An Act to ensure appropriate access to medical parole would help ensure that the Massachusetts medical parole system works as the Legislature originally intended. It seeks to promote public safety and eliminate wasteful public spending on incarcerated people who are dying or permanently incapacitated, and to ensure that they are afforded a measure of decency and compassion at the end of their lives.

BACKGROUND

In 2018, the MA Legislature passed the Criminal Justice Reform Act (CJRA), which required the release of terminally ill or permanently incapacitated prisoners who do not pose a risk to public safety on medical parole. These individuals are often the most elderly and frail members of the prison population and are the least likely to reoffend. Many are rapidly deteriorating and have already served decades in prison.

The most recent numbers published by DOC show that in 2021, 15% of those in DOC custody (over 900 people) were over the age of 60. 45% are serving sentences of 20+ years. Research also indicates that incarcerated elders are extremely unlikely to recidivate, even putting aside serious or terminal medical conditions. The medical parole statute was designed to alleviate the rising costs associated with the care and housing of incarcerated elders, and to allow them to receive humane and appropriate care in community settings, or to live out their final days in the community. While the medical parole statute brought MA closer in line with the compassionate release policies of other states, eligible individuals continue to face significant and tragic barriers to the medical parole process that prevent them from petitioning for or receiving the relief to which they are entitled.

IMPACT

This bill would:

Clarify eligibility determinations: The statute currently requires medical eligibility to be determined by a licensed physician, but inappropriately imposes a public safety assessment within the definition of terminal illness and incapacitation. This results in denials of medical parole that do not clearly indicate whether a person was denied because they are not terminally ill or incapacitated or whether they were denied due to the risk they presently pose to public safety.
[Clarify eligibility determinations: continued]
This bill would separate the public safety assessment from the definition of medical eligibility, ensuring that physicians determine medical eligibility and correctional professionals determine risk. This bill also clarifies the contours of the public safety assessment, see §§ (c)(1) and (d)(1), putting the focus on the risk the person poses in their current medical condition, which will address DOC’s current problematic practice of denying medical parole largely based on the person’s crime of conviction and criminal history, despite the fact that these do not accurately reflect the person’s current level of risk.

Improve racial equity: DOC’s own published statistics show a significant racial disparity in grants and denials of medical parole. DOC has granted medical parole to 11% of those who petitioned. Although Black people make up 29% of the DOC population, whereas 13% of petitions filed for white people were granted, only 6% of petitions filed for Black people were granted. This bill addresses these disparities by revising the risk assessment provisions to focus on the individual’s medical condition and current risk level. It also adds an explicit statement that medical parole shall not be denied based on race, ethnicity, language, religion, gender identity, or sexual orientation. See § (e).

Provide access to cognitively incapacitated persons: Currently, there is no way to ensure that those with cognitive incapacitation such as dementia have access to the medical parole process. These individuals are, by definition, unable to access the process on their own and advocates have learned of their circumstances by chance and over DOC obstruction of access to information about them. This bill would require DOC to routinely screen prisoners 55 and older for cognitive decline. Where cognitive incapacitation is indicated, the DOC would be required to identify someone to petition for them or make use of its extant authority to file the petition itself. See §§ (c) and (d).

Timeliness: When the Legislature passed the medical parole statute, it was intended to be a speedy process that ensured timely decisions and relief, particularly for those with terminal illness. The law was written to require the Superintendent to take certain actions by 21 days after receiving a petition and the Commissioner to make a final decision by 45 days after receiving the petition. DOC has interpreted this to mean the deadline for decision is 66 days after a petition is filed, and regularly takes the full 66 days to issue the decision. PLS has had 12 clients pass away with a petition pending. This bill would clarify the timeline for the process and the urgency with which petitions must be treated by making clear that the 45-day timeline for the Commissioner to make her decision includes the 21 days allotted to the Superintendent to gather information and make a recommendation. It also requires DOC to create an emergency process for considering petitions for those whose life expectancy is 6 months or less. See § (e).
Release after grants: Though the law currently requires the Superintendent to provide a medical parole plan 21 days after a petition is filed, currently no meaningful release planning begins until after a grant has been issued. This means that dying and incapacitated individuals often wait in prison for weeks and months after being granted medical parole. PLS knows of 4 individuals who have passed away in prison while awaiting placement after a grant of medical parole. Additionally, where medical parole is granted, the Commissioner frequently requires the person be housed in a skilled nursing facility, even where a family home is available and medically appropriate. Finally, the Parole Board often places harshly restrictive conditions on medical parolees, essentially converting their parole to home confinement.

This bill would relieve the Superintendent of the existing burden to create a home plan for all petitioners within 21 days of receiving the petition and instead require that DOC create a meaningful home plan within 35 days of receiving the petition if a physician has deemed the individual medically eligible, and mandate that DOC release an individual within 7 days after granting medical parole except in documented extraordinary circumstances. See §§ (c)(4), (d)(4), and (e). This bill would also expand placement options, easing the burden on DOC reentry staff by inserting a pathway to DPH placement pursuant to already existing statute G.L. c. 127, s. 151 for any person granted for whom the DOC cannot identify a post-release placement and by requiring release to a private home where it is feasible and medically appropriate, unless there are documented, specific reasons that plan would cause a risk to public safety. See §§ (c)(4), (d)(4), and (e). The bill would also require that parole conditions be no more restrictive than the person’s medical condition necessitates. See § (e).

Revocation process fixes— Under regular parole, the Parole Board can find a violation but decide to re-parole a person with different conditions and supports to avoid another violation. However, for medical parole, the courts have interpreted the medical parole statute to mean that a medical parolee must be reincarcerated irrespective of circumstances in the event of a violation. Although parole violations are very rare in this context, this practice has meant the reincarceration of medical parolees where even the Parole Board would have elected to re-parole the person. This bill would tie the revocation process for medical parole to the process for regular parole, making re-parole possible and clarifying the Parole Board’s authority to do so. See § (f).
The following are a small set of examples drawn from the many PLS cases that illustrate the problems discussed above.

**P.D.**

PD was a 60-year-old man dying from end stage liver disease when PLS first filed for his medical parole in September 2020. He was serving life without parole for a 2004 murder. At that time of his petition, he was already living in a DOC prison infirmary unit. In early December, Commissioner Mici denied the first of three requests by Mr. D for medical parole. Each time, both the superintendent and prison doctor recommended medical parole. In these denials, the commissioner argued that Mr. D was only “moderately incapacitated,” ignoring the fact that his petition was filed on the basis of terminal illness. The denials also focused heavily on Mr. D’s crime of conviction and allegations made against him that predated the onset of his illness. Finally, in late November 2021, Mr. D was granted medical parole only “to a secure hospital/secure nursing facility,” despite being bed bound and having a home to go to immediately in which he could have received specialized nursing care. Instead, Mr. D died in the prison infirmary a week after being granted medical parole.

