

COMMONWEALTH OF MASSACHUSETTS

MIDDLESEX, S.S.

SUPREME JUDICIAL
COURT No.

APPEALS COURT
No. 2019-P-0332

TIMOTHY DEAL

v.

MASSACHUSETTS PAROLE BOARD

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

Merritt Schnipper
SCHNIPPER HENNESSY PC
25 Bank Row Suite 2S
Greenfield MA 01301
(413) 325-8541
mschnipper@schnipperhennessy.com
BBO# 676543

Barbara Kaban
PO Box 290757
Charlestown MA 02129
(617) 398-7455
kabanlaw@gmail.com
BBO# 641715

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TIMOTHY DEAL

v.

MASSACHUSETTS PAROLE BOARD

APPLICATION FOR DIRECT APPELLATE REVIEW

Appellant Timothy Deal applies pursuant to Mass. R. A. P. 11 for direct appellate review of the order of the Middlesex Superior Court granting judgment on the pleadings to the Massachusetts Parole Board on Deal's Complaint for Certiorari Review filed pursuant to G.L. c.249 §4 and *Diatchenko v. District Attorney for the Suffolk Dist.*, 471 Mass. 12 (2015).

Deal's appeal raises several unresolved questions regarding the standard by which Superior Court judges conducting certiorari review of parole decisions in juvenile homicide cases should assess the Parole Board's exercise of discretion and determine whether the Board provided a particular offender with the meaningful opportunity for release necessary to conform his or her life sentence to constitutional requirements. These important questions themselves arise in the delicate

context of the constitutional separation of powers, pursuant to which courts must review the discretionary decision of an executive agency to determine whether the executive is lawfully carrying out judicially-imposed mandatory life sentences that depend on a particular quality of executive action for their constitutionality in the first instance. Without clearly enunciated standards for the content of parole decisions in such cases, courts have no way to effectively review them and determine whether a particular juvenile is subject to unconstitutionally disproportionate punishment.

Petitioner was convicted of second-degree murder for a killing committed when he was seventeen. When he appeared before it for the first time fifteen years later, Deal presented the Parole Board with a large volume of evidence relevant to the way the particular attributes of youth manifested themselves in his crime, how his rehabilitative trajectory while incarcerated followed a path consistent with the predictions of social science, and the manner in which this evidence related to statutory parole standards. The Parole Board did not engage this evidence at all at Deal's hearing, instead focusing exclusively on his 'version of the crime' and criticizing him when it found that version

'not plausible.' The Board's written decision denying parole so completely failed to address this evidence that the Superior Court judge charged with reviewing the decision called its 'discussion' of the particular considerations applicable to juvenile sentencing "boilerplate language." Nevertheless, the Superior Court upheld the Board's exercise of discretion, apparently proceeding on the assumption that the Board must have considered and had good reason for rejecting the abundant evidence presented to it, even if its written decision gave no indication of what those reasons were.

Parole Board decisions like the one at issue here make it impossible for Superior Court judges to determine whether juvenile homicide offenders have received the meaningful opportunity for release this Court has said is essential to the constitutionality of their mandatory life sentences. Superior Court rulings accepting such Board decisions as legitimate exercises of agency discretion relieve the executive of its obligation to carry out juvenile life sentences in a constitutional manner, and greatly increase the risk such offenders are subject to cruel or unusual punishment. This Court's review, and enunciation of standards to guide both the Parole Board and the

Superior Court in the fulfillment of their respective responsibilities in the cases of juvenile homicide offenders, is necessary to ensure juveniles are punished for adult offenses only in a proportionate and lawful manner.

As further support for his Application, Petitioner relies upon the attached Memorandum of Law.

April 16, 2019

Respectfully Submitted,

TIMOTHY DEAL
By His Attorneys,

/s/ Merritt Schnipper
Merritt Schnipper
SCHNIPPER HENNESSY PC
25 Bank Row Suite 2S
Greenfield MA 01301
(413) 325-8541
mschnipper@schnipperhennessy.com
BBO# 676543

Barbara Kaban
PO Box 290757
Charlestown MA 02129
(617) 398-7455
kabanlaw@gmail.com
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**MEMORANDUM OF LAW IN SUPPORT OF
APPLICATION FOR DIRECT APPELLATE REVIEW**

I. STATEMENT OF PRIOR PROCEEDINGS

In 2002, a Suffolk County grand jury indicted Petitioner Timothy Deal for first-degree murder based on an incident that occurred when he was seventeen years old. Appx:6-7.¹ Deal was tried to a jury in 2004 and convicted of second-degree murder; the Appeals Court affirmed his convictions in an unpublished decision, and this Court denied further appellate review. Appx:6; 2006-P-0470, FAR-16419. Pursuant to the terms of his mandatory life sentence, Deal became eligible for parole in early 2017. Appx:7.

Deal appeared before the Massachusetts Parole Board ("Board") on December 15, 2016 for his initial parole hearing. Appx:7. On July 25, 2017 the Board denied

¹ Citations to the docket entries, Superior Court Order, and Parole Board Decision attached to this application are identified as Appx:Page.

Deal's application and imposed a four-year setback. Appx:6-9. The Board also denied Deal's administrative appeal of its decision. On March 14, 2018 Deal filed a Complaint in the Nature of Certiorari pursuant to G.L. c.249 §4 in the Middlesex Superior Court seeking review of the Board's decision in accordance with the procedures set forth in *Diatchenko v. District Attorney for the Suffolk Dist.*, 471 Mass. 12 (2015) ("*Diatchenko II*"). Appx:2. On September 24, 2018 the Superior Court (Barrett, J.) granted the Board's Motion for Judgment on the Pleadings, and denied Deal's. Appx:4-5. Deal timely noticed his appeal, and the case entered the Appeals Court on March 5, 2019.

II. FACTS RELEVANT TO THE APPEAL²

Petitioner Timothy Deal was convicted of second-degree murder in the stabbing death of his next-door neighbor William Woods, who had informed to police about Deal's marijuana-selling activities and provided information used to support a search warrant for Deal's home that produced both marijuana and a firearm. The Commonwealth had indicted and prosecuted Deal for first-

² Facts not identified as contained in the Appendix to this Application are drawn from the administrative record filed in the Superior Court.

degree murder on the theory that he deliberately set out to kill Woods as retaliation for Woods' 'snitching.'

