

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

SUPERIOR COURT
CIVIL ACTION
No. 2184CV02333

EPIPHANY LAZARRE

vs.

CAROL MICI, Commissioner of the Massachusetts Department of Correction

**DECISION AND ORDER ON CROSS MOTIONS FOR JUDGMENT
ON THE PLEADINGS**

SUMMARY OF DECISION

The Plaintiff brings this action in the nature of certiorari, pursuant to G.L. c. 249, §4 and G.L. c. 127, §119A(g), seeking relief from the Defendant's decision to deny his petition for medical parole.¹ Upon review of the record, the parties' briefs and after oral argument, the court for the reasons explained herein, **DENIES** the Commonwealth's Cross Motion for Judgment on the Pleadings and **ALLOWS** so much of the Plaintiff's Motion vacating the Defendant's denial of Plaintiff's petition for medical parole and granting his petition for medical parole. The court vacates the Defendant's decision because the court finds the decision represents an abuse of the Defendant's discretion; it was arbitrary and capricious because:

- (1) It relied on an unsupported medical opinion of an acting correctional superintendent instead of the two medical opinions of the Department of Correction's own doctors who were both in agreement that the Plaintiff has a terminal illness and his life

¹ The Defendant issued her denial of Plaintiff's request for medical parole on August 13, 2021 and thereafter suit was filed on October 13, 2021. Defendant filed an answer and the record appendix on November 1, 2021. The court has heard this matter on cross motions for judgment on the pleadings on an expedited basis. Counsel selected the hearing dates and argument was heard by the court on January 10, 2022 and was continued, briefly on January 11, 2022. This decision then followed.

expectancy, as of August of 2021, was less than 18 months and his incapacity is permanent,

- (2) It relied upon the acting superintendent's assessment as to the Plaintiff's risk in community if released now, an opinion that was untethered to facts or logic and was simply "*ipse dixit*," that is, because he said it was so; and
- (3) The Defendant has misconstrued the law.

DISCUSSION

The court acknowledges the Defendant's wide discretion in these matters and the considerable deference the court is instructed show her expertise in the exercise of her discretion, but even cloaked with such discretion and deference, this court cannot square her decision, on this record with the plain language and intent of the medical parole statute, G.L. c. 127, §119A. *Buckman v. Commissioner of Correction*, 484 Mass. 14, 24 (2020) (deference is not abdication and incorrect construction of a law is not entitled to deference). If there was ever a case that would seem to meet the medical parole criteria, this would seem to be it.

1. RELEVANT FACTS FROM THE RECORD

The Plaintiff is a 48 year old man who was convicted of aggravated rape and aggravated rape of a child. In November of 2014, he was sentenced to concurrent state prison sentences of 10 – 12 years.² He submitted this petition for medical parole on June 14, 2021, seven months after he was diagnosed with a high-grade glioblastoma in November of 2020.³ This form of brain cancer is aggressive and always terminal. Life expectancy after diagnosis is less than 18

² It was represented to the court that Plaintiff would first be eligible for parole in 2023, but his counsel cautioned that, based on Plaintiff's prognosis, he is unlikely to be alive for that date.

³ The medical reviews in the record note other underlining health conditions but those do not form the basis for this petition and are not addressed.

months, and as few as 15 months, as was suggested by one of the Department of Correction (DOC) doctors. A.R. 19, A.R. 22. Plaintiff was diagnosed approximately 14 months ago.

Plaintiff requires assistance ambulating. He uses a walker, wheelchair or gait chair. He requires assistance with his daily life activities except he can feed himself. He is catharized at night. He has had several rounds of chemotherapy and must have an MRIs every two months. He has had seizures; he had an operation in the spring of 2021 to reduce the size of the tumor to try to alleviate his seizures. He is, essentially, living in the infirmary at SBCC to ensure he gets the medical care he needs.⁴