**E.A.**

EA was a 67 year old man serving a sentence for breaking and entering. While in prison, he was diagnosed with terminal liver cancer, and PLS filed for his medical parole in March 2020, which was denied in June 2020. After a subsequent request for reconsideration and a complaint was filed in Superior Court requesting judicial review of this denial, DOC granted medical parole in August 2020 and released EA to a nursing home two months later. However, in December 2020, while admitted to an outside hospital, EA was taken back into DOC custody and returned to prison for a violation of his parole conditions, not for any alleged criminal behavior. Another medical parole petition was filed, but in March 2021, the commissioner denied it, citing his criminal history and technical parole violation as evidence that EA’s release was incompatible with public safety. She also argued that EA was not permanently incapacitated, despite his petition resting on terminal illness. In May 2021, a superior court judge ordered DOC to make arrangements for EA’s immediate release from custody. He passed away in the community less than two months later.
D.J.

DJ was a 67 year old man over 40 years into a life sentence for armed robbery and murder. PLS filed a medical parole petition for DJ in March 2022. At the time, he was at Shattuck Hospital receiving treatment for terminal renal cancer and was completely bed-bound and wore adult diapers. He relied on nurses for help with almost all activities of daily living, including toileting and showering. The prison medical director estimated his life expectancy was less than 3 months. In May 2022, he was granted medical parole. As expected, his medical condition quickly deteriorated and he was hospitalized due to sepsis. DJ died in late July 2022, chained to a hospital bed because he had never been released on medical parole.

D.B.

D.B. was 87 years old and housed in a DOC infirmary unit when PLS first filed for his medical parole. He was a lifer suffering from dementia, and other illnesses and age-related debility. DOC doctors stated that D.B. was both terminally ill and permanently incapacitated. DOC denied two petitions, in January 2020 and July 2020 and a request for reconsideration in December 2020, despite acknowledging that he suffered from progressively worsening dementia with “progressive confusion and forgetfulness,” glaucoma, and blindness in one eye, and had very limited mobility, wears adult diapers, and spends almost his entire day sleeping “with minimal engagement with his peers.”

Despite his total incapacitation, DOC failed to have a guardian appointed, or petition for medical parole on his behalf. DOC’s denials focused on the facts of the 1976 murder convictions and found that D.B. is generally debilitated, but “not so debilitat[ed] that he does not pose a public safety risk within the meaning of ’permanent incapacity’” as defined in the statute, despite DOC doctors stating he was permanently debilitated and despite no history of institutional violence or noncompliance.

PLS filed a court challenge of the denials in July 2020. DOC granted a second request for reconsideration in August of 2021 after a fall left him completely confined to a bed. Despite having an appropriate family home to go to, the commissioner stipulated that he go to a “secure” nursing facility, citing his 1976 crime as the reason. He was released to a nursing home in October 2021, two years after his first petition was filed.
C.C.

C.C. was 77 years old at the time of his petition and was permanently confined to a DOC infirmary unit. He was serving life without the possibility of parole for a 1995 murder. C.C. suffered from several serious heart and lung conditions and hearing loss and required continuous use of oxygen therapy. He had been hospitalized several times for frequent and persistent pneumonia. C.C. needed assistance with activities of daily living, used an oxygen tank at all times, and could only walk 50 feet before needing to stop due to severely diminished lung capacity. A DOC physician stated that C.C. was likely to die within the next 12-18 months. PLS filed a petition for him in March 2020, proposing that C.C. live with a family member. The superintendent of his facility also recommended medical parole. DOC denied the petition, pointing to his decades-old conviction as evidence that C.C. was a current public safety risk, despite having no disciplinary infractions in over a decade. DOC also rejected the plan for C.C. to live with the family member because he had been living with them at the time of the crime, in which the family member had no involvement. DOC further claimed that C.C’s petition for post-conviction relief demonstrated that he was a risk to public safety, arguing his appeal indicated a failure to accept responsibility for his crime. PLS filed for a reconsideration of his petition in the fall of 2020, and DOC granted medical parole. By this point, C.C. had tested positive for COVID-19 and DOC's medical care provider had adjusted his life expectancy to weeks. Two months later, C.C. was released to a nursing home.

S.G.

SG was 63 years old and living in a DOC infirmary unit when PLS first met him in March 2019. He was serving a life sentence for a murder committed in 1975 when he was a teenager. SG had advanced Alzheimer's Disease and required a prisoner caretaker at all times to assist him with tasks of daily living. He needed constant reminders about where he was going or what he was doing and was not oriented to time or location. In 2017, his parole hearing was halted because he was unable to answer even basic questions due to his dementia. PLS learned of his needs from another person in the medical unit but was forced to file a petition without any documentation or support because DOC had not yet gotten a guardian appointed and would not provide any records without a guardian’s permission due to SG’s incapacitation. During the pendency of the petition, a guardian was appointed and DOC granted the petition based on cognitive incapacitation, but this was nearly a year after PLS began raising SG’s eligibility for medical parole and requesting records. Though DOC granted the petition in January 2020, SG was not released on medical parole until May 2021, 497 days after his petition was granted, due to difficulty in finding a placement for him.
RELEVANT MEDIA
Mercy in short supply for frail, incapacitated inmates

SJC to take another look at how the state is implementing its medical parole law.

By The Editorial Board  Updated September 9, 2022, 4:00 a.m.

The state’s highest court will hear arguments Friday in the two cases, which raise the question of whether the correction commissioner is abiding by a 2018 law, designed to provide an exit ramp for terminally ill or permanently incapacitated prisoners, or whether she’s going out of her way to avoid doing so. DAVID L. RYAN/GLOBE STAFF

Convicted murderers James Carver, 57, and Martin McCauley, 65, have each spent nearly four decades in prison, but they long ago ceased posing any threat to the public. During that time, McCauley has had four back surgeries and now uses a walker and a
brace. Carver was operated on for a brain tumor, a procedure that left him incontinent. He is reliant on a wheelchair and “needs assistance with dressing and feeding when he shakes with tremors.” He has also attempted suicide and been back and forth for stays at Bridgewater State Hospital twice.

But Carver and McCauley have both been denied medical parole by Correction Commissioner Carol Mici. The state’s highest court will hear arguments Friday in the two cases, which raise the question of whether the commissioner is abiding by a 2018 law, designed to provide an exit ramp for terminally ill or permanently incapacitated prisoners, or whether she’s going out of her way to avoid doing so.

“One of the commissioner’s standard, no prisoner would qualify for medical parole unless they were debilitated to the point of being completely immobile, with no use of their hands or limbs,” according to an amicus brief filed in the cases by Prisoners’ Legal Services of Massachusetts, the Disability Law Center and the Committee for Public Counsel Services.

“The Legislature did not envision medical parole as a release mechanism only available in the most extreme cases, but rather as an essential tool for dealing with the Commonwealth’s rapidly aging prison population. The statute was designed to alleviate the Commonwealth’s burden of caring for dying or frail elderly prisoners, and to allow them to live out their final days in a more humane and medically appropriate community setting,” the brief notes.

Now, for the third time in as many years, the Supreme Judicial Court will be asked to judge the seriousness of the Department of Correction’s efforts at implementing a policy that this state was among the last in the nation to adopt.

The numbers alone are an indication that DOC isn’t exactly throwing open the prison gates for those who believe they qualify under the law. Between July 1, 2020, and June 30, 2021, the most recent year for which data is available, 203 inmates filed petitions for medical parole, of which 17 were granted. Two of those petitioners died prior to their
release. Since the program began in 2018, only 56 prisoners have been granted medical parole. Among those, only two have been returned to custody — not for committing any criminal offense but for violations of the terms of their parole.

