COMMONWEALTH OF MASSACHUSETTS

Supreme Judicial Court

SUFFOLK, SS. NO. SJC-12482

JEFFREY ROBERIO,
Petitioner-Appellant,

v.

PAUL TRESELER,
Respondent-Appellee.

ON APPEAL FROM A JUDGMENT OF THE SUFFOLK COUNTY SUPERIOR COURT

BRIEF OF THE RESPONDENT-APPELLEE

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STATEMENT OF THE ISSUE

Whether the Parole Board's application of a 1996 amendment to the parole eligibility statute, G.L. c. 127, § 133A, violated the ex post facto provisions of the United States Constitution and/or article 24 of the Massachusetts Declaration of Rights, where the imposition of a five-year setback before the petitioner's next parole hearing did not substantially risk prolonging his incarceration.

STATEMENT OF THE CASE

Procedural Background

On July 29, 1986, when he was 17 years old, the petitioner in this case, Jeffrey Roberio, robbed and murdered 79-year-old Lewis Jenkins in his Middleborough trailer home. The purpose of the robbery was, in the petitioner's words, to "get money from 'an old man who had a lot of money' and who 'didn't believe in banks.'" *Commonwealth v. Roberio*, 440 Mass. 245, 246 (2003). Jenkins tried to fight back, but was "savagely beaten with a blunt force object. Several bones, including his spine, were fractured, and he had been strangled with his own pillow case. He was alive at the time these injuries were inflicted. Cash, a shotgun, and miscellaneous personal property [were] stolen from his home." *Id.* For these actions, the petitioner was convicted of first-degree murder and armed robbery, and

he was sentenced to life imprisonment without the possibility of parole. His convictions were affirmed by this Court in 2003.[1] *Id.*

The petitioner became eligible for parole, however, when this Court decided *Diatchenko v. Dist. Att'y for the Suffolk Dist.*, 466 Mass. 655 (2013) (*Diatchenko I*). In *Diatchenko I*, the Court held that the imposition of a sentence of life without parole for juvenile first-degree murder offenders violated the prohibition against cruel and unusual punishment under article 26 of the Massachusetts Declaration of Rights. *Id.*; *see also Miller v. Alabama*, 567 U.S. 460 (2012). Subsequently, in the second *Diatchenko* case, the Court held that these offenders (including the petitioner, who had intervened in that litigation) were also entitled to the appointment of public counsel to represent them at their initial parole hearing, and to receive funds to hire expert witnesses to testify on their behalf. *Diatchenko v. Dist. Att'y for the Suffolk Dist.*, 471 Mass. 12 (2015) (*Diatchenko II*).

In accordance with these two decisions, the Parole Board conducted the petitioner's initial parole eligibility hearing on June 25, 2015. *Infra* page 56.[2] At

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[1] The petitioner was originally tried and convicted in 1987, but his convictions were reversed when this Court concluded that he had received the ineffective assistance of counsel at his trial. *Commonwealth v. Roberio*, 428 Mass. 278 (1998). The petitioner was retried (and convicted again) in January 2000.

[2] References to the Addendum to this brief are to the page number. References to

this hearing, the petitioner was represented by counsel, and two expert witnesses presented evidence on his behalf. *Infra* page 60. By his hearing date, the petitioner had been in prison for 29 years, yet as the Parole Board ultimately concluded, the petitioner had taken very few steps to rehabilitate himself during that time. *Infra* page 61. Although he regularly attended Alcoholics Anonymous and Narcotics Anonymous meetings, he had completed only two formal courses to address his identified issues of substance abuse, anger, and violence. *Id*. In fact, when the petitioner first entered prison, he was placed in the substance abuse block to address his alcoholism, but he "was terminated after three months due to misconduct." *Infra* page 59. The Parole Board noted that the petitioner had resisted the Department of Corrections' effort to transfer him to another institution that would have provided more opportunities to complete these rehabilitative courses. *Id.* The petitioner had instead cited his desire to be "comfortable" where he was and to be close to his family, who lived near the institution at which he was then incarcerated. *Id.* Meanwhile, the Parole Board noted, the petitioner was not a model inmate. *Infra* page 57. Although it had been over three years since his last disciplinary infraction, he had nonetheless incurred a total of 39 infractions during

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the petitioner's brief appear as "Pet. Br. at [page]." References to the petitioner's record appendix appear as "Pet. R. at [page]."

his sentence, including violations of prison rules, possession of contraband, possession of tattoo paraphernalia,[3] and fighting. *Id.* The Parole Board also considered factors relevant to the petitioner's age at the time of his crime and his capacity for change. *Infra* page 60 (discussing the petitioner's proffered evidence relative to his upbringing alcohol abuse, difficulties in school, and impulsiveness at the time of the crime).

Based on the above factors, the Parole Board unanimously determined that the petitioner was not a suitable candidate for parole, "because he is not fully rehabilitated." *Infra* page 61. It expressed "serious concern" that the petitioner might, if released, pose "a risk of harm to the community," and that his release was not compatible with the welfare of society. *Id.* (quoting 120 C.M.R. § 300.04). The Parole Board set a five-year setback period for the petitioner's first parole review hearing, "during which time [the petitioner] 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." *Id.*

[3] The petitioner told the Parole Board that he had tattooed over 100 other inmates, explaining that "tattooing [other inmates] in prison is like an ATM machine" because everybody in prison wants one. *Infra* page 55.

The petitioner commenced this lawsuit following the completion of administrative proceedings before the Parole Board. In the second count in his two-count complaint,[4] the petitioner asked for a declaratory judgment that the imposition of a five-year setback, pursuant to G.L. c. 127, § 133A, as amended by St. 1996, c. 43 ("1996 amendment"), violated his rights under the ex post facto provisions of the United States and/or Massachusetts Constitutions. He filed what was captioned as a motion for summary judgment on this count, and included two affidavits in support of that motion. Pet. R. at 9-20. These affidavits set forth the affiants' respective beliefs as to the Parole Board's practices and procedures. *Id.* The Parole Board, however, submitted a motion for judgment on the pleadings, without offering extraneous evidence. *See Crowell v. Massachusetts Parole Bd.*, 477 Mass. 106, 109 (2017) (confirming that "the only appropriate way for the court to evaluate [a petitioner's] claim is through a review of the administrative record upon a motion for judgment on the pleadings").

The Superior Court (Roach, J.) denied the petitioner's summary judgment motion and granted the Parole Board's motion for judgment on the pleadings, in a

[4] The petitioner's first claim was that the board allegedly failed to adequately consider youth-related factors in its decision denying him parole. The Superior Court rejected that claim, and the petitioner has abandoned it on appeal.

written memorandum of decision dated July 7, 2017. *Infra* pages 47-55. The petitioner appealed, and this Court granted his petition for direct appellate review.

Statutory and Regulatory Framework

With exceptions not pertinent here, the Massachusetts parole eligibility law, G.L. c. 127, § 133A, applies to every parole-eligible prisoner, adult or juvenile, who is serving a life sentence.[5] The statute provides for an initial parole hearing within sixty days before the prisoner's parole eligibility date—which for juvenile homicide offenders, like the petitioner here, is their fifteen-year anniversary. § 133A. If parole is denied at the initial hearing, the Parole Board determines a setback period for the prisoner's next review hearing that can be up to the maximum length defined in § 133A. *Id.* At the time of the petitioner's crime in 1986, the version of § 133A that was then in effect permitted a maximum setback period of three years. *Infra* page 62 (version of § 133A that was in effect as of October 1986). In 1996, however, the Legislature enacted an amendment which increased the maximum setback period to five years. *See* St. 1996, c. 43.[6] But this

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[5] The statute does not apply to persons who were adults when they committed first-degree murder, persons confined to the hospital at the Massachusetts Correctional Institution in Bridgewater, and persons "serving more than 1 life sentence arising out of separate and distinct incidents that occurred at different times, where the second offense occurred subsequent to the first conviction." § 133A.

