

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

SUPERIOR COURT
CIVIL ACTION
NO. 2084CV2055

JOHN STOTE

vs.

DEPARTMENT OF CORRECTION AND CAROL MICI

**MEMORANDUM OF DECISION AND ORDER ON PLAINTIFF'S
EMERGENCY MOTION AND MOTION FOR LIMITED, EXPEDITED DISCOVERY,
AND CROSS-MOTIONS FOR JUDGMENT ON THE PLEADINGS**

This is an action pursuant to certiorari under G.L. c. 249, § 4, in which the plaintiff, John Stote, an inmate held at MCI Norfolk, contends that he is being wrongfully denied medical parole by the defendants, the Department of Correction and its Commissioner, Carol Mici, pursuant to G.L. c. 127, § 119A. Presently before the Court are Stote's motion for judgment on the pleadings (Docket No. 6) and the Defendants' cross-motion for judgment on the pleadings (Docket No. 14). In addition, Stote moved for emergency relief (Docket No. 26) and for limited, expedited discovery (Docket No. 23), which are also before the Court.

Stote's motion for limited, expedited discovery is **DENIED**, as it is inconsistent with the nature of certiorari review; instead, the Court remanded this matter to the Commissioner for further development of the record, in part to allow Stote to adduce evidence on the COVID-19 issues Stote sought to address.

In light of the filings and arguments of the parties, and for the reasons that follow, Stote's motions for emergency relief and for judgment on the pleadings are **DENIED**, and the Defendants' motion for judgment on the pleadings is **ALLOWED**.

LEGAL BACKGROUND

This case focuses on whether Stote suffers from a “permanent incapacitation” under the medical parole statute “that is so debilitating that the prisoner does not pose a public safety risk” and is “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.” G.L. c. 127, § 119A (a) and (e).

As is relevant here, G.L. c. 127, § 119A (a) requires the Commissioner to grant medical parole when, among other things, an inmate is suffering from a “permanent incapacitation,” 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.” The Department’s regulations define “debilitating condition” as “[a] physical or cognitive condition that appears irreversible, resulting from illness, trauma, and/or age, 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 medical care.” 501 C.M.R. §17.02. As the Court has noted previously in this litigation, this language requires the Commissioner to make a specific determination – whether an inmate suffers from a physical incapacitation that renders the inmate so debilitated that the inmate is unable currently to pose a public safety risk. The facts concerning the inmate’s underlying offense are not relevant unless they bear on this issue.

Under subsection (e), the Commissioner must make a further, and related, finding: “[i]f the commissioner determines that a prisoner is ... 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,” then “the prisoner shall be released on medical parole.” G.L. c. 127, § 119A (e). This language again ties the risk to the public of the prisoner’s release to the inmate’s incapacity, as it instructs the Commissioner to “determine[]” whether the prisoner is permanently incapacitated “such that” 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.” *Id.* Again, the facts concerning the inmate’s underlying offense are not relevant unless they bear on this issue.

If the Commissioner finds that a prisoner is permanently incapacitated and satisfies the requirements of § 119A (e), release is mandatory under the statute.

PROCEDURAL BACKGROUND

By letter dated June 4, 2020, the Commissioner denied Stote’s request for medical parole. At the hearing on the parties’ cross-motions for judgment on the pleadings arising from this denial, Stote argued that new medical information relevant to his motion had developed after June 4, 2020, and he sought to supplement his filings before this Court to include it.

The Court found that doing so would frustrate the statutory scheme, under which the Commissioner is required to decide whether the plaintiff’s condition constitutes permanent incapacitation under § 119A (a) and, if so, whether, in light of that condition, the plaintiff’s release poses societal risks under § 119A (e), decisions which are tied to plaintiff’s physical condition. Accordingly, by an order dated October 28, 2020, the Court denied without prejudice the parties’ cross-motions for judgment on the pleadings, remanded the case to the Commissioner to permit her to consider the new evidence on an expedited schedule, and ordered that she supplement her determination no later than December 2, 2020. The Court also ordered expedited briefing and argument to follow.