Among those who had their petitions denied, 44 have appealed their cases to superior court as allowed under that 2018 law. And that volume of appeals might have been what attracted the attention of the SJC to take yet another judicial look at the law’s implementation.

That, and at least five cases where superior court judges overturned the commissioner’s ruling and ordered DOC to release the inmates on medical parole. They included:

- Henry Bys, 71, imprisoned since 1973, confined to a wheelchair with “severe avascular necrosis in both hips” who required assistance for dressing and toileting. The court faulted Mici for focusing on Bys’ 1973 crime — the brutal murder of a hitchhiker in Northampton — as “the sum and substance of the commissioner’s public safety analysis,” adding “it is hard to imagine how he [Bys] could pose a public safety risk today by virtue of the details of that crime, committed nearly half a century ago.”

- Epiphany Lazarre’s petition was denied although he was diagnosed with an aggressive cancerous brain tumor that had already confined him to a wheelchair and was deemed terminally ill by two DOC physicians. The court found Mici’s decision arbitrary and capricious and directed his release.

- Dennis Daye, 71, imprisoned since his 1986 conviction for three murders, was paralyzed by a stroke, required the use of a wheelchair, and was dependent on nursing care in a DOC infirmary but was denied medical parole for disciplinary infractions brought against him “during his early years of incarceration.” A single justice of the SJC, raising issues about whether that was “consistent with statutory criteria,” sent the case back to the superior court.
Mici’s record is replete with similar instances — several prisoners suffering from dementia and requiring round-the-clock care, another who suffered a traumatic brain injury while in prison resulting in “severe cognitive impairment” — none were deemed fit for medical parole. Mici, who has been with the department since 1987, was named commissioner by Governor Charlie Baker in 2019.

There will always be those convicted of crimes so heinous that it would be tempting — say, for a correction commissioner, to look for a rationale to keep them locked up forever. Carver, for example, was convicted of starting a rooming house fire in which 15 people lost their lives. But then again his case is also being appealed with the help of the Boston College Innocence Program and that of the public defender’s Innocence Program on the basis that it used now “scientifically unfounded” theories on how the fire started.

The broader point is, Carver’s guilt or innocence is immaterial to the issue of medical parole. The law says the commissioner shall release those deemed so incapacitated that their further incarceration is both inhumane to them and a burden on the taxpayers.

Whatever future guidance comes from the SJC could be enormously helpful. But just as critical will be a fresh approach at DOC, which could be around the corner. The Democratic nominee for attorney general, Andrea Campbell, has made increasing transparency at the department, which she called a “black hole” of information, part of her election platform. She has pledged to make the department “more accountable” for its policies. Backed up by a new governor — who can name a new correction commissioner — that’s what it will take to enforce a law that cries out for better enforcement.

But those political changes will take time. Sadly, for some of those behind bars today, time is already running out.

Editorials represent the views of the Boston Globe Editorial Board. Follow us on Twitter at @GlobeOpinion.
When Nelson Cruz Rodriguez was granted medical parole back in January — he didn’t find out right away.
Rodriguez was unconscious and intubated while being treated for COVID-19. The 57-year-old Rodriguez eventually started feeling better and moved into his brother’s home in Fairhaven, while he continued to receive medical treatment.

But in April, Rodriguez was arrested without warning and sent back to prison.

"It was several parole officers, with backup from local police. It was a show of force. They all had guns," said his attorney, Rebecca Rose. She said he was still so fragile, he had to be helped down the steps and put in waist cuffs instead of shackles.

The reason for the arrest? His health had improved.

"His [parole] officer told him at the time that he had done nothing wrong, but that he was no longer eligible for medical parole," Rose said.

Rodriguez and another man are believed to be the first two cases where Massachusetts has sent medical parolees back to prison because their health improved.

The parole board officially revoked Rodriguez’s parole earlier this month, saying that because he has resumed independent activities such as "showering and using the bathroom," he is no longer eligible for parole.

Rodriguez is now held in a medical unit at the Souza Baranowski Correctional Center, the state’s maximum security prison for men.
Rodriguez is incarcerated on second-degree murder charges and is eligible for regular parole. A hearing is scheduled at the end of June.

John Stote, 61, was arrested the same day as Rodriguez. He was granted medical parole in January — when he was also hospitalized on a ventilator with COVID-19. The night before Stote was scheduled to be discharged from the Lemuel Shattuck Hospital, he was taken into custody.

"The documents disclosed to me shows that a parole officer became aware that he was going to be discharged and ran that up the chain of command to a parole supervisor," Stote's attorney Mark Bluver said. "And the parole supervisor said, well, he didn't die. So let's let the board decide."

The parole board this month decided to provisionally revoke Stote's medical parole — meaning he will remain incarcerated at least until the board considers the case further at another hearing next month. Stote is being held at a medical unit at MCI-Shirley. Bluver is asking for an independent medical evaluation and says Stote's health is deteriorating.

"He's completely wheelchair bound," Bluver said. "He has no function of his left hand or wrist. He cannot dress himself. He cannot put toothpaste on a toothbrush. He can't cut his own food. He's back on oxygen."

"... He cannot dress himself. He cannot put toothpaste on a toothbrush. He can't cut his own food. He's back on oxygen."

MARK BLUVER
The law says medical parole is intended for those who are terminally ill or permanently incapacitated, and do not pose a public safety risk.

A parole board spokesman has said the law is clear that a person can be returned to custody if they have recovered from the condition that made them eligible for medical parole. Bluver argues that Stote may no longer have COVID, but he is still eligible.

"I think what the parole board did is lawless," Bluver said. "The commissioner and the doctor who evaluated him said that even if he recovers — and thank God he has — he is still permanently incapacitated."

Bluver believes the parole board is "bending to political pressure" because family members of the man Stote killed are opposed to his release.

"I'm completely sensitive to this particular victim and to victims in general," Bluver said. "But that has nothing to do with whether or not Mr. Stote is eligible for medical parole."

Stote was convicted in 1997 of killing John Regan of Springfield. Regan’s daughter, Maureen Regan Moriarty says she’s not opposed to all medical parole, but thinks at 61, Stote should remain in prison.

"He has a whole long period of time ahead of him," Moriarty said. "He has tried to skirt this issue and not take responsibility for 25 years. And I do, I believe that he's back in jail and that's exactly where he should be — to end his days."
'It Really Doesn't Exist Anymore'

The state's medical parole law — sometimes called compassionate release law — has been the subject of debate and several court rulings since it was adopted three years ago. Legislation has been filed to exempt those charged with first-degree murder from seeking medical parole.

Earlier this week the State Supreme judicial Court issued two rulings saying that the Department of Correction needs to act quickly on medical parole petitions and can not limit a prisoners ability to resubmit a medical parole request.

Last year the court invalidated some Department of Correction rules on implementing the law. The state says it has begun revising the medical parole regulations after the previous SJC decisions, but was waiting for this week's rulings before finalizing them.

"EOPSS is now reviewing the decisions and intends to make any further adjustments necessary to ensure compliance with the SJC’s ruling," said Jake Wark, a spokesman for the Executive Office of Public Safety and Security in a statement.

