)) in which the Court determined that the statutory provisions mandating life without the possibility of parole were invalid as applied to those, like Jeffrey Roberio, who were juveniles when they committed first degree murder. The SJC ordered that affected inmates receive a parole hearing after serving 15 years in prison. Accordingly, Roberio became eligible for parole and is now before the Board for an initial hearing. Roberio is currently serving his sentence at Old Colony Correctional Center (OCCC), where he has been incarcerated since 1996.

The facts of this case are derived from *Commonwealth v. Roberio,* 440 Mass. 245 (2003). On the evening of July 29, 1986, Jeffrey Roberio (age 17) and his co-defendant, Michael Eagles (age 20),[1] entered the Middleborough trailer home of 79-year-old Lewis Jennings. Mr. Jennings lived alone and kept a large amount of cash in his trailer. The following day, Mr. Jennings' body was discovered, savagely beaten with a blunt force object. Several bones, including his spine, were broken and he had been strangled with his own pillow case. Mr. Jennings had extensive injuries to his face and head, as well as numerous lacerations on his right hand that were indicative of defensive wounds. Cash, a shotgun, and miscellaneous personal property had been stolen from his home.

Several weeks before the victim's death, Roberio had asked a friend to "do a break with him" to get money from "an old man who had a lot of money" and who "didn't believe in banks." On the evening of the murder, Roberio and Eagles were driven to an area near the victim's trailer. Roberio said that he "was going to break into some man's house" and asked for a return ride about one hour later. On the return trip, Roberio was shirtless and wet (it had been raining) and Eagles was seen holding a roll of money. On the day after the murder, Roberio was observed with a $50 bill and had revealed the brutal details of the murder to a friend. He also had the friend drive him back to the area near the victim's trailer, where he retrieved the victim's shotgun and a metal box. The police later found these items. Further investigation revealed that a fingerprint on a beer stein in Jennings' home belonged to Roberio.

At the second trial, a neuropsychologist testifying for Roberio opined that Roberio had attention deficit hyperactivity disorder, oppositional defiant disorder, and a learning disability. He said that when those conditions were exacerbated by alcohol use, Roberio lacked the substantial capacity to conform his conduct to the requirements of the law.

Roberio has been incarcerated for approximately 29 years. During this period, he has incurred 39 disciplinary reports, most of which involve violation of count procedure, possession of tattoo paraphernalia, and other rule violations. Roberio had one fighting incident in 1988, possessed three marijuana cigarettes in 1988, refused to give a urine sample in 1990 (suggestive of substance abuse), and was insolent with staff on a few occasions between 1988 and 1990. He received his last disciplinary report in November 2011, for possession of contraband items.

---

[1] Michael Eagles was tried separately and convicted of murder in the first degree and armed robbery. His convictions were affirmed on appeal (*Commonwealth v. Eagles*, 419 Mass 825 (1995), and he is serving a life sentence without the possibility of parole.

Roberio has spent the last 26 years at Old Colony Correctional Center in Bridgewater. He has worked (sporadically) in the print shop at Old Colony for a total of 16 years, and he currently works as the shop's chief mechanic. Roberio obtained his GED in 2005, and has submitted certificates of completion for programs that include Toastmasters (Speaking without Fear, March 2015 and Speechcraft Program Facilitator, June 2015) and Alternatives to Violence (Basic Course, April 2008 and Second Level Course, November 2008). Roberio attends AA/NA meetings and participates in the facility's music program. However, he has not had any intensive rehabilitative programming to address his history of substance abuse and criminal thinking.

II. PAROLE HEARING ON JUNE 25, 2015

Jeffrey Roberio, age 46, appeared for his first hearing before the Massachusetts Parole Board on June 25, 2015, as a result of the SJC's decision in *Diatchenko*. He was represented by Attorneys Benjamin Keehn and Dulcineia Goncalves.