1. Parole Board Proceedings

Before the Board, Deal's presentation focused on several risk/needs assessments; his educational, programming, and personal work while incarcerated; input from his own family and his victim's family; and a plan for his transition from prison to life in the community. With regard to risk/needs, he proffered a report and testimony from Dr. Ira Packer, a nationally recognized forensic psychologist, targeted at possible psychopathology, propensity for violence, and risk of recidivism.³ Dr. Packer found Deal "does not present with anti-social or psychopathic traits, does not have a substance abuse problem, is not volatile or impulsive, has not engaged in violent behavior or threats in prison for many years, does not endorse or manifest attitudes that condone violence, and has worked hard to avoid negative peer influences" and opined "that Mr. Deal has demonstrated very significant growth and maturity since the index offense and would be at low risk for

³ Dr. Packer's assessment was based on interviews with Deal and his mother, the results of standardized assessment tools, and review of Deal's educational history, correctional record, and trial transcripts.

recidivism if paroled." He also noted Deal "has good insight into the factors that led to his violent behavior as an adolescent, does not present with violent ideas or attitudes, does not present with symptoms of mental illness or a substance abuse problem, has participated well and benefitted from correctional programming, and has shown emotional and behavioral stability." In addition to Dr. Packer's evaluation, the Department of Correction's own risk/needs assessment tool rated Deal high on cognitive behavior, education and vocational skills and low on criminal thinking, anger, substance abuse, and risk of recidivism. Deal also presented evidence showing his trajectory from troubled youth to responsible, disciplined adult was typical of the maturation process of many juvenile offenders.

Deal's wife Kimberly, mother Shirley Gandy, and brother Terrance Gandy all provided the Board with information about housing, jobs, and financial and emotional support available to him should he be released from prison. Terrance explained how he had overcome his own troubled youth and early involvement with the criminal justice system to become a productive, settled adult and member of society. He also expressed regret

about how he had influenced Deal's own trajectory growing up and introduced him to 'street life':

I thought I was looking over my brother by...when I came home, tried to put, like, 'I'm the big bro. I got your back. This is how we do it in the streets.' What I did was make his life worse. I, I'm not proud of what I've done...I still look at him as a little boy, It's hard for me to look at him in the face because I feel like I did this to him.

Nor did Deal only have testimony from his own family. He also presented a videotaped statement from Gladys Bogus, the adoptive mother of the young man he killed, which had been prepared on Bogus' initiative before she died several years earlier in contemplation of Deal's parole eligibility.⁴ In her statement, Bogus told the Board

I would like to say that I'd like to see the child get another chance at life because holding a grudge is not good. And I think it was all a mistake. I really do. I don't think he [inaudible] to do harm to my child. One thing just led to another and it got out of hand. They all grew up together. They played together. They wrestled. And this just - just didn't fit the bill. It didn't you know. And I'd just like to see him have another chance when he comes up for parole. I would like to try to see that he gets out, try to do something with his life.

She concluded with a message to Deal: "don't look back. Look straight ahead. And do something with your life,

⁴ Deal grew up and lived next door to his victim, William Woods, and knew Bogus his entire life.

son. You've got a long road to go yet. You're still young. You've got a chance. I hope you take it."

With regard to programming and education, Deal presented evidence of his attainment of his GED, pursuit of post-secondary studies, tutoring of other inmates, and participation in dozens of skills training and rehabilitative programs, including programs suggested by the Board. He also presented a detailed parole re-entry plan that began with time in a minimum security facility, enumerated the family and community support available to him upon his actual release, and set forth the housing and employment opportunities available to him when he left prison.

Against all this evidence was the letter of Suffolk ADA Charles Bartolomi, which stated

[o]ne of the Commonwealth's major reasons for asking for a denial of parole is the defendant's motive in this case. Mr. Deal killed Mr. Woods because he was a 'snitch.' This is the type of behavior that cannot be tolerated in a civil society. The defendant's behavior can paralyze a community by putting it in fear. A positive vote for parole should not be granted at an initial hearing as it may send the wrong message to other criminals.

Consistent with his letter, in testimony ADA Bartolomi told the Board the Commonwealth believed Deal was "denying his, what happened the night of the incident,

still lying...to this board to better himself and to get a positive parole vote." In response to Deal's testimony that he did not know how his argument with Woods escalated into fatal violence, ADA Bartolomi opined "we know why this happened. Because [Woods] was a snitch."

The Board's questioning largely followed the outline set forth in ADA Bartolomi's letter. It asked no meaningful questions of the personal witnesses who appeared on Deal's behalf. Nor did it question Dr. Packer about Deal's risk/needs assessment or likelihood of re-offense, instead asking only whether Deal was 'minimizing' (i.e., not taking full responsibility for) his crime. Dr. Packer responded "I did not see minimization. I actually saw evidence of somebody who...not only does he not minimize his responsibility, he takes responsibility for something he didn't have responsibility for, which is his friend Nick's death."⁵ Nor did the Board question Deal himself about his reentry plan, or his programming and educational work while incarcerated. Instead, the Board focused primarily on the offense conduct, including whether Deal had

⁵ Deal's childhood best friend Nick was the younger brother of Deal's victim William Woods and was himself murdered several years after Deal was tried and convicted.

killed Woods in retaliation for Woods' informing and Deal's assertion of his rights to a jury trial, appeal, and pursuit of post-conviction remedies.

The Board's four-page Decision denying Deal parole begins with a brief synopsis of the case facts. Appx:6-7. It spends a page discussing Deal's testimony before the Board and its questioning of him at the hearing, with a focus on his version of the events that led to Mr. Woods' death and acceptance of responsibility for them. Appx:7-8. The Decision briefly references the fact Mr. Deal presented evidence relevant to the statutory and regulatory parole criteria discussed supra, but does not discuss that evidence. Appx:8. It then states:

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

The applicable standard used by the Board to assess a candidate for parole is: 'Parole Board Members shall only grant a parole permit if they are of the opinion that there is a reasonable probability that, if such offender is released, the offender

will live and remain at liberty without violating the law and that release is not incompatible with the welfare of society.' 120 C.M.R. 300.04. In the context of an offender convicted of first or second degree murder, who was a juvenile at the time the offense was committed, the Board takes into consideration the attributes of youth that distinguish juvenile homicide offenders from similarly situated adult offenders. Consideration of these factors ensures that the parole candidate, who was a juvenile at the time they committed murder, has 'a real chance to demonstrate maturity and rehabilitation.' *Diatchenko v. District Attorney for the Suffolk District*, 471 Mass. 12, 30 (2015); See also *Commonwealth v. Okoro*, 471 Mass. 51 (2015).