Attorney Ruth Greenberg, who has represented some of the prisoners in the SJC cases, says the rulings show that the high court has had to intervene.

"The Department of Correction is doing everything they can to make medical parole not happen," Greenberg said. "It’s becoming like commutation. It’s a thing which exists in the law, but where the commissioner’s exercise of discretion is so rare, so scarce, that it really doesn’t exist anymore."
Prisoners' Legal Services of Massachusetts is among those monitoring medical parole cases to determine whether the law is being implemented as intended.

"This law was enacted with a thought that there were many people in the Department of Correction custody who really didn't need to be there, whose health had deteriorated to the point where they no longer posed any threat to public safety," said James Pingeon, litigation director for Prisoners Legal Services of Massachusetts. "And holding them in a prison was not just inhumane, but also wasteful of taxpayer money, because it costs much more to hold somebody in a prison and give them medical care than it would be if they were in a nursing home or dying at home in a bed."

Forty-seven petitions for medical parole have been approved since the law was passed — about half since the start of the pandemic, state data show. The number of those actually released is not clear.

At least three men who were granted medical parole after contracting COVID later died.

But the state confirmed that those deaths are not included in the Department of Correction’s official count of the 21 prisoners who have died from the virus. The state says that’s because once they were granted medical parole, they were no longer considered in state custody.

*This segment aired on May 21, 2021.*

**Related:**

- State Rescinds Medical Parole After 2 Men Appeared To Recover From COVID-19
- Medical Parolee Dies In Jamaica Plain Prison Hospital
- DOC Revises Medical Parole Reporting After 2 Prisoner Deaths

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Deborah Becker is a senior correspondent and host at WBUR. Her reporting focuses on mental health, criminal justice and education. More...

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Correction officials thwarting medical parole

Denying or delaying compassionate release to prisoners on their deathbeds violates a 2018 Massachusetts law.

By The Editorial Board  Updated October 9, 2020, 4:00 a.m.

Raymond Harmon was already down to 96 pounds, a bed-bound, terminally ill cancer patient with a DNR on his medical chart, and a lifer with a GPS bracelet on his ankle,
when Correction Commissioner Carol Mici denied his request for medical parole.

Medical parole in his case would have simply meant moving him into hospice care at the same hospital where he was already housed.

Harmon died three weeks later.

Among the reasons given by the commissioner for denying the prisoner’s request, according to Harmon’s lawyer, Ruth Greenberg, was that he “might be harmed by the angry family of the victim” of his crime, a 1985 murder in Lowell. The commissioner also “considered evidence that the governor of Massachusetts does not himself support the release of homicide offenders to medical parole.”

But: “This is not a factor the Commissioner should consider and this Court should say so,” Greenberg urged the state’s Supreme Judicial Court in her brief.

Greenberg is correct. To consider the governor’s beliefs would be a violation of both the letter and the spirit of the 2018 Criminal Justice Reform Act and of an SJC ruling just last January aimed at telling the DOC that the medical parole provisions of that law are to be followed.

The SJC heard several cases this week, each seeking to clarify what was supposed to be a new and more humane way to deal with compassionate release petitions — and in the process to save the state the estimated $320,000 a year that it can cost to house terminally ill and debilitated prisoners.

But “the promise of medical parole . . . remains a cruel illusion for far too many sick and dying prisoners,” according to the amicus brief filed by Prisoners’ Legal Services of Massachusetts.

The Correction Department has indeed raised procedural delay to an art form.

A separate case, brought on behalf of two other inmates, Raymond Vinnie and Robert
Malloy, raises the issue of needless delay even after medical parole has been granted but before an inmate is released.

The department got slapped down in January when the SJC, in a unanimous ruling, threw out most of the DOC’s medical parole regulations, including one that put the burden on inmates to gather their own medical data.

“The Legislature did not intend to place this burden on those so poorly able to bear it,” the decision by the late Chief Justice Ralph Gants said then.

But waiting out a dying inmate as it turns out isn’t all that difficult. Greenberg noted that absent a court order, the department routinely takes a full 90 days to “provide an already prepared administrative record to a reviewing court,” a process that in reality “could not possibly exceed one hour.” But one that certainly cuts into “the time remaining on the planet for the terminally ill.”

And if the inmate dies in the process of that judicial review, the department argues the case is now moot.

As of last month, when the Correction Department filed its brief, 33 state prison inmates and one county jail inmate had been approved for medical parole under the new law, nearly all of them since that last SJC decision. But Greenberg insists, “far more than 35 have died in custody” during that same period.

Greenberg and Prisoners’ Legal Service are using the cases of Harmon and another inmate who died while the department was considering his petition to implore the court to come up with a better way. That would mean shorter time frames and ending what Greenberg called the “Groundhog Day” of lower courts ordering the DOC commissioner to reconsider a case rather than just ordering the commissioner simply to grant the parole request.

It would also mean that once parole is granted, the DOC would be required to have a plan for the inmate’s release — even if that means using a public health facility like
Tewksbury State Hospital as a facility of “last resort.”

Sure, there are those who believe that life in prison should mean just that — and apparently our governor is one of them. But arguments about both compassion and cost-saving matter, as does the law. The Department of Correction has spent the past two years attempting to thwart the 2018 law, and several lower courts have already said so in ruling on individual cases. The DOC isn’t above the law. A compassionate governor would now tell them that. If not, it falls to the state’s highest court to set things right — once again.

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It's hard to get released on medical parole, unless you have Covid - STAT

STAT

Cement Head’s last fight: He was denied parole six times — until he was about to become a Covid-19 statistic

By Eric Boodman

April 14, 2021

During his 39 years in prison, the closest Joseph Messere ever came to walking free was when he was intubated, unconscious, and dying of Covid-19. The opportunity pinged onto his attorney’s phone just before Christmas, in a series of voicemails from the Massachusetts Parole Board. “This is Michelle Wetherbee, chief of the transitional services unit,” said one, from 12:31 p.m. on Dec. 23, 2020. She sounded like she was in a rush, swallowing syllables, garbling Messere’s name. But one thing she made very clear was that this couldn’t wait. “Can you please call me back” — she gave her number — “as soon as possible? We’d really like … your client released as soon as possible.” It was the fourth message her office had left in six days. A little over an hour later, she left another.

To attorney David Apfel, the urgency was strange. Often these sorts of arrangements took months. He’d seen it play out with this client earlier in the year. Messere was a stocky guy known to everyone as “Cement Head.” Ask his unit-mates about Joe Messere, and some might not know whom you were talking about. Everyone knew Cement Head: Cement Head the jailhouse lawyer, Cement Head of the bushy white Hulk Hogan biker mustache. He’d gotten a life sentence in 1981, for second-degree murder, and had been locked up ever since. He’d been denied parole in 1995, 1998, 2004, 2008, and 2013, and when he went before the parole board in December 2019, the decision took five months. On May 11, 2020, Cement Head got his sixth denial. True to his nickname, he asked for reconsideration, and in August, the board denied that, too.

So Apfel was taken aback to learn that Cement Head had just been granted medical parole. The decision was “based on the assessment that his death is imminent,” read one email from a prison-contracted doctor, who wanted to know whether the team should keep forcing air into his lungs through a surgical hole in the throat or start weaning him off machines. Apfel just kept thinking: What the hell are they talking about? Who submitted a petition for medical parole?