[6] Chapter 43 of the Acts of 1996, entitled "An Act relative to eligibility for parole," consisted of a single sentence: "Section 133A of chapter 127 of the General Laws, as appearing in the 1994 Official Edition, is hereby amended by striking out, in

statute did not limit the Parole Board's ability to provide for a setback shorter than the maximum. *See id.*

The Parole Board began conducting parole hearings for juvenile first-degree lifers in 2014, following *Diatchenko I*. Since that time, the board has held 35 initial parole hearings for this group of offenders. Of those, twelve applicants (34%) have been granted release at their initial hearing, and one case remains under advisement. Of the 22 applicants who were denied parole, five applicants (including the petitioner here), or 14%, received the maximum five-year setback. Four others (11%) received a four-year setback, six (17%) received a three-year setback, six received a two-year setback, and one (2%) received a one-year setback. The Parole Board's decisions are public records pursuant to G.L. c. 127, § 130, and all decisions involving life sentences are posted online at https://www.mass.gov/lists/ life-sentence-decisions.[7]

Additionally, § 133A allows the Parole Board to reconsider a prisoner's case at any time between review hearings, and the board's regulations expressly provide a mechanism for doing so. In pertinent part, the board's regulations provide that:

> (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

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line 24, the word 'three' and inserting in place thereof the following word:—five."

[7] Decisions announced prior to 2015 are not available on the mass.gov website, because of a recent redesign to the Commonwealth's website.

> 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.

120 C.M.R. § 304.03.

Taken together, therefore, the amended statute permits the imposition of a setback period of up to five years, but also permits the board to advance a prisoner's case at any time for good reason between parole hearings.

SUMMARY OF THE ARGUMENT

I. This Court should affirm the judgment below. The Parole Board's retroactive application of the 1996 amendment to the parole eligibility law does not violate the ex post facto provisions of the United States or Massachusetts Constitutions, for two reasons. First, the 1996 amendment does not inherently risk prolonging the incarceration of any of the prisoners affected by the statute—those juveniles and parole-eligible adults who are serving life sentences. The board makes a merits-based determination of the appropriate setback period in every case

that comes before it, and an aggrieved prisoner may petition for early review prior to his next parole hearing for compelling reasons. The 1996 amendment does not increase any prisoner's sentence, does not delay any prisoner's initial parole hearing, and does not raise the substantive parole suitability standards. This holds true even for the subset of juvenile homicide offenders such as the petitioner, most of whom have received setbacks that would be perfectly valid under the pre-1996 version of § 133A. Consequently, the petitioner's contention that he and "similarly situated" juvenile homicide offenders must be granted a more beneficial form of ex post facto analysis should be rejected.

Second, the petitioner's as-applied challenge fails because he has not argued on appeal that he was likely to be found suitable for release after only three years, which is when he would have received a parole hearing under the old rule. The nature of the petitioner's crime (a brutal murder), his demonstrated lack of rehabilitative progress, and his history of several dozen disciplinary infractions while in prison—factors all reflected in a unanimous decision to deny parole—each suggest the opposite is true.

II. This Court should decline the petitioner's invitation to depart from its long-held view that the ex post facto provision of article 24 of the Massachusetts Declaration of Rights provides equal protections as the federal Ex Post Facto Clause. In this Court's most recent ex post facto case involving a juvenile

homicide offender, *Clay v. Massachusetts Parole Board*, it employed the federal test, and that test proved both workable and sensible, as *Clay* itself demonstrates. The petitioner has not successfully shown why the federal test is inadequate to protect the rights of Massachusetts citizens, or why it should be abandoned for this and future cases involving Massachusetts constitutional law.

ARGUMENT

I. The retroactive application of the 1996 amendment to Section 133A did not violate the ex post facto provisions of the United States or Massachusetts Constitutions.

The petitioner claims that the retroactive application of the 1996 amendment to § 133A, which took effect ten years after his crime, violates his rights under the ex post facto provisions of the federal Constitution and the Massachusetts Declaration of Rights. This claim fails because the board's imposition of a five-year setback (instead of a three-year setback, which was the maximum allowable setback under the pre-1996 version of § 133A) does not substantially risk prolonging his or any other prisoner's incarceration, for the following reasons.

A. Standard of review.

Both the United States and Massachusetts Constitutions protect against the operation of ex post facto laws. Article I, § 10 of the federal Constitution provides that "[n]o State shall . . . pass any . . . ex post facto Law," and article 24 of the Massachusetts Declaration of Rights provides that "[l]aws 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." "[This Court has] treated the meaning and scope of the ex post facto provisions in the Federal and State Constitutions as identical." *Commonwealth v. Cory*, 454 Mass. 559, 564 n.9 (2009); *Clay v. Massachusetts Parole Bd.*, 475 Mass. 133, 135 (2016) (citing *Police Dep't of Salem v. Sullivan*, 460 Mass. 637, 644 n.11 (2011)).

To prevail on an ex post facto claim, the petitioner "must show both (1) that the law he challenges operates retroactively (that it applies to conduct completed before its enactment) and (2) that it raises the penalty from whatever the law provided when he acted." *Clay*, 475 Mass. at 135 (quoting *Doe, Sex Offender Registry Bd. No. 10800 v. Sex Offender Registry Bd.*, 459 Mass. 603, 618 (2011) (brackets omitted)). "Retroactive changes that apply to the denial of parole are a proper subject for application of the ex post facto clause." *Id.* at 135-36. However, "not every retroactive procedural change creating a risk of affecting an inmate's terms or conditions of confinement is prohibited." *Garner v. Jones*, 529 U.S. 244, 250 (2000) (citing *California Dept. of Corrections v. Morales*, 514 U.S. 499, 508-09 (1995)).

The parties agree on the first prong of this analysis: After denying the petitioner parole at his initial parole hearing in 2015, the Parole Board imposed a five-year setback pursuant to § 133A, as amended by the 1996 amendment. The

Parole Board thus recognizes that it retroactively applied the 1996 amendment to "conduct completed before [its] enactment." *Clay*, 475 Mass. at 136.

The second prong of this test—and the central issue in this appeal—is whether the retrospective application of the 1996 amendment significantly risked increasing the incarceration of either the petitioner himself or the class of individuals covered by the challenged law. *See id*. at 136-37. A petitioner may establish such a "significant risk" in one of two ways. First, he may show that the challenged provision is "facially unconstitutional, meaning it 'by its own terms show[s] a significant risk' of prolonging his or her incarceration." *Id.* at 137 (quoting *Garner*, 529 U.S. at 251). Or, a petitioner may raise an as-applied challenge, by seeking to "demonstrate, by evidence drawn from the rule's practical implementation by the agency charged with exercising discretion, that its retroactive application will result in a longer period of incarceration than under the earlier rule." *Id.* at 137 (quoting *Garner*, 529 U.S. at 255).

In *Clay*, this Court considered an ex post facto challenge to an amendment to § 133A. 475 Mass. at 133. Clay was convicted as a juvenile of first-degree murder, and became eligible for parole after *Diatchenko I*, as did the petitioner in this case. *Id.* He raised both facial and as-applied ex post facto challenges to the retroactive application of a supermajority amendment to § 133A, which added a two-thirds majority vote requirement for any prisoner to obtain release on parole. (At the time

of the petitioner's crime, the statute required only a simple majority vote. *Id.*) The Parole Board had voted 4-to-3 in favor of paroling Clay, but because of the retroactive application of the supermajority amendment, that vote fell short of the two-thirds requirement, and parole was accordingly denied. *Id.* Although it denied Clay's facial challenge, the Court ultimately granted relief on an as-applied basis, because Clay would have been paroled by a 4-to-3 vote under the old rule, but because of the application of the supermajority amendment, he instead remained in prison. *Id.* at 140-41.