On November 9, 2020, the plaintiff filed an “emergency motion” which sought “an Order requiring the Commissioner to grant his medical parole forthwith – an on interim basis – pending resolution of litigation.” The basis for the motion was an outbreak of COVID-19 at MCI Norfolk, where Stote is incarcerated, which Stote described as an “extraordinary event and life threatening to Mr. Stote” and which, “[u]nder the circumstances, [justifies] the Court’s use of its inherent power to temporarily stay Mr. Stote’s sentence,” citing Commonwealth v. Charles, 466 Mass. 63 (2013). The defendants opposed. On November 20, 2020, this Court denied Stote’s emergency motion without prejudice.

On November 12, 2020, Stote moved to amend the complaint to add a claim that the Commissioner’s denial of medical parole violated Article 26 and to request an order for the Commissioner to reconsider her denial of medical parole in light of the COVID-19 issues at MCI Norfolk. While the motion to amend was allowed, Stote has yet to file an amended complaint reflecting these changes.¹

By letter dated November 30, 2020, the Commissioner again denied Stote’s request for medical parole.

FINDINGS OF FACT

A. Stote’s Conviction

Stote was convicted in 1995 for first degree murder and is serving a life sentence. Commonwealth v. Stote, 433 Mass. 19 (2000). The facts presented at Stote’s trial showed that Stote stabbed the victim (which Stote claimed was in self-defense) and disposed of the victim’s body in the Connecticut River. Stote later lied about the relevant facts to the victim’s son, wife and daughter, and to the police when he was questioned. Nearly seven months later, the victim’s

¹ Nevertheless, the substance of these claims is addressed below.

body was discovered in the Connecticut River. A forensic pathologist testified that the victim had sustained ten stab wounds, had two defense wounds on his hand and elbow, and that the cause of death was multiple stab wounds. Id. at 20–21.

B. Stote's Application for Medical Parole

On March 30, 2020, Stote applied for medical parole. A.R. 30-40, 46-47. In his initial petition and in an addendum to it, Stote sought release due to the coronavirus pandemic, claiming that he suffered from heart disease, edema, high blood pressure, severe allergies, colitis, thyroid and sleep apnea, “all [of] which [a]ffects my immune system including taking steroids.” Id. at 31-35. Stote also claimed he took ten medications daily, “which also weakens my immune system to the point I catch colds and flus rather easily than I once did as a younger man.” Id. at 31. Stote contended that he was supposed to have ultrasound examinations on his heart every 90 days but that only one had been done since September 2019. Id. at 34. He also claimed that he required a walker to walk because of back and nerve issues, and alleged that he had a history of three lumbar spinal fusions, was unsteady on his feet, and frequently fell. Id. at 31. He also said he was in pain every day, for which he was medicated. Id. at 35. Stote further wrote that because of thyroid issues, he had gained 60 pounds and then weighed 300 pounds. Id. at 38.

As to why his release would not pose an unreasonable public safety risk, Stote wrote, among other things, that he was “60 years old with major stability issues who is a threat to no one.” A.R. 38.

Stote reported that he planned to live with two family members who have medical training.

In a subsequent petition dated in April 2020, Stote did not claim he was suffering from a terminal illness,² but rather claimed permanent incapacitation based on “numerous medical conditions not being properly addressed, heart condition, edema, hypertension, thyroid, colitis, sleep apnea, missing medication, missing outside app[ointments].” *Id.* at 50; see also 52 (Stote’s claim that he had not received heart medication for five days and had missed six outside medical appointments).

C. Stote’s Institutional Conduct

Stote has a disciplinary history reflecting possession of unauthorized items, conspiring to escape in 2000 (for which he received a 12-month sentence in the disciplinary detention unit), fighting, and disruptive conduct. A.R. 59-60. The record does not show recent disciplinary findings. Stote completed several programs, including Alternatives to Violence, Health Awareness, Emotional Awareness, Leadership and Transformational Thinking, and Restorative Justice Retreat. *Id.* at 60. He has held employment at MCI Norfolk in Maintenance and the Library, and served as a unit runner and as a member of inmate council. His classification report reflects a recommended custody level of minimum or below. *Id.* at 62.