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

Appx:8. The above-quoted language is the Board's only reference to "the distinctive attributes of youth that diminish the penological justifications for imposing the

harshest sentences on juvenile offenders as they related to particular circumstances of a juvenile homicide offender seeking parole" and Deal's "status as a child when the crime was committed." *Diatchenko II*, 471 Mass. at 31-33.

2. Superior Court Proceedings

Deal's certiorari complaint in the Superior Court alleged that "[b]y failing to take into account, or doing so in a cursory way, all of the youth-related 'distinctive attributes' presented and his record of demonstrated 'maturity and rehabilitation,' the Board deprived Mr. Deal of a meaningful opportunity to obtain release in violation of his constitutional right[s]" protected by art. 26 and the Eighth Amendment, as well as the due process guarantees of both the Massachusetts and federal constitutions. He further contended the Board's decision denying parole was arbitrary and capricious in its failure to apply the statutory criteria of G.L. c.127 §130 and regulatory criteria of 120 CMR 300.05, and that its insistence on a theory of his crime rejected by the jury improperly penalized him for exercising his constitutional right to a jury trial.

In his motion for judgment on the pleadings, Deal asserted "the [B]oard's mere boilerplate recitation of,

or reference to, constitutional, statutory and regulatory standards d[id] not satisfy the requirements for reasoned decision-making when assessing a juvenile homicide offender's suitability for parole." He further argued that the Board's failure to address evidence his crime was in significant part the product of the impulsiveness and ill-considered judgments typical of juvenile homicide offenders, and to explain why he was not an appropriate parole candidate despite voluminous evidence of rehabilitation consistent with the idea his crime was a product of transient characteristics of youth, deprived him of the meaningful opportunity for release to which he was constitutionally entitled pursuant to this Court's *Diatchenko* decisions.

Deal contended the constitutional requirement that juvenile homicide offenders receive a meaningful opportunity for release based on demonstrated rehabilitation meant the Board had to: (1) specifically address the ways in which the 'particular attributes of youth' contributed to his crime; (2) weigh the manner in which his risk/needs assessment and other evidence of rehabilitation reflected juveniles' categorically increased amenability to rehabilitation; and (3) ensure that its decision explained the Board's consideration of

these factors, as well as its rationale for concluding that despite this evidence Deal was not a suitable candidate for parole.

When he appeared for a hearing on the parties' cross-motions for judgment on the pleadings, Deal stressed that the Superior Court could not perform the job assigned to it by *Diatchenko II*—"to ensure that the board's determination whether to grant or deny parole to a juvenile homicide offender is 'constitutionally exercised' in the sense that the board has properly taken into account the offender's status as a child when the crime was committed"—unless the Board's written decision meaningfully addressed the categorical attributes of youth as they manifested in a particular case. See 471 Mass. at 33. In response, the motion judge said he was

troubled because...when you're making an evaluation like this, I think you ought to have a reason of some kind given, as opposed to what...everybody could agree, as somewhat boilerplate language. I mean, that was used in the last [juvenile offender parole decision] I saw. But, it is. It's boilerplate language, and whether that's constitutional or not or whether that's sufficient or not, I think we're going to find that out.

When Deal pointed out acceptance of the Board's argument that it was not required to explain how it considered or

weighed the attributes of youth as manifested in a particular case meant "then there is no case in which the Court could find an abuse of discretion by the Board," the motion judge said "therein lies the problem. I agree with you." Still, in its written ruling granting the Board judgment on the pleadings, the Superior Court held

[w]hile the better practice may have been for the board to more specifically outline its findings and discussion in relation to the individual *Miller* facts, as opposed to its general statement that it considered them, such a level of detail is not required, particularly given the discretion afforded to the board. Here, the hearing, including the questions asked, the resulting discussion with Deal, as well as the additional witness testimony and record, taken together with the decision, as a whole, make clear that the board sufficiently considered the *Miller* factors. That those considerations were outweighed by other opposing factors does not invalidate the decision, or mean the board failed to provide Deal a 'meaningful opportunity' to obtain parole.

Appx:13. The Superior Court concluded "[t]he board's decision does not violate Deal's due process rights, nor does it amount to cruel and unusual punishment under article 26 of the Massachusetts Declaration of Rights or the Eighth Amendment to the United States Constitution."

Appx:14.

III. ISSUES OF LAW RAISED BY THE APPEAL

1. To what extent, if any, must written Parole Board decisions denying juvenile homicide offenders' parole applications demonstrate and explain the Board's consideration of 'the distinctive attributes of youth that diminish the penological justifications for imposing the harshest sentences on juvenile offenders' as they relate to the particular circumstances of the individual seeking parole?

2. How should a court reviewing parole proceedings in which a juvenile homicide offender presents substantial evidence of his or her maturation and rehabilitation and the role the '*Miller* factors' played in his or her offense conduct, but in which the Parole Board does not address these considerations either at the parole hearing or in its written decision denying parole, determine whether the Board abused its discretion by failing to adequately account for the particularities of juvenile offenders?

These issues are preserved for the Court's review, as they formed the primary basis of Deal's arguments in the Superior Court.

IV. ARGUMENT

1. The Judicial Review Contemplated by *Diatchenko II* Is Impossible Unless the Parole Board Expressly Addresses the Particular Attributes of Youth as they Manifest in Individual Cases

When this Court held "the meaningful opportunity for release through parole is necessary to conform the juvenile homicide offender's mandatory life sentence to the requirements of art. 26," *Diatchenko II*, 471 Mass. at 19, it entrusted an executive agency with ensuring an otherwise disproportionate and unconstitutional sentence is executed lawfully. If the Parole Board does not provide an opportunity for release that is meaningful, a juvenile homicide offender who is denied parole returns to prison to serve an unlawful, and constitutionally disproportionate, sentence. Because judicial review of decisions in juvenile parole cases is the only mechanism to determine whether a particular offender's opportunity for release was 'meaningful,' and therefore whether his or her life sentence is being constitutionally executed, Board decisions in such cases must expressly weigh evidence of the particular attributes of youth relevant to each case and explain how that evidence factored into the Board's application of the G.L. c.127 §130 parole factors. When it failed to address this individualized

evidence in Deal's case either on the record or in its decision, the Board frustrated the purpose of judicial review and made it impossible for the Superior Court, or this Court, to determine whether Deal received the meaningful opportunity for release to which he is constitutionally entitled.