The United States Supreme Court has twice considered the precise issue faced in this case, *i.e.*, whether the retroactive application of a law increasing the maximum permissible setback between parole hearings violates the Ex Post Facto Clause. *See Garner*, 529 U.S. at 244; *Morales*, 514 U.S. at 499. In *Morales*, the prisoner committed two homicides, murdering his second victim while on parole for his first murder. 514 U.S. at 503. Morales challenged a California statute that (similar to the statute challenged here) "made only one change" to that state's parole law: it allowed the California Parole Board to defer the prisoner's next parole review hearing by up to two years, whereas the prior version of the statute required annual parole hearings. *Id.* at 504, 507. The Court firmly rejected the contention that "making parole hearings less accessible would effectively increase the prisoner's sentence and violate the ex post facto clause." *Id.* at 504 (brackets

omitted). Instead, the Court recognized that the amendment—which did not change the prisoner's sentence and did not delay his initial parole hearing—"simply allow[ed] the Board to avoid the futility of going through the motions of reannouncing its denial of parole suitability on an annual basis." *Id.* at 512. The Court so concluded because the parole rate of prisoners covered by the statute was "quite remote," and the board's imposition of a longer setback period was supported by factual findings that the prisoner would not merit parole in any shorter period of time. *Id.* at 511-12. Thus, the Court upheld the statute against an ex post facto challenge, because it "create[d] only the most speculative and attenuated possibility of producing the prohibited effect of increasing the measure of punishment for covered crimes." *Id.* at 509.

In *Garner*, the Court upheld a rule that lengthened the maximum setback to eight years (an increase of five years from the prior rule, and three years longer than the rule at issue in *Morales*). 529 U.S. at 247-48. The rule permitted the Georgia Parole Board to delay a prisoner's next parole hearing when it found that the prisoner had no realistic chance of making parole in a lesser period of time. *Id.* at 248. Also, as in *Morales*, the rule at issue did not modify any aspect of the prisoner's sentence or delay his initial parole hearing. *Id.* at 250. The Court therefore rejected the contention that a rule permitting a lengthier setback period "seem[ed] certain to result in some prisoners serving extended periods of

incarceration." *Id.* at 255 (quotation marks omitted). Instead, the Court held that the challenged rule, by its own terms, did not create such a risk. *Id.* In so holding, the Court noted the fact that each prisoner received a merits-based evaluation of his case, and that determination included a setback that was appropriate in light of that evaluation. *Id.* The Court also recognized that "the Board's policies permit expedited parole reviews in the event of a change in [a prisoner's] circumstance or where the Board receives new information that would warrant a sooner review." *Id.* at 254 (internal quotation marks omitted). For these reasons, the Court held that the retroactive application of this rule did not facially risk prolonging any prisoner's incarceration. *Id*. at 254.

As these decisions show, this Court and the Supreme Court have each recognized that not every change to a state's parole law violates ex post facto. Instead, "the question of what legislative adjustments will be held to be of sufficient moment to transgress the constitutional prohibition *must* be a matter of degree." *Morales*, 514 U.S. at 509 (emphasis in original) (quotation marks and citation omitted); *see Garner*, 529 U.S. at 250 (quoting *Morales*'s teaching "that not every retroactive procedural change creating a risk of affecting an inmate's terms or conditions of confinement is prohibited," and that such questions are "a matter of degree"); *Clay*, 475 Mass. at 137 ("Because the Legislature must have due flexibility in formulating parole procedure and addressing problems associated

with confinement and release, there is no single formula for identifying which legislative adjustments, in matters bearing on parole, would survive an ex post facto challenge." (citing *Garner*, 529 U.S. at 252 (quotation marks omitted))).

In this case, the petitioner fails to demonstrate that the 1996 amendment to § 133A is a facially invalid ex post facto law, or that it violates the Ex Post Facto Clause as applied to him. The petitioner's argument that the amendment violates the ex post facto rights of all "similarly situated" juvenile homicide offenders fails as well.

B. The 1996 amendment to Section 133A is not a facially unconstitutional ex post facto law.

The petitioner makes an argument that the Supreme Court rejected in *Garner* and *Morales*: that, "[o]n its face, an extension of the allowable interval between parole review hearings creates a 'substantial risk of increased punishment.'" Pet. Br. at 11. His facial attack turns on whether the "inherent effect of the [1996] amendment creates a significant risk of increased punishment for covered individuals." *Clay*, 475 Mass. at 139.

As a preliminary matter, a facial ex post facto challenge can only succeed if the retroactive application of the law in question creates a "significant risk of increased punishment" for the *entire* class to which the law applies. *See Clay*, 475 Mass. at 139 (denying facial ex post facto claim because it did not risk prolonging the incarceration of the individuals covered by the challenged amendment) (citing

Garner, 529 U.S. at 251). Thus, the Court must resolve this facial challenge by looking to the "class of individuals" to whom the amendment applies—which, in this case, as in *Clay*, is "those sentenced to life in prison." *Clay*, 475 Mass. at 139. This includes both juveniles and parole-eligible adults. *Id.*

The 1996 amendment to § 133A is not a facially invalid ex post facto law, for the reasons discussed below.

1. Extending the maximum permissible setback period from three years up to five does not inherently risk prolonging any prisoner's incarceration.

The 1996 amendment does not, on its face, inherently risk prolonging any prisoner's incarceration. It extended the maximum permissible setback period from three years to five, but changed no other aspect of the parole eligibility law. *See* St. 1996, c. 43 (replacing the three-year maximum setback with a five-year maximum setback). Thus, the 1996 amendment did not limit the Parole Board's discretion to impose whatever setback period it believes is appropriate (up to the maximum) based on the merits of each case, nor did it constrain the Parole Board's ability to advance cases for compelling reasons before the next scheduled parole hearing.

In *Garner* and *Morales*, the Supreme Court faced ex post facto challenges to similar rules, and held that the retroactive application of a rule which simply permits a longer setback between parole hearings does not, on its face, significantly risk prolonging any prisoner's incarceration. *Garner*, 529 U.S. at 256;

Morales, 519 U.S. at 509. Other courts have since agreed. *See, e.g., Gilman v. Brown,* 814 F.3d 1007, 1016 (9th Cir. 2016) ("a decrease in the frequency of parole hearings—without more—is not sufficient to prove a significant risk of lengthened incarceration"); *Henderson v. Scott*, 260 F.3d 1213, 1216-17 (10th Cir. 2001) (rejecting facial challenge where the parole board retained the discretion to advance a review hearing and the challenged statute "only allows less frequent parole reconsideration dates in situations where the Parole Board determines that more frequent reconsideration is unnecessary"). Furthermore, in *Garner*, the Court recognized that the existence of regulations permitting early review of the board's decision alleviated any risk of prolonged incarceration resulting from a lengthy setback period. 529 U.S. at 254; *accord Morales*, 514 U.S. at 512-13.

