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NOTIFY

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

SUPERIOR COURT
CIVIL ACTION
No. 2184CV02252

JAMES KEOWN

vs.

CAROL A. MICI AS COMMISSIONER OF THE MASSACHUSETTS DEPARTMENT
OF CORRECTION; NELSON ALVES, SUPERINTENDENT, MCI-NORFOLK;
THOMAS A. TURCO III, SECRETARY OF THE EXECUTIVE OFFICE OF PUBLIC
SAFETY AND SECURITY

DECISION AND ORDER ON PLAINTIFF'S MOTION FOR JUDGMENT
ON THE PLEADINGS AND DEFENDANTS' CROSS MOTION FOR
JUDGMENT ON THE PLEADINGS

This matter came on for hearing on May 31, 2022, on the Parties' Cross Motions for Judgment on the Pleadings. Plaintiff James Keown ("Keown") seeks relief from the decisions of the Commissioner of Correction (the "Commissioner") denying his petition for medical parole and request for reconsideration. After hearing, review of the record, and for the reasons stated below, this matter is REMANDED for further consideration by the Commissioner.

LEGAL FRAMEWORK

The medical parole statute allows for the release of "aging and ill prisoners who are unlikely to reoffend." *Harmon v. Commissioner of Corr.*, 487 Mass. 470, 472 (2021). "The purpose of the statute . . . [is] both to reduce significant health care expenditures . . . and to show compassion to sick and disabled prisoners." *Id.* at 477. The statute provides,

If 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. The parole board shall impose terms and conditions for medical parole that shall apply through the date upon which the prisoner's sentence would have expired.

Notice Sent (3)
06-29-22, DC

G.L. c. 127, § 119A(e).

The process begins when a prisoner or his or her designee petitions the superintendent of the correctional facility where the prisoner resides. G.L. c. 127, § 119A(c)(1). Within 21 days, the superintendent must provide the commissioner with (1) the prisoner's petition; (2) a recommendation on whether it should be granted; (3) a written diagnosis by a licensed physician; (4) a medical parole plan; and (5) an assessment of the risk of violence posed by the prisoner if released. *Id.* The commissioner then has 45 days to issue a written decision granting or denying the petition, accompanied by supporting reasons. G.L. c. 127, § 119A(e). During this 45-day period, the commissioner must review the superintendent's submitted materials, provide notice to interested parties (the victim, victim's family, and the district attorney), and review any written statements from those parties. G.L. c. 127, § 119A(c)(2).

First, the commissioner must determine if the prisoner is "terminally ill" or "permanently incapacitated." *Buckman v. Commissioner of Corr.*, 484 Mass. 14, 19 (2020). "Terminally ill" means "a condition that appears incurable, as determined by a licensed physician, that will likely cause the death of the prisoner in not more than 18 months and that is so debilitating the prisoner does not pose a public safety risk." G.L. c. 127, § 119A(a). A "permanent incapacitation" is 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.* Second, the commissioner must decide whether the prisoner, if released, will "live and remain at liberty without violating the law." *Buckman*, 484 Mass. at 19, quoting G.L. c. 127, § 119A(e). Third, the prisoner's release must not be "incompatible with the welfare of society." *Id.*, quoting G.L. c. 127, § 119A(e). If the commissioner answers each of the three questions in the prisoner's favor, then release is mandatory, not discretionary. *Id.*

Medical parole “is available to all prisoners, including those convicted of murder in the first degree.” *Sharris v. Commonwealth*, 480 Mass. 586, 601 (2018). The statute thus places the commissioner in a challenging position between two competing goals: “an offer of unearned mercy when someone is at the end of their life and the just verdict and sentence imposed to punish criminal conduct.” *Lazarre v. Commissioner of Corr.*, No. 2184CV02333, slip op. at 4 (Mass. Super. Ct. Jan. 12, 2022) (Connolly, J.). The commissioner must perform a “swift” and “unflinching review of the petitioner’s medical condition as well as a careful weighing of any risk to public safety that may ensue from the release of the petitioner.” *Id.*, citing *Buckman*, 484 Mass. at 28. Ultimately, she must decide when a petitioner is “too ill, too debilitated, and too close to death to pose a risk to public safety.” *Id.*

BACKGROUND

A. Keown’s Index Offense

Keown is 48 years old and serving a life sentence without parole. He was convicted in 2008 for the pre-meditated murder of his wife. *Keown v. Commonwealth*, 478 Mass. 232, 234 (2017). Over several months in 2004, Keown progressively poisoned his wife with ethylene glycol – a transparent liquid used in a variety of solvents, including antifreeze. *Id.* at 234-237.

