

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

SUPERIOR COURT  
CIVIL ACTION  
No. 2184CV01688

CARLOS RODRIGUEZ

vs.

CAROL MICI, COMMISSIONER OF CORRECTION

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

The plaintiff inmate, Carlos Rodriguez ("Rodriguez"), commenced this certiorari appeal seeking judicial review of the defendant Commissioner of Correction, Carol Mici's ("Commissioner"), denial of his application for medical parole pursuant to G. L. c. 127, § 119A, the Medical Parole Statute. Rodriguez's complaint also asserts that the Commissioner's denial violated his constitutional rights. The case is before the court on the parties' cross motions for judgment on the pleadings. A hearing was held on August 29, 2022. For the following reasons, Rodriguez's motion is **DENIED**, and the Commissioner's decision is **AFFIRMED**.

**BACKGROUND**

The administrative record sets forth the following facts, with further facts reserved for later discussion. On April 5, 2018, following a jury trial in Middlesex County, Rodriguez was convicted of two counts of indecent assault and battery of a child. He was sentenced to four to six years of prison, to be followed by five years of probation.<sup>1</sup> The assaults occurred between 1998 and 2002; the victim was Rodriguez's granddaughter, who was three years old when the

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<sup>1</sup> The Appeals Court affirmed Rodriguez's convictions. Commonwealth v. Rodriguez, 99 Mass. App. Ct. 1101, 2020 WL 7090802 (2020) (Unpublished Opinion).

assaults began. Rodriguez is currently serving his sentence at Old Colony Correctional Center ("OCC").

On March 26, 2021, Rodriguez filed an application for medical parole based on diagnoses of Parkinson's disease and hydrocephalus, which have caused him to experience frequent dizziness, falls, and a disturbed gait, as well as other chronic conditions. The application states that although Rodriguez "is able to ambulate within the confines of his unit" he requires the use of a wheelchair in his daily life. At the time of his application, Rodriguez was sixty-seven years old. Appended to the application were medical records compiled by Rodriguez's attorney and an evaluation by a licensed social worker. The social worker recommended that Rodriguez be released to a skilled nursing facility with continual medical oversight.

Following his application, the Department of Corrections ("DOC") medical vendor, Wellpath, performed a Medical Parole Assessment. Its April 20, 2021, report states that Rodriguez has the following chronic conditions: asthma, diabetes, hydrocephalus with placement of ventriculoperitoneal shunt in 2017, hyperlipidemia, hypertension, and Parkinson's disease. It notes that his asthma, diabetes, hyperlipidemia, and hypertension are medically managed, while brain imaging performed in 2021 indicated a stable position of his shunt system, with persistent moderate dilation of his lateral and third ventricles. The neurology specialist opined that his Parkinson's disease was contributing to his gait disturbance, but did not recommend medication at that time. As concerns Rodriguez's mobility, the report states that his "status is limited due to gait disturbance secondary to hydrocephalus and Parkinson's disease thus uses wheelchair as needed, however is able to complete activities of daily living independently." The Medical Parole Assessment concludes by noting that "Mr. Rodriguez is permanently incapacitated

secondary to a progressive neurodegenerative illness, however at this time is considered medically stable without concrete evidence that he has less than 18 months to live.”

By letter dated May 6, 2021, the Superintendent of OCC, Stephen Kennedy (“Kennedy”), recommended that the Commissioner deny Rodriguez’s application. Documented in Kennedy’s letter is a risk assessment based on Rodriguez’s criminal and institutional history.<sup>2</sup> In addition to the underlying details of his convictions, Kennedy notes that Rodriguez pleaded guilty to three disciplinary reports in 2019 and 2020, two of which involved physical altercations with other inmates, that he has a lifetime open restraining order, and that he has refused to participate in sex offender treatment. Under the category of medical diagnosis/prognosis, Kennedy notes the contents of the Medical Parole Assessment, and states that despite these limitations Rodriguez “is able to complete activities of daily living independently,” and that “he has access to his wheelchair and a pusher for long distances.” Under mental health, Kennedy states that Rodriguez is diagnosed with depressive episodes and psychotic disorder with hallucinations.