The same factors are present in this case. The 1996 amendment is nearly identical to the rules which the Supreme Court upheld against facial ex post facto challenges in *Morales* and *Garner*. As in those cases, the Parole Board includes in every decision it reaches a determination of the appropriate setback period based on its view of when each prisoner is likely to be able to demonstrate a meritorious case for release. *See, e.g., Garner*, 529 U.S. at 254 ("Rather than being required to review cases pro forma, the Board may set reconsideration dates according to the likelihood that a review will result in meaningful considerations as to whether an inmate is suitable for release."); *Morales*, 514 U.S. at 512 (challenged amendment

"simply allows the Board to avoid the futility of going through the motions of reannouncing its denial of parole suitability on a yearly basis"). In each of its decisions, the board considers the nature of the crime, the prisoner's disciplinary history and his record of rehabilitative progress—and, in juvenile cases, the age-related factors which are required to be considered under this Court's decision in *Diatchenko II*, 471 Mass. at 31 (Parole Board must give meaningful consideration to age-related factors in determining whether prisoner has reformed while in prison (quoting *Miller*, 567 U.S. at 472)). These factors all inform the board's ultimate decision as to the appropriate setback length.

Additionally, the Parole Board's regulations provide a vehicle for requesting an earlier parole hearing for compelling reasons. *See* 120 C.M.R. § 304.03 (prisoner may obtain reconsideration of the Parole Board's decision denying parole, if he shows: (a) "a material change in personal or other circumstances"; (b) that he has accomplished "[t]he tasks mandated by the parole hearing panel"; (c) "[e]specially mitigating circumstances"; or (d) "compelling reasons why a more lenient decision should be rendered"). The Supreme Court specifically held that such policies alleviate much of the risk that a lengthened setback period will prolong anyone's incarceration. *See Garner*, 519 U.S. at 254 (holding that a rule permitting a longer setback did not violate the Ex Post Facto Clause where "the Board's policies permit expedited reviews in the event of a change in their

circumstances or where the Board receives new information that would warrant a sooner review"); *Morales*, 514 U.S. at 512-13 (recognizing the state parole board's "practice" of "review[ing] for merit any communication from an inmate asking for an earlier suitability hearing"); *see also Gilman v. Schwarzenegger*, 638 F.3d 1101, 1108 (9th Cir. 2011) ("[T]he availability of advance hearings is relevant to whether the changes in the frequency of parole hearings create a significant risk that prisoners will receive a greater punishment.").

Finally, a prisoner who is aggrieved by the Parole Board's decision with respect to the setback length has several avenues to contest that decision. *See* 120 C.M.R. §§ 304.02 (administrative appeal), 304.03 (reconsideration motion); G.L. c. 249, § 4 (certiorari review in the Superior Court). Thus, it is "nothing beyond speculation and conjecture that the [1996] amendment to § 133A would 'increas[e] the measure of punishment attached to the covered crimes,'" *Clay*, 475 Mass. at 139 (quoting *Morales*, 514 U.S. at 514), with respect to prisoners serving life sentences.

2. The 1996 amendment did not lengthen the maximum sentence for murder, delay any prisoner's initial parole hearing, or heighten the parole suitability standards.

Additionally, like the rules upheld by the Supreme Court in *Garner* and *Morales*, there are several things which the 1996 amendment did *not* do. First, the amendment did not increase any prisoner's sentence. *See Garner*, 529 U.S. at 250

(amended law "did not modify the statutory punishment imposed for any particular offenses"); *Morales*, 514 U.S. at 507-08 ("Rather than changing the sentencing range applicable to covered crimes, the [] amendment simply alters the method to be followed in fixing a parole release date under identical substantive standards"); *cf. Clay*, 475 Mass. at 138-40 (rejecting facial ex post facto claim where challenged amendment did not change the sentence imposed for first-degree murder). The petitioner was sentenced to life in prison, and that is the sentence he is still serving today, albeit with the addition of parole eligibility.

Second, the 1996 amendment "has no effect on the date of any prisoner's initial parole suitability hearing; it affects the timing only of *subsequent* hearings." *Morales*, 514 U.S. at 511 (emphasis in original). That is vitally important because it means that the 1996 amendment does not delay or deprive any prisoner of his *initial* hearing—a hearing at which the Parole Board can "tailor the frequency of subsequent suitability hearings to the particular circumstances of the individual prisoner." *Id.*; *see also Garner*, 529 U.S. at 250 (amended statute did not "alter the standards for determining either the initial date for parole eligibility or an inmate's suitability for parole" (citing *Morales*, 514 U.S. at 507)); *cf. Commonwealth v. Brown*, 466 Mass. 676, 689 n.10 (2013) (holding that the retroactive application of a 25-year minimum sentence violated ex post facto where it delayed a prisoner's initial parole hearing by 10 years).

Third, the 1996 amendment did not make the parole suitability factors any tougher for a prisoner to meet. *Garner*, 529 U.S. at 250 (amendment did not alter the standards for parole suitability); *Morales*, 514 U.S. at 507-08 (same). Again, the law only extended the maximum setback length, and nothing more.

Fourth, the 1996 amendment did not create a *minimum* setback period, which would have curtailed the Parole Board's discretion to review a prisoner's case until a certain period of time had elapsed, no matter how meritorious his case might have been.[8]

The fact that the 1996 amendment does not increase the length of any prisoner's sentence, delay his initial parole hearing, make it any more difficult for him to satisfy the conditions for parole, or impose a minimum setback period that would prevent an actually-suitable prisoner from receiving the opportunity to obtain release should lead this Court to reject this facial ex post facto challenge.

3. The 1996 amendment and § 133A apply to a class of prisoners (juvenile and adult lifers) whose likelihood of obtaining parole is very low.

Finally, the 1996 amendment and the statute it amended, § 133A, apply to a class of prisoners whose "probability of release on parole, particularly as part of an

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[8] At least one court has held that this sort of provision might not violate the ex post facto clause at all. *See Henderson*, 260 F.3d at 1216 (rejecting facial ex post facto challenge to a statute that increased the minimum setback periods between parole hearings, because that law, as amended, "[did] not facially increase the likelihood of punishment"). This Court of course need not confront that issue in this case.

initial hearing, is very low." *Clay*, 475 Mass. at 139; *see also Morales*, 514 U.S. at 510 (rejecting a facial ex post facto claim where "the amendment applie[d] only to a class of prisoners for whom the likelihood of release on parole [was] quite remote"). As discussed above, the individuals covered by the law are "those [prisoners who have been] sentenced to life in prison." *Clay*, 475 Mass. at 139. This class includes not only juveniles, but parole-eligible adults as well. *See id.*

The *Clay* Court examined the Parole Board's publicly-available statistics and determined that the 22 percent parole rate for eligible lifers reflected a "very low" chance of actually being granted parole. Thus, the Court concluded that the retroactive application of the supermajority amendment presented no "significant risk of increased punishment" to this class. *Clay*, 475 Mass. at 139 n.7; *see also Garner*, 529 U.S. at 251 (rejecting facial ex post facto challenge to law that "covers all prisoners serving life sentences"). The Parole Board's more recent available statistics reflect similar percentages: For 2015, adult and juvenile lifers were paroled at a 21 percent rate, while for 2016, that rate increased marginally to 27 percent. *See* Massachusetts Parole Board, 2015 Annual Statistics Report, *available at* https://www.mass.gov/doc/2015-annual-statistical-report/download; Massachusetts Parole Board, 2016 Annual Statistics Report, *available at*

https://www.mass.gov/doc/2016 -annual-statistical-report/download.[9] Thus, the rate of parole for the class of individuals potentially affected by the 1996 amendment remains low.

Furthermore, unlike the supermajority amendment in *Clay*, many of the prisoners potentially affected by the 1996 amendment receive setbacks that are well below the maximum five years—a substantial percent of lifers receive *less* than a five-year setback, as the petitioner himself acknowledges. *See* Pet. Br. at 16 (alleging that 70 percent of lifers receive the maximum setback). This means that the Parole Board does not categorically apply the maximum setback allowed by the 1996 amendment to every member of the class, and many members of the covered class receive setbacks that would have been valid under the pre-1996 version of the statute. This makes a facial claim to this amendment even less tenable than the one rejected in *Clay*. *See* 475 Mass. at 139-40.