D. Stote’s Medical Condition and Assessments

Wellpath provides medical care to MCI Norfolk inmates. In a Wellpath Medical Assessment dated April 3, 2020, Dr. Michael Moore, the Medical Director at MCI Norfolk, noted that Stote was in general population and had “limited mobility secondary to chronic low back pain which has required multiple surgeries” but that despite surgery, Stote was dependent on a

² The record shows that Stote never claimed to suffer from a terminal illness. Accordingly, the Court need not address the Commissioner’s unnecessary findings in her denials of his request for medical parole that Stote was not terminally ill.

cane “because of unstable gait which essentially renders him incapacitated.” A.R. 81. Dr.

Moore added:

Mr. Stote also suffers from hypertension, hyperlipidemia, ulcerative colitis, chronic lymphedema and obesity. Recent laboratory assessment is consistent with pre diabetes and early renal dysfunction which immunologically compromises him to ward off any infectious process.

Id.

In an affidavit dated November 2, 2020 and filed on November 5, 2020, Stote stated that “[w]hen I went to prison in 1995, I had a back condition that was scheduled for a surgical intervention. That surgery did not occur. Since being incarcerated, I have had one (1) surgical procedure to correct the neural compression and severe stenosis ... Prior to my incarceration I had three (3) surgeries.” Stote stated he suffered from worsening pain arising from his back condition and claimed he could not walk without the assistance of a cane, and more recently a walker. Stote claimed he needed a spinal fusion, which required further tests. He also claimed that he has been told by a physician’s assistant that following expected back surgery, he would be hospitalized for 30 to 45 days “with the hope that I will be able to walk again.” Stote said he had fallen three times two weeks previously because of weakness and nerve damage to his leg for which he takes a drug, Neurontin, but which he claimed he does not receive in the proper dosage. He stated that another drug could be more effective, but has not been prescribed because of its cost. Stote also contended that he was in constant pain, almost always at 10 on a 1 to 10 scale. He claimed that in July, Dr. Moore, increased his pain medication, but told Stote he would be safer and better cared for outside of prison.

Stote further stated that he suffered from heart disease (thickening of the left ventricle valve and leaking aortic valve) for which he was supposed to have an ultrasound in 2019 but which did not occur and had not been re-scheduled. He also claimed to suffer from

hypertension, edema (which he said had not been treated), and a thyroid condition which had resulted in weight gain resulting in morbid obesity (and which he said he had not been properly treated and which aggravated his back issues). Stote also stated he suffered from colitis, sleep apnea, and carpal tunnel syndrome, and took some 42 different pills a day to address his medical issues, which negatively impacted his kidneys and placed him in the early stages of kidney failure. Stote further claimed he had not received his medications in a timely manner since the COVID-19 lockdown began at MCI Norfolk in March, and that delivery of his medications has been delayed, sometimes for days.

On November 9, 2020, the defendants submitted a Wellpath Medical Parole Assessment prepared by Dr. Moore about Stote, dated November 5, 2020. Like Dr. Moore's April 3, 2020 assessment, it reflects that Stote resided within general population and suffered from hypertension, hyperlipidemia, ulcerative colitis, lumbar radiculopathy, and morbid obesity. This time, however, Dr. Moore did not find Stote to be "essentially ... incapacitated," as he found in April (A.R. 81), but rather concluded that he was not "permanently incapacitated."

Supplemental A. R. 16. In his November report, Dr. Moore wrote:

At the present, Mr. Stote's hypertension, hyperlipidemia and ulcerative colitis are effectively being treated with his present medical regime. His lumbar radiculopathy continues to worsen causing difficulty with walking and increasing levels of pain. He has had a recent MRI, which shows extensive pathology in the lumbar area with [cord] compression. He is presently being evaluated by neurosurgery for surgical intervention. His obesity continues to aggravate radiculopathy and he is now on a weight reduction diet to mitigate his obesity.

Supp. A.R. 15-16.

In a November 23, 2020 letter, Stote's counsel requested that the Commissioner be advised that "because of the lockdown at MCI-Norfolk, critical medical procedures ordered for Mr. Stote have been delayed or withheld. Because of his worsening back situation as referenced

[by] ... Dr. Moore, my client informs me that all procedures have been put on hold. These procedures include, but are not limited to[,] an ultrasound for his heart, and various scans for his as yet unscheduled back surgery. Please be aware that he has submitted numerous ‘sick slips’ that have gone unanswered. He also reports that his right leg is literally ‘not functioning’ and he is unable to walk to the Yard.”