As this Court observed in *Diatchenko II*, in juvenile cases the already-complex determination of whether a particular individual should be paroled "is probably far more complex than it is in the case of an adult offender because of the unique characteristics of juvenile offenders" and the "potentially massive amount of information [that] bears on these issues." 471 Mass. at 23. While the "question for the reviewing judge" at the certiorari stage is limited to "whether the board abused its discretion in the manner in which it considered and dealt with" such evidence in the context of a particular parole application, *id.* at 31, it is well established that where a "decision neither contains any explicit findings of fact nor sets forth the test used to evaluate" the evidence presented, "no determination c[an] properly be reached as to whether the decision was legally erroneous or so devoid of factual support as to be arbitrary and capricious."

MacLaurin v. Holyoke, 475 Mass. 231, 234 (2016). “In such circumstances, deference is to be accorded the [Board’s] decision only if the reviewing court can ascertain whether the decision comports with [the constitutional] purpose[]” of the meaningful opportunity for release. *Id.* at 238.

Here, Deal presented the Board with voluminous “legal, medical, disciplinary, educational, and work-related evidence” bearing on how the unique characteristics of juvenile offenders played out in his case and connected that evidence to the statutory parole factors. *Diatchenko II*, 471 Mass. at 23. But the Board did not discuss this evidence or the manner in which it informed its evaluation of Deal’s parole application at all, either at the hearing or in its written decision. At the hearing, the Board’s focus was almost exclusively on the facts of Deal’s crime and the Board’s belief Deal’s ‘version of events’—i.e., his insistence he had not set out intentionally to kill Woods because of his ‘snitching’—was ‘not credible.’ The Board had no questions for Dr. Packer about his assessment of Deal’s rehabilitative work while incarcerated or likelihood of recidivism, and only asked whether Deal was ‘minimizing’ his culpability (Dr. Packer said he was not); no

questions for Deal about his re-entry plan, employment, or programming and educational work while incarcerated; and no questions for Deal's family members at all.

Deal's 'version of events' is arguably relevant to the parole calculus, as G.L. c.127 §135 directs consideration of "the circumstances of [the] crime" in the context of parole proceedings. Still, the Board's single-minded focus meant the record of Deal's parole hearing contains a tremendous amount of evidence of his rehabilitation generally and the relevance of his juvenile-offender status to the parole calculus specifically, virtually all of it militating strongly in favor of parole readiness, but no hint of the Board's assessment or use of that evidence is reflected in its ultimate decision. And, as the motion judge noted, the portion of the Board's written decision that purports to address the aspects of youth relevant to culpability and capacity for rehabilitation is "boilerplate language" that does not discuss the specific evidence presented or explain how it factored into the Board's analysis. Indeed, the judge remarked that he had seen identical language in a previous Board decision.

The Board's failure to create a record of whether and how it considered the particular attributes of youth

as they manifested in Deal's case, and to explain the way it did or did not take that evidence into account when it made its ultimate parole decision, makes it impossible for a reviewing court to determine whether the Board "constitutionally exercised" its discretion to grant or deny parole "in the sense that the board has properly taken into account the offender's status as a child when the crime was committed." *Diatchenko II*, 471 Mass. at 33 (quoting *Commonwealth v. Cole*, 468 Mass. 294, 302 (2014)). In juvenile homicide cases like Deal's, where "the offender's opportunity for release is critical to the constitutionality of the [mandatory life] sentence," *id.* at 23, Board decisions not susceptible to review mean there is no way the Superior Court, or this Court, can determine whether a particular juvenile offender is subject to cruel or unusual punishment in violation of art. 26. The Court must protect against this risk of unconstitutional punishment by requiring Board decisions in juvenile homicide offender cases to explicitly address the particular attributes of youth relevant to both the offender's crimes and rehabilitative trajectory while incarcerated and explain how the Board weighed this evidence in the context of its overall parole suitability determination.

2. A Board Decision Denying Parole to a Juvenile Homicide Offender that Does Not Address the Relevant Attributes of Youth as Manifested in the Particular Offender's Case Is Arbitrary and Capricious and Therefore an Abuse of Discretion

When this Court held that judicial review of parole proceedings was necessary to ensure juvenile life sentences were constitutionally executed, it was quick to emphasize that "[b]ecause the decision whether to grant parole to a particular juvenile homicide offender is a discretionary decision by the board, an abuse of discretion standard is appropriate." *Diatchenko II*, 471 Mass. at 31 (citations omitted); see also *Cole*, 468 Mass. at 302 (recognizing "the judiciary may not interfere" with Board's exercise of discretion in parole proceedings within constitutional limits). "Neither the [Board's] broad discretion nor the limitations on judicial review, however, mean that the [Board] can do whatever it pleases whenever it chooses to do so." *Donovan v. City of Woburn*, 65 Mass. App. Ct. 375, 379 (2006). Courts should find a decision denying parole "did constitute an abuse of discretion—was arbitrary and capricious" in cases where "the board essentially failed to take [the particular attributes of youth as

manifested in a particular case] into account, or did so in a cursory way." *Diatchenko II*, 471 Mass. at 31.

Settled principles of review establish a Board decision fails to take into account the relevant constitutional considerations, and is therefore arbitrary and capricious, if it neither addresses the relevant evidence presented nor explains how that evidence bore on its overall assessment of parole suitability. See, e.g., *Doe 205614 v. Sex Offender Registry Bd.*, 466 Mass. 594, 604 (2013) (agency action is "arbitrary and capricious [if it] fail[s] to consider studies referenced in the record showing the differences between the psychological development and outlook of children and mature adults" where youth is relevant to decision). 'Boilerplate language' directed towards the ultimate question presented is another hallmark of abuse of discretion: "[w]hen a decision contains conclusions that do no more than repeat regulatory phrases, and are unsupported by any facts in the record, [reviewing courts] are constrained to conclude that the decision is unreasonable, whimsical, capricious, or arbitrary, and therefore invalid." *Wendy's Old Fashioned Hamburgers of N.Y. v. Board of Appeal of Billerica*, 454 Mass. 374, 386 (2009). If a reviewing court finds "the factual premise

on which [the Board] purports to exercise discretion is not supported by the record, its action is arbitrary and capricious and based upon an error of law." *Donovan*, 65 Mass. App. Ct. at 379.