2. STANDARD OF REVIEW

Certiorari review under G.L. c. 249, § 4 is available to correct substantial errors of law apparent on the record that adversely affects material rights. *Doucette v. Massachusetts Parole Bd.*, 86 Mass. App. Ct. 531, 540-541 (2014). The court reviews decisions to ensure that they are not arbitrary and capricious or based on an error of law. *Id.* at 541. “A decision is arbitrary or capricious such that it constitutes an abuse of discretion where it ‘lacks any rational explanation that reasonable persons might support.’” *Frawley v. Police Commissioner of Cambridge*, 473 Mass. 716, 729 (2016), *quoting Doe v. Superintendent of Schools of Stoughton*, 437 Mass. 1, 6 (2002). The court reviews the Commissioner’s decision solely to ensure that it is reasonable in light of the facts and circumstances shown in the record. Certiorari relief is warranted, however, where, as is true here, Plaintiff shows substantial material errors that if allowed to stand will result in manifest injustice to a petitioner who is without another available remedy. *Johnson Products, Inc. v. City Council of Medford*, 353 Mass. 540, 541 n.2 (1968). The court concludes that the Defendant’s decision is arbitrary and capricious because it is unsupported by the record

⁴ The record contains a report from a guard who monitored Plaintiff during an overnight shift in the HSU in June of 2021. A.R. 13. Mr. Lazarre was never observed moving out of the bed without assistance.

and rests upon a fundamental error of law that the index offense is, without more, cause to deny medical parole.

3. ANALYSIS

The slender record before the court reveals that there is no dispute as to Plaintiff's diagnosis, medical condition, or prognosis. Nor is there any disagreement that the crimes for which the Plaintiff was convicted are grave offenses: using his position as a family friend and calling himself a so-called pastor to control a child in his care, groom and rape her. The medical parole statute intersects 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. There is inherent tension in pursuing both goals. In enacting the statute, our Legislature placed the Commissioner of Correction as the traffic officer in the middle of that intersection. She must perform an 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. The Commissioner has been given this additional, and challenging, role which also demands a swift turnaround because it is highly time sensitive. *Buckman*, 484 Mass. at 28 (recognizing burden this places on Commissioner, but also acknowledging that she is in the best position to bear it). She must quickly gather all relevant information, get input from, *inter alia*, the district attorney and medical providers and a recommendation from the facility where the petitioner was housed. G.L. c. 127, §119A(c)-(d). A medical parole plan and risk assessment must also be developed. In essence, she is asked to decide when is a petitioner too ill, too debilitated, and too close to death to pose a risk to public safety. And, if released, where does he go?

Here, notwithstanding the Plaintiff's bleak and terminal medical prognosis, the Defendant's denial of Plaintiff's petition rests solely on Acting Superintendent Rioux's opinion

that Plaintiff poses a “high risk to reoffend if released at this time.” He reasoned that “[t]he severity and relative recentness of Mr. Lazarre’s index offense indicate that at this time Mr. Lazarre has the capacity to perform actions that would put others at risk.” A.R. 4. The Defendant adopts that opinion and concludes in her denial of the Plaintiff’s petition, in relevant part:

While the information provided indicates that Mr. Lazarre suffers from various medical conditions, and his median survival time is approximately fifteen months, there is no evidence that he is currently so debilitated that he does not pose a public safety risk. Though a June 18, 2021 evaluation by Dr. Straus indicates that Mr. Lazarre remains dependent upon staff to provide his care, with the exception that he is able to feed himself, and that he neither walks nor bathes himself, an August 10, 2021 evaluation by Dr. Petros indicates that Mr. Lazarre’s conditions are currently stable, and he can ambulate with assistance, often using a gait chair, walker or wheelchair. Considering his ability to ambulate with a gait chair, walker or wheelchair, and the severity, nature and recentness of the index offense, in my professional judgment, I do not believe that if released Mr. Lazarre would be able to live and remain at liberty without violating the law. I am convinced that such release at this time would be incompatible with public safety and the welfare of society. A.R. 4-5

As referenced in the Defendant’s denial, both DOC doctors concurred with the Plaintiff’s diagnosis and prognosis. Dr. John Straus provided the Defendant with a medical review where he found, *inter alia*, that Plaintiff has a glioblastoma, high grade glioma grade III, which was diagnosed on November 13, 2020 after a brain biopsy to determine the cause of Plaintiff’s seizures. Plaintiff has received chemotherapy, radiation, and a craniotomy to reduce his seizures. His medical treatment is all palliative, not curative. Defendant summarizes Dr. Straus’ conclusion in her denial quoting that “Mr. Lazarre is permanently disabled and ... his life expectancy is likely less than eighteen months.” A.R. 2.⁵ Similarly, Dr. James Petros the Medical Director at the Infirmary at Souza Baranowski Correctional Center (SBCC),⁶ provided