Lawyers say they’ve seen this happen to at least four other people incarcerated in Massachusetts, too: All on ventilators for Covid-19, all given medical parole when death looked imminent. (The first cases were reported by WBUR.) One man had put in an application, which was denied, only for authorities to reverse course eight days later and “release” him mere hours before his death. His freedom, though, looked much like the end of his incarceration: confined to a hospital bed, stiff lungs inflated with a machine’s artificial breath. Another man was granted medical parole while on a ventilator in January, but was re-arrested and brought back to prison earlier this week because he had survived and was no longer deemed sick enough.

The stories began emerging right as infections in Massachusetts state prisons were spiking: The total number of Covid-19 cases among prisoners had more than doubled from early October to late November, jumping from 460 to 1,019 — and those figures would get much worse. Since early in the pandemic, a court-appointed “special master” had been scrutinizing the Department of Correction’s coronavirus statistics. It wasn’t clear that there would be any sanctions or consequences for the agency if it failed to protect those in its charge. Still, surging case counts didn’t make leaders look good, and deaths made them look worse. By early December, nine prisoners had died. But the Covid-19 mortality numbers they were reporting at the time were for people who’d died in custody — not those who’d died while out on medical parole.

To attorneys, that provided an alarming possible explanation for situations like Cement Head’s: The Department of Correction was trying to make it seem like it had fewer Covid-19 deaths on its hands than it really did.

But as with so many pandemic-time patterns, this one revealed an older, deeper injustice. For those with less newsworthy illnesses, almost nothing happens “as soon as possible.” The week Apfel was getting those insistent calls, a medical parole application went in for Frederick Yeomans, serving a drunk-driving-related sentence. His pancreatic cancer had metastasized to his lung and bone; he could hardly get to the bathroom by himself, and wanted hospice care rather than chemo. He died incarcerated, his paperwork pending, 18 days into the 45. Correction Commissioner Carol Mici has to make a decision; in Cement Head’s case, she took two.

“The risk to the public was very, very low,” said Yeomans’ lawyer, Suzanne McDonough. “I mean, the man couldn’t walk. I don’t think he was going to be able to skip out of a nursing facility, find some booze, hop in a car, and drive.”

As medical parole delays go, though, 18 days is nothing. Some applicants die fighting a denial, spending their last months in court trying to show they only have months to live. Yet others get medical parole but remain in...
prison, while authorities say they’re working to find a place for the person to go. It isn’t always clear, though, when that’s true and when it’s just an excuse. Raymond Vinnie Jr., for instance, seemed similar to Cement Head: Convicted of murder decades ago, bedridden, tube-fed. But when he got medical parole earlier in 2020, and his kids wanted to bring him home to Georgia, the authorities kept saying no. It was only by resorting to drastic measures — a kind of jailbreak with the law on its side — that his family could get him out.

Not so for Cement Head, though he was estranged from his family and had nowhere to go. The reason officials kept calling Apfel turned out to be a form that needed signing — one last gateway of paperwork you have to pass through to go from being granted medical parole to being officially released. “Oh, interesting,” Apfel said. “They couldn’t have cared less when he was alive, and now that he’s a vegetable, they want to release him as soon as possible. To whom? For what?”

Medical parole, or compassionate release, is different from plain old parole, less about prisoners’ disciplinary records, more about their fragility. The rationale is both moral and fiscal. Why keep someone locked up and treated at great taxpayer expense if they’re too sick to hurt anyone? Why not let them go, to die a more comfortable death? In Massachusetts, to qualify you have to be “permanently incapacitated” or unlikely to live over 18 months, and either way, too frail to pose a safety risk. But the 3-year-old law gives authorities plenty of discretion, and they’re often reluctant to let people go. Of 432 applications, only 47 have been approved. And that statistic doesn’t capture a crucial variable: how long it took for the person to be released.

No one knows this better than Ruth Greenberg, often referred to as the state’s mama of medical parole. She’s been well-known among incarcerated people for years, a defense lawyer who takes on indigent clients, who answers every collect call. She jokes that her number is written by the toilets in the state prison at Norfolk. Recently, though, she’s developed a new specialty: taking the Department of Correction to court over its handling of medical parole. When other lawyers have questions about the statute, she is their go-to, and she’s intimately familiar with the ailments of those on “wheelchair row.”

She would like for government officials to imagine her in a rosewood office, with assistants and bookshelves. Instead, she has what she calls “a Subaru practice” — operating solo out of her apartment in a Boston suburb, boxes of documents stored in the trunk of her Subaru, which she’s hardly driven in 15 years.

She doesn’t need to go down to her filing cabinet of a car to check the name and story of every person whose medical parole case she’s taken on. “I remember each and every one, the freed and those who died in chains, unlawfully restrained, and without enough time left to litigate,” she wrote in a text message. “I am their Kaddish,” she added, referring to the Jewish prayer of mourning. There are around 25, and she can rattle them all off by heart, with a mini-description of each case’s outcome: “granted after litigation” or “granted but not released without litigation” or “denied” or “died.” She can think of only one that didn’t require a legal fight.

Her first medical parole case began in February 2018, in the cafeteria-like visiting room at Norfolk, when a 30-year-old named Alex Phillips lifted his shirt to show his mother a protrusion in his abdomen. She tried to stay calm. “I said, ‘Well, maybe you have a bowel obstruction,’” his mother, Ann Burke, recalled. “Because I didn’t want him to totally freak out.” She knew that wasn’t a bowel obstruction. She’d spent years working as a hospice and oncology nurse, and she knew that was a tumor.

Because it’s deemed a security threat, family members often aren’t told when an incarcerated loved one goes to the hospital. The person just disappears, suddenly unavailable for visits, unable to make calls. That’s part of the reason medical parole is so alluring — to have unrestricted company through the disorientation of illness. By the time Burke could finagle special permission for a phone conversation, her son had spent nearly a week
contemplating metastatic cancer alone. At first, he tried to put on a brave face, saying he might still have a few years. Then, he broke down: “He said, ‘Mom, I know I’m going to die. Please don’t let me die in prison.’”

We tend to think of Massachusetts as one of the most progressive states — its health care reform a blueprint for Obamacare, its senators pushing the Green New Deal. The reality isn’t so clear-cut. “We are very faux-liberal, particularly when it comes to criminal justice,” state Rep. Liz Miranda, a number of whose loved ones have been incarcerated, said in a recent webinar. In 2018, 45 states and the federal government had medical parole laws on the books. Massachusetts legislators had been trying to pass one for years — which was, Miranda said, “like moving Mount Rushmore.”

Some trace the resistance back decades, to Willie Horton, who was doing time for murder, was let out of a Massachusetts prison on furlough, committed rape and assault — and then became an infamous ad attacking Gov. Michael Dukakis when he ran for president in 1988. Some — current Gov. Charlie Baker included — think that if you’ve gotten life without parole for first-degree murder, there shouldn’t be a way out, no matter how ill you are. Even so, the law finally passed as part of a sweeping criminal justice reform bill, in April 2018. Baker unsuccessfully tried to limit the prisoners eligible. But the more effective barriers were subtler, more procedural ones.