Under these standards, there is no question the Board decision denying Deal parole is arbitrary and capricious and an abuse of discretion. The 'factual premise' on which the Board purports to exercise discretion—the manner in which the particular attributes of youth relevant to Deal's crime and rehabilitative trajectory inform the overall parole calculus—is unsupported by a record that overwhelmingly demonstrates both that his crime was the product of transient immaturity and that he has fulfilled the greater promise of rehabilitation common to juvenile offenders. The Board did not analyze or discuss the large volume of individualized and undisputed evidence on this question Deal presented at his parole hearing, either on the record or in writing. Instead, its decision merely mouths the applicable legal standards and claims in conclusory fashion to deny parole "[a]fter applying this standard to the circumstances of Mr. Deal's case."

Appx:8.

Such cursory treatment of the central question presented to an executive agency would render a decision arbitrary and capricious even where constitutional rights are not at stake. Here, however, the "nature of the action sought to be reviewed" is far from the ordinary decision of an administrative body. *Diatchenko II*, 471 Mass. at 31 (quoting *Rivas v. Chelsea Hous. Auth.*, 464 Mass. 329, 334 (2013)). In cases like Deal's, the Board is charged with ensuring juvenile homicide offenders receive the meaningful opportunity for release necessary to render lawful otherwise unconstitutional mandatory life sentences. If the Board fails to take constitutionally relevant evidence into account, or does so only cursorily, that failure makes both executive and judiciary complicit in disproportionate, and therefore cruel or unusual, punishment. See *Cole*, 468 Mass. at 302 ("at the core of the judicial function is the power to impose a sentence...Once a sentence is imposed, the executive branch holds the power and responsibility of executing it").

The need for a record that fully reflects the Board's consideration of all relevant evidence, and explanation of how that evidence factored into the decision in a particular parole case, is therefore

heightened when compared to cases involving executive action not implicating constitutional rights. Any Board decision that does not permit a reviewing court to determine whether a particular juvenile received a meaningful opportunity for release, or whether he or she is serving a disproportionate sentence, is necessarily arbitrary and capricious because it amounts to a legal error of constitutional significance. This Court should clarify that the Parole Board abuses its discretion any time it denies a juvenile homicide offender parole without addressing evidence relevant to the attributes of youth as they manifest in an individual case in a way that allows reviewing courts to understand how that evidence factored into the parole decision under consideration. Because the decision in Deal's case frustrates constitutionally necessary judicial review, it is an abuse of discretion and must be vacated.

V. REASONS DIRECT REVIEW IS APPROPRIATE

Petitioner's appeal is of the utmost import not only to himself, but also to all other similarly situated juvenile offenders at risk of being denied a meaningful opportunity for release and thereby subject to cruel or unusual punishment. Direct review by this Court is necessary to ensure the mandatory life sentences decreed by the Legislature, imposed by the courts, and carried out by the executive branch are executed consistent with art. 26 and to provide Superior Court judges with effective standards by which to assess the constitutionality of the juvenile parole decisions that come before them for review.

April 16, 2019

Respectfully Submitted,

TIMOTHY DEAL
By His Attorneys,

/s/ Merritt Schnipper
Merritt Schnipper
SCHNIPPER HENNESSY PC
25 Bank Row Suite 2S
Greenfield MA 01301
(413) 325-8541
mschnipper@schnipperhennessy.com
BBO# 676543

Barbara Kaban
PO Box 290757
Charlestown MA 02129
(617) 398-7455
kabanlaw@gmail.com
BBO# 641715

CERTIFICATE OF COMPLIANCE

I certify that the foregoing document complies with the Rules of Appellate Procedure applicable to formatting of briefs, including the relevant provisions of Rules 16 and 20. Compliance with the length limitation governing Applications for Direct Appellate Review is demonstrated by the fact this Application is printed in the Courier New font and its argument section contains no more than ten pages of text.

/s/ Merritt Schnipper

CERTIFICATE OF SERVICE

I certify that on April 16, 2019 I filed the foregoing document via the Court's electronic filing system, which will automatically deliver a copy to AAG Matthew Landry, counsel for the Massachusetts Parole Board.

/s/ Merritt Schnipper

APPENDIX

[Skip to main content](#)

1881CV00733 Deal, Timothy vs. Massachusetts Parole Board

- Case Type
- Administrative Civil Actions
- Case Status
- Open
- File Date
- 03/14/2018
- DCM Track:
- X - Accelerated
- Initiating Action:
- Certiorari Action, G. L. c. 249 § 4
- Status Date:
- 03/14/2018
- Case Judge:
-
- Next Event:
-

- All Information
- Party
- Event
- Tickler
- Docket
- Disposition

Party Information

Deal, Timothy
- Plaintiff

Alias

Party Attorney

- Attorney
- Kaban, Esq., Barbara Taylor
- Bar Code
- 641715
- Address
- Post Off Box 290757
Charlestown, MA 02129
- Phone Number
- (617)398-7455
- Attorney
- Schnipper, Esq., Merritt Spencer
- Bar Code
- 676543
- Address
- Schnipper Hennessy PC
25 Bank Row
Suite 2S
Greenfield, MA 01301
- Phone Number
- (413)325-8541

[More Party Information](#)

Massachusetts Parole Board
- Defendant

Alias

Party Attorney

- Attorney
- Benedetti, Esq., Shara
- Bar Code
- 684475
- Address
- Massachusetts Parole Board
12 Mercer Rd

- Natick, MA 01760
- Phone Number
 - (508)650-4500

[More Party Information](#)