For these reasons, and for those stated *supra* Parts I.B.1 and 2, the 1996 amendment creates no "significant risk" of prolonging the incarceration of "those sentenced to life in prison" (*i.e.*, juveniles and parole-eligible adults). The

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[9] The Parole Board's 2014 Annual Statistics Report was available online before the redesign of the Commonwealth's website, and it indicates a 41% parole rate for all lifers for 2014. However, that number is an aberration from the norm, because it includes 7 cases in which juvenile first-degree murder offenders were granted parole at their initial hearings immediately post-*Diatchenko I*.

petitioner offers only "speculation and conjecture" in arguing to the contrary.[10] This Court should therefore reject the petitioner's claim that the 1996 amendment facially violates the federal and state ex post facto provisions. *See Clay*, 475 Mass. at 138 ("where retroactive application of a parole law creates only a speculative or conjectural risk of prolonging incarceration, the Court has refused to hold such law unconstitutional" (citing *Garner*, 529 U.S. at 255-57 and *Morales*, 514 U.S. at 509)).

C. The petitioner's asserted claim regarding juvenile homicide offenders is without merit.

Apparently recognizing the futility of arguing that the 1996 amendment facially risks prolonging the incarceration of the full class of covered individuals when it plainly does not, the petitioner instead makes a quasi-facial attack against the amendment by pointing to a *subset* of that affected class. He argues that the 1996 amendment, "[o]n its face," risks prolonging the incarceration of juvenile homicide offenders such as himself. Pet. Br. at 6-15. This claim does not neatly fit as a facial claim, because a proper facial challenge does not take into account special characteristics within the affected "class of individuals"—such as juvenile

[10] The Court, of course, went on to find an as-applied violation on the unique facts of that case, but, as discussed below, the facts of this case should lead the Court to a different result. *See infra* Section I.D (addressing petitioner's as-applied arguments).

status. Neither does it fit as an as-applied claim, because the petitioner seeks relief on behalf of other "similarly situated" prisoners in addition to himself.

Regardless of its label, however, the petitioner's claim fails on its own terms. The retroactive application of the 1996 amendment does not risk prolonging any juvenile homicide offender's incarceration—indeed, since the Parole Board began hearing juvenile first-degree murder cases post-*Diatchenko I*, 13 of 22 initial hearings, or 59%, resulted in setbacks of three years or less. In other words, a clear majority of setbacks imposed on juvenile first-degree murder offenders would have been valid under the old law. *See supra* page 13. As to the remaining 9 offenders in this subclass (including the petitioner), the imposition of a four- or five-year setback does not risk prolonging their incarceration, for the same reasons already discussed. *See supra* Section I.B.1 (arguing that the Parole Board has the discretion to impose whatever setback it concludes is appropriate, in light of its assessment of when a prisoner will potentially be able to demonstrate suitability for parole, and that early review procedures exist to advance appropriate cases); Section I.B.2 (arguing that the 1996 amendment does not lengthen the sentence imposed, delay a prisoner's initial parole hearing, or toughen the standards for obtaining parole).

In *Clay*, this Court had an opportunity to draw a distinction between juveniles and parole-eligible adults for ex post facto purposes, yet it appropriately did not do so. *Clay*, like this case, concerned a first-degree murder offender who

was a juvenile at the time of his crime, and thus had become parole-eligible after *Diatchenko I*. In resolving his ex post facto claims, the Court never mentioned the fact that Clay was a juvenile at the time of his offense, because its analysis simply did not require it do so. That was the right approach, and it is the one the Court should employ here, too.

Nonetheless, to argue otherwise, the petitioner points to this Court's prior recognition in the *Diatchenko* cases that juveniles are constitutionally different from adults and enjoy greater prospects for reform. *See* Pet. Br. at 6-14; *Diatchenko II*, 471 Mass. at 31. The petitioner seeks to extend that language outside of the context in which it was originally said (in the context of holding that juveniles cannot be sentenced to life without the possibility of parole). While the Court has recognized that juvenile offenders are "constitutionally different for sentencing purposes" and have "greater prospects for reform" when compared to adults, it has also been crystal clear that this understanding should not be seen as a substitute for the Parole Board's proper role in determining "whether a particular juvenile homicide offender merits parole." 471 Mass. at 30 (quoting *Miller*, 567 U.S. at 471). Indeed, the Court was quick to recognize that to do so "would usurp impermissibly the role of the board." *Id.*

The petitioner, however, seeks to do just that, and suggests that the 1996 amendment has a disparate impact on juvenile homicide offenders because

juveniles are paroled at higher rates than adults. While it is true that a strong percentage of juvenile first-degree murder offenders have been paroled since *Diatchenko I*, those are primarily the result of initial hearings—hearings the 1996 amendment does not affect in any way. *See supra* page 13 (noting that 12 out of 35 juvenile first-degree murder offenders were granted parole at their initial hearings); Section B.2 (arguing that the 1996 amendment does not delay any prisoner's initial parole hearing). Furthermore, the Parole Board's consideration of each juvenile case already includes consideration of the *Miller* factors, which take into account the "distinctive attributes of youth that diminish the penological justifications for imposing the harshest sentences on juvenile offenders." *Diatchenko II*, 471 Mass. at 31 (quoting *Miller*, 567 U.S. at 472). Because the "constitutional differences" between juveniles and adults are already recognized in each juvenile case the Parole Board hears, its decision as to the appropriate setback is appropriately informed by those factors, thus mitigating the risk that a juvenile's incarceration might be prolonged where an adult's might not be.

At bottom, there is simply no evidence that the 1996 amendment actually risks lengthening any prisoner's incarceration—even a juvenile's—for the reasons discussed above. Thus, no special analysis for this subset of the prisoners affected by the 1996 amendment is appropriate.

D. As applied in this case, the 1996 amendment did not violate the petitioner's ex post facto rights.

To the extent the petitioner challenges the 1996 amendment as applied to him, that claim also fails. To succeed on an as-applied ex post facto claim, the petitioner must demonstrate, "by evidence drawn from the rule's practical implementation by the agency charged with exercising discretion, that its retroactive application will result in a longer period of incarceration than under the earlier rule." *Clay*, 475 Mass. at 140 (quoting *Garner*, 529 U.S. at 255). In the context of this case, that means the petitioner must show that *he* likely would have been released on parole had he actually come up for a review hearing after only three years, instead of being forced to wait five years under the 1996 amendment. *See Garner*, 529 U.S. at 255 (to obtain relief, the prisoner "must show that as applied to *his own sentence* the law created a significant risk of increasing his punishment" (emphasis added)); *Weaver v. Graham*, 450 U.S. 24, 29 (1981) (to violate the Ex Post Facto Clause, a law "must disadvantage the offender affected by it"); *Richardson v. Pennsylvania Bd. of Probation & Parole*, 423 F.3d 282, 291 (3d Cir. 2005) ("the ultimate question [in an ex post facto case] is the effect of the change in parole standards on the individuals' risk of increased punishment"); *see also Michael v. Ghee*, 498 F.3d 372, 384 (6th Cir. 2007) (rejecting, in a case brought under 42 U.S.C. § 1983, both facial and as-applied ex post facto challenges because, "on appeal, plaintiffs have not attempted to show how any one

individual defendant faces a substantial risk of serving more time under the new guidelines"). The petitioner has not even attempted to make such a showing.

