



The Commonwealth of Massachusetts
SUPREME JUDICIAL COURT
FOR SUFFOLK COUNTY
JOHN ADAMS COURTHOUSE

ONE PEMBERTON SQUARE, SUITE 1300
BOSTON, MASSACHUSETTS 02108-1707

WWW.SJCCOUNTYCLERK.COM

July 16, 2020

MAURA S. DOYLE
CLERK

CASE INFORMATION (617) 557-1100
FACSIMILE (617) 557-1117

ATTORNEY SERVICES (617) 557-1050
FACSIMILE (617) 557-1055

Rosemary Curran Scapicchio, Esquire
107 Union Wharf
Boston, MA 02109

RE: No. SJ-2020-0495

DENNIS DAYE

v.

THE DEPARTMENT OF CORRECTION and CAROL MICI, COMMISSIONER OF
CORRECTION

NOTICE OF DOCKET ENTRY

You are hereby notified that on July 16, 2020, the following
was entered on the docket of the above referenced case:

ORDER OF TRANSFER: Case transferred to Suffolk Superior Court,
Civil Session. (Lenk, J.)

Maura S. Doyle, Clerk

To: Rosemary Curran Scapicchio, Esquire
John T. Haggerty, Esquire
Suffolk Superior Court Dept.

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

SUPREME JUDICIAL COURT
FOR SUFFOLK COUNTY
No. SJ-2020-0495

DENNIS DAYE

vs.

DEPARTMENT OF CORRECTION & another¹

ORDER OF TRANSFER

This matter came before the court, LENK, J., on the petitioner's petition for a writ of certiorari and motion for judgment on the pleadings, and the defendants' joint motion to transfer the matter to the Superior Court pursuant to G. L. c. 211, § 4A. In 1986, the petitioner was convicted of murder in the first degree, armed assault in a dwelling, armed robbery, and firearms violations. He is serving three life sentences for his murder convictions, as well as sentences on the related charges.

In March, 2020, the petitioner, who is seventy-one years old, filed a request for medical parole under G. L. c. 127, § 119A, on the ground that he is permanently incapacitated as a result of a stroke that he suffered in August, 2016, which left him paralyzed and dependent on nursing care for almost all of his

¹ Carol Mici, in her official capacity as the Commissioner of Correction.

daily needs. The request was accompanied by affidavits by the medical director of the agency which administers health care for the Department of Correction (DOC), and another physician at that facility, stating that the petitioner is permanently incapacitated. According to these physicians, the petitioner has multiple independent medical conditions, in addition to permanent paralysis from the stroke; the petitioner uses a wheelchair, and is in need of "almost total" nursing care. The Superintendent at the Massachusetts Correctional Institution at Shirley (MCI-Shirley), where the petitioner has been housed in the nursing unit since his stroke, determined that the petitioner is permanently incapacitated, and that his release would not pose a risk to public safety and was not incompatible with the public welfare; after reviewing the petitioner's release plan to a nursing facility, the Superintendent approved the request for medical parole.

In May, 2020, after a hearing attended by the Superintendent of MCI-Shirley, the State-wide medical director of the agency which administer's DOC's medical care, and four family members of the victims, but not the petitioner, and taking into account affidavits filed by an assistant district attorney for Essex County, the Commissioner of Correction denied the request for medical parole. On June 30, 2020, the petitioner filed his petition for a writ of certiorari in this court.

In her decision denying the request for medical parole, the Commissioner noted statements by the assistant district attorney concerning the petitioner's more than twenty-years of attempts to challenge his convictions, his "lack of remorse and failure to accept responsibility for his crimes," his flight before his arrest, and disciplinary actions brought against him during his early years of incarceration. The Commissioner also pointed to statements by a number of the victims' family members, summarized by one family spokesperson, about the effect that the deaths of their loved ones had had on their lives, and the emotional difficulty they had experienced during one of the petitioner's appeals.