Events

Date	Session	Location	Type	Event Judge	Result
07/26/2018 02:00 PM	Civil J Rm 420	Courtroom 420	Motion Hearing	Kirpalani, Hon. Maynard	
07/26/2018 02:00 PM	Civil A Rm 710	Courtroom 710	Motion Hearing		Rescheduled
09/11/2018 05:00 PM	Civil H Rm 520	Courtroom 520	Status Review	Barrett, Hon. C. William	Held as Scheduled
09/18/2018 02:00 PM	Civil H Rm 520	Courtroom 520	Hearing for Judgment on Pleading	Barrett, Hon. C. William	Held - Under advisement

Ticklers

Tickler	Start Date	Due Date	Days Due	Completed Date
Service	03/14/2018	06/12/2018	90	
Judgment	03/14/2018	03/14/2019	365	09/24/2018

Docket Information

Docket Date	Docket Text	File Ref Nbr.	Image Avail.
03/14/2018	Attorney appearance On this date Barbara Taylor Kaban, Esq. added for Plaintiff Timothy Deal		
03/14/2018	Case assigned to: DCM Track X - Accelerated was added on 03/14/2018		Image
03/14/2018	Original civil complaint filed.	1	Image
03/14/2018	Civil action cover sheet filed.	2	Image
03/14/2018	Plaintiff(s) Timothy Deal's Motion to Waive Filing Fee Motion Allowed (Henry,J) March 14, 2018 Copy Given In Hand	3	
03/15/2018	Attorney appearance On this date Merritt Spencer Schnipper, Esq. added as Private Counsel for Plaintiff Timothy Deal		
03/15/2018	Affidavit of Barbara Kaban	4	Image
06/18/2018	Attorney appearance On this date Shara Benedetti, Esq. added as Private Counsel for Defendant Massachusetts Parole Board		
06/18/2018	Defendant, Plaintiff Massachusetts Parole Board, Timothy Deal's Motion to impound inmate records PROVISIONALLY IMPOUNDED Documents part of Joint Motion to Impound paper #5	5	

<u>Docket Date</u>	<u>Docket Text</u>	<u>File Ref Nbr.</u>	<u>Image Avail.</u>
	Bates stamp 000131-000267 000271-000389 Hearing on Motion to Impound on September 18, 2018 per agreement of attorneys of record		
06/18/2018	Affidavit of counsel, Shara Benedetti, in support of #5 motion.	5.1	
06/18/2018	Affidavit of Keeper of the records.	5.2	
06/18/2018	General correspondence regarding IMPOUNDED Documents part of Joint Motion to Impound paper #5 Bates stamp 000131-000267 000271-000389 Hearing on Motion to Impound on September 18, 2018 per agreement of attorneys of record		
07/12/2018	The following form was generated: Notice to Appear Sent On: 07/12/2018 08:48:57		
07/25/2018	Event Result:: Motion Hearing scheduled on: 07/26/2018 02:00 PM Has been: Rescheduled For the following reason: Joint request of parties Hon. Maynard Kirpalani, Presiding Appeared: Staff: Maria Pantos, Assistant Clerk Magistrate		
08/21/2018	The following form was generated: Notice to Appear Sent On: 08/21/2018 14:36:40		
08/21/2018	The following form was generated: Notice to Appear Sent On: 08/21/2018 14:59:25		
09/04/2018	Plaintiff Timothy Deal's Motion for judgment on the pleadings MRCP 12(c) and Memorandum of Law in support	6	Image
09/04/2018	Defendant Massachusetts Parole Board's Cross Motion for judgment on the pleadings MRCP 12(c) and opposition to Plaintiff's Motion for Judgment on the Pleadings	7	Image
09/04/2018	Massachusetts Parole Board's Memorandum in support of Cross-Motion for Judgment on the Pleadings and opposition to Petitioner's Motion for Judgment on the Pleadings	7.1	Image
09/04/2018	Plaintiff Timothy Deal's Reply to Defendant's Cross-Motion for Judgment on the Pleadings	7.2	Image
09/11/2018	Event Result:: Status Review scheduled on: 09/11/2018 05:00 PM Has been: Held as Scheduled Hon. C. William Barrett, Presiding Appeared: Staff: Dia S Roberts-Tyler, Assistant Clerk Magistrate		
09/17/2018	Habeas corpus issued as to Timothy Deal at MCI - Norfolk for 09/18/2018 02:00 PM Hearing for Judgment on Pleading.	8	
09/18/2018	Matter taken under advisement: Hearing for Judgment on Pleading scheduled on: 09/18/2018 02:00 PM Has been: Held - Under advisement Hon. C. William Barrett, Presiding Appeared:		

Docket Date	Docket Text	File Ref Nbr.	Image Avail.
	Staff: Dia S Roberts-Tyler, Assistant Clerk Magistrate		
09/20/2018	Endorsement on Motion to Impound (#5.0): ALLOWED By agreement of the parties. See Attached (Dated: 9/18/18) notice sent 9/20/18 Judge: Barrett, Hon. C. William		Image
09/20/2018	<p>ORDER: PURSUANT TO UNIFORM RULES ON IMPOUNDMENT PROCEDURE, RULE 8: This matter is before the Court on 9/18/18 Motion for Impoundment, pursuant to Rule VIII of the Uniform Rules on Impoundment Procedure. The underlying case is of the following nature:</p> <p>The motion requests the court to issue an order to impound the following information:</p> <p>particular document(s) within the court file, specifically Adm. Record Bates Stamps 131-267; 271-389</p> <p>Motion Allowed. This motion was not opposed and a hearing was conducted. Having considered the arguments of the parties, legal authority, and relevant factors including, but not limited to, the nature of the parties and the controversy, constitutional rights, the type of information and the privacy interests involved, the extent of community interest, and the reason for the requested impoundment, and otherwise being fully advised, the Court ALLOWS the motion for the following reasons:</p> <p>1) The Court finds that good cause for impoundment of the record containing Bates stamped pages 131-267 and 271-389 has been demonstrated by the movant to protect the following interests: The Plaintiffs privacy interests regarding confidential information contained in documents Bates stamped #131-267 and #271-389/</p> <p>2) The Court further finds that no less restrictive measure is available to protect this/these interest(s), and that the degree, duration and manner of impoundment ordered herein are no broader than necessary to protect the interest(s).</p> <p>The following document(s) contained in the court file: Bates stamped pages 131-267 and 271-389</p> <p>It is further ORDERED that the materials impounded pursuant to this Order may be:</p> <p>copied by, inspected by, the parties and their attorneys of record by further order of the Court.</p> <p>This ORDER shall expire on 30 days following the final adjudication of the case.</p> <p>So ORDERED, this Sept. 18, 2018</p> <p>By the Court, C. William Barrett, Judge</p> <p>Entered and certified copies sent 9/20/18</p> <p>Judge: Barrett, Hon. C. William</p>	9	Image
09/24/2018	<p>MEMORANDUM & ORDER:</p> <p>MEMORANDUM OF DECISION AND ORDER ON THE PARTIES' CROSS MOTIONS FOR JUDGMENT ON THE PLEADINGS:</p> <p>(which see 5 pages)</p> <p>ORDER:</p> <p>For the foregoing reasons, the plaintiff's motion for judgment on the pleadings is DENIED and</p>	10	Image