Keown and the victim were married for seven and one-half years when they moved to Massachusetts from Missouri in January 2004. *Id.* at 234. To facilitate the move, Keown falsely told his wife and his employer that he had been accepted into Harvard Business School. *Id.* In truth, Keown had used his skills as a Web designer to forge an acceptance letter and other documents and contracts purportedly from Harvard Business School. *Id.* at 234, 239. Thereafter, Keown embezzled funds from his employer while working remotely. *Id.* at 235. The employer discovered his misdeeds and promptly fired him in July 2004. *Id.*

The victim first showed signs of illness in May 2004. *Id.* at 234. By the end of July, she had suffered weeks of flu-like symptoms, diarrhea, nausea, and malaise. *Id.* Despite receiving treatment from several medical providers and visiting an urgent care facility, her condition continued to deteriorate. *Id.* On August 20, 2004, she was admitted to Newton-Wellesley Hospital after exhibiting abnormal kidney function and neurological impairment, including slurred speech, an inability to walk, and dizziness. *Id.* The doctors determined that her illness was likely attributable some unidentified form of poisoning. *Id.* When the doctors questioned the victim about whether she felt safe at home, she responded “Yes, absolutely.” *Id.* at 234-235. She was discharged on August 23, 2004. *Id.* at 235.

On the morning of September 4, 2004, Keown reported to the on-duty doctor that the victim appeared confused, had difficulty walking, and had garbled speech. *Id.* The doctor instructed Keown to bring the victim to the hospital immediately, but Keown did not do so until after 9 p.m., at which point she was unconscious. *Id.* The victim lapsed into a coma and died on September 8, 2004, after being removed from life support. *Id.* The medical examiner concluded that the cause of death was both acute and chronic ethylene glycol poisoning. *Id.* at 237.

At trial, the Commonwealth argued that Keown had poisoned his wife to conceal his fraud and collect the benefits of her life insurance policy. *Id.* at 244. Evidence showed the victim was not aware that Keown had been fired, had never attended Harvard Business School, or that they were on the edge of financial ruin. *Id.* at 236. Prior to the victim’s death, searches for “antifreeze death human” and “poison recipe” had been conducted on Keown’s laptop computer, and Keown had insisted repeatedly that the victim drink Gatorade which can mask the taste of ethylene glycol. *Id.* at 236-237. The victim’s symptoms further indicated that she had been given small doses of ethylene glycol over several months and then a lethal dose prior to her final hospital

admission. *Id.* at 237.

B. Keown's Medical Course and Petitions for Medical Parole

Keown was in a normal state of health until early 2020, when he reported weakness in his extremities and an unsteady gait. A.R. 177. He first petitioned for medical parole on May 18, 2020, which the Commissioner denied on July 24, 2020. By September 2020, Keown was using a walker to ambulate due to twitching, spasms, and persistent weakness in his extremities. A.R. 177. He also reported issues with dexterity, writing, and using utensils. *Id.* Neurologists at Lemuel Shattuck Hospital noted that Keown may be suffering from a motor neuron disease. A.R. 135-137, 177, 249. However, they were unable to provide a more definitive diagnosis because a brain MRI and electromyogram performed in September and October 2020, respectively, were benign and unremarkable. *Id.*

On January 29, 2021, Keown again petitioned for medical parole, asserting that he was suffering from a progressive neurological disorder, albeit without a definite diagnosis. On February 3, 2021, Wellpath Medical Director, Dr. Steven Descoteaux, provided his medical parole assessment and stated therein that Keown “is partially incapacitated by progressive weakness, but it is not likely that [he] will die from his known medical conditions in the next 18 months.” A.R. 169. At that time, Keown reportedly spent 21 hours per day in bed, could only sit upright for 20 minutes to an hour, and could not shave or hold a meal tray. A.R. 127. On February 16, 2021, Lemuel Shattuck Hospital neurologist, Dr. Taha Bali, noted that while “motor neuron disease is a major consideration,” the “etiology behind [Keown’s] presentation remains unclear.” A.R. 137. On April 9, 2021, Dr. Descoteaux submitted an addendum to his medical parole assessment in which he reported that: Keown had been transferred to the critical stabilization unit at MCI-Norfolk due to increased falls; Keown could ambulate with a walker but needed to stop and rest

frequently; and he exhibited weakness in his hands and was unable to write. A.R. 118. Dr. Descoteaux concluded,