Kennedy concludes that “although [Rodriguez] is suffering from several health conditions, he is not permanently incapacitated within the meaning of the medical parole statute as his conditions are not ‘so debilitating that the prisoner does not pose a public safety risk’ as required under G. L. c. 127, § 119A.” In support thereof, Kennedy cites the fact that Rodriguez remains housed in OCC’s general population where he able to complete his activities of daily living independently, his recent history of disciplinary reports, and the nature of his convictions coupled with his refusal to participate in treatment.

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<sup>2</sup> Prior to the Commissioner making her decision, under the Medical Parole Statute, the superintendent of the facility where the prisoner is housed is to send to the Commission a recommendation and “an assessment of the risk for violence that the prisoner poses to society.” G. L. c. 127, § 119A(c)(1).

By decision dated May 27, 2021 (“Decision”), the Commissioner denied Rodriguez’s application for medical parole. The Decision summarizes the materials considered, including the application and attachments, Wellpath’s Medical Parole Assessment, and Kennedy’s letter and recommendation. The Decision also refers to a written opposition submitted by the Middlesex County District Attorney’s office. Taking all these materials into account, and reciting the same facts and reasoning presented in Kennedy’s assessment, the Commissioner concluded that Rodriguez’s “incapacitation is not so debilitating that he no longer poses a public safety risk.” On July 26, 2021, Rodriguez commenced this action.

### **STANDARD OF REVIEW**

The Medical Parole Statute provides that a prisoner aggrieved by a denial of his application may petition for relief in the nature of certiorari pursuant to G. L. c. 249, § 4. See G. L. c. 127, § 119A(g). “On certiorari review, the Superior Court’s role is to examine the record . . . and to correct substantial errors of law apparent on the record adversely affecting material rights.” Doucette v. Massachusetts Parole Bd., 86 Mass. App. Ct. 531, 540-541 (2014) (citations omitted). “In reviewing the decisions of administrative bodies which, like the parole board, are accorded considerable deference, . . . the arbitrary and capricious standard of review applies.” Id. at 541 (citations omitted). “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 Comm’r of Cambridge, 473 Mass. 716, 729 (2016) (citation omitted).

### **DISCUSSION**

Rodriguez argues that certiorari relief is warranted because the Commissioner applied an incorrect standard under the Medical Parole Statute and its companion regulation, 501 Code

Mass. Regs. § 17.02, and made a faulty assessment of public risk. He also cites the omission of a proper medical parole plan. These errors, he argues, render the Decision arbitrary and capricious. Rodriguez further argues that the denial constitutes cruel and unusual punishment in violation of the Eighth Amendment. The court addresses these issues in turn, after first resolving an issue with the record on appeal.

### **1. Record on Appeal**

Twice after filing the complaint, Rodriguez sought to expand the record in this case to include an additional medical record dated April 14, 2021, and certain journal articles. Because certiorari review is limited to determining the legality of the Commissioner's Decision, the court may not review materials that were not before the Commissioner at the time she rendered her Decision. For that reason, the court declines to review the additional materials, as they fall outside of the administrative record. See Abercrombie v. Commissioner of Corr., 101 Mass. App. Ct. 1116, 2022 WL 3640325 at \*2 (2022), citing Board of Selectmen v. Civil Serv. Comm'n, 37 Mass. App. Ct. 587, 588 n.4 (1994). As discussed *infra*, Rodriguez also does not present cognizable constitutional claims that would allow expansion of the record. See *id.*<sup>3</sup>

### **2. Review of Commissioner's Decision**

Under the Medical Parole Statute:

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.