⁵ Dr. Straus’ medical parole assessment is at A.R. 19. In his summary he states: “48 year old male with High Grade Glioblastoma. Patient is permanently disabled and life expectancy is less than 18 months.” A.R. 19

⁶ The Plaintiff appeared to have been at the Old Colony Correctional Center (OCCC) when he filed his petition for medical parole. It was explained to the court at the hearing that Plaintiff was subsequently moved to SBCC because

the Defendant with an updated medical evaluation of the Plaintiff dated August 10, 2021, just days before she authored her denial. While Dr. Petros does state that “[p]resently, the patient is stable,” he also concluded his report stating:

Glioblastoma is almost always lethal. Median survival time is approximately 15 months.... The patient is symptomatic from his tumor. His risk for medical instability will increase over time. The patient’s health has the potential to deteriorate suddenly requiring emergency hospitalization. Expiration within the next 18 months is highly likely. In the meantime, the SBCC medical staff will continue to offer palliative services.
A.R. 22

And, Dr. Petros, gave a more complete medical history and course of treatment for Plaintiff’s brain tumor than merely stating that “[p]resently Plaintiff is stable.” Dr. Petros reported that Plaintiff was treated for seizures, he had “expressive aphasia,”⁷ and the MRI showed a slight increase in the “necrotic left temporal mass with infiltrating tumor.” In April of 2021, Plaintiff had a left craniotomy to reduce the tumor. A.R. 20-22.

The record leaves no doubt that Mr. Lazarre’s condition constitutes a terminal illness and permanent incapacitation. However, the Defendant contends that the legal definitions of those terms require not only a medical condition rendering someone terminally ill or permanently incapacitated but further that if released the petitioner would not pose a public safety risk.⁸ It is on that point, Defendant contends, why this petition must be denied. The Defendant’s denial is based upon Acting Superintendent Roiux’s opinion:

it had better medical resources to address his needs than did the OCCC. In other words, the only reason Plaintiff was at SBCC was to access medical care.

⁷ Expressive aphasia, according to MayoClinic.org website, is when a person knows what they want to say but cannot find the words to do so.

⁸ The statute defines these terms as follows:

“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.” “Terminal illness” is “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 that the prisoner does not pose a public safety risk.

G.L. c. 127, §119A

While his medical diagnosis yields a prognosis of less than 18 months to live, his conditions do not fully meet the definition of either a terminal illness or permitted incapacitation that is so debilitating that he does not pose a risk to public safety, as required by M.G.L. c. 127 §119A, 508 CMR 17, Medical Parole and 103 DOC 603 Medical Parole Considering the severity and nature of the underlying offense, I believe he still has the capacity to perform actions that would put others at risk. It is my opinion that if released at this time, Mr. Lazarre would be unable to remain at liberty without engaging in criminal activity. It is my assessment that Mr. Lazarre continues to present a significant risk to public safety. (emphasis added) A.R. 12.

The court scoured the record to find support, anywhere, for Acting Superintendent Rioux's conclusion that Plaintiff can still perform actions that would put others at risk.

Mr. Lazarre's only adult conviction is his index offense. This is his only state prison sentence. He has no other criminal history mentioned in the record. Those are the facts and do not, in any way, serve to minimize the seriousness of the offenses committed by Plaintiff. In December of 2014, two years after committing the index offense and just at the beginning of his incarceration, DOC performed a risk assessment which indicated that Plaintiff was at "a low risk of violent recidivism and a low risk of general recidivism." A.R. 52-A.R. 59. Since his incarceration, he has incurred approximately seven disciplinary reports, none of them that significant. One that sounded significant, a threat to kill a roommate, upon further investigation turned out to be an unfortunate choice of expression. In 2018, Plaintiff, in response to a mental health clinician who asked him what he would do if he had a roommate, responded, 'kill him.' DOC punished him for this indefinite, unspecified threat with a 60-day loss of telephone privileges.