Keown has a progressive neurological condition that is being worked up by neurology. . . . He is permanently incapacitated by a neurological condition that may not be mitigated or cured. It appears to be progressive. He is not expected to die from this or any other of his illnesses in the next 18 months.

Id.

The Commissioner denied Keown's second petition for medical parole the same day Dr. Descoteaux submitted his addendum, concluding that "Keown's ability to attend to his daily needs [eating, using the bathroom, showering, and dressing himself unassisted], maintain a job, and ambulate with a walker [did] not suggest any medical condition so debilitating that he does not pose a public safety risk." A.R. 117. She reasoned that Keown's physicians had "not yet [] clinically determined whether his medical condition can be mitigated or cured," and they all agreed further testing was necessary to obtain a definitive diagnosis. A.R. 117 (emphasis in original). She also noted that Superintendent Nelson Alves and Middlesex District Attorney Marian Ryan opposed Keown's release as incompatible with societal welfare based on his index offense and history of deceit. A.R. 114, 117.

On June 2, 2021, Keown was examined by Dr. Konstantin Balashov, a neurologist at Boston Medical Center. Dr. Balashov ruled out multiple sclerosis (MS) and concluded:

Neuromuscular disorder (e.g., ALS [amyotrophic lateral sclerosis] or PLS [primary lateral sclerosis]) is highly suspected. Paraneoplastic syndrome is possible, but less likely. . . . Would suggest to refer the patient to a specialized ALS clinic for further evaluation[.]

A.R. 11, 12. Keown then requested that the Commissioner reconsider her denial of medical parole. Meanwhile, on July 1, 2021, the Medical Director of MCI Norfolk, Dr. Chidi Achebe, issued a medical assessment in which he noted that Keown ambulates with a walker in a seated position,

has complete loss of bilateral hand dexterity with mild contractures of right hand and worse on the left, and is “unable to button shirt, or carry out [activities of daily livings].” A.R. 58-59.

On August 12, 2021, the Commissioner denied Keown’s request for reconsideration. The Commissioner incorporated her prior decision and further stated that Keown is not terminally ill or permanently incapacitated because his condition is “tentatively diagnosed” as ALS vs. PLS and “has not been deemed permanent or irreversible.” A.R. 3. She emphasized that Keown “could easily use his disability to manipulate potential victims [and] may be able to commit the same crime, or similar crimes, again.” A.R. 3. The Commissioner concluded,

I do not believe that [] Keown would remain at liberty without violating the law based on the deceptive and heinous nature of his crime, the fact that his murder required little physical ability, and that he still has mobility and use of his right hand. Rather, I am convinced he would pose a risk to public safety were he to be released at this time.

A.R. 4.

On October 1, 2021, Keown filed this action requesting certiorari review of the Commissioner’s denial of his request for reconsideration.¹

CERTIORARI REVIEW

A prisoner who has been denied medical parole may petition for relief under G.L. c. 249, § 4. See G.L. c. 127, §119A(g). Certiorari review is available to correct substantial errors of law apparent on the record and adversely affecting material rights. *Doucette v. Mass. Parole Bd.*, 86 Mass. App. Ct. 531, 540-541 (2014). The Court reviews parole decisions to ensure that they are not arbitrary and capricious or based on an error of law. *Id.* at 541. A decision is arbitrary and capricious where it “lacks any rational explanation that reasonable persons might support.”

¹ Keown previously filed an action in Norfolk Superior Court, No. 2182CV00479, on May 20, 2021, seeking certiorari review of the Commissioner’s April 9, 2021 decision. The Court consolidated that action with this matter on January 19, 2022.