<u>Docket Date</u>	<u>Docket Text</u>	<u>File Ref Nbr.</u>	<u>Image Avail.</u>
	<p>the defendant's cross motion for judgment on the pleadings is ALLOWED.</p> <p>C. William Barrett Justice of the Superior Court</p> <p>DATE: September 21, 2018</p> <p>Entered and copies sent 9/24/18</p> <p>Judge: Barrett, Hon. C. William</p>		
09/24/2018	<p>JUDGMENT on the Pleadings entered:</p> <p>After hearing and consideration thereof; That the plaintiff's motion is denied and the Defendants cross motion is allowed.</p> <p>It is ORDERED and ADJUDGED: That the Boards decision is hereby affirmed.</p> <p>Judge: Barrett, Hon. C. William</p>	11	Image
10/03/2018	<p>Notice of Appeal Plaintiff, Timothy Deal, through and by his attorneys, and gives notice pursuant to Rule 3 of the Massachusetts Rules of Appellate Procedure, of his intent to appeal the Judgment and orders of the Superior Court issued on September 24, 2018 granting the Massachusetts Parole Board's Motion for Judgment on the Pleadings and denying Deal's Motion for Judgment on the Pleadings.</p> <p>Applies To: Kaban, Esq., Barbara Taylor (Attorney) on behalf of Deal, Timothy (Plaintiff)</p>	12	Image
10/11/2018	<p>Court received letter from Barbara Kaban. Compliance with the Rules of Appellate Procedure, a transcript of the hearing before Judge Barrett was ordered through the office of Transcription Services. related to appeal</p>	13	Image
02/25/2019	<p>CD of Transcript of 09/18/2018 02:00 PM Hearing for Judgment on Pleading received from Pamela Borges DosSantos.</p>	14	
02/27/2019	<p>Appeal: notice of assembly of record sent to Counsel</p>	15	
02/27/2019	<p>Notice to Clerk of the Appeals Court of Assembly of Record</p>	16	
03/11/2019	<p>Appeal entered in Appeals Court on 03/05/2019 docket number A.C. 2019-P-0332</p>	17	Image

Case Disposition

<u>Disposition</u>	<u>Date</u>	<u>Case Judge</u>
Disposed by Court Finding	09/24/2018	



Charles D. Baker
Governor

Karyn Polito
Lieutenant Governor

Daniel Bennett
Secretary

The Commonwealth of Massachusetts
Executive Office of Public Safety and Security

PAROLE BOARD

12 Mercer Road
Natick, Massachusetts 01760

Telephone # (508) 650-4500

Facsimile # (508) 650-4599



Paul M. Treseler
Chairman

Michael J. Callahan
Executive Director

DECISION

IN THE MATTER OF

TIMOTHY DEAL

W84556

TYPE OF HEARING: Initial Hearing

DATE OF HEARING: December 15, 2016

DATE OF DECISION: July 25, 2017

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

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

I. STATEMENT OF THE CASE

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

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

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

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

II. PAROLE HEARING ON DECEMBER 15, 2016

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

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

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

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

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

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

III. DECISION

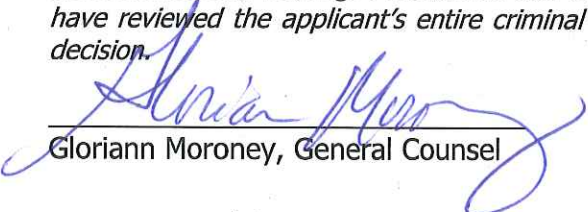
The Board is of the opinion that Mr. Deal has not demonstrated a level of rehabilitative progress that would make his release compatible with the welfare of society. The Board recommends that Mr. Deal partake in more programming, such as Criminal Thinking and Restorative Justice. The Board believes that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

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

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

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

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


Gloriann Moroney, General Counsel

7/25/17
Date

COMMONWEALTH OF MASSACHUSETTS

MIDDLESEX, ss.

SUPERIOR COURT
CIVIL ACTION
No. 1881CV00733

TIMOTHY DEAL

vs.

MASSACHUSETTS PAROLE BOARD

**MEMORANDUM OF DECISION AND ORDER ON THE PARTIES'
CROSS MOTIONS FOR JUDGMENT ON THE PLEADINGS**

Timothy Deal (Deal) appeals from a decision of the Massachusetts Parole Board (board) denying his application for parole. His complaint alleges that the denial: was arbitrary and capricious; amounts to cruel and unusual punishment; and violates his due process and other constitutional rights. The matter is before the court on the parties' cross motions for judgment on the pleadings. A hearing was held on September 18, 2018. For the following reasons, Deal's motion is **DENIED**, and the board's motion is **ALLOWED**.

BACKGROUND

In 2004, a jury convicted Deal of second-degree murder for the killing of William M. Woods (victim). The victim died after sustaining multiple stab wounds. At the time of the murder, Deal was seventeen years old. On December 16, 2016, a parole hearing was held, at which Deal was represented by counsel. During the course of the approximately two-hour hearing, Deal testified at length, answering questions about his neighborhood, his home life, his education, and the circumstances leading up to and during the criminal episodes that resulted in his conviction.

By decision dated July 25, 2017, the board denied Deal's application for parole. The decision largely rests on the board's conclusion that Deal has not taken full responsibility for the crime he committed. In particular, the board notes Deal's testimony that the crime was not in retaliation for the victim's prior cooperation with police, and that he did not remember what triggered the fight between the two of them. Given the circumstances, including a later phone call to the victim's mother wherein Deal told her that the victim was an informant, the board deemed Deal's version of events not "plausible."