G.L. c. 127, § 119A(e). A permanent incapacitation is defined as "a physical or cognitive incapacitation that appears irreversible, as determined by a licensed physician, *and* that is so

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<sup>3</sup> The court further notes that the additional medical record was available to Wellpath at the time that it made its April 20, 2021, report, and concerned Rodriguez's hypertension as opposed to his mobility-related conditions. Accordingly, even if the court were to take it into account, the result undoubtedly would be the same.

debilitating that the prisoner does not pose a public safety risk.” G. L. c. 127, § 119A(a) (emphasis added). See Buckman v. Commissioner of Corr., 484 Mass. 14, 19 n.9 (2020) (“Where the commissioner determines that the prisoner suffers from ‘permanent incapacitation’ . . . the commissioner has already determined . . . that ‘the prisoner does not pose a public safety risk’”).

The regulations associated with the Medical Parole Statute further clarify that a “debilitating condition” is:

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.

Here, as noted *supra*, the Commissioner determined that, although Rodriguez suffers from several health conditions, he is not permanently incapacitated within the meaning of the Medical Parole Statute because his conditions are not “so debilitating that the prisoner does not pose a public safety risk” as required under G. L. c. 127, § 119A. In support of this conclusion, the Commissioner relied on reports that Rodriguez lives in the prison’s general population, remains able to independently perform the activities of daily living, albeit with limited mobility, his recent disciplinary reports, and the nature of his crime coupled with his refusal of treatment. While perhaps not inevitable, the Commissioner’s reasoning is rational. The record supports her determination Rodriguez’s physical ailments are not severe enough to prevent him from being able to recidivate or otherwise pose a public safety risk, particularly given that his convictions involved non-physically demanding crimes committed against young, vulnerable victims. In the absence of statutory physical incapacitation or terminal illness, denial of medical parole was

appropriate. Under these circumstances, and giving her the “considerable deference” required, the Decision is not arbitrary or capricious. Greenman v. Massachusetts Parole Bd., 405 Mass. 384, 387 (1989). See Small v. Mici, Civil No. 2084CV02088 (Mass. Sup. Ct. July 9, 2021) (Deakin, J.) (affirming denial of medical parole on similar facts).<sup>4</sup>

Rodriguez’s arguments on appeal do not change the result. Although Rodriguez is correct that under the statute and the associated regulation “permanent incapacitation” does not mean total incapacitation, or the complete elimination of a prisoner’s ability to commit a crime, see G. L. c. 127, § 119A(a); 501 Code Mass. Regs. § 17.02, his interpretation essentially equates to any limitation in mobility as constituting “permanent incapacitation,” without regard for the prisoner’s ability to nevertheless pose a public risk. The interpretation is illogical. The plain language of the statute and the regulation require the Commissioner to analyze the prisoner’s impairments in relation to the crimes committed to determine debilitation and potential risk, as she did here. No single impairment or condition is determinative under the statute or the regulation. See id. The Commissioner’s interpretation thus was not erroneous.

The other arguments likewise fail. The Commissioner properly took into account the nature of Rodriguez’s crime and his status as a sex offender in conducting her statutory analysis; in doing so, she did not categorically decide that such individuals do not deserve medical parole. Similarly, neither the statute nor the regulations require the Commissioner to place a certain weight on the DOC risk assessment tool (COMPAS Risk Need Assessment), which classified Rodriguez as a low risk for violence and recidivism, in making her decision.<sup>5</sup> Rodriguez’s

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<sup>4</sup> At the hearing, Rodriguez’s counsel additionally argued that the Decision was not supported by substantial evidence. Where the Commissioner’s cited to and relied heavily on the record, however, as already discussed, this argument likewise fails.

<sup>5</sup> The DOC risk assessment is a separate assessment from the superintendent’s assessment under the Medical Parole Statute.

argument that his disciplinary reports may be connected to his neurological conditions is based on conjecture, and unsupported by the record.