Roberio apologized for the murder, but said that he cannot undo the damage done in committing the murder. He said that he believes he now merits parole because he has overcome many disabilities. He said that he was "an out-of-control kid with no direction" at the time, and that it was particularly hard in the summer because he wanted to go out and do what he wanted to do. Roberio said that he suffered from lead poisoning as a youngster and had difficulty learning in school. He was a "scrawny, geeky-looking kid that no one wanted to be with." His father was not active in his life; he was just a provider. He felt like an outsider and "so being on the outside, [he] found kids that were on the outside also, that had problems." He believes that things took a turn for the worse when he began regularly abusing alcohol, which he claims turned him into a different person. When he drank, he became "the kid that nobody wanted to be around" because he would become "angry."

In describing himself prior to the murder, Roberio said that he did not have good judgment and would do things "on impulse." Roberio said that his alcoholism started "roughly around 13-years-old" and that alcoholism runs in his family. His father was an alcoholic and he became a full blown alcoholic, as well. He said that drinking made him "combative," and that he had no respect for people or their property around the time of the murder. He said that if he was determined to do something, he "just did it." He said that he was drinking regularly, but was not in any type of treatment.

Roberio described the circumstances surrounding the murder as follows: Roberio knew Mr. Jennings prior to the murder and had been by his house "a couple of times." A friend of his had sold a car to Mr. Jennings. Mr. Jennings decided he didn't want the car and asked for his money back. After his friend gave the money back, the friend decided to make a plan to rob Mr. Jennings. However, Roberio didn't want to go through with his friend's robbery plan, which involved Roberio waiting in the woods while his friend took Mr. Jennings to the dog track, and then robbing Mr. Jennings' house while they were gone. Roberio formulated his own robbery plan, separate and apart from his friend, and a couple weeks later began soliciting help from others he knew that were involved in criminal activities.

Roberio encountered Michael Eagles and told him about his idea to rob Mr. Jennings. So, they went to a store and stole a roll of tape to prepare for the robbery. Eagles bought a bottle of liquor, which they both drank, and they made their way to Mr. Jennings' home in the

woods. Roberio went behind Mr. Jennings' home and ripped out some wires "in case if there was somebody home, they could not call for help if they heard someone outside." They walked to the front and knocked on the front door. Mr. Jennings opened the door and Roberio asked to use his phone. Mr. Jennings "kindly" pointed to the phone and, as Roberio walked over to the phone, Eagles entered the house and pushed Mr. Jennings to the floor. Roberio told Eagles to watch Mr. Jennings while he looked for the money. When he could not find the money, he went over to Mr. Jennings and asked him where the money was. Mr. Jennings "wasn't cooperating," so Roberio started "punching him" and "kicking him" and "asking him where the money was." Mr. Jennings refused to cooperate, and Roberio continued to search the house without success. He returned to Mr. Jennings and again asked where the money was. Mr. Jennings refused to say, so he "proceeded to keep punching Mr. Jennings, kicking Mr. Jennings, breaking his ribs, his spine, his arm, punching him in the face." At some point, Mr. Jennings said that he would show them where the money was, so he was allowed to go retrieve it. Mr. Jennings went into a bedroom, went under a bed, and "came up with a shotgun." Mr. Jennings pointed the shotgun at Roberio and backed him out of the bedroom. Eagles picked up a barstool and threw it at Mr. Jennings, knocking the shotgun out of his hand. Roberio said he lost control at that point. He was "furious and angry" at not finding the money, as well as having a shotgun pulled on him. He therefore "took it all out on Mr. Jennings."

Roberio said he did not have any moral compass when he first went to prison, so he acted the same as he had acted in the streets. He was a "young kid" and "scared to death" and would hang out with older guys for protection and to learn "the ropes." Roberio said his moral compass came years later when he "started getting involved with other guys who were doing programs" (and not getting disciplinary tickets) and had a lot going for themselves despite being in prison. He said that he no longer has any impulse issues and no longer acts up.

Roberio said alcohol abuse was a major cause of the murder because it fed his rage. When he first entered prison, he realized that he had to address his alcoholism and so he entered the substance abuse block. He was terminated after three months due to misconduct. He has not had any other substance abuse programming since then. However, he has regularly attended AA/NA meetings since 2008. A few Board Members questioned Roberio about the many tattoo-related disciplinary reports he incurred over the years. Roberio said that he was involved in tattooing for around 10 years because he likes to draw and was being paid to give tattoos. He said "tattooing in prison is like an ATM machine" because everybody in prison wants one. He said that he has tattooed over 100 inmates, with the last occurring in 2002, at age 34.