Phillips, who’d served 12 years of the 18-to-20 he’d gotten for manslaughter, applied just as the law was being passed. It took three petitions, two denials, one reconsideration, and seven months for him to get out on medical parole. He died three weeks later, telling his mom people were there for him, trying feebly to move from where he lay on the couch. “He really wasn’t ready to go,” Burke said.

Of the dozen Massachusetts lawyers interviewed for this article, all of them described similar issues with the medical parole cases they’d handled. In one denial, the commissioner cited the governor’s distaste for releasing certain categories of prisoners. Another, according to an attorney, claimed that the applicant had no mobility issues, when in fact he had special dispensation to receive meals where he lived because he couldn’t walk to the chow hall. After a denial is appealed in court, the authorities have insisted on taking the full 90 days allowed by law to submit documents, even though they’ve already sent those very same files to the prisoner’s counsel. “They’re not granting medical parole when they should be,” said Lauren Petit of Prisoners’ Legal Services.

The state Executive Office of Public Safety and Security denied that its officials are deliberately dragging out medical parole cases. In response to questions from STAT, it said the allegation is baseless, as is the accusation that they are trying to lower the number of Covid-19 deaths they have to report, and added that the medical parole process takes less time for those who will be paroled to a hospital bed where they are already. “The Department of Correction reviews each medical parole petition on its own merits and makes a determination based on the criteria set by Massachusetts law,” the agency said in a statement. “Throughout the pandemic, DOC has adopted the latest public health guidance and treatment strategies on behalf of those in our care, including the use of medical parole when appropriate to the inmate’s health status and public safety ramifications.”

Court filings, the agency added, could take time to redact, and a person’s eligibility for medical parole could change as their health deteriorates. Officials refused to discuss individual applicants.

The protagonists in these cases aren’t easy for the public to care about. Often, they’re the opposite of sympathetic. Some have been convicted of murder, rape, or assault: It can be hard to disentangle the medical case from the criminal one. Joseph Buckman, for instance, was convicted of stabbing his wife to death in 1998. The couple’s daughter, Lisa Carlow, has always maintained his innocence, and she made sure that visiting her father was part of her own kids’ routine. At a certain age, they started asking questions. “Why does Grampy’s house
have police men there? Why do you have to go through metal detectors at Grampy’s? Why is there barbed wire at Grampy’s?” She sat them down to explain.

Her faith in her father’s innocence was one reason she was so adamant about bringing him home on medical parole. Some of her relatives opposed it. She was willing to shut down the day care she ran in her basement and forego the income of renting out a portion of her house. But almost as soon as he came home, after a yearlong court battle, it was clear he needed to be in the hospital. “He was literally home for less than 24 hours,” Carlow said.

Greenberg is still incensed about that. But for her, Buckman’s guilt or innocence is beside the point: Medical parole is not about relitigating a crime. In part, it’s about recognizing that the death of even the most troubled person is still the end of someone’s life. Mostly, though, it’s about upholding the law. “It gives hope to other prisoners that the law is real, that the law doesn’t only operate against them,” Greenberg said. She wants her clients to know that the law doesn’t just put people behind bars; it can free people, too.

“I am supposed to be retired,” Greenberg went on. “But I promised Alex Phillips — I promised him, and I promised his mother — that I would not let the Department of Correction do again what they did to him.” But, as she is fond of saying, she is a small axe, and the agency is a big tree. Her promise would be hard to keep.

It was Greenberg who first heard that Cement Head had gotten last rites. It was early December 2020. Covid-19 had been sweeping through Norfolk. Prisoners phoned their lawyers, more and more panicked as ambulances came for their unit-mates. Greenberg didn’t know Cement Head, but she figured another attorney might, and sent out an email blast. When Apfel saw the news, he started to cry.
He’s a high-powered Boston lawyer, a former federal prosecutor now specializing in financial crime, but his fondness for Cement Head predated all of that. They’d first met 30 years ago, when Apfel was fresh out of law school. He’d gone in with Clarence Darrow dreams and felt guilty for taking a job at a “fancy dancy firm” — and here was this prisoner, calling because the prison wouldn’t allow him full access to the law library. Messere laughed uproariously when he said everyone knew him as Cement Head. “I just liked the guy, what can I say?” Apfel said. “I could see how, for many other people, he’d be an acquired taste, but I acquired the taste very quickly.”

At first, he could seem like a prison-movie stereotype, “L-O-V-E” tattooed across his right knuckles, “H-A-T-E” across his left. He was doing time then at Walpole, the state’s highest-security prison, and in the ’80s, it was a rough place. An old acquaintance of Cement Head’s remembers fashioning knives out of aluminum from the license plate shop. You had to watch your back. “As the prison hierarchy pecking order goes, he wasn’t one to be pecked,” wrote Peter, another friend, who’s still incarcerated at Norfolk and agreed to email interviews on condition that he be referred to only by his first name. But Cement Head was a “solid, stand-up guy who you could trust and count on if shit hit the fan. That was very important back then, you needed people you could trust, sometimes with your life.”

He’d show new arrivals the ropes, tell them which guys to run with, which to avoid. At the time, he was known for eating whole, raw cloves of garlic, the smell clinging to him like a cloud. Those who knew him later on at Norfolk said he couldn’t stand the stuff, which seemed strange for a man whose Italian grandmother had given him a love of food. Everything else, though, he ate as a kind of homage to her, the one person who dared intervene when his father beat him. These were stories he’d tell his friend Michelle Kosilek as they power-walked together around the Norfolk yard. How he’d grown up to be a welder and tinkerer like his dad, fixing motorcycles and riding them, working on pipelines and oil rigs. How his father’s nickname for him became his name, inked across his shoulder.

Both he and Kosilek had been studying law, Kosilek suing the authorities so they’d recognize her rights as a trans woman, Cement Head bringing case after case for himself and others. He could be “irascible as a disturbed hornet,” Kosilek said; she tried to convince him that, in legal proceedings, at least, deference would help him win. His stubbornness, though, could come in handy; when a fellow prisoner came to him with an injustice — an unfair conviction, a withheld medication — Cement Head wouldn’t let it go.

That cement-headedness was also one reason he’d had so much trouble getting parole himself. He’d been convicted in 1981 of stabbing someone the year before. He insisted that he was innocent. Apfel tried to convince him that taking responsibility would give him a leg up with the Parole Board. “He had severe problems with alcohol — and the second-degree murder for which he was convicted, he was drunk as a skunk. He had a history of being a blackout drinker,” Apfel said. “I tried to say, ‘Look, Joe, don’t you think there’s a chance that you murdered this guy and didn’t remember? You did things you wouldn’t have done if you didn’t have as much booze in your system.’”

Cement Head wouldn’t hear of it. His parole was denied again and again. Then the pandemic arrived. Apfel emailed the authorities about Cement Head’s asthma, his high risk for severe Covid-19. His parole was denied again.