In a November 24, 2020 addendum to Wellpath’s Medical Parole Assessment, Dr. Steven Descoteaux, Wellpath’s Medical Director for the DOC, wrote that on November 3, 2020, Stote tested negative for COVID-19, and that on November 11, 2020, Stote was seen by a medical provider on rounds, who observed increased swelling in his lower extremities and thus prescribed an increase in his “water pill,” but that “[t]here has otherwise been no significant interval change since 11/5/20.”

E. Incidence of COVID-19 at MCI Norfolk

Stote’s claim that there was a COVID-19 outbreak at MCI Norfolk is accurate. In the Amended Special Master’s Weekly Report dated November 9, 2020, filed pursuant to CPCS v. Trial Court, SJC-12926, the number of confirmed active COVID-19 cases (both inmates and staff) jumped from 4 during the week of October 22, to 83 during the week of October 29 through November 4, with 80 new cases that week. Further, at argument in November, the defendants represented that in testing conducted from November 3 to 5, 2020, of all inmates, staff and vendor staff at MCI Norfolk, 164 total cases were identified, more than doubling the prior count. Specifically, on November 3, 2020, a total of 662 tests were administered, with 28 positive results, comprised of 24 inmates and 4 staff; on November 4, 663 tests were administered, with 93 positive results comprised of 91 inmates and 2 staff; and on November 5, 247 tests were administered, with 45 positive results, comprised of 44 for inmates and 1 staff.

On November 9, 2020, the defendants filed an Affidavit of Nelson Alves, the Superintendent of MCI Norfolk. In it, Alves stated that Stote was housed in the 2-2 housing unit, which has a capacity of 104 beds but was capped at 79. Nevertheless, Unit 2-2 “is an open unit and inmates must self-discipline to socially distance.” Attached to the affidavit was a “Patient Information” sheet, which stated that inmates with a positive COVID-19 test result would be housed in a designated area and isolated together for ten days until free of symptoms for 24 hours without the use of Tylenol or Motrin. Close contacts of inmates who had tested positive, such as those within the same housing unit, would also be quarantined for 14 days. Except for patients with severely compromised immune systems, COVID-19-positive patients would not be retested at the end of quarantine, pursuant to an unidentified CDC guidance. COVID-19-positive patients would be tested twice a day for oxygen levels and temperature. Daily cleaning of the facility would continue, staff would be required to wear personal protective equipment, inmates were requested to wear masks and wash hands frequently, and any positive patients would be issued an N95 mask. The sheet does not state that correctional officers who have contact with positive patients would be isolated from those who have not tested positive, and does not indicate what steps, if any, had been implemented because of and in response to the spike in COVID-19 cases.

In the latest report available, dated December 10, 2020, the Special Master reported that the incidence of COVID-19 infection had dropped at MCI Norfolk. For the week of December 3 through December 9, 2020, the Special Master reported 21 confirmed cases of COVID-19 infection among inmates, down from a high of 162 during the week of November 5 through 11, 2020, with 9 cases among correctional officers. There are currently 43 active COVID-19 cases

among inmates, 24 active cases among correctional officers, and two cases among other staff, with one confirmed COVID-19 inmate death.³

F. Commissioner's Decisions and the Supplemental Record

The Commissioner rendered two decisions denying Stote's requests for medical parole, one dated June 4, 2020 and one dated November 30, 2020. As the November 30, 2020 decision expressly incorporated the June 4, 2020 decision, both are relevant.

In her June 4, 2020 letter, the Commission wrote:

Please be advised that I am denying your petition for medical parole at this time. I am not persuaded that you are either terminally ill or permanently incapacitated as those terms are used in G.L. c. 127, §119A, or that you are so debilitated that if you were to be released, you would live and remain at liberty without violating the law, or that your release would be compatible with the welfare of society.