When confronted with his minimal programming, Roberio admitted as much and offered the following explanation: "I've taken my own steps to understand what my issues were . . . . I've maintained my own stability against violence in prison . . . . I've taken my own steps to try bettering myself." When a Board Member inquired as to why he did not advocate for a lateral transfer to an institution that offered more rehabilitative programs, Roberio stated that he actually advocated to stay at OCCC when the Department of Corrections sought to transfer him for good behavior. He preferred to stay at OCCC because his family lives about five minutes from the institution and he wanted to remain close to them for support. He said, "I've become very complacent at Old Colony. It's a comfortable situation of what I know."

Given Roberio's young age at the time of the murder, as well as the parole suitability factors outlined in *Diatchenko* that ensures a juvenile offender is afforded a meaningful opportunity for release, the Parole Board was interested in which, if any, developmental or societal issues played a role in the commission of such a brutal crime. The information from Roberio and his attorneys indicate that Roberio had difficulties in school as far back as kindergarten, and he began receiving special education support in elementary school. At around age 16 (after Roberio had been brought before the juvenile court for the fourth time), he was referred to a community counseling center, which described him as a "boy in serious emotional trouble" and who's "lack of self-esteem, impulsiveness, and difficulty in negotiating interpersonal relationships put him at risk for further acting out." Other reports from this period indicate that Roberio's mother was emotionally distant and neglectful, and that his father was an alcoholic and typically unavailable for support.

Roberio reportedly dropped out of school at age 16, with little guidance or support from his parents. He would often stay out all night and, at one point, left home and moved in with an older woman. He drank alcohol to excess to mask his shyness at social events, and he would often drink to the point of becoming confrontational and combative. Binge drinking was a regular occurrence, and often resulted in blackouts and memory loss. Roberio submitted a 2013 neuropsychological evaluation that was performed by Dr. Paul A. Spiers (now deceased). In his report, Dr. Spiers stated that prior to the murder, Roberio suffered from learning disabilities, attention deficit hyperactivity disorder, oppositional defiant disorder, two separate closed head injuries, lead poisoning, and alcohol and drug use. These factors resulted in "impulsivity, poor planning and judgment" and "a lack of insight." Dr. Spiers opined that Roberio "was not acting in a rational, premeditated, or intentional fashion at the time of the crime." Dr. Spiers further opined that Roberio was "extremely remorseful" and "accepts full responsibility for his actions." He said that Roberio "has also gained marked insight into the role that his developmental disabilities and vulnerability to the effects of drugs and alcohol had on his behavior." He concluded that Roberio was now fully functioning and stated, "The process of human maturation has effectively dissipated the neurological and developmental disabilities that resulted in the commission of a terrible crime by a teenage boy with untreated mental disease and defects."

Four individuals spoke in support of parole at the hearing, including Roberio's mother, Roberio's cousin, neuroscientist Dr. Marlene Oscar Berman (expert witness), and statewide sentencing advocate Lisa Gigliotti. Dr. Berman stated that she reviewed Dr. Spiers' 2013 evaluation report and conducted her own tests on Roberio earlier this year. She said that she agreed with Dr. Spiers' 2013 opinion that Roberio's delayed neurological maturation had resolved itself.

Four people spoke in opposition to parole, including the victim's daughter, two granddaughters, and Plymouth County District Attorney Timothy Cruz. DA Cruz stated that the brutality of the murder, as well as Roberio's lack of sufficient institutional programming, make him unsuitable for parole. A member of the Victim Services Unit read written statements of opposition from two additional granddaughters of the victim.

III. DECISION

At age 17, Jeffrey Roberio (admittedly) was the mastermind and primary actor in a robbery where he viciously, and brutally, beat and strangled an elderly man to death. Roberio claims that alcohol abuse was responsible for his violent behavior. Nevertheless, he spent the last 26 years at Old Colony working and getting "comfortable," rather than aggressively pursuing rehabilitative programming to address his issues of substance abuse, anger, and violence. For the 29 years that he has been incarcerated, he has only completed two courses of anti-violence programming, and he has not had any substantive rehabilitative programming to address his substance abuse.