After this discussion, the Commissioner determined that, because no licensed physician has concluded that any of the petitioner's medical conditions will result in his death within the next eighteen months, he is not permanently incapacitated within the meaning of G. L. c. 127, § 119A.

General Laws c. 127, § 119A, provides that an inmate may be eligible for medical parole "due to a terminal illness or incapacitation" (emphasis added). Inmates who have been convicted of murder in the first degree are eligible for medical parole under the statute. See, e.g., Vazquez v. Superintendent, Massachusetts Correctional Institution, Norfolk, 484 Mass. 1058 (2020). The Commissioner's decision appears to have conflated

these two criteria, and indicates that the Commissioner understood "incapacitation" to mean that the petitioner would die within the next eighteen months, whereas anticipated death within no more than eighteen months is the definition of "terminal illness" under the statute. See id. "Permanent incapacitation" is defined as "a physical or cognitive incapacitation that appears irreversible, as determined by a licensed physician, and that is so debilitating that the prisoner does not pose a public safety risk." Id. Otherwise put, there appears to be a significant question whether the Commissioner's decision that the petitioner is not permanently incapacitated is supported by substantial evidence in the record.

The Commissioner's decision also states that the petitioner's "always being classified to maximum security," his history of violence while incarcerated, and the fact of the three murders of which he has been convicted, "make him unlikely to ' . . . live and remain at liberty without violating the law.'" She concluded, "I believe that [the petitioner's] release would be ' . . . incompatible with the welfare of society.'" Based on the petitioner's classification reports, which are included in the record, however, the petitioner is classified as placed at a medium security facility because the nature of his offense does not allow him to be placed in minimum security. In addition, although the petitioner had a history of disciplinary violations

while initially incarcerated, he has not had any disciplinary reports in the last ten years, since well before the stroke.

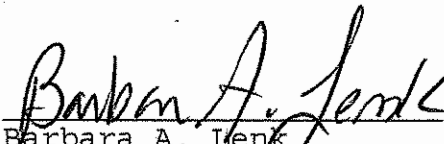
As to these separately-stated reasons for denying the petition, there appears to be some question whether the reasons are consistent with the statutory criteria, as well as whether they are supported by the record. The statute requires that "[t]f the commissioner determines that a prisoner is terminally ill or permanently incapacitated such that if the prisoner is released the prisoner will live and remain at liberty without violating the law and that the release will not be incompatible with the welfare of society," the prisoner "shall be released on medical parole" (emphasis added). See Buckman v. Commissioner of Correction, 484 Mass. 14, 18 (2020) (four documents must be provided to Commissioner to allow decision whether to grant medical parole are: "(1) the petition itself; (2) "a medical parole plan;" (3) "a written diagnosis by a physician licensed to practice medicine"; and (4) "an assessment of the risk for violence that the prisoner poses to society," only first of which must be provided by inmate).

While both this court and the Superior Court have jurisdiction over them, actions in nature of certiorari under G. L. c. 249, § 4, "are most appropriately brought in the Superior Court." Here, to the extent that the petitioner challenges whether the Commissioner's findings are supported by

the record, any factual determinations which must be made are better made in the Superior Court. To the extent that the petitioner's claim that the assertedly-improper result here is similar to purportedly-improper results in other cases involving this Commissioner's decisions to deny medical parole is an attempt to raise a class-action challenge, a determination whether to certify a class belongs in the first instance in the Superior Court. Accordingly, the defendants' motion to transfer the case to the Superior Court shall be allowed.

Upon consideration, it is ORDERED that the matter shall be transferred to the Superior Court, pursuant to G. L. c. 211, § 4A, for determination, after whatever hearings are necessary, whether the Commissioner's decision is supported by substantial evidence in the record, an abuse of discretion, or an error of law, and whether a writ of certiorari should issue.

By the Court


Barbara A. Lenk
Associate Justice

Entered: July 16, 2020