A.R. 1. The Commissioner relied on the findings reached by Dr. Moore in his April 3, 2020 assessment, and noted Dr. Moore's conclusion that Stote was "essentially ... incapacitated" (id. at 2) and Dr. Moore's finding that Stote's conditions "immunologically compromises you to ward off any infectious process." Id. She reviewed Stote's disciplinary history and programs he completed and employment while in prison, and found that Stote was "able to shower, dress, eat, and [use the] toilet without assistance. You work on legal work in the unit common space, go out on the campus, and to the Community Service Building. You use a cane, but do not use a walker ... [and] ambulate relatively well ... able to move fairly quickly." Id. at 3. The Commissioner also considered a letter from the prosecuting District Attorney's Office, which argued that Stote was not suffering from a permanent incapacitation "that ... is so debilitating that [Stote] does not

³ While it is not in the record, and the defendants object to its consideration, Stote submitted a letter on December 10, 2020 alleging that two men from a cell adjacent to Stote's and who share a toilet with Stote tested positive for COVID-19, and that some 50 more prisoners were quarantined as the result of COVID-19 testing, with further testing expected. As the Court does not rely on these particular allegations for the reasons discussed below, it need not address DOC's objection.

pose a public safety risk,” and a letter from the victim’s family, objecting to State’s release based on the trauma and anguish suffered by the family. Id. She concluded that Stote was not permanently incapacitated, was not “so physically debilitated that you no longer pose a public safety risk,” and that Stote’s “refusal to show remorse for your crime, also indicates to me that you would not live in accordance with the law if released on medical parole.” Id. at 3-4.⁴

After remand, the Commissioner received further facts, including the Wellpath reports discussed above, further letters from the District Attorney and victim’s family, and Stote’s November 2, 2020 affidavit. As noted above, Stote’s affidavit largely reviewed his medical issues, but also included the following passage:

In closing, it is appropriate for me to address Commissioner Mici’s statement in her evaluation concerning my lack of remorse concerning my crime. I am currently serving a life sentence for first degree murder. I was found guilty by a jury in 1997. While it is true that I have tried to set aside that verdict and will continue to do so based on the advice of my attorneys, I have had much time to contemplate the results of my actions in October 1995 and can state, unequivocally, that I am truly sorry for the [victim’s] family. I have read the letter from [the victim’s family member] and appreciate her pain and wish it were not so. Nevertheless, I can’t change what happened; I can only feel deep remorse and sadness for those events 25 years ago.

Supp. A.R. 21.

After remand, the Commissioner issued the November 30, 2020 decision. In it, she again denied medical parole, finding:

Although Mr. Stote continues to suffer from multiple chronic medical conditions including hypertension, hyperlipidemia, ulcerative colitis, lumbar radiculopathy, and morbid obesity, I do not find him to be terminally ill or permanently incapacitated as defined in G.L. c. 127, § 119A (a). This decision is based on the reasons that follow.

⁴ In addition, the Commissioner noted that Stote faces a federal detainer for a 24-month committed sentence for bank fraud and aiding and abetting, and that “as of April 23, 2020, the federal authorities confirm there is an outstanding federal warrant. If released on medical parole, the federal authorities would take custody of you.” A.R. 2.

Supp. A.R., 1-2. In support of the decision, the Commissioner noted the November 5, 2020 assessment conducted by Dr. Moore, including his finding that Stote was not permanently incapacitated. Id. at 2.⁵ She again noted the District Attorney's position, reiterated in a November 12, 2020 letter, and a November 10, 2020 letter from the victim's family, "describ[ing] in detail the ordeal the family of the victim suffered." Id. at 2. She concluded:

After reviewing Judge Ricciuti's October 28, 2020 Order, the updated medical evaluations conducted by Doctor Moore and Doctor Descoteaux based on Mr. Stote's current medical condition, the written statement from the victim's family, the written statement in opposition to Mr. Stote's medical parole petition from the Hampden County District Attorney, Mr. Stote's affidavit concerning his present medical conditions, and considering Mr. Stote's expressed concerns regarding the Department's management of COVID-19 at MCI-Norfolk, which efforts include but are not limited to, the testing of all inmates and staff, directives informing staff on proper personal protective equipment use, the separation of any inmates testing positive for COVID-19, the issuance of face masks to all inmates, the constant disinfecting of all areas of the institution, the provision to inmates of meals in their cells to allow proper social distancing, the availability of soap and hand sanitizer for inmates and staff, and compliance with CDC and DPH guidelines[,] I am denying Mr. Stote's petition for medical parole. I note that Mr. Stote has had the same cellmate since January 2017 and is located 10 yards from the officer station on the first floor, where he is able to report any immediate health concerns he may have. ... Based on the aforementioned evidence, Mr. Stote's hypertension, hyperlipidemia and ulcerative colitis are effectively being treated with his present medical regimen. Although Mr. Stote will require surgical intervention to correct his lumbar radiculopathy, no medical doctor has stated that his condition is a "permanent incapacitation." Further, according to Dr. Moore, Mr. Stote is not likely to die within the next 18 months. Accordingly, Mr. Stote's current medical conditions do not qualify him for release pursuant to the medical parole statute, G.L. c. 127, §119A. As such, after reconsideration, I am denying Mr. Stote's petition for medical parole.