Frawley v. Police Comm'r of Cambridge, 473 Mass. 716, 729 (2016). Stated differently, an action is arbitrary and capricious if it is taken “without consideration and in disregard of facts and circumstances.” *Hercules Chem. Co. v. Department of Env'tl. Protection*, 76 Mass. App. Ct. 639, 643 (2010). This Court may not substitute its own opinion for that of the Commissioner. *Frawley*, 473 Mass. at 729. Certiorari relief is warranted, however, where the petitioner shows substantial material errors that if allowed to stand will result in manifest injustice to the petitioner who is without another available remedy. *Tracht v. County Comm'rs of Worcester*, 318 Mass. 681, 686 (1945); *Lewis v. Comm. for Pub. Counsel Servs.*, 50 Mass. App. Ct. 319, 328 (2000).

DISCUSSION

As explained more fully below, this matter must be remanded for further decision as the Commissioner committed substantial errors in determining that Keown (1) was not “permanently incapacitated”; (2) will not live and remain at liberty without violating the law; and (3) that his release is incompatible with the welfare of society. G. L. c. 127, § 119A(e); *Buckman*, 484 Mass. at 19. In her ruling, the Commissioner erred to the extent she interpreted “permanent incapacitation” to require a conclusive diagnosis or total incapacitation.² Further, while the Commissioner properly considered Keown’s index offense and other factors in her determination, she failed set forth a sufficient nexus between those factors and Keown’s current ability to place others at risk despite his present limitations.

A. Permanent and Irreversible Incapacitation

² Keown contends that he is permanently incapacitated and entitled to medical parole because he has been diagnosed with ALS. This argument is without merit. Dr. Balashov performed the most recent examination in the record and opined that Keown was suffering from “ALS or PLS; with paraneoplastic syndrome also possible but less likely.” A.R. 12 (emphasis added). This constitutes a differential diagnosis, not a conclusive finding of ALS. See *In re Hicks's Case*, 62 Mass. App. Ct. 755, 761 (2005) (“[D]ifferential diagnosis . . . is a standard scientific technique of identifying the cause of a medical problem by eliminating the likely causes until the most probable one is isolated.”). Dr. Achebe’s report is also consistent with such a diagnosis. A.R. 57, 58. Thus, the Commissioner’s finding that Keown was only “tentatively diagnosed as ALS vs. PLS” was not arbitrary or capricious.

The statutory definition of “permanent incapacitation” requires that the condition (1) “appear[] irreversible” to a licensed physician; and (2) be “so debilitating that the prisoner does not pose a public safety risk.” G.L. c. 127, § 119A(a). The applicable regulations similarly define “debilitating condition” as:

A physical or cognitive condition that appears irreversible and which causes a prisoner significant and serious impairment of strength or ability to perform daily life functions such as eating, breathing, toileting, walking or bathing so as to minimize the prisoner's ability to commit a crime if released on medical parole, and requires the prisoner's placement in a facility or a home with access to specialized palliative or medical care.

501 Code Mass. Regs. § 17.02; accord 103 Dept. of Corr. § 603.

In her initial decision, the Commissioner reasoned that Keown's condition is not irreversible because it “*may or may not* be mitigated or cured.” A.R. 116 (emphasis added). Likewise, the Commissioner denied Keown's request for reconsideration because his “tentative diagnosis” meant his “incapacity has not been deemed permanent or irreversible.” A.R. 3. The uncontradicted evidence does not support this conclusion. Dr. Descoteaux stated that Keown “is *permanently incapacitated* by a neurological condition that *may not* be mitigated or cured [and] *appears to be progressive*.” A.R. 118 (emphasis added).³ Further, Drs. Descoteaux, Balashov, and Achebe did not indicate the availability of any treatment expected to cure or reverse Keown's condition, whether ultimately diagnosed as ALS, PLS or otherwise. As such, Keown's condition appeared irreversible to these physicians, satisfying the first prong of “permanent incapacitation.” G.L. c. 127, § 119A(a). The Commissioner erred to the extent she denied Keown's petition based on the mere absence of a definitive diagnosis or the physicians' failure to explicitly invoke the term “irreversible.” See *Adrey v. Department of Corr.*, No. 19-3786-H, 2020

³ “Progressive,” as related to a disease, is defined as “increasing in extent or severity.” See <https://www.merriam-webster.com/dictionary/progressive> (last accessed June 14, 2022).