Though the authorities dispute it, those in their custody say infection control was questionable at best. The place that Norfolk designated for the people who felt sick was the one with the worst associations: “The restricted housing unit, the hole, the punishment, isolation, it’s all the same thing,” said someone who recently got out on
It's hard to get released on medical parole, unless you have Covid - STAT


Cement Head kept calling Apfel, sometimes more than once a day. He wouldn’t answer most of the time: It was just Joe, wanting to hear another human voice. When he did pick up, though, Cement Head sounded scared. His letters, too, kept arriving, his penmanship as beautiful as ever — but some of his concerns were new. He still complained of not being given the inhaler he needed. But he also wrote about someone who’d worked inside a Covid-positive unit suddenly appearing in his own. He worried about inadequate testing. “I am so pissed off, because we haven’t been told if the rest of us are negative,” he wrote on Nov. 6. The next day, he wrote, “They took the guy across from me!!”

Then, he disappeared himself. After a week or so of silence, Apfel got a call. It didn’t begin with the usual, dramatic, “Helloooooooooo.” Instead, Cement Head’s voice was hoarse, and halting, the sound of someone who’d just tested positive for the coronavirus, and even with extra oxygen couldn’t catch his breath. Soon, he was on a ventilator. When Apfel tried to call the hospital, they wouldn’t give him any information: “They didn’t have a patient by that name and they never had had a patient by that name, and I said, ‘Well, that’s not true.’”

Days after that, Apfel heard Cement Head had gotten last rites. He felt terrible. He was just about to file an emergency transfer request. Rationally, he knew it was stupid guilt — more paperwork probably wouldn’t have helped — but he felt guilty all the same.

But Cement Head wasn’t dead yet. He was just alive enough, documents show, for prison officials to file a new medical parole petition on his behalf — and for the commissioner to want to deal with it at a remarkable speed.

That wasn’t how it usually worked, in Greenberg’s experience. There were a few exceptions, but she’d mostly seen officials blocking or delaying prisoners’ medical parole applications, not filling them out themselves. For several years, a Department of Correction policy stipulated that petitions wouldn’t be considered unless the prisoner had identified and gotten documents from all the doctors who’d be providing care after release — “a formidable task for even a young and healthy prisoner, given a prisoner’s limited access to the world outside,” read a January 2020 judgment by the state Supreme Judicial Court, which struck down the rule after Greenberg challenged it on behalf of Joseph Buckman and another client.

But transferring that responsibility from the prisoner to the prison sometimes created a new barrier. Care plans were now subject to the whims of authorities — even when family members already had a workable plan in place.

Raymond Vinnie’s kids knew what their father needed. He’d had a stroke in September 2019, and six months later was bedbound and unable to feed himself. Two of his four kids had previously cared for patients just like him, Morenika Vinnie, his second-eldest, as a certified medical assistant at a brain-injury recovery center and then a hospital, and her older sister Natasia Jefferson as a home health aide. Vinnie’s petition for medical parole had gone in on the last day of February 2020, weeks before the pandemic became a pandemic. Natasia bought bathroom grab-bars, planned a ramp and a wheelchair-accessible toilet, so her dad could move home.

But when the correction commissioner granted Vinnie medical parole, taking all 66 days the law allows once a petition is filed, her letter said he’d be released after “his acceptance into a long-term care facility” — paroling him from institution to institution. In the interim, the agency wouldn’t let him go — even to another non-correctional part of the same state hospital. When Greenberg took the authorities to court, government lawyers said that he’d signed a long-term care consent form. He couldn’t go live with his kids, they went on, because he
had an unpaid fine in Georgia and because he was tube-fed, his health too delicate for travel, his care too complex for family members without special training.

The unpaid fine turned out to be a non-issue. Vinnie’s kids offered to hire nurses. They offered to have their father driven home to Columbus, Ga., by ambulette if he was too fragile to fly. They offered to find a nursing home near them. They even offered to move to Massachusetts. But, as Morenika said of the authorities, “They just kept making excuses,” — and kept making arrangements for her dad to go to a long-term care facility in Massachusetts.

The tactic wasn’t unique to Vinnie’s case. The commissioner granted medical parole to someone else last December, but refused to allow him to live with his wife, who said she was willing and able to care for him. He spent over two more months incarcerated, waiting for a nursing home bed to open up. Another person was granted medical parole in January 2020, and is still incarcerated, awaiting a placement, over a year later.

It is legitimately complex to find a nursing-home bed for someone who’s been paroled. “There are endless barriers,” said Deb Goldfarb, a clinical social worker at Harvard Law School’s Criminal Justice Institute. “You call a nursing home, and you speak to the admissions person, and you say, ‘Are you accepting people or do you have open beds?’ They say yes, you say, ‘Do you take people from prison?’ And what’s the next question? ‘What did they do?’” But to her, it doesn’t always look like the authorities are making a good-faith effort.

For Vinnie, the question of open nursing-home beds could have been moot. His kids were anxious to have him home. When they were growing up, he ran a printing shop, where he showed his son Raymond III how to drive a forklift, left hand on the steering wheel, right hand maneuvering the forks. Then, in 1993, he’d been convicted of first-degree murder and given life without parole. For over 20 years, he told his children not to visit. “He didn’t want us to see him in prison,” Morenika explained. “My dad is very, very prideful.”

Finally, a few years before his stroke, she decided enough was enough. What if he died and they hadn’t seen him for decades? She flew up, first by herself, and then with her three siblings. He’d missed most of their adult lives, new grandchildren glimpsed only through letters and calls.
It's hard to get released on medical parole, unless you have Covid - STAT

It’s hard to get released on medical parole, unless you have Covid - STAT

By the time he’d gotten medical parole, they were still making up for lost time. Plus, Vinnie’s kids worried that every extra day in custody upped the chances that he’d get Covid-19. So, when their father was still incarcerated just over six weeks after the commissioner’s decision, they took matters into their own hands and flew to Boston. “We went up there like thieves in the night,” his daughter Ramona Horn said. It wasn’t a secret. They said they’d told the authorities they were coming, but officials just kept telling them to wait.

When they arrived at the state hospital where many prisoners are treated, they said they weren’t leaving without their dad. They made sure to stay calm. But seeing their dad was a shock. At the base of his back was a deep wound, one that the family thought could only be the result of neglect. “It was just open flesh, bigger than a grapefruit,” Raymond III recalled. At the sight of it, he started to cry.
They needed to get their father out of there. They signed some papers — an official certificate of release, a form waiving liability as he was “leaving against medical advice” — then tucked his urine bag between his legs, and made a stretcher out of his sheets. They drove straight to the airport. They were nervous as they boarded the plane. Ramona could feel her heart, frantically ticking. “We felt that, up to the 11th hour, someone was going to storm the gate to try and stop us,” she said. “We felt like we were on the run. We really did.” It was only when the wheels began to lift that they believed it: They were leaving the jurisdiction of the Massachusetts Department of Correction. Their father was free.

The news wasn’t welcome to everyone. Vinnie was convicted of shooting Charles Hardison, a high school tennis star, and for the victim’s mother, every part of the medical parole process unearthed a fresh wave of grief. “Just to have to sit down to write a statement is to go back to one of the darkest times in my life,” said Adlene Hardison.

“It’s painful, because I’m just reliving it.”