1. Unlike the petitioner in *Clay*, the petitioner here had a very low chance of being paroled after only three years, and he has not attempted to show otherwise.

In resolving an as-applied challenge, the most relevant "evidence [of] the rule's practical implementation" in this case is the Parole Board's 2015 written decision denying parole. *Infra* pages 56-61; *see also Clay*, 475 Mass. at 140-41 (resolving petitioner's as-applied ex post facto claim by examining the Parole Board's written decision, which provided "clear evidence" to justify the result reached).

In its decision, the Parole Board unanimously found that the petitioner was unsuitable for release because he was not yet rehabilitated. *See infra* page 61 (Parole Board's decision explaining that the petitioner was "not fully rehabilitated" and expressing the board members' shared "serious concern of whether [the petitioner] still presents a risk of harm to the community, and whether his release is compatible with the best interest of society"). The board's decision was supported by evidence, adduced at the hearing, that the petitioner had failed to take recommended courses to rehabilitate himself, had rejected prison officials' offer to transfer him to another institution where he could have taken such courses to

address his anger and substance abuse issues,[11] and had incurred 39 separate disciplinary infractions during his 29-year incarceration. *See Deal v. Comm'r of Correction*, 475 Mass. 307, 322-323 (2016) (noting the Parole Board's factual findings in this same petitioner's initial 2015 parole hearing). The board also gave consideration to the petitioner's juvenile status at the time of his crime and his individual capacity for reform as a juvenile homicide offender. *Infra* pages 60-61. Those factors, nevertheless, did not alter the board's conclusion that the petitioner had not met the standards to qualify for release. *See infra* page 61. Thus, in evident recognition that the petitioner still needed to demonstrate a substantial amount of rehabilitative progress before his next parole hearing, and would likely not be able to demonstrate suitability in less than five years, the board members imposed the maximum five-year setback. *Id.* The board instructed the petitioner to use that time to "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." *Id.*

As in *Clay*, the Parole Board's written decision provides the Court with the most important "evidence [of] the rule's practical implementation" to decide this case. 475 Mass. at 140. However, unlike in *Clay*, the board's decision here

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[11] The petitioner instead elected to remain at the institution he was then located at, where he said he was "comfortable." *Infra* pages 57, 59.

supports the *denial* of the petitioner's as-applied claim. In *Clay*, the Parole Board had voted 4-to-3 in favor of granting parole, but because of the retroactive application of the supermajority amendment, parole was denied. Thus, but for the challenged amendment, Clay "would have been granted parole. Instead, he remain[ed] in prison." *Id*. at 140. *Clay* is thus a nearly perfect exemplar of what a successful as-applied ex post facto challenge looks like: a case in which, even though the rule change did not carry a substantial risk of increased punishment *for the entire affected class of persons*, the rule change *as applied to the particular offender* demonstrably did so.

This case, however, is a mirror image of *Clay*. Here, the Parole Board's unanimous decision to deny the petitioner parole and to impose a five-year setback was based on record evidence of his then-existing unsuitability for parole, and the steps the petitioner was instructed to take in order to become suitable before his next parole hearing. *See infra* pages 56-61. The petitioner has made no argument on appeal that he completed these tasks, or that he would have actually met the criteria for parole had he received a parole review hearing within three years after his initial parole hearing. Thus, the petitioner here—in stark contrast to Clay—has not even attempted to show that, but for the 1996 amendment, he "would have been granted parole." *See Clay*, 475 Mass. at 140. Therefore, even if the 1996 amendment somehow systematically disadvantaged juvenile first-degree murder

offenders—and it does not, for the reasons described above—an as-applied challenge would still fail, because the petitioner has not shown that *he* has any greater likelihood of being released on parole under the pre-1996 rules.

Moreover, if the petitioner sincerely believed that he would have met the standards for release on parole after only three years, he could have said so by filing a reconsideration motion with the Parole Board. *See* 120 C.M.R. § 304.03. Even if a reconsideration motion was denied, it nonetheless would have created some record for this Court to evaluate in assessing whether he truly would have been suitable for parole after three years—thus providing a basis for determining whether the five-year setback substantially risked prolonging his incarceration. The petitioner made no effort to do so, and thus, no record of his potential suitability at the three-year mark exists. In the absence of any such record, the petitioner can allege nothing more than a "speculative and attenuated possibility" of demonstrating an as-applied ex post facto violation. *See Clay*, 475 Mass. at 150 (quoting *Morales*, 514 U.S. at 509); *see also Brown*, 814 F.3d at 1016 (explaining that "proving a significant risk of prolonged incarceration in parole cases requires exacting evidence," and rejecting an as-applied claim because the petitioner "[did not] offer evidence showing that he would have received parole before the enactment of [the challenged law]"); *Richardson*, 423 F.3d at 293 (affirming the denial of habeas corpus relief to a prisoner who "provided no evidence, and for that

matter, has proffered no allegations, that a 'significant risk' of increased punishment was created by the application of the [challenged provisions] to his individual case"); *Henderson*, 260 F.3d at 1217 (rejecting an as-applied ex post facto challenge to a statute extending the maximum permissible setback where the petitioner "[did not show] that his circumstances have changed sufficiently in light of his convictions and sentences to warrant an earlier parole consideration date"). Accordingly, the petitioner's as-applied claim must be rejected.

2. The petitioner's two affidavits lack important context about the Parole Board's policies or practices.

The petitioner refers extensively in his brief to two affidavits which he presented for the first time to the Superior Court, and which he claims are "undisputed." These affidavits, however, were outside the scope of a claim that should have been brought under the certiorari statute, G.L. c. 249, § 4, not as a petition for declaratory relief. *See Diatchenko II*, 471 Mass. at 12, 31 (quoting *Averett v. Comm'r of Correction*, 25 Mass. App. Ct. 280, 287 (1988) ("A complaint for declaratory relief is . . . [not] an appropriate remedy where the validity of an adjudication . . . of an individual case is being challenged. There relief in the nature of certiorari is to be sought.")); *Crowell*, 477 Mass. at 109 (confirming that "the only appropriate way for the court to evaluate [a petitioner's] claim is through a review of the administrative record upon a motion for judgment

on the pleadings"). The allegations contained in the affidavits are not "undisputed," and the Parole Board does not stipulate to the allegations contained in them.

In any event, the petitioner's affidavits lack important context, and fail on their own terms to overcome the presumption that the Parole Board has acted in accordance with its enabling statute and published regulations. *See, e.g.*, *Clay*, 475 Mass. at 141 n.9 ("Absent a demonstration to the contrary, we presume the [b]oard follows its statutory commands and internal policies in fulfilling its obligations." (quoting *Garner*, 529 U.S. at 256)). For example, the affidavits assert baldly that the Parole Board has "never" granted a reconsideration petition for a lifer who was given a five-year setback, *see* Pet. Br. at 4; Pet. R. at 12. But they do not allege that any prisoner who applied for reconsideration actually met the criteria for that relief, or the suitability standards for parole. *See, e.g., Schwarzenegger*, 638 F.3d at 1109 ("Plaintiffs have adduced no evidence that the [California Parole] Board has denied a request for an advance hearing where a prisoner has shown a change in circumstances or new evidence."). Thus, the affidavits do not support the petitioner's claims for relief.

II. This case presents no reason to construe the Ex Post Facto provision of the Massachusetts Constitution differently than Article 1, Clause 10 of the Federal Constitution.

The petitioner argues that this Court should depart from its long-settled understanding of the scope of article 24 of the Massachusetts Declaration of

Rights, and announce for the first time that article 24 provides more protections than the federal Ex Post Facto Clause. This Court should decline to do so.