Despite having spent his entire adult life in prison without adequate programming, Roberio (age 46) asks the Board to trust that he is rehabilitated and that he no longer presents a risk of harm to society because he has changed of his own volition. While his overall conduct in prison does not raise heightened concern for violence and substance abuse, the fact that he has been complacent in addressing these issues leaves serious concern of whether he still presents a risk of harm to the community, and whether his release is compatible with the best interest of society. While Roberio's age and development at the time of the crime are important factors to consider in assessing his parole suitability, the most important criteria in the analysis of parole suitability remains whether Roberio meets the legal standard for parole.

The standard we apply in assessing candidates for parole is set out in 120 C.M.R. 300.04, which provides that "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." Applying that appropriately high standard here, it is the unanimous opinion of the Board that Jeffrey Roberio does not merit parole at this time because he is not fully rehabilitated. The review will be in five years, during which time Roberio should engage in rehabilitative programming that addresses substance abuse, anger, violence, and any potential mental health issues that may impair his ability to function as a law abiding citizen in society.

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.

Michael J. Callahan, Executive Director

November 4, 2015
Date

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss

SUPREME JUDICIAL COURT
SJ-2016-0235

JEFFREY S. ROBERIO,
petitioner,

v.

PAUL M. TRESELER,
Chair, Massachusetts Parole Board,
respondent.

AFFIDAVIT OF PATRICIA GARIN

I, Patricia Garin, state the following:

1. I am a 1984 graduate of Northeastern University School of Law and a partner at the firm of Shapiro Weissberg & Garin.

2. This affidavit is submitted to provide the Court with information regarding the effect of the 1996 change to G.L. c.127, §133A, which increased the permissible setback period for prisoners serving life sentences who are denied parole from three years to five years. This affidavit also provides the Court with information concerning the likelihood that a prisoner who has been given a five-year setback pursuant to G.L. c. 127, §133A might receive a review hearing in less than five years.

3. By way of background, the focus of my practice is

criminal defense and prisoners' rights, with a concentration on issues relating to parole.

4. My knowledge of and experience with the Massachusetts Parole Board (parole board) began as a law student and continues to this date.

5. Since 1994, I have been an Adjunct Professor at Northeastern University School of Law, where I teach a course on the rights of prisoners and supervise the Prisoners' Rights Clinic. My students in the clinic represent parole eligible Massachusetts prisoners serving life sentences at parole release hearings before the parole board.

6. The vast majority of such "lifer hearings" involve prisoners who, having been convicted of second degree murder, are parole eligible after having served fifteen years of their life sentence.

7. Since 2000, I have attended a conservatively estimated total of 275 lifer hearings as counsel for the prisoner, as the attorney supervisor for one of the law students in my class, or as a mentor for counsel appointed by the Committee for Public Counsel Services.

8. Prisoners denied parole are given a date for a review hearing. The statute states that the board must provide a prisoner denied parole who is serving a life

sentence with a review hearing in "at least" five years. Thus, the board has the authority to provide prisoners with a review hearing in less than five years. However, the majority of denials are accompanied by a five-year setback.

9. Before 1996, lifers denied parole were typically given three-year setbacks, the maximum then allowable by law. When the law was amended, five-year setbacks soon became the new normal. This phenomenon is a major reason that the prisoners' rights community in Massachusetts has opposed efforts to further increase the allowable setback period.

10. Bills seeking to extend the setback period for lifers are filed in the Legislature almost every year.

11. In 2014, I testified before the Joint Committee of the Judiciary in opposition to a bill that sought to increase the permissible setback period for second degree lifers from five years to ten years. The bill was defeated. A copy of my testimony is appended to this affidavit.

12. Since 2000, my students and I have filed a conservatively estimated total of thirty-five administrative appeals and requests for reconsideration of decisions by the parole board denying parole. Such administrative requests for relief by lifers denied parole are considered by the parole board, i.e., the exact same group of people who

issued the decision denying parole that is being appealed.

13. The board does not typically provide any reason for its decision to grant or deny an appeal or a request for reconsideration.

14. As further described below, appeals and requests for reconsideration are so rarely successful that we generally file them only when necessary to exhaust administrative remedies.