To her, some who’ve been convicted of non-violent crimes deserve medical parole. That isn’t the case for Vinnie. “Let him serve the time; he murdered my 15-year-old,” she said. But she was also angry at prison authorities. She’d made peace with the idea that Vinnie would end up in a nursing facility, which was what they told her would happen. The next thing she knew, he was home. She wishes they’d warned her that was a possibility, so she could prepare herself for the knowledge that she’d lost her son but Vinnie would be spending time with his kids. “It was like they didn’t care,” she said.

Part of a letter Cement Head sent his attorney, David Apfel, in November from the state prison at Norfolk.

That was the impression Apfel got, too. Or rather, as far as he could tell, they seemed to care a lot about Cement Head as a statistic.

To be fair, the medical director of Wellpath, the company that provides prisoners’ care, had asked about the patient’s end-of-life wishes. The team had tried and failed to find Cement Head’s family members, and his longtime lawyer was the next best thing. The medical director, Steven Descoteaux, had put the question to Apfel, and Apfel thought back to the years and years of cement-headedness. He said his client would want everything done; if there was a fighting chance at survival, he’d want to fight.
That wasn’t the direction Cement Head’s doctors had been leaning. A few days earlier, Descoteaux had written, “I am convinced that all options to save his life have been exhausted, and that the appropriate course to take now is to end intubation and provide end of life comfort care.” As if defending himself against eventual criticism, he’d added, “This is what would be done for a person in this patient’s situation anywhere else.” Those notes had been quoted in the medical parole decision, which Apfel hadn’t yet received. But after that conversation, Descoteaux emailed a social worker at Milford Regional Medical Center, to pass on that Apfel had “expressed interest in giving Messere every chance,” even if it meant a feeding port in his belly, a surgical breath-hole in his windpipe, and long-term care.

Descoteaux acknowledged, though, that it might be too late. When he sent Apfel the medical parole decision, six days after it was signed, he wrote that it was based on the assessment that Cement Head’s death was imminent.

Already, Michelle Wetherbee, from the Parole Board, had been calling Apfel for five days. He found himself speaking with her on Christmas Eve.

“I said, ‘Why are you calling me about this?’” Apfel recalled. He wasn’t Cement Head’s designated health care proxy. “And she said, ‘Well, you’re the one person who’s his contact, and he’s not in a position to sign the release himself.’”

But if he were released, Apfel asked, what would that even mean? Where would he go? It turned out that Cement Head would stay in the same hospital until his death; if he survived, then other care arrangements would be made. What exactly those arrangements were wasn’t clear to Apfel. He said Wetherbee couldn’t give him any specifics.

“I said, ‘Who would be responsible for paying for his burial, for his funeral?’ She said, ‘Oh that would be on him.’” To Apfel, that was outrageous. As far as he could tell, the state was simply trying to wash its hands of someone who’d been in its custody for four decades. Why on earth would anyone sign for this person’s release in these circumstances?

Well, he remembers her saying, there are many instances in which the prisoner or the prisoner’s family thinks it’s important to die free.

It was true. There are many families for whom that is important, even if the person may never be conscious of the change. But Cement Head couldn’t speak for himself. He had no loved ones who could want that for him, or who hoped to spend time at his bedside. He had no money to pay for his own burial. Apfel had the distinct impression that the prison authorities were doing their utmost to shirk responsibility, to leave a dying man out in the cold.

Wetherbee referred all questions to an Executive Office of Public Safety and Security spokesperson, who said that parole staff can’t specify treatment plans for someone on medical parole who recovers, and have no authority over burial arrangements, though financial assistance is available. The agency did not dispute any details of the exchange.

As Apfel remembers it, the conversation ended when Wetherbee said the purpose of the call was to see whether he would sign the form, and it sounded like he wasn’t going to: “I said, ‘No, I’m not. I think what you’re doing is obscene.’”
He wasn’t the only one. To Sen. Patricia Jehlen, it sounded like prison authorities were subverting the intent of the law — and she would know, as she’s one of the state legislators who wrote it. “The whole situation seems to be cruel and cynical,” she said in an interview. “If you’re going to deny people who have weeks to live, what does it mean to release a person who is unconscious and intubated? It can’t be for either of the purposes, either compassion or cost savings.”

Exactly how many people have been in Cement Head’s situation is a matter of debate. Officials at the Executive Office of Public Safety and Security say that three people have been granted medical parole while coronavirus-positive, and the special master’s weekly reports have stated that two of them have been released, since it started listing that number in December. But attorneys told STAT they know of at least two more who have been released while on ventilators for Covid-19, though it isn’t clear why they aren’t included in the official tally.

Those numbers might seem tiny, but they hide a larger story. “It’s like salt in the wound,” said Goldfarb, the social worker with Harvard Law’s Criminal Justice Institute. “Clearly the Department of Correction has a mechanism to make this happen very quickly. Why these cases, and not the rest?”

A member of the prison health care team, who spoke on condition of anonymity, wasn’t sure that Covid-19 cases had been fast-tracked, but couldn’t explain why the timeline was so different for someone like Cement Head and someone like Yeomans. The person noted that the law can be unclear, acknowledging that sometimes the commissioner makes decisions that don’t seem to jibe with medical assessments, but also that the doctors’ predictions aren’t always right, either: “Covid threw us a few curve balls, where we thought a few people were about dead, and then they bounced back. But the majority of those that we thought would die did.”
The state says the parole board is now reporting to the courts any Covid-related deaths of people released on medical parole, though none has been disclosed and the board has not reported deaths retroactively from last year. Nor do reports show how long it took people to get medical parole, how long it took to be released, or how many people have died trying. Greenberg is still litigating denials, but she’s tired. In one ongoing case, the commissioner refused to reconsider a previous decision, writing that the person was well enough to be “swaying his upper body and appearing to be dancing as he sits in his wheelchair in an attempt to amuse a dementia patient.”

That image provides a kind of backdrop to the numbers in the special master’s reports. By the end of March 2021, there had been 3,021 confirmed coronavirus cases among people incarcerated in state prisons; when the special master began his work, one year earlier, the Department of Correction had 7,642 people in its custody. In those 12 months, there were nearly 1,000 inmates who’d been released, through various mechanisms. But there were 21 for whom the virus became a change of sentence, from however much time they’d gotten to a sentence of death.

One of them was Cement Head. He died on New Year’s Eve, in custody, his hospital room guarded, a few hours after the doctors had called Apfel to say there was permanent scarring on his lung and little chance he’d come back. Apfel had told them that Cement Head would’ve wanted heroic measures, and he’d gotten them. But he would only want to stick around if his mind were intact, stubborn, indignant, the same mind that had put together countless legal claims. As Apfel put it later, “Joe would not have wanted to be kept alive as a mere appendage of tubes.”

His friend Michelle Kosilek likes to imagine him in the afterlife, sitting around a celestial campfire with a tankard of mead and a pipe. In a way, it was almost fitting that, as Kosilek put it, his death “became another embarrassing statistic for the powers that be.”

Four days later, Apfel got an email saying that Cement Head would be buried at the state’s expense. Apfel wrote back within an hour, asking when the burial would take place, and whether he could attend. He hoped he might be able to speak at the graveside, to find some way to mark the end of Cement Head’s life. First he heard nothing. Then, about 10 days later, he got a note saying that prison burials are not open to the public. If he wished to visit the grave, “at some time in the future after the pandemic has subsided,” he would need to request permission from the prison superintendent.

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