Mass. Super. LEXIS 86, *14 (Mass. Super. Ct. June 19, 2020) (Krupp, J.) (finding error where “none of the medical professionals contradicted the notion that plaintiff’s current level of incapacitation was anything other than permanent and would get worse in the near term.”); *Mahdi v. Department of Corr.*, No. 1982CV01064, slip op. at 10 (Mass. Super. Ct. Mar. 31, 2020) (Connors, J.) (finding error where nothing medically indicated that petitioner’s conditions were remedial or anything other than permanent).⁴

B. Risk to Public Safety, Risk of Reoffense, and Societal Welfare

As noted, the second prong of “permanent incapacitation” requires the Commissioner to consider whether the prisoner “poses a risk to public safety.” G.L. c. 127, § 119A(a). The statute separately requires the Commissioner to determine whether the petitioner “will live and remain at liberty without violating the law and that the release will not be incompatible with the welfare of society.” *Buckman*, 484 Mass. at 19, quoting G.L. c. 127, § 119A(e). As the three elements of the analysis are “formally separate . . . but certainly conceptually intertwined,” they often rest on the same supporting evidence. *Mahdi*, No. 1982CV01064, at 11. The Supreme Judicial Court has observed,

Where the commissioner determines that the prisoner suffers from permanent incapacitation or terminal illness, the commissioner has already determined . . . that the prisoner does not pose a public safety risk. Because we recognize the possibility that a prisoner who does not pose a public safety risk may nonetheless violate the law, we do not equate [the elements] but instead note their close interrelationship.”

Buckman, 484 Mass. at 19 n.9 (internal quotations and citations omitted); see also *Carver v. Mici*, Nos. 2177CV00105 and 2177CV00272, 2021 Mass. Super. LEXIS 514, at *16 n.11 (Mass. Super. Ct. Dec. 30, 2021) (Karp, J.) (applying the same “analysis and reasoning” to the assessments of

⁴ On remand, the Commissioner may benefit from review of Keown’s updated medical records to resolve any uncertainties as to the diagnosis, prognosis, treatment, and expected course of his condition.

the risk to public safety and risk of reoffense).

Here, the Commissioner rested her determination of all three elements on the same grounds. Although she accepted that Keown is limited to the use of his right hand and ambulating with a walker, she concluded,

I do not believe that [] Keown would remain at liberty without violating the law based on the deceptive and heinous nature of his crime, the fact that his murder required little physical ability, and that he still has mobility and use of his right hand. Rather, I am convinced he would pose a risk to public safety were he to be released at this time.

A.R. 4. While the Commissioner did not err by emphasizing the horrific nature of Keown's offense, she failed to establish an adequate nexus between his past conduct and the present risk, given his current condition and the available parole restrictions. See *Mahdi*, No. 1982CV01064, at 11 (holding the record must show the interrelationship between a prisoner's criminal history and his risk of release based on present circumstances).⁵

The Commissioner's decision implied that Keown would need to approach total incapacitation to qualify for medical parole. The statute "does not require 'total incapacitation' or the absence of independent functioning." *Adrey*, 2020 Mass. Super. LEXIS 86 at *10; see also *id.* at *7 & n.9 ("[A] level of function [that] is very low: bed bound, unable to dress or feed themselves, and totally dependent on others" is "more akin to total incapacitation [than] the medical parole statute's definition of 'permanently incapacitated.'"). Thus, having accepted that Keown is limited to the use of his right hand and ambulating with a walker, the Commissioner was required to justify

⁵ Keown argues that by evaluating his risk based solely upon his index offense, the Commissioner "impermissibly create[d] a higher standard for release than someone convicted of a lesser crime." Pl.'s Mot. at 25. Keown's argument is incorrect as a matter of law and fact. It is proper for the Commissioner, "to consider the facts of the horrific crime for which [the petitioner] is imprisoned when determining [whether] he is [] still capable of committing a similar crime." *Carver*, 2021 Mass. Super. LEXIS 514, at *15. Moreover, the Commissioner did not rely upon the index offense alone. She properly considered that Keown murdered his wife to conceal his prior fraud and embezzlement of funds. See *Harmon*, 487 Mass. at 481 (holding the Commissioner may consider unadjudicated conduct).

her conclusions with record evidence that Keown still poses a present risk to others despite his limitations. She did not do so.