There is no other risk assessment or criminal history in the record before the court. There is nothing that updates his risk of committing a sexual offense if released – especially considering his current physical condition. In fact, the only mention of his current physical condition in support of the Defendant's decision is that because Plaintiff can ambulate, with the

assistance of a gait chair or walker, he still poses a risk. A.R. 5. No other consideration is given as to how, or even whether, his illness and incapacity may, in fact, reduce his risk to public safety even further than the “low risk” he was assessed at in 2014. There are no facts, and even less logic, to support the Defendant’s conclusion that today, Plaintiff’s “release ... would be incompatible with public safety.” A.R. 5

What the record does show is a bleak medical picture of a petitioner who is gradually losing mobility, needs assistance with his activities of daily living, has experienced seizures and has had at least one episode of expressive aphasia. His life expectancy is not more than a few months, at the most.⁹ The court cannot find any support, anywhere in the record, for Acting Superintendent Rioux’s conclusion that: “[c]onsidering the severity and nature of the underlying offense, I believe he still has the capacity to perform actions that would put others at risk ... It is my assessment that Mr. Lazarre continues to present a significant risk to public safety.” (emphasis added). This opinion is in jarring juxtaposition to everything else he wrote in his evaluation before reaching his penultimate paragraph. Yet, the Defendant’s denial rests on this opinion even though the record compels a contrary conclusion.¹⁰ The court finds that it is arbitrary and capricious for the Defendant to rest her decision on this unsupported opinion that

⁹ The hearing in this matter carried over to a second day to permit the parties to provide the court with additional information. In the Defendant’s August 13, 2021 denial, she expressed a willingness to reconsider her denial after Plaintiff completed his scheduled September 2021 round of chemotherapy and upon review of a September 2021 MRI. The record before the court did not have any references to such a further consideration. On January 11, 2022, Defendant’s counsel presented the court with the November 3, 2021 updated Medical Parole Assessment authored by Dr. Petros, Medical Director at SBCC. This document is not in the administrative record as it was apparently created after the administrative record was assembled and filed in this action. **The court now, sua sponte, expands the record appendix to include this document (11/3/2021 Wellpath Medical Parole Assessment signed by Dr. James Petros).** Defendant’s counsel reported to the court that the Defendant had seen this document, considered it and reaffirmed her decision. The 11/3/21 updated medical assessment is consistent with a progressive, debilitating decline of the Plaintiff. In his summary, Dr Petros added: “In the final stages of glioblastoma, seizures occur in 50% of patients, 1/3 in the week before dying. Also, progressive neurological deficits, incontinence, progressive cognitive deficits and headaches are seen.”). Pg. 3 of 11/3/21 Medical Parole Assessment.

¹⁰ The District Attorney did not object to release, saying that the medical records indicated it was appropriate and that the Commissioner should consider all the factors. A.R. 4

runs counter to all the objective, verifiable evidence that is contained in the record, including the two medical evaluations and the DOC's own risk assessment from 2014.

Moreover, the index offense alone, without more, cannot be the basis for finding someone a public safety risk such that they are ineligible for medical parole. To do so would eviscerate medical parole because every petitioner has been convicted and sentenced to a prison term. The legislature has deliberately carved out this harbor of compassionate release and has made all prisoners, even those serving life sentences, eligible. G.L. c. 127, §119A(b) (“[n]otwithstanding any general or special law to the contrary, a prisoner may be eligible for medical parole due to a terminal illness or permanent incapacitation.”). The Defendant committed an error of law in relying solely on the index offense to determine what risk, if any, is posed to the public should Plaintiff be released. *Harmon v. Commissioner of Correction*, 487 Mass 470, 480 (2021) (statute creates opportunity for all persons serving an incarcerated sentence to seek medical parole). That error is compounded by the lack of any current risk assessment as required by G.L. c. 127, § 119A(c)(1)(iii).¹¹ In performing the risk assessment, the Commissioner's own regulations require a superintendent to use “standardized assessment tools that measure clinical prognosis, such as LS/CMI assessment tools and/or COMPAS, as well as risk level for classification evaluation purposes,” 501 CMR § 17.03(7)(d), and numerous other factors.¹² That was not done for Mr. Lazarre.