Id. at 3. The Commissioner did not revisit her determination in the June decision that Stote's release would not pose a risk of violation of the law or to the welfare of society, and did not discuss Stote's November 2 affidavit expressing remorse, despite her finding in her June decision that Stote's "refusal to show remorse for [his] crime" supported her then-conclusion that "you would not live in accordance with the law if released on medical parole."

⁵ The Commissioner did not assess Stote's conditions in light of the COVID-19 outbreak at MCI Norfolk, but simply noted Stote's negative COVID-19 test on November 3.

DISCUSSION

A. Emergency Motion

In addition to certiorari review, Stote also seeks an emergency order under § 119A, by which this Court would instruct the Commissioner to exercise her discretionary authority and release Stote on an interim basis in light of the COVID-19 issues at MCI Norfolk, relying on Commonwealth v. Charles, 466 Mass. 63 (2013). Assuming this request is not moot in light of the decision below on Stote’s motion for judgment on the pleadings, it is meritless as framed.

The statute invests the authority in the Commissioner to decide on medical parole; while the Court has the power under the certiorari statute to review that decision, it does not have the authority to make the decision in place of the Commissioner, under the plain language of the statute as well as separation of powers principles. Cf. Comm. for Pub. Counsel Servs. v. Chief Justice of Trial Court, 484 Mass. 431, 451–452, aff’d as modified, 484 Mass. 1029 (2020) (“CPCS”) (citations omitted) (“Rule 29 is designed to protect the separation of powers as set forth in art. 30. ‘The execution of sentences according to standing laws is an attribute of the executive department of government.’ To attempt to ‘revise,’ i.e., cut short, sentences in the current situation would be to perform the function of the parole board, thereby ‘effectively usurp[ing] the decision-making authority constitutionally allocated to the executive branch’”) (citations omitted, alteration in original).

Stote’s reliance on Charles in support of his motion is misplaced. Charles was a criminal case resting on criminal process in which the defendant had moved to stay his sentence under Mass. R. Crim. P. 31 and for a new trial under Mass. R. Crim. P. 30 based on the misconduct of Annie Dookhan. 466 Mass. at 69-70. The Court in Charles ultimately held that under such facts and “[i]n exceptional circumstances, a judge of the Superior Court does have the authority to

allow a defendant's motion to stay the execution of his sentence, then being served, pending disposition of the defendant's motion for a new trial.” Id. at 79. But here, Stote has not sought a new trial.

For similar reasons, CPCS is unhelpful. In it, the movants raised unlawful restraint arguments under Mass. R. Crim. P. 30(a). Rule 30(a) provides that “[a]ny person who is imprisoned or whose liberty is restrained pursuant to a criminal conviction may at any time, as of right, file a written motion requesting the trial judge to release him or her or to correct the sentence then being served upon the ground that the **confinement or restraint was imposed in violation of the Constitution or laws of the United States or of the Commonwealth of Massachusetts**” (emphasis added). In the instant case, Stote does not contend that his sentence was illegal when imposed or violates a specific provision of law now. Contrast CPCS (No. 2), 484 Mass. at 1031 (inherent authority to stay execution of sentence where “validity of the underlying conviction is being questioned”). Further, while the Supreme Judicial Court relied on its superintendence powers to grant relief, it recognized the limitations imposed on its authority under separation of powers principles:

Our broad power of superintendence over the courts does not grant us the authority to authorize courts to revise or revoke defendants' custodial sentences, to stay the execution of sentence, or to order their temporary release unless a defendant (1) has moved under Mass. R. Crim. P. 29, within sixty days after imposition of sentence or the issuance of a decision on all pending appeals, to revise or revoke his or her sentence, (2) has appealed the conviction or sentence and the appeal remains pending, or (3) has moved for a new trial under Mass. R. Crim. P. 30.