In its decision, the board provides a history of Deal's participation in programs while incarcerated and notes its consideration of the oral testimony of Deal's wife, mother, and brother, as well as the prior recorded testimony of the victim's mother, who all expressed support for his parole. The board also considered the testimony of a forensic psychologist who spoke in support of Deal's parole, and an assistant district attorney, who was opposed. The record before the board, which it referenced during the hearing, also included Deal's written "autobiography" and the forensic psychologist's report.

STANDARD OF REVIEW

Deal seeks this court's review of the board's decision pursuant to G. L. c. 249, § 4. This statute provides for review in the nature of certiorari to correct claimed errors of law apparent on the record made in proceedings below that are not otherwise reviewable. *Bartlett v. Greyhound Real Estate Fin. Co.*, 41 Mass. App. Ct. 282, 290 (1996). The reviewing judge is confined to the record of the proceedings below, and may only correct "substantial errors of law apparent on the record adversely affecting material rights." *MacHenry v. Civil Serv. Comm'n*, 40 Mass. App. Ct. 632, 634 (1996) (citation omitted).

The standard of review that a court applies in a certiorari proceeding differs depending on the nature of the action for which review is sought. *Diatchenko v. District Attorney for Suffolk Dist.*, 471 Mass. 12, 31 (2015) (*Diatchenko I*). Here, the proper standard of review is “abuse of discretion” as measured by the “arbitrary and capricious” test. *Id.* “A decision is not arbitrary and capricious unless there is no ground which reasonable [persons] might deem proper to support it.” *T.D.J. Dev. Corp. v. Conservation Comm’n of North Andover*, 36 Mass. App. Ct. 124, 128 (1994). See *Sierra Club v. Commissioner of the Dep’t of Env’tl. Mgmt.*, 439 Mass. 738, 748 (2003) (agency’s decision is not arbitrary and capricious if it has a “rational basis”).

DISCUSSION

1. *Legal Standard for Parole Determination.* The standards for parole hearings are set forth in G. L. c. 127, § 130. A prisoner may not be granted parole simply because he has exhibited good conduct. G. L. c. 127, § 130. Rather, parole is only appropriate when there is a reasonable probability that: (1) the prisoner will “live and remain at liberty without violating the law,” and (2) “that his release is not incompatible with the welfare of society.” *Id.* See *Greenman v. Massachusetts Parole Bd.*, 405 Mass. 384, 385 (1989). The board is entrusted with the responsibility of determining if and when convicted persons may be appropriately released. *D’Urbano v. Commonwealth*, 345 Mass. 466, 476 (1963). To that end, the board is afforded broad discretion in determining when to grant parole. See *Stewart v. Chairman of Massachusetts Parole Bd.*, 35 Mass. App. Ct. 843, 848 (1994).

Following the Supreme Judicial Court’s decisions in *Diatchenko I* and *Diatchenko v. District Attorney for Suffolk Dist.*, 471 Mass. 12 (2015) (*Diatchenko II*), when considering the parole applications of juvenile homicide offenders, the board must also consider the factors outlined in *Miller v. Alabama*, 567 U.S. 460, 471 (2012) (*Miller factors*). *Diatchenko II*, 471

Mass. 12 at 31. These include an underdeveloped sense of responsibility, being more vulnerable to negative influences and outside pressures, having a limited control over one's environment, and the fact that a child's actions are less likely to be evidence of irretrievable depravity.

Diatchenko I, 466 Mass. at 660, quoting *Miller*, 460 U.S. at 471.

2. *Arbitrary and Capricious*. A review of the record shows that the board's decision has a rational basis with respect to the required legal standards. Deal's account of the crime and its circumstances, and his acceptance of responsibility, are relevant considerations for the board. See *Greenman*, 405 Mass. at 386 (circumstances of crime "clearly are relevant under the statute"), citing G. L. c 127, § 135; *Doucette v. Massachusetts Parole Bd.*, 86 Mass. App. Ct. 531, 543 (2014) (board entitled to assess credibility).


Deal nevertheless argues that the board failed to properly consider the *Miller* factors where the decision notes them in a superficial, cursory manner without further elaboration or discussion. See *Diatchenko II*, 471 Mass. at 31. While the better practice may have been for the board to more specifically outline its findings and discussion in relation to the individual *Miller* facts, as opposed to its general statement that it considered them, such a level of detail is not required, particularly given the discretion afforded to the board. Here, the hearing, including the questions asked, the resulting discussion with Deal, as well as the additional witness testimony and record, taken together with the decision, as a whole, make clear that the board sufficiently considered the *Miller* factors. That those considerations were outweighed by other opposing factors does not invalidate the decision, or mean that the board failed to provide Deal a "meaningful opportunity" to obtain parole.¹

¹ Given the record and the testimony at the hearing, the same is true for the board's consideration of risk assessment, even though no substantive discussion of it is present in the decision.

3. Other Claims. The board's decision does not violate Deal's due process rights, nor does it amount to cruel and unusual punishment under article 26 of the Massachusetts Declaration of Rights or the Eighth Amendment of the United States Constitution. At the hearing, Deal was represented by counsel. *Diatchenko II*, 471 Mass. at 24. With the assistance of counsel, as set forth above, Deal was able to present evidence to the board through documents and witnesses concerning his eligibility for parole. The record is also clear that the board considered factors relevant to both *Miller* and § 130. Given the process afforded, Deal is likewise unable to demonstrate a violation of his right to be free of cruel and unusual punishment. See *id.* at 18-19. (art. 26 requires "that a juvenile homicide offender serving a mandatory life sentence be provided a meaningful opportunity to obtain release, so that his or her sentence is not effectively one of straight life in prison-an outcome that art. 26 prohibits"). Finally, to the extent the court has not addressed any further arguments made, the court deems them to be without merit.

ORDER

For the foregoing reasons, the plaintiff's motion for judgment on the pleadings is **DENIED** and the defendant's cross motion for judgment on the pleadings is **ALLOWED**.


C. William Barrett
Justice of the Superior Court

DATE: September 21, 2018

Entered: 9/24/18