¹¹ The Defendant may take exception to the court's insertion of “current” when citing to this provision. However, while true the statute is silent, it would render the provision incongruent with the statute's intent if the Defendant could rely upon stale, or out of date risk assessments. This is a dynamic factor that has to be updated and considered at the time the request for medical parole. See Fn 12 below.

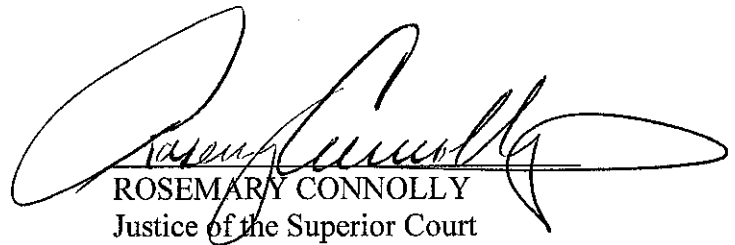
¹² According to the regulations, “[t]he superintendent's risk for violence assessment required by 501 CMR 17.03(7)(d) shall take into consideration: (a) the prisoner's terminal illness/permanent incapacitation and prognosis; (b) the prisoner's current housing situation (e.g., placement in general population, institutional infirmary, Lemuel Shattuck Hospital, or outside hospital); (c) clinical management of the prisoner's terminal illness/permanent incapacitation; (d) assessment for mobility, gait and balance, specifically, whether the prisoner is bed-ridden, wheelchair-bound, uses a walker, or can walk with assistance; (e) the medically prescribed and required durable medical equipment or other assistive devices for the prisoner including, but not limited to, wheelchairs (manual or

ORDER

The Defendant's cross motion for judgment on the pleadings is **DENIED**. The Plaintiff's motion for judgment on the pleadings is **ALLOWED in so far as it requested that the Defendant's Decision be vacated and his petition for medical parole allowed**. Defendant's August 13, 2021 decision denying the Plaintiff's petition for medical parole is hereby **VACATED**.

Because time is of the essence, the court **ORDERS** that this matter be remanded to the Commissioner for purposes of **immediately preparing a medical parole release and medical care plan for the Plaintiff and to prepare for his immediate release, without further delay.**

The court will retain jurisdiction and conduct a virtual (via ZOOM) status review of the matter on Friday, January 21, 2022 at 12pm.



ROSEMARY CONNOLLY
Justice of the Superior Court

DATE: JANUARY 12, 2022

electric), hospital beds, traction equipment, canes, crutches, walkers, kidney machines, ventilators, oxygen, monitors, pressure mattresses, and/or lifts; (f) the prisoner's ability to manage Activities of Daily Living (ADL); (g) psychological assessment; (h) advanced directive/DNR; and (j) the prisoner's height, weight, ability to eat or if the prisoner is fed intravenously." 501 C.M.R. § 17.05.

21-2333

Wellpath Medical Parole Assessment

Name: Epiphany Lazarre

DOB: 5/27/73

Site: Souza-Baranowski Correctional Center

Date: November 3 2021

ID #: W105510

Patient Info/History:

This patient is a 48 year old man with a past medical history of a left posterior temporal high grade glioblastoma (HGG). This cerebral tumor was confirmed by needle biopsy in 11/20. Past medical history is also positive for depression, schizophrenia, and personality disorder. The patient was treated with chemotherapy and radiotherapy. Following treatment, the patient presented to Morton Hospital from Old Colony Correctional Center (OCCC) after suffering a "breakthrough seizure". The seizure was a 4 minute subclinical seizure. Post-seizure, the patient experienced whole-body tremors at rest, along with confusion (? post-ictal state). CT scan of the head showed a stable tumor burden with questionable increased vasogenic edema compared to an MRI on 3/18/21. The patient was given dexamethasone and transferred to Brigham and Women's Hospital (BWH). At the time of admission, the patient had expressive aphasia. EEG demonstrated moderate bilateral cerebral dysfunction and encephalopathy. MRI demonstrated a slight increase in the size of a necrotic left temporal mass with infiltrating tumor vs. edema. The Neurosurgery and Neuro-Oncology Services recommended tumor resection.