Keown's medical parole plan calls for release to the care of his mother and sister in Missouri. The Commissioner did not identify a specific risk Keown poses to his own family members or, if so, why an alternative placement is unacceptable. See 501 Code Mass. Regs. §§ 17.09(3), 17.11 (empowering the Commissioner and then the Parole Board to set terms and conditions of release and supervision). Although Keown committed the index offense against a family member, the record does not indicate a current motive or ability to commit a similar crime against his mother or sister, who are presumably aware of the acts underlying his conviction. Likewise, the Commissioner did not identify how, in a practical manner, Keown's release may endanger the victim's family or the public in general – particularly if subject to certain restrictions, such as being placed a sufficient geographic distance from the victim's family and prohibited from contact, being monitored electronically, and/or having restricted access to computers and the internet. See *Malloy v. Department of Corr.*, 487 Mass. 482, 486 (2021) (discussing available restrictions).⁶

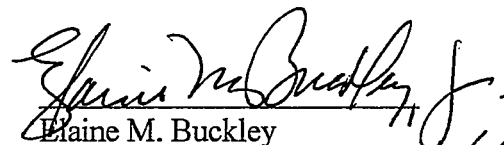
The Commissioner's "error [was] compounded by the lack of any current risk assessment as required by G.L. c. 127, § 119A(c)(1)(iii). The Commissioner's own regulations require the [S]uperintendent to use 'standardized assessment tools that measure clinical prognosis, such as LS/CMI assessment tools and/or COMPAS[.]'" *Lazarre*, No. 2184CV02333, at 9, quoting 501 Code Mass. Regs § 17.04(2)(d). According to the Defendants, Keown "did not receive a Risk or

⁶ The Court rejects Keown's argument that the Commissioner should have dismissed statements from the victim's family members outright because of bias. The statute expressly affords them the right to submit the statements and, based on Keown's first-degree murder conviction, the right to request a hearing. G.L. c. 119A(c)(2). The Commissioner is further required to consider such statements despite their inherent partiality. G.L. c. 119A(c),(e). Nevertheless, the issue the Commissioner must ultimately determine is "whether [the prisoner's] debilitated state is such that he does not pose risk to public safety and will not break the law." *Mahdi*, No. 1982CV01064, at 15.

Needs Assessment” due to his “sentence to life for first degree murder.” A.R. 154. The regulation does provide any such exception. See 501 Code Mass. Regs § 17.04. The Superintendent’s “risk assessment” amounted to a recitation of Keown’s index offense and did not account for the most recent medical evaluations in the record.⁷ The failure to conduct a proper risk assessment thus further justifies remand.

ORDER

This matter is **REMANDED** to the Commissioner to address the issues raised in this decision and to consider medical parole for Plaintiff, James Keown. The Superintendent of MCI-Norfolk is **ORDERED** to provide to the Commissioner, within 20 days of this Order, a Risk of Violence Assessment pursuant to 501 Code Mass. Regs. § 17.04. Within 30 days of this Order, the Commissioner shall also provide to defense counsel, an updated diagnosis of his conditions stating the current diagnosis(es) by a licensed physician and an updated medical parole plan, to the extent different from the prior submissions.⁸ Within 30 days of the receipt of the Commissioner’s updated medical records/ parole plan, the plaintiff may provide the Commissioner a revised medical parole plan or additional medical records for the Superintendent and/or the Commissioner to consider. The Commissioner shall issue a decision on Plaintiff’s medical parole in accordance with G.L. c. 127, § 119A and this court’s rulings within 30 days of the receipt of the records from the Superintendent and plaintiff.


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⁷ The District Attorney’s assessment does not mitigate this infirmity. She conceded that Keown “satisfies the threshold requirement of being permanently incapacitated . . . and that presumably he would like and remain at liberty without violating the law.” A.R. 68. Nonetheless, she concluded that Keown’s release was “incompatible with the welfare of society” based entirely on his index offense. A.R. 68-69. The District Attorney did not explain the seeming inconsistency between these interrelated elements and the statute does not bar prisoners from medical parole based on their index offense alone. *Buckman*, 484 Mass. at 19 n.9; *Sharris*, 480 Mass. at 601.

⁸ Copies to be sent to counsel for the defendant.

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