CPCS, 484 Mass. at 450.

Stote argues that his confinement is in violation of the state and federal constitutions in light of the alleged risk to his health during the pandemic. As discussed below, these claims do not change the analysis under § 119A, and he has shown no basis upon which to conclude that

any such claims trump the application of the statute. Even had he shown cruel and unusual punishment, those claims are not properly framed in this case, but are being addressed in the continuing litigation in Foster v. Mici, in which another session of this Court granted certification of a class consisting of “all Massachusetts prisoners confined at DOC facilities (but not at county jails), and a subclass of all such prison inmates who according to guidelines of the Centers for Disease Control and Prevention (“CDC”) are at increased risk from COVID-19 due to their age (age 50 and older) and/or medical conditions that have been determined to increase risks from COVID-19 (but not medical conditions that “may” increase those risks).” See Foster, 2084CV855, Docket No. 74. Stote is a member of the class, and there is no basis upon which to conclude his interests will not be properly represented in that action and which may provide Stote an alternate mechanism of relief. See id., Docket No. 78 (“the Department of Correction is in the process of implementing a home confinement program”).

B. Cross-Motions for Judgment on the Pleadings

As noted above, § 119A mandates medical parole but only if the Commissioner makes the findings outlined in subsections (a) and (e).

The determination as to whether Stote is “permanently incapacitated” as defined in subsection (a), has two components: first, the “physical or cognitive incapacitation” must “appear[] irreversible, as determined by a licensed physician,” and second, it must be “so debilitating that the prisoner does not pose a public safety risk.” These are adjudicated factual findings that must be supported by substantial evidence in the record. See, e.g., Beryl v. Superintendent, Souza-Baranowski Corr. Ctr., 55 Mass. App. Ct. 906, 907 (2002).

The Commissioner’s decision under subsection (e) is broader, and requires her to determine whether “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.”

While these judgments are tied to the prisoner’s medical condition, they involve questions of judgment by the Commissioner, and are thus reviewed for arbitrariness or capriciousness. See, e.g. City of Revere v. Massachusetts Gaming Comm’n, 476 Mass. 591, 605 (2017); see also, e.g., Doucette v. Massachusetts Parole Bd., 86 Mass. App. Ct. 531, 541 (2014) (“[i]n reviewing the decisions of administrative bodies which, like the parole board, are accorded considerable deference, ... the arbitrary and capricious standard of review applies”). A decision is arbitrary or capricious “where it ‘lacks any rational explanation that reasonable persons might support.’” Perullo v. Advisory Comm. on Personnel Standards, 476 Mass. 829, 836 (2017) (citations omitted). And, of course, the court may “correct only a substantial error of law, evidenced by the record, which adversely affects a material right of the plaintiff.” Sheriff of Plymouth County v. Plymouth County Personnel Bd., 440 Mass. 708, 710 (2004) (citation omitted).

This case turns on the “permanent incapacitation” finding. The Commissioner’s finding under subsection (e) that Stote will not “live and remain at liberty without violating the law and that the release will not be incompatible with the welfare of society” is unaddressed in the November decision, despite a remand clarifying the law on this point. Even had she addressed this point, it would have been problematic on this record. In the June decision, the Commissioner noted that Stote’s “refusal to show remorse” supported the subsection (e) finding that Stote “would not live in accordance with the law if released.” In her November decision, the Commissioner failed to address Stote’s November 2 expression of remorse. And while it is, of course, completely appropriate for the Commissioner to consider the input of the prosecuting district attorney’s office and of the victim’s family, that input must only be used to address the issue framed by the statute – whether Stote’s release poses a current risk to the welfare of

society. The Commissioner's November letter simply did not evaluate the input of the district attorney or victim's family to make this specific determination, as required under the statute. Contrast Commonwealth v. Doucette, 81 Mass. App. Ct. 740, 742–743 (2012) (victim impact statement appropriate consideration at sentencing). Stote's status as a convicted first degree murderer does not exclude him from the scope of the statute, as the Legislature chose not to exempt such inmates from its scope, even where the crime has had devastating impact on the victim's family. See, e.g., Vazquez v. Superintendent Massachusetts Corr. Inst., Norfolk, 484 Mass. 1058 (2020) (rescript) (medical parole granted to prisoner convicted of first degree murder); see also Commonwealth v. Clerk-Magistrate of the W. Roxbury Div. of the Dist. Ct. Dept., 439 Mass. 352, 355 (2003) (in interpreting statute, courts do not add language "to a statute that the Legislature did not put there").