As discussed extensively above, "[this Court has] treated the meaning and scope of the ex post facto provisions in the Federal and State Constitutions as identical." *Cory*, 454 Mass. at 564 n.9; *see also Clay*, 475 Mass. at 135 (internal citation omitted). The Supreme Court has said that the Ex Post Facto Clause incorporates "a term of art with an established meaning at the time of the framing of the Constitution." *Morales*, 514 U.S. at 504 (internal citation omitted). In the parole context, an ex post facto violation results when a law, applied retroactively to conduct completed before its enactment, substantially risks prolonging a prisoner's incarceration. *Clay*, 475 Mass. at 135.

The petitioner, however, argues that the Court should "[p]rovid[e] juvenile homicide offenders with greater protection under the Declaration of Rights than may be required under federal law." Pet. Br. at 13. He does not seem to disagree with the federal test *per se*, but rather with how the Supreme Court applied that test in *Garner* and *Morales*. *See* Pet. Br. At 9-11.[12] *Contrast Diatchenko I*, 466 Mass. at 283-84 (accepting the *Miller* Court's analysis of the constitutional differences

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[12] The *Morales* Court and the dissent in that case both stated the operative test identically. 514 U.S. at 504-05 (citing *Calder v. Bull*, 3 U.S. (Dall.) 386, 390 (1798)); *id.* at 516 (Souter, J., dissenting) (quoting *Calder*).

between juveniles and adults, but disagreeing with *Miller*'s holding that life sentences without parole might be appropriate in some circumstances for juvenile homicide offenders, and holding instead, under article 26 of the Declaration of Rights, that such sentences are never permissible).

Thus, the petitioner appears to be asking the Court to give his juvenile status special weight in its analysis under the existing test for ex post facto claims. For the reasons discussed above, *see supra* Section I.C, that is not appropriate. A person's juvenile status has no relevance in analyzing whether the retroactive application of a law substantially risks prolonging that person's incarceration, at least absent some provision in the challenged law that applies specifically to juveniles. No such provision is at issue here. *See Clay*, 475 Mass. at 133 (Court did not consider petitioner's juvenile status in its analysis of whether a supermajority amendment to § 133A violated his ex post facto rights). And the fact that the *Clay* Court was able to uncover an ex post facto violation by using its existing ex post facto test in a case in a similar posture to this one confirms that the existing test works and remains viable for this case and future ones as well. The petitioner's claims require only a straightforward application of the same test that this Court recently employed in *Clay*, which in turn is based on the federal test as enunciated most recently in *Garner* and *Morales*.

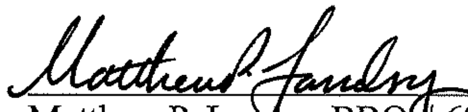
For these reasons, the Court should decline the petitioner's invitation to depart from its historic understanding of the meaning and scope of article 24.

CONCLUSION

This Court should affirm the judgment of the Superior Court.

Respectfully submitted,

MAURA HEALEY
ATTORNEY GENERAL



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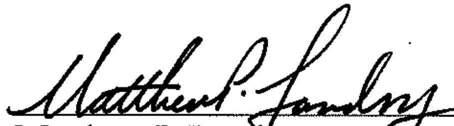
CERTIFICATE OF COMPLIANCE

I, Matthew P. Landry, hereby certify that the foregoing brief complies with all of the rules of court that pertain to the filing of briefs, including, but not limited to, the requirements imposed by Rules 16 and 20 of the Massachusetts Rules of Appellate Procedure. The brief complies with the applicable length limit in Rule 20 because it contains 9,599 words in 14-point Times New Roman font (not including the portions of the brief excluded under Rule 20), as counted in Microsoft Word (version: Word 2016).



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CERTIFICATE OF SERVICE

I hereby certify that on December 17, 2018, two true copies of the foregoing brief will be served upon counsel for the petitioner, via U.S. mail, first-class postage prepaid, to the following:

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ADDENDUM

Prior Decisions

Memorandum of Decision and Order on Cross-Motions for Judgment on the Pleadings in *Jeffrey Roberio v. Paul Treseler*, Civ. No. 1684-CV-02622 (Mass. Super. Ct. July 7, 2017) .... Add. 47

Parole Board Memorandum of Decision in the Matter of Jeffrey Roberio (Nov. 4, 2015) .... Add. 56

Constitutional and Statutory Provisions

U.S. Constitution, art. I, § 10 .... Add. 62

Massachusetts Declaration of Rights, art. 24 .... Add. 62

G.L., c. 127, § 133A (version in effect as of October 1986) .... Add. 62

G.L., c. 127, § 133A (current version) .... Add. 63

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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.

Mass. App. Ct. 280, 287 (1988)(validity of individual adjudication not appropriately challenged by complaint for declaratory relief). Certiorari is a limited procedure reserved for correction of substantial errors of law apparent on the record created before a judicial or quasi-judicial tribunal. The court evaluates the plaintiff's claims on a petition for certiorari through a review of the administrative record. School Comm. of Hudson v. Board of Educ., 448 mass. 565, 575-576 (2007), citing St. Botolph Citizens Comm., Inc. v. Boston Redev. Auth., 429 Mass. 1, 7 (1999).

The Board's decision to grant parole is limited by statute; it may only do so where it finds, "after consideration of a risk and needs assessment, that there is a reasonable probability that, if the prisoner is released with appropriate conditions and community supervision, the prisoner will live and remain at liberty without violating the law and that release is not incompatible with the welfare of society." G. L. c. 127, section 130. No prisoner is entitled to parole (G.L. c. 127, section 136; Deal v. Commissioner of Correction, 475 Mass. 307, 322 (2016)), the statute does not create an expectation of release through parole, (Dietchenko II, 471 Mass. at 18), and the board's determination is entitled to considerable deference. Dietchenko II, 471 Mass. at 21 ("The decision is a discretionary one for the board 'with which, if otherwise constitutionally exercised, the judiciary may not interfere.'"); Greenman v. Massachusetts Parole Bd., 405 Mass. 384, 387 (1989). However, this deference is not without limits.

Our Supreme Judicial Court has recently recognized a "constitutional dimension" to the parole process for juvenile homicide offenders. Diatchenko I, 466 Mass. at 674. "The purpose of judicial review here is not to substitute a judge's or an appellate court's opinion of the board's judgment on whether a particular juvenile homicide offender merits parole, because this would usurp impermissibly the role of the board. Rather, judicial review is limited to the question whether the board has carried out its responsibility to take into account the attributes or factors

just described in making its decision." Diatchenko II, 471 Mass. at 30. Under an abuse of discretion standard, court review determines whether the action taken by the Board was arbitrary and capricious. Id., at 31.

The statutory authority of the Board is contingent upon consideration of specific factors deemed relevant by the Legislature. "In making this [parole determination], the [Board] shall consider whether, during the period of incarceration, the prisoner has participated in available work opportunities and education or treatment programs and demonstrated good behavior . . . [and] . . . whether risk reduction programs . . . would minimize the probability of the prisoner re-offending once released." G.L. c. 127, section 130. For juvenile homicide offenders, these factors must now also include what are called the Miller factors.[2]

Mr. Roberio argues, through experienced and articulate counsel, that the Board abused its discretion "by giving no more than 'cursory' consideration to the Miller factors presented" by his petition. He rightly notes that "a juvenile's life sentence with the possibility of parole becomes an unlawful de facto life sentence when the parole process fails to provide the juvenile with 'a meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation.'" Plaintiff's Motions for Judgment on the Pleadings and for Summary Judgment (Docket, Paper 11), at page 10 (emphasis in original), citing Diatchenko II, 471 Mass. at 20.