15. Administrative appeals are filed pursuant to 120 Code Mass. Regs. §304.02, and usually contain an argument that the setback period should be shorter. Requests for reconsideration, filed pursuant to 120 Code Mass. Regs. §304.03, typically ask the board to revisit a decision denying parole on the grounds that the prisoner has completed a program or otherwise addressed an issue which the board had identified as requiring attention before a prisoner could receive a positive parole vote.

16. In my thirty-plus years of experience, I have no knowledge of the board ever allowing a motion for reconsideration to reduce a lifer's setback period. Nor to my knowledge has the board ever acted on its own, see 120 Code Mass. Regs. 301.01(5), to hold a review hearing sooner than the setback period identified in the decision denying parole.

17. Since 2000, the Prisoners' Rights Clinic at Northeastern has had only two appeals granted -- one in 2004 and one last week. Aside from these two cases, I do not know of any lifer whose administrative appeal of a decision denying parole has been successful.

18. In preparation for my 2014 testimony before the Legislature, I reviewed parole statistics for 2012, which reveal the following.

19. In 2012, the board issued records of decision for 134 lifers who had parole release hearings.[1/] Eighty percent (108) were denied parole. Of the denials, over seventy percent (77) were accompanied by five-year setbacks.

20. Thus, seven out of ten lifers denied parole in 2012 received the maximum setback allowed by law.

21. The board typically does not provide prisoners denied parole with any explanation for the length of the setback selected.

22. In preparing this affidavit, I consulted with attorneys John Fitzpatrick and Joel Thompson, who are the supervising attorneys for the Harvard Prison Legal Assistance Project at Harvard Law School ("PLAP"). PLAP students represent lifers at parole release hearings.

[1/]Actually 136 lifers had hearings in 2012. Two died waiting for their decisions.

23. Attorneys Fitzpatrick and Thompson told me that, in their experience, lifers who have appealed or requested reconsideration following a parole denial have never received relief from the board.

24. Attorney Fitzpatrick, who has supervised Harvard Law School students representing prisoners before the parole board since 1998, stated to me in an e-mail:

> "These appeals and requests for reconsideration are an exercise in futility. I cannot recall PLAP ever winning an appeal or a request for reconsideration. It is so pointless that we typically only file an appeal when we are perfecting a later suit against the Board (we have to exhaust administrative remedies)."

SIGNED UNDER THE PAINS AND PENALTIES OF PERJURY THIS 21th DAY OF JULY, 2016.

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Testimony of Attorney Patricia Garin before

The Joint Committee on the Judiciary

Concerning House Bill 4084

I am an attorney practicing in the areas of criminal defense and civil rights at the law firm of Stern, Shapiro, Weissberg & Garin in Boston. I have practiced in these areas for 30 years. For the last 20 years I have also taught Prisoners' Rights at Northeastern University School of Law where I supervise law students at lifer hearings before the Parole Board. I am also the President of the Board of Directors for Prisoners' Legal Services and I am the representative from the Massachusetts Association of Criminal Defense Lawyers on the legislatively created Special Commission on Criminal Justice. I am inside Massachusetts prisons frequently and I appear before the Parole Board at lifer parole release hearings, supervising my students' cases, approximately 25 times a year. I am testifying today against House Bill 4084 on behalf of Citizens for Effective Public Safety – a group of community organizations and agencies that formed a coalition to address criminal justice concerns.

The U.S. Department of Justice's National Institute of Corrections (NIC) and the Pew

Center on the States recognize that success in obtaining parole increases when parole board members and parole staff motivate prisoners and parolees to change.[1] "Sustained behavioral change occurs when an individual receives more positive reinforcement than negative reinforcement."[2] This is true when it comes to lifer release hearings.