Finally, as concerns the medical parole plan, Rodriguez's social worker prepared a proposed medical parole plan, which provided that a certain group of skilled nursing facilities were considering accepting level 1 and 2 sex offenders. Kennedy's staff contacted a representative of the facilities, who indicated that they generally do not accept sex offenders. Kennedy's letter further addressed the issue of a medical parole plan, stating that the following plan likely would address his needs:

If granted [medical] parole Mr. Rodriguez would need access to a primary care physician and neurologist. He would need MassHealth coverage for his medical costs, or to set up private health insurance if he does not qualify for MassHealth. Mr. Rodriguez would need reliable transportation to and from any medical appointments and reside in a home that was handicap accessible with a ramp and first floor housing. Any housing would need to be approved by the Parole Board and Mr. Rodriguez would need to register as a sex offender. . . . Reentry staff will provide assistance in procuring medical insurance for Mr. Rodriguez and will work with [Rodriguez's attorney] to identify appropriate housing should he be granted medical parole.

Under G. L. c. 127, § 119A(a) and (c), as superintendent, Kennedy bore the burden of proposing a medical parole plan, which was to include "the proposed site for treatment and post-treatment care." See *id.*; Buckman, 484 Mass. at 29. Rodriguez argues that Kennedy's medical parole plan falls short of the statutory requirements because it fails to identify available housing options for him. Although he is likely correct, the deficiency is not fatal to the Decision. Given Rodriguez's status as a sex offender, and the consequent unavailability of the social worker's proposed housing plan, in conjunction with the twenty-one-day turnaround required, G. L. c. 127, § 119A(c), Kennedy's proposed plan was reasonable under the circumstances. More importantly, where the application ultimately was denied based on other factors, any deficiency related to the medical parole plan did not adversely affect Rodriguez's material rights. Firearms

Records Bur. v. Simkin, 466 Mass. 168, 180 (2013); Small, Civil No. 2084CV02088 at 8-9.

Thus, on this basis certiorari relief is unwarranted.

### **3. Eighth Amendment Claim**

The standard to prove an Eighth Amendment violation based on inadequate medical care is demanding. A plaintiff must satisfy a two-part test: that 1) the defendant's failure to provide care presented him with a "substantial risk of serious harm," Farmer v. Brennan, 511 U.S. 825, 834 (1994); and (2) the defendant acted with "deliberate indifference" to his health or safety. Estelle v. Gamble, 429 U.S. 97, 106 (1976). To establish a substantial risk of harm, "the deprivation alleged must be, objectively, sufficiently serious; a prison official's act or omission must result in the denial of the minimal civilized measure of life's necessities." Farmer, 511 U.S. at 834 (citations and internal quotations omitted). To show deliberate indifference, the deficiencies in medical treatment must be so serious as to constitute "an unnecessary and wanton infliction of pain" that is "repugnant to the conscience of mankind." Estelle, 429 U.S. at 105-106. See Clark v. Birk, 55 Mass. App. Ct. 1113, 2002 WL 1940377 at \*1 (2002) (Unpublished Opinion).

The allegations in the complaint, facts contained in the administrative record, and argument in support of Rodriguez's motion do not come close to satisfying this standard. The medical records evidence that Rodriguez is receiving ongoing care, accommodations, and treatment for his various chronic conditions. That his medical appointments and follow-ups are not occurring on his preferred or optimal timeline is not the constitutional standard. Neither does Rodriguez provide authority for his argument that the Eighth Amendment requires that the

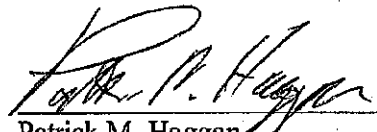
Commissioner grant him medical parole based on the level of care he is receiving in prison. No constitutional violation has occurred.<sup>6</sup>

**4. Conclusion**

For all of these reasons, Rodriguez's motion for judgment on the pleadings is **DENIED**, and the Commissioner's Decision is **AFFIRMED**.

**ORDER**

For all of these reasons, Rodriguez's motion for judgment on the pleadings is **DENIED**, and the Commissioner's Decision is **AFFIRMED**.

  
Patrick M. Haggan  
Justice of the Superior Court

Dated: December 9, 2022

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<sup>6</sup> The court need not address the other constitutional claims asserted in Rodriguez's complaint, as they were not raised or argued in his motion.