On the determinative issue in this case, the Commissioner's finding that Stote is not permanently incapacitated is supported by substantial evidence.

Stote's argument is not that he suffers from a single condition that renders him incapacitated, but that he suffers from a constellation of conditions that has this effect. See A.R. at 50 (Stote's claim of permanent incapacitation based on "numerous medical conditions not bring properly addressed, heart condition, edema, hypertension, thyroid, colitis, sleep apnea, missing medication, missing outside app[ointments]"). But boiled to its essence, his argument is that his conditions have rendered him largely immobile with a compromised immune system, and this makes him especially vulnerable to COVID-19.

Stote is not completely immobile; in his April 3, 2020 assessment, Dr. Moore found that Stote had "limited mobility secondary to chronic low back pain which has required multiple surgeries" but that despite surgery, Stote was dependent on a cane "because of unstable gait

which essentially renders him incapacitated.” A.R. 81. In the June decision, as noted above, the Commissioner found that Stote was “able to shower, dress, eat, and [use the] toilet without assistance. You work on legal work in the unit common space, go out on the campus, and to the Community Service Building. You use a cane, but do not use a walker ... [and] ambulate relatively well ... able to move fairly quickly.” *Id.* at 3. While Stote’s mobility has decreased since June – for instance, he now uses a walker and suffers from leg swelling – the record does not reflect that Stote is unable to walk or to complete the other life functions mentioned by the Commissioner.

In any event, the record simply does not support the conclusion that Stote’s mobility issues are permanent; on the contrary, Stote concedes his back issues are not permanent, and stated in his November 5 affidavit that he expected to undergo surgery “with the hope that I will be able to walk again.”

Some of Stote’s conditions do appear permanent. According to Dr. Moore’s April 3 and November 5 assessments, Stote suffers from heart disease and from “chronic” hypertension, hyperlipidemia, and ulcerative colitis, which are irreversible. While the Commissioner notes in her November 30 decision that Stote’s hypertension, hyperlipidemia, and ulcerative colitis “are effectively being treated with his present medical regimen,” that ignores the statutorily-relevant issue as to whether they are permanent, as it appears they are. It would also appear that Stote’s immunologically compromised condition may also be irreversible.

Nevertheless, while these conditions pose an obviously serious risk to Stote while incarcerated in a facility suffering from a COVID-19 outbreak, they are neither alleged nor have been shown to be the cause of Stote’s physical incapacities that would prohibit him from committing future crimes if released. Indeed, Stote does not contend that any of his physical

conditions, alone or in combination, are debilitating under the DOC's regulations, where he would "require[] the prisoner's placement in a facility or a home with access to specialized medical care." Stote asserted he did not plan to live in such a facility, but rather with two family members.

Stote has understandably emphasized that he is extraordinarily vulnerable to the COVID-19 infection that exists in MCI Norfolk. But for purposes of analyzing his request for medical parole under § 119A, the Commissioner did not err by not considering that issue in greater detail. See CPCS, 484 Mass at 451; Foster v. Comm'r of Correction (No. 1), 484 Mass. 698, 733 (2020) ("The specific measures the defendants might choose to reduce the number of incarcerated individuals in DOC custody are ... not ordinarily for a court to decide [barring a constitutional violation]").⁶ That said, nothing in this Order prevents the Commissioner from considering whether Stote is eligible for other forms of relief, and nothing prohibits Stote from pursuing other remedies beyond those offered in the medical parole statute.

ORDER

For the foregoing reasons, Stote's motion for expedited discovery, Stote's motion for emergency relief, and his motion for judgment on the pleadings are **DENIED**. Defendants' motion for judgment on the pleadings is **ALLOWED**.

SO ORDERED.

/s/ Michael D. Ricciuti
Justice of the Superior Court

Date: December 11, 2020

⁶ There is one crucial difference between parole and medical parole that bears noting – the granting of parole is discretionary, whereas, if the facts support it, granting medical parole is not, but rather is required by the statute. See § 119A (e) ("the prisoner shall be released on medical parole" where the facts support it).