The NIC explains that, in an effective parole hearing:

> The climate of a hearing includes the expression of appreciation for progress, actively listening, acknowledging a parolee's challenges, and creating goals that regard progress, which are all actions that provide positive reinforcement. Similarly, a parole board's response to violations can provide both consequences for failure and positive reinforcement for those areas that have gone well.[3]

We are at a point in our history where **all** evidence based practices tell us that it is time to reduce the amount of time persons spend in prison, to provide more opportunities for rehabilitation inside of prison, and to use parole hearings to incentivize prisoners to grow and change and progress. Extending the setback period for those convicted of second degree murder to ten years does exactly the opposite. Telling prisoners who have just completed fifteen years of incarceration that the Parole Board is giving up on them for ten additional years and that they cannot possibly change enough in ten years to warrant any consideration is counterproductive. It is counterproductive to prison safety because of the extreme hopelessness it will create; it is counterproductive to public safety because it will lead to longer prison sentences which will lead

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[1] Nancy M. Campbell, *Comprehensive Framework for Paroling Authorities in an Era of Evidence-Based Practices*, NATIONAL INSTITUTE OF CORRECTIONS (2008), available at http://nicic.gov/Library/022906; Pew Center on the States, *Smart Responses to Parole and Probation Violations*, p. 7 (November 2007).

[2] Campbell, *supra* note 4, at 38.

[3] Id. at 39.

to higher recidivism rates; and, it is counterproductive to a prisoner's personal growth.

A lifer who is successfully on parole in the community wrote me about this bill:

> The additional lengthy setback period will the final blow to taking away all of the lifers' hopes or the promises of ever having a life beyond prison walls. In fact, referencing my own situation, when serving almost nineteen years, one of the things that always helped me to keep moving forward progressively during the worst of times was the reality that I had a chance of getting out relatively soon, meaning within five years.

The statute setting forth the setback period for lifers was amended in 1996 to increase the setback period from 3 years to 5 years. This was done during a period of time when sentences were being increased, mandatory minimum sentences were being adopted and imposed, and the treatment of juvenile offenders was greatly harshened. We are at a different point in history. We know so much more about sentencing, corrections, and best practices. We know that giving a prisoner a ten setback is such a crushing blow that there will never be any incentive to grow and change. We know that best practices tell us that our Parole Board should be checking in with parole eligible prisoners more frequently than once every ten years so that the Board can set realistic goals for release for prisoners and reward their accomplishments. Finally, this passage of this bill will lead to longer periods of incarceration, with the resultant increase in public funds. H4084 is contrary to all best practices in corrections and parole and should not become law.

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss

SUPERIOR COURT
1684CV02622

JEFFREY S. ROBERIO,
plaintiff,

v.

PAUL M. TRESELER,
(in his capacity as Chair, Massachusetts Parole Board)
defendant

AFFIDAVIT OF BARBARA KABAN

I, Barbara Kaban, state the following:

1. I am a 1998 graduate of Boston University School of Law and a member of the Massachusetts Bar in good standing.

2. Prior to becoming an attorney, I was a researcher at the Harvard Graduate School of Education studying the emergence of intellectual and social competence in young children.

3. From 1998-2000, I was a Soros Justice Fellow providing post-dispositional advocacy for juveniles committed to the Department of Youth Services.

4. From 2000 to 2012, I was Deputy Director of the Children's Law Center of Lynn, providing direct representation and appellate advocacy for juvenile offenders.

5. In July 2012, I joined the Committee for Public Counsel Services as Director of Juvenile Appeals.

6. In that capacity, I was responsible for assigning counsel to represent juvenile homicide offenders in Massachusetts who became parole-eligible as a result of the Supreme Judicial Court's decisions in Diatchenko v. District Attorney for the Suffolk Dist., 466 Mass. 655 (2013) (Diatchenko I), and Commonwealth v. Brown, 466 Mass. 676 (2013).

7. My responsibilities also included monitoring the outcomes of these parole hearings.

8. Since retiring from CPCS in December 2015, I have continued to monitor the outcomes of juvenile homicide offenders' parole hearings in my capacity as the principal investigator for a study of Massachusetts juvenile homicide offenders funded by the Shaw Foundation.

9. The Massachusetts Parole Board posts its decisions pertaining to prisoners serving life sentences on its web site (www.mass.gov/eopss/agencies/parole-board).

10. Since December 24, 2013 (when Diatchenko I and Brown were decided), the Massachusetts Parole Board has held release hearings for thirty-four (34) juvenile homicide offenders who were sentenced originally to life without the possibility of parole. Thirteen (13), or approximately 38%,

of these juveniles received positive parole votes.