On 4/14/21, the patient underwent a left craniotomy. The patient was eventually transferred to Lemuel Shattuck Hospital (LSH) on 4/21/21 for continued care. The patient was scheduled for palliative oral chemotherapy at LSH. Each cycle was to be 28 days in length consisting of temozolamide (Temolar; TMZ). The patient received his first cycle of TMZ starting on 6/2/21 for 5 days at a dosage of 300mg daily. In addition, the patient received Zofran and Dexamethazone. Future doses of TMZ would be calculated based on absolute neutrophil and platelet count. The patient did not experience any nausea. He

2.

remained independent with eating; continent of urine and bowel, but needed assistance with bathing. He was unable to walk due to leg weakness.

On 6/11/21, the patient was transferred to Souza Baranowski Correctional Center (SBCC) for continued care. From 6/30/21 – 7/5/21, the patient underwent his second cycle of chemotherapy. The patient continued to tolerate the chemotherapy well. On 7/22/21, the patient underwent a follow-up MRI of the brain which showed the tumor to be stable. On the same day, the patient was seen at the Dana Farber Cancer Center. The patient was felt to be stable and a repeat clinic visit as well as repeat MRI of the brain were scheduled for 9/23/21. At SBCC, from 7/27/21 – 8/1/21, the patient received his third cycle of chemotherapy which was tolerated well. The patient's fourth cycle of chemotherapy was administered from 8/24/21 - 8/29/21. This was followed by a fifth chemotherapy cycle beginning on 9/25/21. The patient's final cycle of chemotherapy was started on 10/27/21 and completed on 10/31/21.

Throughout his clinical course at SBCC, the patient has received Keppra as seizure prophylaxis. The patient has required assistance when ambulating. He often uses a gait chair, walker, and wheelchair. A Foley catheter was inserted in order to prevent urinary retention and soilage of the patient's bed due to decreased ability to ambulate and perform activities of daily living (ADL's).

Medical Restrictions:

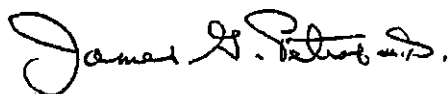
Monthly chemotherapy
Weekly laboratory tests
Foley catheter to bedside drainage
Daily weights
No stairs
No heavy lifting
Wheelchair/walker for ambulation
Assistance with ADL's

Summary:

This patient is a 48 year old man who was diagnosed with a glioblastoma of the left posterior temporal lobe in 11/20. This was treated with chemotherapy and radiotherapy. Following treatment, the patient was treated for a "breakthrough seizure" and remained on Keppra prophylaxis. CT scan of the head showed a stable tumor burden. The patient was transferred to Brigham and Women's Hospital (BWH), where he was admitted with expressive aphasia. EEG demonstrated moderate bilateral cerebral dysfunction and encephalopathy. MRI demonstrated a slight increase in the size of a necrotic left temporal mass with infiltrating tumor vs. edema.

On 4/14/21, the patient underwent a left craniotomy. The patient was eventually transferred to Lemuel Shattuck Hospital (LSH) for continued care. There, he completed his first cycle of chemotherapy. This was followed by additional cycles of chemotherapy at SBCC until his final cycle on 10/27/21. The chemotherapy is regarded as palliative, rather than curative. For the foreseeable future, the patient will undergo MRI of the brain every 2 months along with appointments at the Dana Farber Cancer Center. Presently, the patient is stable.

The prognosis of glioblastoma remains poor. Median survival time is approximately 8-15 months. Five year survival is < 10%. In the final stages of glioblastoma, seizures occur in 50% of patients, 1/3 in the week before dying. Also, progressive neurologic deficits, incontinence, progressive cognitive deficits, and headache are seen. This patient is symptomatic from his tumor. His risk for medical instability will increase over time. The patient's health has the potential to deteriorate suddenly requiring emergency hospitalization. Expiration within the next 18 months is highly likely. In the meantime, the SBCC medical staff will continue to offer palliative services.



James G. Petros MD

Medical Director

Souza Baranowski Correctional Center Infirmary