As further developed at the hearing before me on May 24, 2017, Roberio argues that, because the Board failed in its written decision to "grapple with" the details of the evidence he

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[2] The United States Supreme Court has identified a number of factors that sentencing judges should consider in making individualized determinations about juvenile offenders for purposes of life sentences: (1) the defendant's chronological age and its hallmark features – among them, immaturity, impetuosity, and failure to appreciate risks and consequences; (2) the family and home environment that surrounds the defendant; (3) the circumstances of the homicide offense, including the extent of the defendant's participation in the conduct and the way familial and peer pressures may have affected him or her; (4) whether the defendant might have been charged and convicted of a lesser offense if not for incompetencies associated with youth; and 5) the possibility of rehabilitation." See Commonwealth v. Costa, 472 Mass. 139, 147 (2015), citing Miller v. Alabama, 132 S.Ct. 2455 (2012).

presented at his hearing "in an articulated way," and thus failed to "show its work," the court must rule that the Board's decision is arbitrary and capricious. Diatchenko II, 471 Mass. at 31 ("[A] denial of a parole application by the board will constitute an abuse of discretion only if the board essentially failed to take these factors into account, or did so in a cursory way."). It is of course correct that the Board is not "free to ignore or simply pay lip services to the juvenile lifer's evidence (including expert evaluations and testimony)." Plaintiff's Motions at page 15. However, the Board argues in its cross-motion that its unanimous opinion "was a logical conclusion deduced from rational consideration of all relevant factors after a review of the Plaintiff's record," and that its "opinion was formed after receiving and considering all of the information appropriate to a parole determination, including the age related attributes of a juvenile offender." Defendant's Memorandum of Law in Support, Docket Paper 12, at pages 9 and 13.

Following thorough review of the full administrative record and the authority cited by the parties, Plaintiff's Motions for Judgment on the Pleadings and for Summary Judgment are **DENIED**, and Defendant's Cross-Motion for Judgment on the Pleadings is **ALLOWED**, for the reasons discussed below.

Discussion

Count I – Abuse of Discretion

The Board conducted a lengthy hearing at which many witnesses participated. Mr. Roberio had a full and fair opportunity to address all of the material issues from his point of view: the circumstances of the murder (described in various court records and opinions as a brutal beating and strangling) which occurred during an unsuccessful robbery attempt, planned and led by him against Lewis Jennings, a small-town elderly neighbor; Mr. Roberio's historical

struggles in school and home environments leading up to that time; his longstanding – even at age 17 – alcoholism, and the way it fueled his rage and violence; his then lack of any moral compass, respect for others, or capacity to control impetuous decisions; and his efforts at work and self-help (as well as the discipline he has received) since – encompassing over 29 years of incarceration at the time of the hearing. An expert witness trained in neuroscience testified on Roberio's behalf to her opinion that, based on testing (including recent testing of social abilities and emotional and behavioral functioning), and evaluation by herself and a (now deceased) colleague spanning a twenty-four year period, Mr. Roberio has "clearly outgrown the affects (sic) of his traumatic brain injuries and early exposure to lead," and his "delayed neuronal maturation has resolved itself." The Board also heard from family members and advocates in support of Mr. Roberio's release, and law enforcement and family members of Mr. Jennings opposed.

Of most significance to the court, given the challenge presented of cursory review, is the detailed and thoughtful questioning of Mr. Roberio by each of the Board members. Although it is clear from the questioning that each member held his or her own distinct concerns, each was straightforwardly focused on elements material to the Miller factors, and the relationship of those factors to this prisoner's rehabilitation.

One Board member questioned Mr. Roberio extensively on his subjective understanding of the neurological defenses raised historically by counsel and the neuro-psychological experts, and his own views about, for example, his: lead poisoning; learning disabilities; alcoholism; and decision making and impulse control – including his experience of those elements over time. Another Board member focused on Mr. Roberio's work history at the institution, and his repeated loss of the work he valued as a result of disciplinary reports for rules infractions,

primarily his persistent pursuit of tattooing fellow prisoners, as "an ATM machine" (over 100 people in 10 years). Yet another Board member probed Mr. Roberio on why all of his rehabilitative efforts have (admittedly) been through self-help (AA and a church-related group – "I've taken my own steps;" "I put myself through my own sobriety and self-help programs"), without any professional ("credentialed") counseling at any time during his prison term. This record reflects that the gist of all the questioning of Mr. Roberio was an attempt to compare his juvenile self in 1986 when he murdered Mr. Jennings, to his adult self in 2015 seeking parole.

At the hearing before me counsel for Mr. Roberio opined that "the hearing itself [before the Board] doesn't matter;" that whatever the Board was thinking must be reflected in the written decision itself, because the SJC has indicated "what they want these opinions to look like." I respectfully disagree. The Board hearing, as with any other administrative proceeding, is an important part of the record before the court. And, contrary to Mr. Roberio's argument, certain of the Board members' questions demonstrate a working familiarity with the expert opinions presented in support of parole.

To the reviewing court this and all of the other Miller-factor questions at the hearing demonstrate that the Board's decision was indeed "informed by age-related considerations." Plaintiff's Motions, at page 20. The way I read the Board's unanimous opinion, the members first factored in those age-related considerations, but then went on to address their assessment of Roberio's demonstration of "maturity and rehabilitation." Diatchenko II, 472 Mass. at 30. Consistent with the concerns expressed at hearing, the Board's Decision concludes that Mr. Roberio has not sufficiently addressed his historical issues with alcohol abuse, anger, and violent behavior, due to the dearth of rehabilitative programming which he has never "aggressively pursued." Decision, at page 6.

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**.

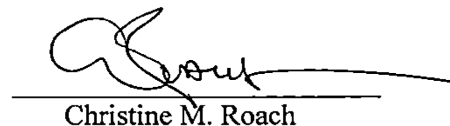
Conclusion

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



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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

ARTICLE I OF THE U.S. CONSTITUTION

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.

CHAPTER 127 OF THE MASSACHUSETTS GENERAL LAWS

(version in effect as of October 1986)

SECTION 133A— Eligibility for Parole; Parole Permits; Violations, Effect.

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 of 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.

CHAPTER 127 OF THE MASSACHUSETTS GENERAL LAWS

(current version)

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

Every prisoner who is serving a sentence for life in a correctional institution of the commonwealth, except prisoners confined to the hospital at the Massachusetts Correctional Institution, Bridgewater, except prisoners serving a life sentence for murder in the first degree who had attained the age of 18 years at the time of the murder and except prisoners serving more than 1 life sentence arising out of separate and distinct incidents that occurred at different times, where the second offense occurred subsequent to the first conviction, shall be eligible for parole at the expiration of the minimum term fixed by the court under section 24 of chapter 279. The parole board shall, within 60 days before the expiration of such minimum term, conduct a public hearing before the full membership unless a member of the board is determined to be unavailable as provided in this section. Notwithstanding the previous sentence, the board may postpone a hearing until 30 days before the expiration of such minimum term, if the interests of justice so require and upon publishing written findings of the necessity for such postponement. For the purposes of this section, the term unavailable shall mean that a board member has a conflict of interest to the extent that he cannot render a fair and impartial decision or that the appearance of a board member would be

unduly burdensome because of illness, incapacitation, or other circumstance. Whether a member is unavailable for the purposes of this section shall be determined by the chair. Board members shall appear unless said chair determines them to be unavailable. Under no circumstances shall a parole hearing proceed pursuant to this section unless a majority of the board is present at the public hearing. Unless a board member is unavailable due to a conflict of interest, any board member who was not present at the public hearing shall review the record of the public hearing and shall vote in the matter.

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

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

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

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