SIGNED UNDER THE PAINS AND PENALTIES OF PERJURY THIS 2nd DAY OF JANUARY, 2017.

Barbara Kaban

Notice sent 7/10/11 (Sm)
CPCS MAPB
BK CM
OC

R. 21

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14

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss **SUPERIOR COURT**
1684CV02622-A

JEFFREY ROBERIO,

Plaintiff

v.

PAUL TRESELER, in his capacity as Chair, Massachusetts Parole Board,

Defendant

MEMORANDUM OF DECISION AND ORDER ON CROSS-MOTIONS FOR JUDGMENT ON THE PLEADINGS

Introduction

Plaintiff Jeffrey Roberio is a "juvenile homicide offender" sentenced to life imprisonment.[1] He seeks relief pursuant to G.L. c. 231A and G.L. c. 249, section 4 from a decision by the Massachusetts Parole Board unanimously denying his application for parole. Diatchenko v. District Attorney for Suffolk District, 471 Mass. 12, 30-32 (2015)(Diatchenko II). Plaintiff also challenges the portion of the decision setting a five-year review date, and seeks a review in fewer than five years.

The parties agree on the applicable law. A civil action in the nature of certiorari is the appropriate form of judicial review available for parole decisions by the Board. Diatchenko II, at 30-31; Doucette v. Massachusetts Parole Bd., 86 Mass. App. Ct. 531, 540 (2014)(decisions of the Board not subject to review under G.L. c. 30A); Averett v. Commissioner of Correction, 25

[1] In August of 1987, Mr. Roberio was convicted of the first degree murder of Lewis Jennings. Roberio was seventeen years old at the time of the killing. He was initially sentenced to life in prison without the possibility of parole, pursuant to then-applicable law. Commonwealth v. Roberio, 428 Mass. 278 (1991); 440 Mass. 245 (2003). Following the decision in Diatchenko v. District Attorney for the Suffolk District, 466 Mass. 655 (2013)(Diatchenko I), he was resentenced to life in prison with the possibility of parole after fifteen years, which in Mr. Roberio's case made him immediately eligible to be considered for parole. Diatchenko II, 471 Mass. at 16.

For the Board in its discretion and experience to be wary of Roberio's subjective assessment and pronouncement that he meets the qualifications for parole, for example, "because I don't drink," is not arbitrary and capricious. Likewise, for the Board to have weighed certain of the Miller factors (including those addressed by the expert opinion) differently than counsel believes they should be weighed does not mean the Board "rejected" the Miller factors, and does not unconstitutionally deprive Roberio of a meaningful opportunity to obtain release. Nor can I agree that the Board was duty-bound to explain in its Decision why the necessary programming could not occur on parole. Plaintiff's Motions at page 18. As I view this record, the Board "carried out its responsibility to take into account the [age] attributes or factors . . . in making its decision," Diatchenko II, at 30, and accordingly Roberio's Motions on Count I of his Petition are **DENIED**.

Count II - The Five-Year "Setback"

The Board's Decision provides that "the review will be in five years, during which time Roberio should engage in rehabilitative programming that addresses substance abuse, anger, violence, and any potential mental health issues that may impair his ability to function as a law abiding citizen in society." Decision at page 6. Count II of Roberio's Petition for Relief seeks a declaration that he is entitled to a review hearing within three years (by June 24, 2018) instead of five. The parties do not agree on the legal analysis applicable to this claim.

Plaintiff's argument is that at the time of Mr. Jennings' murder in 1986, people serving life sentences who were denied parole were entitled to receive a review hearing every three years. The Legislature changed the law in 1996 to permit five-year so-called setbacks. G.L. c. 127, section 133A. Roberio concludes that application of the five-year rule to him violates his "constitutional right to be protected from the operation of ex post facto laws," relying on Clay v.

Massachusetts Parole Bd., 475 Mass. 133, 135 (2016). Plaintiff's Motions at page 23. The basis for this conclusion is that, since juveniles are constitutionally different from adults due to their greater prospects for reform, Diatchenko II, 471 Mass. at 30, use of an extended setback for them creates a significant risk of prolonging their incarceration, citing Commonwealth v. Brown, 466 Mass. 676, 689 n.10 (2013). Roberio also argues that his capacity to petition for an earlier hearing -- or the Board's own discretion to review earlier -- are theoretical only, because that never, in practice, occurs; according to Plaintiff's (uncontradicted) evidence, the Board virtually never conducts an early review. 120 Code Mass. Regs. Sections 301.01(5) and 304.03; Plaintiff's Motions at pages 27-28; Plaintiff's Reply at pages 4-5.

The Board in turn maintains that the statute does not operate retroactively, because it does not apply to events that occurred before its enactment, citing Commonwealth v. Corey, 454 Mass. 559, 564 (2009). Defendant's Cross-Motion at page 13. It argues that here, the 1996 amendment to G.L. c. 127 section 133A "did not change or alter any decisions made in the past," id., because Roberio had no right or expectation whatsoever in 1996 to be considered for parole. It was not until long after the date of the statutory amendment, that is, until the Diatchenko I decision in 2013, that he first received this opportunity. Moreover, this particular amendment did not change either parole eligibility dates or the standard for determining parole. Contrast Commonwealth v. Gabriel, 89 Mass. App.Ct. 1124 (2016)(Rule 1:28 decision)(change in setback not an increase in punishment), with Commonwealth v. Brown, 466 Mass. 676, 689 n. 10 (2013)(extending the initial date for parole eligibility changed a penalty and inflicted a greater punishment). Finally, the Board argues Diatchenko II held that children are constitutionally different from adults "for purposes of sentencing," and G.L. c 127 section 133A impacts neither sentencing nor parole eligibility.

By my reading the Board has the better part of the law on this point. The Brown footnote explicitly addresses "the possible penalty for a crime committed when an earlier version of the statute was in effect," and laws that "change[ ] the punishment and inflict[ ] a greater punishment." Brown, 466 Mass. at 689 n.10. That is not the case here. More significantly, the recent Clay decision addressed a substantive legislative change to the nature of the Board vote required to grant parole. In Mr. Clay's case, he obtained an affirmative (though split) Board vote, in numbers which would have been sufficient to grant him parole under prior statute, but were insufficient under the new law. The SJC in its analysis distinguished between an increase in punishment that is certain and demonstrable, and one that is speculative and conjectural. It held that the circumstances of Mr. Clay's petition entailed a certain and demonstrable increase in punishment to him. In contrast, under all of the circumstances of Mr. Roberio's petition presented on this record, his claim to an increase in punishment falls into the category of the speculative and conjectural. Accordingly, Count II of his Petition is also **DENIED**.

Conclusion

For all of the reasons stated:

- **Plaintiff's Motions for Judgment on the Pleadings and for Summary Judgment (Paper 11) on Counts I and II of the Petition are each DENIED;**
- **Defendant's Cross-Motion for Judgment on the Pleadings (Paper 12) is ALLOWED; and**
- **The Parole Board did not violate the Plaintiff's constitutional, statutory, or regulatory rights.**

SO ORDERED.

Dated: July 7, 2017

Christine M. Roach

15

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss

SUFFOLK SUPERIOR COURT
1684CV02622

JEFFREY ROBERIO,
Plaintiff

v.

PAUL TRESELER, Chair, Massachusetts Parole Board,
Defendant

NOTICE OF APPEAL

Now comes the plaintiff, Jeffrey Roberio, pursuant to Mass. R.A.P. 3, and gives notice of his intent to appeal so much of the memorandum of decision, order, and judgment of the Superior Court as denies his motion for summary judgment on count two of the complaint and as allows the defendant's motion for judgment on the pleadings on that count.

Respectfully submitted,

JEFFREY ROBERIO

By his attorney,

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Dated: July 21, 2017.

NO. SJC-12482

JEFFREY ROBERIO,
PETITIONER-APPELLANT

v.

PAUL TRESELER,
CHAIRMAN, MASSACHUSETTS PAROLE BOARD,
RESPONDENT-APPELLEE

BRIEF AND RECORD APPENDIX FOR THE PETITIONER-APPELLANT ON APPEAL FROM A JUDGMENT OF THE SUFFOLK SUPERIOR COURT